Working Party on Solicitors' Rights of Audience

Final report

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, SBS, Vice-President of the Court of Appeal

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

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

Mr Robert Allcock, BBS, JP, Solicitor General, Department of Justice (until January 2007)

Mr Ian Wingfield, GBS, JP, Solicitor General, Department of Justice (from February 2007)

Mr Peter Barnes, Solicitor

Mr Denis Brock, Solicitor (until December 2006)

Mr Andrew Jeffries, Solicitor (from December 2006)

Mrs Eleanor Ling, SBS, OBE, JP

Mr Joseph Tse, SC, Barrister

Mr Benjamin Yu, SC, Barrister

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

Consultation paper

3. In May 2006, the Working Party issued a consultation paper which set out the guiding principle which the Working Party considered should underlie any changes to the existing rules on rights of audience in the higher courts. The paper also sought the public's views on the various issues which the Working Party had identified as relevant to the question of extending rights of audience.

4. The Working Party received some 260 responses to the consultation paper, mostly from members of the legal profession, but including some from the community at large. An overwhelming majority favoured extending higher rights of audience to suitably qualified solicitors. There was strong opposition to applying a limit to the number of solicitors who could be granted higher rights of audience in any year, or to restricting solicitor-advocates to particular areas of law or particular types of proceedings. On other issues, views were more diverse, particularly in relation to the ways in which a solicitor should be able to qualify for higher rights of audience. The Working Party has carefully considered the responses to the consultation paper and the conclusions presented in this report take those views into account.

The Working Party's guiding principle

5. 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. The Working Party thinks that solicitors can be granted higher rights of audience without creating that risk.

6. Before presenting our conclusions in relation to higher 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

7. 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.

8. 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 currently offered by both the University of 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. From 2008, the PCLL will also be offered by the Chinese University's School of Law. 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.

9. 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 or as a judge's marshall in Hong Kong), the new barrister is eligible to apply to the Bar Council for a certificate granting him unrestricted rights of audience.

10. 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

[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.

to the Law Society for a practising certificate. This certificate must be renewed annually for so long as the solicitor practises in Hong Kong.

11. The majority of lawyers in Hong Kong are solicitors, with 5,799 holding current practising certificates as solicitors as at August 2007. As at August 2007, there were 1,028 practising barristers.

The Bar Association and the Law Society

12. 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.

13. 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

14. 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.

15. 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".

16. 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 that it helps to maintain the barrister's objectivity, it allows for specialisation, and it ensures an efficient division of labour as between a client's solicitor and barrister.

17. 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.

18. 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 hearing[3] 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 complex and falls within the expertise of a particular barrister, or simply for reasons of efficiency.

19. 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

20. 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."*

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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.

21. 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.

22. Compliance with the guiding principle which we set out at paragraph 5 of this paper (which echoes the views of the Chief Justice set out at paragraph 20) 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. We believe that the scheme which we describe in the following paragraphs complies fully with our guiding principle. Taken together with the overwhelming support from respondents to the consultation paper for an extension of rights of audience in the higher courts, we have concluded that rights of audience in the higher courts should be granted to solicitors who satisfy the terms of the scheme we propose.

23. We examine now in turn the elements of the proposed scheme to grant solicitors higher rights of audience, together with the issues which we believe need to be addressed in relation to each element.

Elements of the proposed scheme for granting solicitors higher rights of audience

Eligibility

24. 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.

25. It would seem reasonable to impose a primary requirement for eligibility that the applicant solicitor should have completed a minimum 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.

26. A range of views were expressed by those who responded to our consultation paper. A significant number rejected the imposition of any minimum period of practice, pointing out that what was important was the amount of quality experience, as opposed to the number of years of post-qualification experience. Quality of experience and the number of years experience did not necessarily correlate. It was also pointed out that there was no similar restriction on barristers' level of qualification and many argued that solicitors and barristers should be treated in the same way in this regard. Of those who considered that a minimum period of practice was appropriate, the majority favoured the Law Society's proposal that solicitor applicants for higher rights of audience should have completed five years of practice. The Bar Association did not object to this suggestion.

27. Having carefully considered the various views expressed on this issue, we have concluded that a minimum period of practice should be a pre-requisite for a solicitor to gain higher rights of audience. We believe that that approach properly balances the public interest in expanding the pool of competent advocates in the higher courts while maintaining the viability of an independent Bar. We conclude that five years is an appropriate minimum period of practice and recommend that this should be a minimum requirement before a solicitor can apply for higher rights of audience.

28. 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. Strong views were expressed on consultation both for and against allowing overseas experience to count towards the minimum practice period. On balance, we are persuaded that experience in a common law jurisdiction should be taken into account, but that a minimum period of practice in Hong Kong should be prescribed. We think that two years is an appropriate minimum period of Hong Kong practice, and so recommend.

29. It is foreseeable that a barrister with a number of years of experience might choose to switch his career to that of a solicitor, and apply to become a solicitor-advocate. In such circumstances, we think that the applicant's experience as a barrister should be taken into account but that the same minimum requirements as to post-qualification experience should apply. In other words, an applicant should be required to have completed five years'

practice as a solicitor or a barrister, with at least two years' practice in Hong Kong.

Litigation experience

30. Clearly, a solicitor should not be granted higher rights of audience unless he is able to demonstrate adequate litigation experience. We have recommended that five years' post-qualification practice be a pre-requisite for eligibility to apply for higher rights of audience, but a successful applicant would also need to satisfy certain minimum requirements as to his litigation experience. However, while it is a simple matter to apply a clear-cut measure such as the number of years of post-qualification practice, it is much less so to determine what amounts to "litigation experience". If a minimum period of litigation experience is to be required, how is that to be measured? Should it, for instance, be restricted to periods when the candidate was engaged solely in litigation practice, or should it include times when his work was only partly litigation? Should different weight be given to different types of litigation work, whether by distinguishing between different levels of forum, or between advocacy and other work performed by solicitors?

31. In this regard, we recognise that "advocacy" encompasses the acts of speaking and writing in support of a position, and that a litigation solicitor who is involved in higher court work (a) may be involved in a substantial amount of written advocacy and (b) is constrained by the current restrictions as to the amount of oral advocacy he or she may practise in such courts.

32. We acknowledge the difficulty of prescribing with precision what should constitute appropriate litigation experience and we believe that some measure of discretion will need to be applied by the Higher Rights Assessment Board, the body we propose should administer the scheme for admission. We have concluded that an applicant for higher rights of audience should be required to show that he has three years of relevant recent litigation experience. That experience could include advocacy work or other litigation work. The Assessment Board should be given a degree of latitude in determining what amounts to relevant litigation experience. Different weight would need to be given to different types of experience, with much weight given to actual advocacy, whether written or oral. Examples of such work would include contested hearings before a Master and conducting trials in the District Court and the magistracies (or their equivalents in other common law jurisdictions), together with experience of written or oral advocacy in the higher courts for which qualification is sought.

33. Along with the application form, a candidate for higher rights of audience would need to provide the Board with full information about his litigation and advocacy experience during the three years prior to the date of application. That information would need to include details of applications or hearings conducted by the applicant. The candidate's record of advocacy

experience would enable him to demonstrate the quality as well as the quantity of that experience.

34. We have proposed to avoid any rigid requirements as to the number or type of court or tribunal appearances which an applicant must show. A minimum of 30 was an initial requirement in England, but this led to difficulties with applicants attending, for example, numerous time summonses and so reaching the required number whilst at the same time having gained insufficient demonstrable advocacy experience. We are content to proceed in this less prescriptive way in part as applicants will also have to pass (or be exempted from) written tests in High Court procedure and in ethics, as well as a practical advocacy test, before being granted higher rights.

35. In addition to satisfying the minimum practice requirements, an applicant should have to satisfy the Board that he was "*in all other respects suitable*." This would give the Board discretion to refuse an application where, for instance, the Board was not satisfied as to the applicant's overall competence, professional conduct record or integrity.

Restriction by quota

36. 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.

37. 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.

38. There was virtually no support among those who responded to the Working Party's consultation paper for the imposition of a quota. It was pointed out that a quota would not be in the public interest and would seriously distort the enhanced competition and advocacy standards which extended rights of audience would bring. There was no reason to suppose that there would be a flood of applicants for higher rights of audience and, even if there were, the Bar's future could be adequately safeguarded by

ensuring that the eligibility criteria for higher rights of audience were sufficiently high. The Bar Association itself agreed that, for the purpose of ensuring the quality of solicitor-advocates, the question of establishing appropriate criteria for eligibility was more important than fixing a quota on the number of solicitors who could apply each year.

39. In the light of the near unanimity of views expressed to us, we do not think that a quota should be imposed on the number of solicitors who may be granted higher rights of audience each year. Under the scheme we propose, only solicitors who are experienced and competent advocates would be eligible to apply for higher rights of audience. As the Bar Association points out, the key issue is to establish the criteria for eligibility at a level which ensures candidates satisfy the highest standards of advocacy. In our view, that will remove any risk of a flood of applicants without the need for imposing artificial and arbitrary quotas.

Scope of accreditation

40. The question arises as to whether unrestricted rights of audience should be granted to all solicitor-advocates, or whether these should be limited in some way. 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.

41. 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.

42. 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 scheme we envisage would have been in practice for

a number of years and would have had to 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.

43. Most respondents to the Working Party's consultation paper who addressed this issue gave broad support to the Law Society's view that a solicitor should be able to apply for higher rights of audience in respect of civil proceedings, criminal proceedings, or both. The suggestion that a solicitor-advocate should be limited to particular areas of law or a particular type of proceedings, or that they should be precluded from jury trials, was roundly rejected. The Bar Association supported the Law Society's view that solicitor-advocates should be granted either civil or criminal rights of audience, or both, if they can demonstrate the requisite experience and skills.

44. We are not aware that the schemes applied in the United Kingdom have caused difficulty there. Bearing that in mind, and taking account of the views expressed by those responding to the Working Party's consultation paper, we consider that solicitor-advocates should be granted higher rights of audience for civil proceedings, criminal proceedings, or both, providing they satisfy the criteria specified. We are confirmed in our view by the fact that both the Law Society and the Bar Association favour such an approach.

The Higher Rights Assessment Board

45. The consultation paper prompted a range of views from respondents as to the appropriate accreditation body for granting higher rights of audience. Some favoured the Council of the Law Society, while others argued for a different accrediting 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 may not be best placed to assess the skills required of those seeking to undertake advocacy in the higher courts.

- An independent accreditation body would offer the applicant, the Judiciary and the public assurance that solicitor-advocates met an appropriate standard of advocacy competence

46. The consultation paper pointed out that 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.

47. As observed by the consultation paper, 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.

48. An alternative approach presented in the consultation paper 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.

49. Having considered the various options and the responses to the consultation paper, we think it important that the system for accreditation should ensure that it is not only the interests of solicitors which are taken into account, but that there is also input from the judiciary, the Bar and the wider community. We accordingly recommend that the accrediting authority, to be known as the Higher Rights Assessment Board, should be chaired by a senior

judge (nominated by the Chief Justice) and should consist of the following additional members:

(a) Two experienced members of the Judiciary (either serving or retired), nominated by the Chief Justice;

(b) Three litigation solicitors, nominated by the Council of the Law Society of Hong Kong;

(c) Three Senior Counsel, nominated by the Bar Council of Hong Kong;

(d) One member selected by the Chairman from a panel of persons appointed by the Chief Justice, who are not, in the opinion of the Chief Justice, connected in any way with the practice of law; and

(e) A Law Officer or Deputy Law Officer in the Department of Justice, nominated by the Secretary for Justice.

50. The organisation and administration for the Board would be provided by the Council of the Law Society. We envisage that meetings of the Board would generally be held quarterly, but only if there were applications to consider, but could be more frequent if workload demanded. Decisions of the Board would be made by majority vote, with a minimum of seven members required in support to approve an application.

51. In considering an application for higher rights of audience, where it considers it appropriate the Board should be entitled to request information from the applicant in addition to that provided in the application form, or to invite the candidate to attend for interview. There would also need to be a mechanism to ensure that any potential conflicts of interest are declared by members of the Board, such as where an applicant is a member of the same firm or chambers as a member of the Board.

Application procedure

52. Under the scheme we propose, candidates for higher rights of audience would submit their applications to the Council of the Law Society. The Council would be required to review each application and, if it considers an application complies with the prescribed requirements, would pass the application to the Assessment Board for consideration. Where the Council believes a candidate has not satisfied the prescribed requirements (such as where, for instance, he has not been in practice in Hong Kong for at least two years, or has not been qualified as a solicitor or barrister for five years), the Council will recommend to the Board that the application be rejected. The Board is not, of course, bound to accept a recommendation by the Council, either to reject or to grant an application, and it is the Board's decision which is determinative.

53. Successful applicants will be issued with a Higher Rights Qualification Certificate by the Council. The Council will be required to keep a register of solicitors granted higher rights of audience. The register should be open to public inspection and the Council should be required to notify the Judiciary Administrator of the names of all those granted higher rights of audience.

54. In order not to unduly lengthen the process of qualifying for higher rights of audience, we think that there should be some flexibility in the application process. It should therefore be open to prospective applicants to sit the prescribed advocacy course (on which we elaborate later in this paper) before they have completed the minimum five years' post-qualification practice necessary to qualify for higher rights of audience.

55. It falls to be considered whether there should be any limit on the number of times a failed applicant should be entitled to re-apply for higher rights of audience. If a limit is to be imposed, should this be a lifetime limit, or merely a restriction on the number of applications which an individual may make within a specified period? The imposition of a limit would ensure that the Council and the Board are not bombarded with repeated applications from unsuitable candidates. In practice, however, it is unlikely that a solicitor would choose to put his professional reputation at stake by risking repeated rejections. The imposition of a lifetime limit on the number of applications an individual may make would seem arbitrary, and would unreasonably penalise a solicitor who subsequently attained the requisite level of competence. A compromise might be to allow an individual to apply only once each calendar year.

Routes to qualification

56. 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).

57. 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, have considerable advocacy experience, and must undergo additional training. We understand that the development and accreditation routes in England and Wales are being phased out.

58. There was a wide range of views expressed on this aspect of the consultation paper. Some favoured the least restrictive approach, arguing that a solicitor, whom the court must have been satisfied was a "fit and proper person to be a solicitor", was *prima facie* qualified to be an advocate with rights of audience in the higher courts and should be granted those rights with the minimum formality. Others argued that candidates for higher rights of audience must be able to demonstrate substantial advocacy experience in Hong Kong over many years.

59. Having considered the views of those who responded to the consultation paper and having reviewed the various possible alternatives, we have concluded that there should be only two routes by which candidates can attain higher rights of audience. In addition to satisfying the minimum periods of post-qualification practice and litigation experience, candidates should either:

(a) pass an Advocacy Course approved by the Assessment Board ("the Qualification Route"); or

(b) satisfy the Assessment Board that they are suitably experienced and suitably qualified senior litigation practitioners to exercise higher rights of audience in proceedings relating to the qualification for which they have applied ("the Exemption Route").

60. Most candidates for higher rights of audience would be expected to apply via the Qualification Route. They would be required to complete an Advocacy Course, which would be in a form prescribed by the Council of the Law Society and approved by the Higher Rights Assessment Board, with separate courses set for criminal and civil proceedings. The course would consist of both written and practical examinations, with a practical assessment before an assessor nominated by the Board. The written part would be, first, an examination in Higher Court procedure for those who could not show sufficient relevant Higher Court litigation experience to be granted exemption, and, second, an examination in the ethics of advocacy. For the practical assessment, this would comprise mock advocacy in the form of a short mock trial, including witness examinations. The practical assessor may (but need not) be a member of the Board. There would be no restriction on entry to the Advocacy Course, so that a solicitor who paid the necessary fees would be eligible to sit the course before he had completed the minimum period of post-qualification practice to apply for a Higher Rights Qualification Certificate.

61. The Exemption Route would, *inter alia*, enable solicitors with extensive overseas advocacy experience but limited Hong Kong experience to obtain higher rights of audience. It would also offer a means by which experienced Hong Kong solicitors (including a barrister who has converted to become a solicitor) could qualify without the need to complete the Advocacy Course. To qualify for exemption, a candidate would need to satisfy the Board that:

(a) he has substantial recent advocacy experience in the higher courts in proceedings in which the qualification for which he has applied would entitle him to appear as an advocate; or

(b) he has substantial judicial, or quasi-judicial, or arbitral experience, having presided over trials or hearings in judicial, quasi-judicial or arbitral proceedings in Hong Kong; or

(c) by reason of the totality of his advocacy or judicial, quasi-judicial or arbitral experience in Hong Kong or any other common law jurisdiction, he is suitably experienced and qualified to exercise rights of audience before the higher courts in such proceedings.

In determining a candidate's suitability for exemption, the Board would take into account all relevant circumstances, including any written references from judges, etc, before whom the candidate has appeared. The Board would be entitled to require a candidate to attend an interview as part of the assessment procedure.

Conduct and discipline

62. The consultation paper noted that in both England and Wales and Scotland the respective Law Societies have drawn up codes of conduct specific to solicitor-advocates, and that the Hong Kong Law Society's draft legislation envisages that the Society's Council would draw up specific rules for solicitor-advocates. Views were evenly split among those who responded to the consultation paper, with half in favour of the Law Society taking responsibility for the conduct and discipline of solicitor-advocates and half against. Of those against, the majority proposed that this role should be taken on by an independent panel appointed by the Chief Justice. The Bar considered that once the changes in the code of conduct had been discussed and enacted, the Law Society should be responsible for the conduct and discipline of solicitor-advocates.

63. Among the arguments advanced in favour of the Law Society taking responsibility for the conduct and discipline of solicitor-advocates was the fact that a system by which some parts of a solicitor's conduct (the exercise of higher rights of audience) were regulated by a different body would invite complexity, possible inconsistency of approach and risk double

jeopardy. A counter argument put forward was that the Law Society was not best placed to be entrusted with the task of disciplining solicitor-advocates.

64. In relation to the specific issue of the "cab-rank rule" to which we referred at paragraph 17 of this paper, a number of respondents argued that this should not apply to solicitor-advocates. They observed that a fundamental ethical obligation for solicitor-advocates should be always to consider whether any particular case would best be served by representation by a solicitor-advocate or by counsel. In addition, they questioned whether it was appropriate to apply the "cab-rank rule" to solicitor-advocates who (unlike barristers) did not operate independently but were subject to their firm's conflict procedures.

65. Taking account of the various views expressed and the approach favoured in other jurisdictions, we consider that the Council of the Law Society, in consultation with the Bar Council and the judiciary, should draw up a code of conduct for solicitor-advocates. Once that code has been adopted, we recommend that the Council of the Law Society should be responsible for applying the code and for the conduct and discipline of solicitor-advocates. A specific issue which the code would need to address would be whether, or to what extent, the "cab rank rule" should apply to solicitor-advocates.

Legislation

66. Legislation providing the necessary framework is plainly the appropriate means by which to grant higher rights of audience to solicitors.

Summary of recommendations

67. We recommend that:

(1) Applicants for higher rights of audience must have five years' post-qualification practice of which at least two years must have been in Hong Kong.

(2) The three years immediately preceding the application must include what an assessment board considers to be sufficient litigation experience, with the greatest weight being given to actual advocacy.

(3) Successful applicants should be granted higher rights of audience for civil proceedings, criminal proceedings or both.

(4) A Higher Rights Assessment Board should be established. This would be chaired by a senior judge, nominated by the Chief Justice, and would consist of the following additional members:

(a) Two experienced members of the Judiciary, nominated by the Chief Justice;

(b) Three litigation solicitors, nominated by the Council of the Law Society;

(c) Three Senior Counsel, nominated by the Bar Council;

(d) One member selected by the Chairman from a panel of persons appointed by the Chief Justice, who are not, in the opinion of the Chief Justice, connected in any way with the practice of law; and

(e) A Law Officer or Deputy Law Officer in the Department of Justice, nominated by the Secretary for Justice.

(5) Application for higher rights of audience should be made to the Council of the Law Society, which will review applications before passing them with its recommendation for rejection or grant to the Assessment Board.

(6) The Assessment Board should not be bound by the Council's recommendation, and it should be the Board's decision which is determinative.

(7) In addition to satisfying the minimum practice requirements, an applicant should have to satisfy the Board that he is in all other respects suitable to be granted higher rights of audience.

(8) Applicants for higher rights of audience must either:

(a) pass an Advocacy Course approved by the Assessment Board; or

(b) satisfy the Assessment Board that they are suitably experienced and suitably qualified senior litigation practitioners to exercise higher rights of audience in proceedings relating to the qualification for which they have applied.

(9) Successful applicants should be issued with a Higher Rights Qualification Certificate by the Council of the Law Society. The Council must maintain a register of those granted Certificates, and must provide the Judiciary Administrator with the names of such person.

(10) The conduct and discipline of solicitor-advocates will be the responsibility of the Council of the Law Society, who will apply

a code of conduct to be drawn up by the Council of the Law Society in consultation with the Bar Council and the Judiciary.

(11) Legislation should be enacted to provide the necessary framework for the granting of higher rights of audience to solicitors.

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