

立法會
Legislative Council

LC Paper No. CB(2)559/07-08(06)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Meeting on 13 December 2007

Background Brief on Solicitors' rights of audience

Purpose

This paper provides background information on the issue of solicitors' rights of audience in the High Court.

The legal profession

2. The legal profession in Hong Kong is divided into two branches - barristers and solicitors. Lawyers practising within one branch of the profession are not, at the same time, allowed to practise within the other.

3. Barristers specialize in advocacy and consultancy work. As a general rule, they cannot act directly for a client without instructions from a solicitor. They work as sole practitioners, sometimes alone but traditionally with other barristers in offices known as sets of chambers. They are not permitted to enter into partnerships. All barristers have unlimited rights of audience before the courts, i.e. they can appear on behalf of a party to proceedings in any court.

4. Solicitors can deal directly with members of the public and are mostly engaged in general practice. They have the right to appear in the Magistracy and the District Court, certain preliminary proceedings in the High Court and Court of Appeal, and appeals to the High Court from magistrates' decisions. They are not entitled to conduct High Court trials or appear before the Court of Appeal in open court. Solicitors may form partnerships.

Background

Consultation Paper on Legal Services

5. In January 1993, the Law Society of Hong Kong published a paper entitled "The Future of the Legal Profession" which called for a unified legal profession.

The Hong Kong Bar Association responded in January 1994 with a Position Paper which rejected the Law Society's proposals.

6. In March 1995, the Attorney General's Chambers published the "Consultation Paper on Legal Services" for a three-month public consultation. The aim of the Consultation Paper was to prompt a public reappraisal of legal services in Hong Kong. One of the recommendations made in the Consultation Paper was -

".....it should be possible for solicitors to acquire rights of audience in all courts under statutory provisions similar to those in England and Wales."

7. The "Report on the Consultation Exercise and Proposals for the Way Forward" was published by the Attorney General's Chambers in February 1996. With respect to the proposal of extension of solicitors' rights of audience in the higher courts, 32 written submissions were received during the consultation period. The proposal was supported (with or without qualifications) by all submissions, except the Bar Association and one barrister. In view of the Bar's objection, the Administration proposed to conduct a further study of the state of the Bar in other common law jurisdictions where solicitors could acquire full rights of audience. It also proposed to gauge the level of public support for this change by conducting a public opinion survey on this issue. After the results of both exercises were known, the Administration would decide on the way forward.

8. A specially designed survey to solicit opinions from Hong Kong residents on the issue of granting the rights of audience to solicitors was conducted by the Department of Applied Statistics and Operational Research, City University of Hong Kong. The Report on "Public Opinion Survey on Extension of Solicitors' Rights of Audience" was submitted to the Attorney General's Chambers in May 1996. In gist, the survey covered a total of 1070 questionnaires which were considered valid for analysis. 78.2% of the respondents either completely or partially agreed that the rights of audience of solicitors should be extended.

9. The Report on "Public Opinion Survey Public Opinion Survey on Extension of Solicitors' Rights of Audience" and the Report on "The State of the Bar in Various Commonwealth Jurisdictions" were submitted to the Panel on Administration of Justice and Legal Services at its meeting on 8 July 1996. The Administration advised the Panel that it had not drawn any conclusion on the matter and would like to invite views from the Panel and the two legal professional bodies. If broad support was forthcoming, the Administration would consider moving Committee stage amendments to the Legal Services Legislation (Miscellaneous Amendments) Bill 1996, which had been introduced into the LegCo on 26 June 1996, to extend the rights of audience of solicitors.

10. The Bar Association advised the Panel that it was exceedingly concerned about the possible negative impact of the proposal on the Bar. The Law Society pointed out that the recent reforms in England for solicitors to acquire extended

rights of audience had not undermined the strength and independence of the English Bar, and did not believe that the Hong Kong Bar would be affected by a similar proposal. Some members of the Panel did not support the proposal as they shared the concern of the Bar Association and considered that it might be too early to draw conclusion from the English Bar in view of the small number of solicitor advocates who obtained rights of audience in England. They also questioned whether it was in the public interest to initiate a change in light of the imminent change of sovereignty.

11. At the first meeting of the Bills Committee on Legal Services Legislation (Miscellaneous Amendments) Bill 1996 on 28 October 1996, the Administration advised members that it was preparing to introduce a proposal to extend solicitors' rights of audience by way of Committee stage amendments. Some members considered that the proposal was outside the scope of the Bill. The Administration agreed to seek a private ruling from the President on the procedural propriety of the proposal. If the amendment was ruled as out of order, the Administration would introduce a separate bill and request the House Committee to refer that bill to the existing Bills Committee. The President subsequently gave a private ruling that the proposed amendment exceeded the scope of the Bill and might not be proposed to the Bill.

12. At the resumption of the Second Reading debate on the Legal Services Legislation (Miscellaneous Amendments) Bill 1996 at the Council sitting on 25 June 1997, the Attorney General said that after the ruling given by the President to the effect that the proposal to permit solicitors to acquire extended rights of audience would be outside the scope of the Bill, he could have sought to introduce an additional bill on this subject. However, given the large number of bills to be considered by the Council in the session, he decided that it would not be fair to add to that burden. Moreover, the Law Society and the Bar Association had entered into a dialogue on this issue and it was hoped that an understanding could be reached between them in the near future.

Civil Justice Reform (CJR)

13. In February 2000, the Working Party on CJR was appointed by the Chief Justice to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed. On 21 November 2001, the Working Party published an Interim Report and Consultation Paper containing 80 proposals for consultation. The Final Report on CJR with 150 recommendations was published on 3 March 2004.

14. The Interim Report and Consultation Paper on CJR stated that -

"Issues such ashow far rights of audience might be extended..... are all questions with a possibly significant impact on litigation costs. However, such questions fall outside the Working Party's remit."

In its Final Report, the Working Party pointed out that a number of respondents had nevertheless made suggestions on these issues. The Law Society went so far as to suggest that "*[t]he most patent omission inthe CJR..... is that of higher rights of audience of solicitors in the High Court. The failure to consider the topic - an expedient way to reduce costs in civil litigation - detracts intellectually from the CJR.....*" The Working Party rejected this criticism. It pointed out that reforming the system of civil rules and practices with a view to enhancing its cost-effectiveness was a key component of any attempt to tackle the problems of cost, complexity and delays. However, the fact that other matters which might also have a bearing on these problems did not mean that they all could be crammed into the same study and examined by the Working Party.

Working Party on Solicitors' Rights of Audience

15. In his address at the Opening of the Legal Year 2001 on 15 January 2001, the Chief Justice made reference to the question of whether solicitors should have the rights of audience in the High Court. He considered it premature to explore the matter as the recent increase in the civil jurisdiction of the District Court had substantially expanded the scope of advocacy work for solicitors. Further, solicitors already had certain rights of audience in the High Court. Such existing rights of audience were not extensively exercised. It would be appropriate to consider further extension when their existing rights of audience in the District Court and the High Court were extensively and competently exercised.

16. On 7 June 2004, the Chief Justice announced his decision to set up a working party to study the solicitors' rights of audience in the higher courts. On 24 June 2004, the Chief Justice appointed Hon Mr Justice Bokhary, Permanent Judge of the Court of Final Appeal, as the Chairman of the Working Party on Solicitors' Rights of Audience (the Working Party). Other members of the Working Party comprise four other judges, a Law Officer from the Department of Justice, two barristers, two solicitors and a lay member not connected with the practice of law.

17. The Working Party's terms of reference are 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.

18. On 7 June 2006, the Working Party issued the "Consultation Paper on Solicitors' Rights of Audience" for public consultation. Before the formal release of the Consultation Paper, Hon Mr Justice Bokhary, Chairman of the Working Party, invited members of the Panel on Administration of Justice and Legal Services and other interested Members to attend an informal briefing on 5 June 2006.

19. In November 2006, the Panel on Administration of Justice and Legal Service requested the Judiciary Administration to provide the timetable and the approach of the next stage of work of the Working Party. The Secretary of the Working Party

responded in writing on 7 December 2006 that the original deadline for response to the Consultation Paper (i.e. 31 August 2006) was extended at the request of, inter alia, the two legal professional bodies until the end of September 2006. As the Working Party had received some 260 responses, it would take some time for its members to consider these responses, some of which had made detailed comments on the various issues raised. It was too early to predict when the Working Party would be in a position to formulate its final recommendations.

Latest development

20. The Judiciary Administration has recently advised that it will report the deliberations of the Working Party to the Panel at its meeting on 13 December 2007.

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10 December 2007