

Working Party on Solicitors' Rights of Audience

Consultation paper

Introduction

1. On 24 June 2004, the Chief Justice established a Working Party under the chairmanship of the Hon Mr Justice Bokhary, Permanent Judge of the Court of Final Appeal, with the following terms of reference:

"To consider whether solicitors' existing rights of audience should be extended and, if so, the mechanism for dealing with the grant of extended rights of audience to solicitors."

2. The other members of the Working Party appointed by the Chief Justice are:

The Hon Mr Justice Ma, Chief Judge of the High Court

The Hon Mr Justice Tang, Justice of Appeal of the Court of Appeal of the High Court

The Hon Mr Justice Pang, Judge of the Court of First Instance of the High Court

The Hon Mr Justice Andrew Cheung, Judge of the Court of First Instance of the High Court

Mrs Eleanor Ling, SBS, OBE, JP

Mr Robert Allcock, BBS, JP, Solicitor General, Department of Justice

Mr Benjamin Yu, SC

Mr Joseph Tse, SC

Mr Denis Brock, Solicitor

Mr Peter Barnes, Solicitor

The Secretary is Mr Stuart Stoker of the Department of Justice.

The Working Party's guiding principle

3. The two questions under our terms of reference are:
 - i) whether solicitors' existing rights of audience should be extended; and
 - ii) if so, by what mechanism should such extended rights of audience be granted.

Plainly the public interest is the sole criterion on each question. The public interest demands a high standard of advocacy before the courts. And it is in the public interest to enlarge the pool of advocates capable of reaching that standard. To that end, the talent for and interest in advocacy likely to be found in some solicitors should be tapped to enlarge that pool of advocates, provided that it can be done without creating an unacceptable risk to the sustainability of a separate referral Bar. We make that proviso because the Bar has served Hong Kong well as the primary means by which the public demand for a high standard of advocacy is met and it is accordingly essential to maintain a strong Bar. The foregoing considerations constitute the principle by which we guide ourselves on both questions.

4. Before considering the issue of rights of audience, it may be helpful if we begin with a general outline of the structure and workings of the legal profession in Hong Kong.

The structure of the legal profession in Hong Kong

5. The legal profession in Hong Kong, in common with many common law jurisdictions, is divided into two branches: solicitors and barristers. A lawyer cannot at the same time be both a solicitor and a barrister, but must practise as one or the other. In very broad terms, the principal distinction between the two branches is that barristers specialise in advocacy and have unlimited rights of audience in any court in Hong Kong, while solicitors do not. Solicitors do, however, have rights of audience in magistrates' courts and the District Court, and in chambers hearings in the Court of First Instance and the Court of Appeal.

6. The training and qualifications for both branches of the profession are to a large extent the same.¹ A prospective lawyer in either branch must first complete a Bachelor of Laws degree from a Hong Kong University or from an approved overseas university, in the course of which he must obtain passes in a number of specified subjects. Thereafter all prospective entrants to the profession (other than those who have qualified elsewhere) must complete a one-year course leading to the Post-graduate Certificate in Laws (PCLL). The PCLL is offered by both the University of

¹ This introduction restricts itself to outlining the qualification route for lawyers who train in Hong Kong. There are special provisions which relate to the admission in Hong Kong of lawyers admitted in an overseas jurisdiction.

Hong Kong and the City University of Hong Kong not only to their own graduates, but also to those who have obtained a degree from an overseas university. It is only on completion of the PCLL that the training diverges and the would-be lawyer must opt for one branch of the profession or the other.

7. Those opting to become barristers must serve a one-year pupillage. During this period the pupil barrister is attached to a practising barrister (his “pupil master”) who provides him with practical guidance and experience. The pupil is not paid, but after completing the first six-months of his pupillage he can apply to the Court to be admitted as a barrister. He can then obtain a limited practising certificate which will allow him certain rights of audience. On completion of his pupillage (part of which may be served in the Department of Justice), the new barrister is eligible to apply to the Bar Council for a certificate granting him unrestricted rights of audience.

8. A prospective solicitor must serve two years as a trainee solicitor, during which time he will be attached to a practising solicitor (the trainee’s “Principal”) and must obtain experience in a number of specified aspects of a solicitor’s practice. He will be paid at not less than the rate fixed from time to time by the Law Society of Hong Kong, the governing body for the solicitors’ branch of the profession. On completion of his traineeship (part of which may be undertaken in the Department of Justice), the trainee can apply to the Court of First Instance for admission as a solicitor, and thereafter to the Law Society for a practising certificate. This certificate must be renewed annually for so long as the solicitor practises in Hong Kong.

9. The majority of lawyers in Hong Kong are solicitors, with over 5,400 holding current practising certificates as solicitors as at July 2005. As at July 2005, there were 932 practising barristers.

The Bar Association and the Law Society

10. The Bar Association is the professional organisation for barristers. It is a society registered under the Societies Ordinance. Its objects include prescribing rules of professional conduct, discipline and etiquette. The Bar Council, elected annually by barristers, is the executive committee of the Bar Association. Barristers must comply with the *Code of Conduct of the Bar of Hong Kong* issued by the Bar Association, which may be amended from time to time by the Association in general meeting or the Bar Council. Where the Council considers that the conduct of a barrister should be inquired into as a result of a complaint, this will be referred to a Barristers Disciplinary Tribunal, consisting of a Senior Counsel, a barrister who is not a Senior Counsel and a lay person.

11. The Law Society of Hong Kong is the professional body for solicitors. It is an incorporated company limited by guarantee and its objects include promoting high standards of work and ethical practice in the profession and ensuring compliance with the law and rules affecting solicitors. The Law Society Council is the Society’s governing body. All solicitors must

comply with the *Hong Kong Solicitor's Guide to Professional Conduct* issued by the Society. Where the Council considers that a solicitor's conduct should be inquired into as a result of a complaint, the matter will be referred to a Solicitors Disciplinary Tribunal, consisting of two solicitors and one lay person.

How the profession works

12. Solicitors may either practise alone, or they may form partnerships with other solicitors, known as "firms". They may also carry on group practices. Legislation has been passed that will permit solicitors to practise within solicitor corporations, but that legislation is not yet in force. Many solicitors will choose to specialise in a particular type of legal work, such as conveyancing or family law, though those practising alone or in a small firm will usually offer general legal services. The larger firms often provide specialist teams of lawyers handling particular areas of practice, such as litigation.

13. In contrast, barristers practise alone and are not permitted to form partnerships with anyone else, whether or not they are lawyers. For administrative convenience, however, groups of barristers usually form together to share office accommodation and support services. This shared accommodation is known as "chambers".

14. While a member of the public may approach a solicitor direct to obtain his legal services, he cannot do so in relation to a barrister. Instead, a barrister can generally only be engaged by a solicitor, and the prospective client must therefore first consult a solicitor in relation to any matter on which a barrister's services are sought.² Members of certain other professions are, however, permitted direct access to barristers. The rationale for this general distancing of the barrister from the client is said to be that it helps to maintain the barrister's impartiality, it allows for specialisation, and it ensures an efficient division of labour as between a client's solicitor and barrister.

15. A practising barrister is bound to accept any instruction to appear before a court in the field in which he professes to practise at his usual fee having regard to the type, nature, length and difficulty of the case. This is customarily known as "the cab-rank rule". However, special circumstances such as conflict of interest may exist which justify a barrister in refusing to accept a particular instruction. The "cab-rank rule" does not apply to solicitors.

16. The fact that solicitors have only restricted rights of audience means that a solicitor will, for instance, need to engage a barrister on behalf of his client to appear in any trial or open hearing³ in the Court of First Instance. Even where a solicitor is able to appear himself, he may nevertheless choose to use the services of a barrister instead. This may be because the solicitor lacks experience in advocacy, or because the matter is

² In certain circumstances, barristers may also be instructed by other professionals, such as accountants, company secretaries, surveyors and arbitrators.

³ Subject to certain limited exceptions.

complex and falls within the expertise of a particular barrister, or simply for reasons of efficiency.

17. The present position is that the Bar has been the only source of direct appointment to the High Court bench. However, solicitors who are qualified to practise as a solicitor of the High Court and have so practised for at least ten years are eligible for appointment to the High Court.

A case for change

18. At the ceremony marking the opening of the legal year in February 2005, the Chief Justice said:

“For a long time, calls have been made for an extension of solicitors’ existing rights of audience with a view to enlarging the pool of advocates available to the public. The subject is a most important one. It is fundamental to consider what is in the public interest. A most important facet is that there must be the highest standards of advocacy before the courts. This is essential to the administration of justice in an adversarial system. Another most important facet of the public interest is that there should be a strong and independent Bar.”

19. The arguments for and against the extension of solicitors’ rights of audience have been debated for many years. We do not propose to rehearse them here in detail, but in broad terms they may be said to come down to the following:

- Those in favour of an extension of rights of audience argue that it will bring down the costs of litigation and increase the consumer’s choice by enlarging the pool of competent advocates and increasing competition.
- Those against an extension of rights of audience argue that it will threaten the existence of the Bar and lower the overall standards of advocacy before the courts.

Of course, there are other arguments advanced for and against an extension of rights of audience, but few if any that do not fall on analysis to be merely a variant of one or other of the arguments outlined above.

20. Compliance with the guiding principle which we set out at paragraph 3 of this paper (which echoes the views of the Chief Justice set out at paragraph 18) would in our view answer the principal objection of those who oppose an extension of rights of audience. That principle mandates a scheme which grants solicitors higher rights of audience while ensuring that standards of advocacy before the courts are maintained (or enhanced), and does not threaten the continued viability of the Bar.

21. We examine now in turn the elements which would fall to be included in any scheme to grant solicitors higher rights of audience, together with the issues which we believe need to be addressed in relation to each element. The Working Party wishes to consult the community on the various issues discussed in this paper before coming to a view as to whether it is feasible to devise a scheme which accords with our guiding principle and, if so, what the various elements of that scheme should be.

The elements of a scheme for granting solicitors higher rights of audience

Eligibility

22. A key element of any scheme is determining what categories of solicitor should be eligible for higher rights of audience. Clearly, the criteria to be applied must be sufficiently strict to ensure that only competent advocates qualify, and that viability of the Bar (particularly the junior Bar) is not compromised, while at the same time ensuring that the standards are not so restrictive as to preclude any meaningful increase in the pool of practising advocates available in the higher courts.

23. It would seem reasonable to impose a primary requirement for eligibility that the applicant solicitor should have completed a specified period of post-qualification practice. We note that in England a solicitor must have a minimum of three years' litigation experience in the higher courts of England and Wales (see regulation 4 of the Higher Courts Qualification Regulations 2000), while in their December 2002 proposal the Law Society of Hong Kong suggested a minimum five years' practice.

24. If the intention is to ensure that applicant solicitors have appropriate advocacy skills, then there is a case for saying that a period of practice in another common law jurisdiction should count towards the minimum practice period required. We note that that is the case under the English provisions, and under the Law Society of Hong Kong's proposal.

Restriction by quota or qualifications?

25. Concern has been expressed in some quarters that the granting of higher rights of audience to solicitors may lead to a flood of solicitor advocates, which would threaten the existence of the Bar. One way to avoid this would be to impose a quota on the number of solicitors who will be granted higher rights of audience each year. In that way, numbers could be maintained at a level which increased the pool of advocates while maintaining the viability of the Bar.

26. Against that approach it may be said that:

- A quota system would have arbitrary consequences where there were a number of competing solicitors of equal abilities.
- There is no evidence from other jurisdictions which have allowed suitably qualified solicitors higher rights of audience that that has led to the demise of the referral Bar.
- It would be difficult to establish objectively at what level the number of solicitor advocate entrants allowed each year would constitute a genuine threat to the viability of the Bar.

27. Bearing in mind the principle guiding our deliberations, we do not envisage a scheme in which solicitors other than those who are experienced and competent advocates would be allowed to apply for higher rights of audience. The alternative to a fixed quota on the number of solicitors who may apply for higher rights of audience would be to establish the criteria for eligibility (principally, the years of practice) at a level which ensures there is no flood of applicants.

Qualifications and experience

28. We have suggested above that the principal qualification for eligibility which a prospective solicitor advocate must satisfy is the completion of a specified minimum number of years in practice. The question then arises as to whether the completion of a post-qualifying period is sufficient, or whether during some or all of that period the applicant solicitor advocate must have been involved in litigation work. If litigation experience is thought necessary, what should the nature of that experience be? Should it be confined to actual court work, or should it extend to other experience, such as teaching and research related to litigation? If credit is to be given for comparable experience, what categories of work experience should be included, and what credit should be given? We note in this regard that the Hong Kong Law Society's draft legislation refers to "*appropriate judicial, quasi-judicial or arbitral experience*", in addition to experience as an advocate.

Ways to gain higher rights of audience

29. In England and Wales, solicitors may gain higher rights of audience by one of four routes:

- development route (by satisfying specific training, assessment and experience criteria);
- accreditation route (by practising as a lawyer for a minimum specified period, having litigation experience for a minimum specified period, and complying with training and assessment requirements);

- exemption route (by relevant advocacy or judicial experience in England and Wales or a relevant jurisdiction); or
- qualification in another jurisdiction (by having appropriate qualifications in another jurisdiction)⁴.

30. Should a similar approach be adopted in Hong Kong, or should only some of these alternatives be available and, if so, which one or ones? We note in this regard that the Hong Kong Law Society's draft legislation proposes exemption and qualification routes, and that in order to be qualified a solicitor must have practised for several years, having considerable advocacy experience, and must undergo additional training.

Scope of accreditation

31. In both England and Wales and Scotland, a solicitor may be granted higher rights of audience in all proceedings, or his rights of audience may be restricted to civil or criminal proceedings only. A similar approach is proposed in the Hong Kong Law Society's draft legislation. A 1996 statistical survey of solicitor advocates in Scotland found that the majority of applicants opted for rights in either civil or criminal proceedings, rather than in all proceedings. That would seem unsurprising, given the increasing specialisation of legal practice.

32. A further refinement would be to restrict higher rights of audience to a particular field of expertise (such as commercial law, or family law). It could be argued that that would ensure a higher level of expertise in those granted such rights. The downside of such an approach, however, would be that it would raise significant practical problems. Firstly, there would be difficulties of definition (what proceedings does, say, "family law" cover?), and secondly, problems would arise when proceedings involved more than one area of expertise, or where the proceedings unexpectedly gave rise to issues outside the solicitor advocate's area of authorised practice.

33. An alternative suggested by some is that solicitor advocates should be precluded from conducting jury trials. This is because such proceedings require a particularly high level of court expertise. The counter arguments which might be advanced to such a restriction include:

- There is no such restriction on a barrister, who is eligible to appear before a jury immediately on completion of his pupillage.
- In contrast to the newly qualified barrister, a solicitor advocate under the kind of scheme we envisage would have been in practice for a number of years and would have had to

⁴ The exemption route and the accreditation route will cease to be available from 31 December 2006. This follows a previous decision that, in due course, the development route will be the sole means through which solicitors will be able to qualify for higher rights of audience in England and Wales.

demonstrate his competency in advocacy to the satisfaction of the accrediting body.

- A litigant or defendant should not be precluded from instructing a newly accredited solicitor advocate in a jury trial if he wishes to do so, just as he is free to instruct a newly admitted barrister under the current rules.

We note that no such restriction is imposed under the provisions in either England or Scotland, and it is not envisaged in the scheme put forward by the Hong Kong Law Society.

Accrediting authority

34. A key question is whether the accrediting authority for solicitor advocates should be the Council of the Law Society or some other body. In favour of the former, it can be said that:

- This would be analogous with the existing provisions in respect of the admission of solicitors.
- No separate body is deemed necessary to govern the admission of barristers, who enjoy unrestricted rights of audience from their first day of practice. The Law Society should therefore be the appropriate body to set and assess standards for solicitor advocates (who, by definition, are already experienced practitioners).

In favour of an accrediting body other than the Council of the Law Society, it can be said that:

- The Law Society is not best placed to assess the skills required of those seeking to undertake advocacy in the higher courts.
- An independent accreditation body would offer the public assurance that solicitor advocates met an appropriate standard of advocacy competence

35. The Legal Practitioners Ordinance (Cap 159) provides that solicitors are admitted by the Court of First Instance if the court is satisfied that the applicant is "*a fit and proper person to be a solicitor*" (see section 4) and the applicant has complied with the requirements as to training and qualifications prescribed by the Council of the Law Society of Hong Kong. Similarly, section 27 of Cap 159 provides that the Court of First Instance may admit as a barrister a person whom it considers "*a fit and proper person to be a barrister*" who has complied with the requirements prescribed by the Council of the Hong Kong Bar Association.

36. An analogous provision in respect of solicitor advocates would be to provide that the Court of First Instance may grant a solicitor rights of audience in the higher courts if the court considers the applicant to be “a *fit and proper person to be a solicitor advocate*” and the applicant has complied with the requirements as to training and qualifications prescribed by the Council of the Law Society. We note that this is the approach adopted in England and Scotland, where the respective Law Societies regulate admission as a solicitor advocate.

37. An alternative approach would be for a body other than the Law Society to prescribe the requirements as to training and qualifications which an applicant solicitor must satisfy before seeking accreditation as a solicitor advocate, and to assess whether or not an applicant has satisfied those requirements. The alternatives would include:

- the Chief Justice, or a person or persons appointed by him; or
- a body similar in composition to the Working Party, with representatives from the Judiciary, the Bar, the Law Society, the Department of Justice and the community.

Conduct and discipline

38. In both England and Wales and Scotland the respective Law Societies have drawn up codes of conduct specific to solicitor advocates. We note that the Hong Kong Law Society’s draft legislation envisages that the Society’s Council would draw up specific rules for solicitor advocates. We consider that solicitor advocates should be subject to compliance with rules specific to them, and those rules would need to consider what action should be taken in respect of the “cab-rank rule” to which we referred at paragraph 15 of this paper.

Questions

39. The Working Party would welcome the community’s views on the various issues raised in this paper, particularly in response to the specific questions which follow:

1. In line with the principle set out at paragraph 3 of the paper, and provided a scheme can be devised which does not endanger the continued existence of an independent Bar, do you agree that rights of audience in the higher courts should be extended to suitably qualified solicitors (see paras 3 and 18 to 21 of the paper)?

2. If you have answered “no” to question 1, there is no need to go further. If you have answered “yes” to question 1, please answer the following questions:

- (a) Do you think that a solicitor's eligibility for higher rights of audience should be related to his years of post-qualification practice and, if so, what should be the minimum period of practice required (see paras 22 to 24 and 28)?
- (b) Do you think that there should be a limit on the number of solicitors who may be granted higher rights of audience in any year (see paras 25 to 27)?
- (c) In England and Wales, there are four ways in which a solicitor can qualify for higher rights of audience. Should a similar approach be followed in Hong Kong and, if not, what approach do you favour (see paras 29 and 30)?
- (d) Should a solicitor be granted unrestricted higher rights of audience in relation to any proceedings, or should he only be granted higher rights in relation to a particular area of law or a particular type of proceedings (see paras 31 to 33)?
- (e) Which body or person should grant higher rights of audience (see paras 34 to 37)?
- (f) Should the Law Society be responsible for the conduct and discipline of solicitors granted higher rights of audience and, if not, which body should take on this role (see para 38)?

Comments

40. The Working Party would be grateful for comments by 31 August 2006. Please send your comments to the Secretary to the Working Party by any of the following means -:

Mail : Room LG228, High Court Building, 38 Queensway, Hong Kong
(Attn.: Secretary to the Working Party on Solicitors' Rights of Audience)

Fax : 2524 6438

E-mail : secretary_wposroa@judiciary.gov.hk

41. It may be useful for the Working Party, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments received in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Working Party will assume that the response is not intended to be confidential.

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