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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 30 January 2012**

**Implementation of the scheme for granting
higher rights of audience to solicitors**

Purpose

This paper provides background information and a brief account of the discussions of the Bills Committee on Legal Practitioners (Amendment) Bill 2009 ("the Bills Committee") on the scheme for granting higher rights of audience to solicitors ("the scheme").

Background

Existing rights of audience

2. With the legal profession in Hong Kong being comprised of two branches, 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 specialize in advocacy and have unlimited rights of audience in any court in Hong Kong, while solicitors do not. Solicitors only have rights of audience which have been acquired by legislation or through usage of particular courts. Currently, solicitors have rights of audience in, inter alia, magistrates' courts and the District Court, and in chambers hearings in the Court of First Instance and the Court of Appeal.

The Legal Practitioners (Amendment) Bill 2009

3. In June 2004, the Chief Justice ("CJ") established a Working Party on Solicitors' Rights of Audience ("the Working Party") 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. In June 2006, the Working Party issued the "Consultation Paper on Solicitors' Rights of Audience" for public consultation. An overwhelming majority of the responses to the consultation paper favoured extending higher rights of audience to suitably qualified solicitors. The Final Report of the Working Party was

published in October 2007. The Working Party recommended that legislation should be enacted to provide the necessary framework for the granting of higher rights of audience to solicitors. CJ had accepted the Working Party's recommendations and requested the Administration to take forward the matter by appropriate legislation. The Panel on Administration of Justice and Legal Services ("AJLS Panel") was consulted on the legislative proposal to grant higher rights of audience to solicitors on 16 December 2008. No objection was raised to the proposal.

4. The Legal Practitioners (Amendment) Bill 2009 which sought to provide the necessary legal framework for granting higher rights of audience to solicitors before the High Court ("HC") and Court of Final Appeal ("CFA") in civil and criminal proceedings was introduced into the Legislative Council ("LegCo") on 24 June 2009. At the conclusion of its scrutiny work, the Bills Committee agreed that there was a need to review the scheme at an appropriate junction, say around two years after its implementation. The issue was referred to the AJLS Panel for follow-up.

Relevant discussions of the Bills Committee

The Higher Rights Assessment Board and eligibility requirements

5. According to the Legal Practitioners (Amendment) Ordinance 2010 ("LPO") which was enacted on 20 January 2010, the Higher Rights Assessment Board ("the Assessment Board") acting as the gatekeeper of the standard of advocacy before the courts will determine applications by solicitors for higher rights of audience. The Assessment Board comprises members appointed by CJ from serving and former judges, members of the legal profession and an officer of the Department of Justice, as well as a lay member to be selected by the chairperson of the Assessment Board from among a panel of lay persons appointed by CJ. The Assessment Board may delegate to its committees its powers and duties in relation to any interview required to be attended by an applicant for higher rights of audience. The Assessment Board will also make rules to deal with various matters including those relating to any courses or training or assessments or examinations required to be completed or passed by an applicant for higher rights of audience.

6. Solicitors who has at least five years' post-qualification practice, of which at least two years must have been in Hong Kong during the period of seven years immediately before the date of application and who have satisfied further eligibility requirements (e.g. completion of an approved advocacy course and passing of related assessments) prescribed by the rules to be made by the Assessment Board may apply to the Board for rights of audience before HC and CFA in civil proceedings, criminal proceedings, or both. The Assessment Board

must, in relation to each calendar year, specify one or more periods during which applications may be made.

7. The Bills Committee noted the agreement of the two legal professional bodies with the eligibility requirements. Concern was, however, expressed that these eligibility requirements did not include experience in advocacy work before the courts which should be a critical factor of consideration in the grant of higher rights of audience. The two legal professional bodies advised the Bills Committee that advocacy encompassed the acts of speaking and writing in support of a position. The Working Party recommended in its Final Report that the Assessment Board should be given a degree of latitude in determining the relevant advocacy experience of an applicant, taking into account the totality of his or her litigation and advocacy experience. The Administration's explanation was that the eligibility requirements were the threshold requirements only. Apart from satisfying these threshold requirements, an applicant should also satisfy the conditions for granting applications set out under section 39L of LPO, including experience and competence in litigation and advocacy, whether written or oral.

Determination of application by the Assessment Board

8. To grant higher rights of audience, the Assessment Board has to be satisfied, inter alia, that the applicant has acquired sufficient litigation experience within the period of three years immediately before the date of the application and was in all respects a suitable person. Pursuant to section 73CA of LPO, detailed eligibility requirements and matters relating to the assessment of applications under the accreditation route and the exemption route will be governed by subsidiary legislation to be made by the Assessment Board, which will be subject to the scrutiny of LegCo.

9. The Assessment Board is empowered to, inter alia, make enquiries with the Council of the Law Society of Hong Kong ("the Council") regarding eligibility and other requirements, and also to require the applicant to provide it with further information relating to the application at an interview before it or otherwise. If the application is proposed to be refused, the applicant must be given an opportunity to make representation.

10. In response to members' enquiry about the appeal mechanism in respect of applications for higher rights of audience, the Administration advised that section 73CA(2)(c)(i) of LPO provided that the Assessment Board may make rules on arrangements for appeal or review in respect of matters concerning assessments or examinations. A person who had failed in his or her application for higher rights of audience was not precluded from making another application in the following year and subsequent years.

11. Members also enquired as to whether the applicant concerned would be notified of the enquiries made by the Assessment Board with the Council concerning his or her eligibility and whether the details of the enquiries and the information provided by the Council would be conveyed to the applicant.

12. The Administration advised that the Assessment Board was empowered to make rules to provide for the enquiries made under section 39M(1)(a) of LPO. It was envisaged that the rules to be made by the Assessment Board would, subject to the Assessment Board's own views, be likely to provide for the following minimum requirements -

- (a) a prior written consent from the applicant for release of information should be obtained;
- (b) both the request for and the provision of information shall be made on a confidential basis and in writing;
- (c) the Assessment Board shall inform the applicant when it requested his or her information from the Council; and
- (d) any information disclosed by the Council to the Assessment Board under section 39M(1)(a) would be disclosed to the applicant at the same time.

13. The Administration further advised that while the Judiciary had pointed out that it was inappropriate to pre-empt the Assessment Board (which had not yet been formed) on this subject, it would have no objection for the Administration to suggest the above requirements to the Assessment Board when it was formed for its consideration.

14. The Law Society explained to the Bills Committee that the most common enquiry was likely to be in respect of conduct matters and it was the firm view of the Council that only those cases which resulted in disciplinary action should be disclosed to the Assessment Board. Chapter 16 of the Hong Kong *Solicitors' Guide to Professional Conduct* lists the sanctions which can be imposed by the Law Society: "Letter of Regret", "Letter of Disapproval"/"Strong Letter of Disapproval" and finally a referral to the Convenor of the Solicitors Disciplinary Tribunal.

Higher rights of audience certificate

15. On the granting of an application, the applicant has the higher rights of audience sought, and those rights will then be exercisable by the applicant as a solicitor. The Council, upon notification, must issue a certificate in respect of

higher rights of audience to the successful applicant. The Council is to maintain a register of those who are granted certificates, make it available for public inspection and provide the Registrar of HC with the names of such persons. The Council may make rules in order to deal with the issue of and other matters concerning higher rights of audience certificates. The Council is also empowered to issue a code of conduct for solicitor advocates, in consultation with CJ and the Council of the Hong Kong Bar Association.

16. The Consumer Council which was in support of the Bill suggested to the Bills Committee that the list of persons with higher rights of audience to be kept by the Council should include further information such as specialized areas and year of admission of the solicitors. The Law Society undertook to consider positively the Consumer Council's suggestion.

Implementation of the scheme

17. The Law Society of Hong Kong had expressed its hope to the Bills Committee that the Assessment Board would be convened within six months of the passage of the Bill and would be operational within six months thereafter. The Administration advised the Bills Committee at that time that barring unexpected circumstances, the Assessment Board was expected to be in a position to invite applications about 12 months after the enactment of the Bill.

18. The Bills Committee also discussed other issues including cessation and re-acquisition of higher rights of audience, and unlawful exercise of such rights. For details, members may refer to the report of the Bills Committee [LC Paper No. CB(2)749/09-10].

Recent position

19. According to the Administration, the Assessment Board which was formed in July 2010 is preparing the related subsidiary legislation. The new regime will be brought into full operation as soon as practicable after the subsidiary legislation is finalized and approved by LegCo.

Relevant papers

20. A list of the relevant papers which are available on the LegCo website is in the **Appendix**.

Appendix

Relevant papers on implementation of the scheme for granting higher rights of audience to solicitors

Meeting	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	16.12.2008 (Item VII)	Agenda Minutes
House Committee	8.1.2010	Report of the Bills Committee on Legal Practitioners (Amendment) Bill 2009

Council Business Division 2
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