

立法會

Legislative Council

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Bills Committee on Legal Practitioners (Amendment) Bill 2021

Background brief

Purpose

This paper provides background information to facilitate members' consideration of the Legal Practitioners (Amendment) Bill 2021 ("the Bill"). It also summarizes the major views and concerns expressed by members of the Panel on Administration of Justice and Legal Services ("the Panel") on related matters.

The Bill

2. Published in the Gazette on 9 July 2021 and given First Reading at the Council meeting of 14 July 2021, the Bill seeks to amend section 31A of the Legal Practitioners Ordinance ("Cap. 159") so that a person (not being a barrister) who holds office as a legal officer (as defined by section 2 of the Legal Officers Ordinance (Cap. 87) and including a person deemed to be a legal officer for the purposes of Cap. 87)¹ is eligible to be appointed as Senior Counsel ("SC").

Background

3. According to section 31A(1) of Cap.159, only barristers are eligible to be appointed as SC provided that the substantive eligibility requirements under section 31A(2) of Cap. 159 (including sufficient ability, standing and knowledge

¹ "Legal officers" include (a) officers stipulated under section 2 and schedule 1 of the Legal Officers Ordinance (Cap. 87) (i.e. all Government Counsel/Public Prosecutors, Senior Government Counsel/Senior Public Prosecutors up to the Secretary for Justice, as well as certain legal professionals in the Lands Department, Companies Registry and Lands Registry); (b) those who are deemed to be legal officers under section 3(3) of the Director of Intellectual Property (Establishment) Ordinance (covering legal professionals in the Intellectual Property Department); and (c) those deemed to be legal officers under section 75(3) of the Bankruptcy Ordinance (covering legal professionals in the Official Receiver's Office).

of the law as considered by the Chief Justice of the Court of Final Appeal ("CJ"), and the requisite no-less-than-ten years' experience) ("the eligibility requirements") are satisfied. In other words, under the current regime legal officers (see *Note 1*) who are not barristers ("legal officers (non-barristers)") are not eligible for appointment as SC even if they took up the same amount of advocacy work as those who are barristers, and satisfy the eligibility requirements.

4. At its meeting on 21 June 2021, the Panel was briefed by the Administration on the latest initiatives of the Department of Justice ("DoJ") in promoting professional development for local legal profession in private practice as well as the legal officers in the Government, including a proposal to amend Cap. 159 to enable legal officers (non-barrister) to be eligible for consideration to be appointed as SC ("the legislative proposal"). In response to the invitation of the Panel, representatives of the Hong Kong Bar Association ("the HKBA representatives") attended the meeting to give their views.

Major views and concerns of the Panel on Administration of Justice and Legal Services

5. The views and concerns expressed by members and the HKBA representatives at the Panel meeting on 21 June 2021 are summarized in the ensuing paragraphs.

Impact on the status of Senior Counsel

6. The HKBA representatives pointed out that SC was a rank to which the junior counsel had aspired. Furthermore, according to section 31A(1) of Cap. 159, CJ may appoint as SC barristers who satisfy the eligibility requirements after consultation with the chairman of the Council of the Bar Association ("Bar Council") and the president of the The Law Society of Hong Kong ("Law Society"), the appointment as SC represented the peer recognition of the appointee's years of experience gained. The experience tested included the appointee's wealth of experience to represent both sides of the argument (to prosecute, to defend, for the plaintiff and for the defendant) inside the court, and his/her commitment to the rule of law, interest of justice for the furthering of the public interest demonstrated outside the court.

7. Noting that a legal officer appointed as SC would, under the legislative proposal, only be entitled to use the title of SC when holding office as a legal officer, the HKBA representatives were concerned that the "temporary" nature of this title would make it different from the SC title which hitherto was bestowed for life. They opined that, if carried through, the legislative proposal would result in an "artificial" or "secondary" category of SC which would diminish the international perception of the status of Hong Kong's SC, and would not elevate

the status of legal officers (non-barrister). To maintain the status quo would be in the best interest of the public.

8. The Administration took strong exception to the view that the status of SC bestowed on legal officers (non-barrister) under the legislative proposal would be of a "secondary" category. It stressed that the legislative proposal would align with the merit-based selection principles and would not alter the existing selection mechanism and criteria of appointment of SC. Same as barristers in private practice, legal officers (non-barrister) would be equally required to satisfy the eligibility requirements.

9. Some members shared the Administration's view and considered that as only those legal officers (non-barrister) who could demonstrate a high level of quality and experience in advocacy satisfying the eligibility requirements would be considered for appointment as SC, and the appointment would be made by CJ, the status of SC would not be diminished by the legislative proposal.

10. On the other hand, some members expressed concerns whether the legislative proposal might give rise to more junior legal officers would be recommended for appointment as SC prematurely and hence devaluating the title of SC. The Administration rejected such a possibility categorically in view of the fact that legal officers (non-barrister) would be equally required to satisfy the eligibility requirements to be appointed as SC, including possessing sufficient ability and standing as considered by CJ. The Administration further clarified that an application for appointment as SC was initiated by a barrister or legal officer through application and not by recommendations of any party. It trusted that, before making an application, the legal officer concerned should have gone through strenuous training and development, risen through the ranks and a self-evaluation to ensure that his/her ability and standing could satisfy the eligibility requirements.

Requisite years of experience for appointment as Senior Counsel

11. Noting that a barrister would have the requisite experience under section 31A(3) of Cap. 159 for appointment as SC if he had practised at the bar in Hong Kong or practised as an advocate while he holds office as a legal officer for not less than 10 years in aggregate, some members enquired whether legal officers (non-barrister) could satisfy this requirement if the legislative proposal was implemented.

12. In response, the Administration referred to a recent example in DoJ in which a very senior legal officer (non-barrister) with more than 20 years' experience of advocacy made an application for appointment as SC. Notwithstanding that the application was made just one year after she had gone through a three months' pupillage and changed to the barrister's stream, the legal officer concerned has been appointed as SC. The Administration highlighted the

fact that it was not the one year of experience as a barrister, but the over 20 years' experience of advocacy in DoJ that was taken into account by CJ when appointing the legal officer concerned as SC. The example also showed that the key consideration was on whether the legal officer concerned had sufficient ability, standing and knowledge of the law and the requisite years of experience which were relevant.

Equality in opportunities for legal officers to be appointed as Senior Counsel

13. In response to members' enquiries about the objective of the legislative proposal, the Administration explained that under the current regime, even if legal officers (non-barrister) were taking up a comparable amount of advocacy work as those who were barristers in the Government or in the private practice, they would not be eligible for the appointment as SC. The legislative proposal only sought to remove the hurdle which unfairly blocked legal officers (non-barrister) from being appointed as SC just because they were not barristers. It would also encourage legal officers who shoulder important public functions to pursue excellence in serving the public.

14. The HKBA representatives stressed that legal officers (non-barrister) were not barred from becoming eligible for appointment as SC under the existing regime. As long as these legal officers took the necessary change over to the Bar by serving a short period of pupillage of about three months, those who satisfied the eligibility requirements would be fully eligible to be considered for appointment as SC. They also pointed out that SC was, first of all, a counsel who did not simply acquire their position by advocating but also by observing all the code of conduct and conventions which were not written and could only be learnt and earned on the job. Therefore, the pupillage experience for the legal officers (non-barrister) applying for appointment as SC would be of immense value to the Government.

15. According to the Administration, there was no practical distinction between the roles and duties of legal officers in the Government who were barristers and those who were solicitors since, in respect of any of the matters mentioned in section 4(1) of Cap. 87, legal officers shall have all the rights of barristers and solicitors duly admitted under the provisions of Cap. 159 including a right of audience before any court or tribunal. Some members subscribed to this view and opined that, given the unique nature of the duty of legal officers and based on the merit-based selection principle, a legal officer (non-barrister) having over 10 years of advocacy experience with outstanding performance which satisfied the eligibility requirements should not be deprived of the opportunity for appointment as SC.

Impact on legal practitioners in private practice

16. The Administration stressed that the legislative proposal would not affect any rights of legal practitioners in private practice including the opportunities for barristers to be appointed as SC, nor disturb the professional demarcation between the barristers' and solicitors' branches since a legal officer (non-barrister) who was appointed as SC would only be entitled to use the title of SC when holding office as a legal officer.

17. Members agreed to the arrangement that a legal officer (non-barrister) appointed as SC should only be entitled to use the title of SC when holding office since, by doing so, it would strike a proper balance between the interests of upholding a self-regulatory legal profession and of retaining legal talents in the Government, which was in the public interest.

18. The Administration also advised that, while the legislative proposal would provide incentive to retain talents in the Government, the self-regulatory regime for dealing with matters relating to the legal profession in private practice was duly respected. To maintain a proper balance, legal officers (non-barrister) appointed as SC shall no longer carry the title of SC after they left the government service. If they resumed private practice as, say, solicitors, they should be subject to the professional regulatory regime of The Law Society of Hong Kong ("the Law Society") which would be in the best of public interest.

Other concerns

19. In response to members' enquiries on whether there were similar practices in overseas jurisdictions to appoint legal professionals working in the Government as SC, the Administration advised that while it had no information at hand, the situation in Hong Kong might be unique in that many legal officers who were not barristers were taking up comparable amount of advocacy work as those who were barristers, or even more than those who were solicitor advocates.

20. Some members considered that, after taking the first step to enable legal officers (non-barrister) to be eligible for consideration of SC appointment, it was worthwhile to consider extending it to solicitor advocates as they also advocated in court.

21. Noting that an SC might be appointed by CJ after consultation with chairman of the Bar Council and the president of the Law Society, and that Bar Association seemed to have reservation on the legislative proposal, some members questioned whether there might be potential conflict of interest if an application for appointment as SC was initiated by a legal officer (non-barrister). The Administration advised that as the legislative proposal did not alter the selection mechanism and criteria of appointment of SC, the legal professional bodies might still be consulted by CJ on future SC appointment exercises. It was trusted that when the chairman of the Bar Council and the president of the Law Society were consulted, they would exercise their professional judgments by

focusing on whether the eligibility requirements were satisfied rather than whether the potential appointee was a barrister or not.

Latest position

22. Subsequent to the Panel meeting held on 21 June 2021, submissions on the legislative proposal made by a member of the public (LC Paper No. CB(4)1150/20-21(01)) and the Bar Association (LC Paper No. CB(4)1206/20-21(01)) were issued to members for reference on 23 June 2021 and 5 July 2021 respectively.

23. At the House Committee meeting on 16 July 2021, members agreed to form a Bills Committee to scrutinize the Bill.

Relevant papers

24. A list of relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
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Bills Committee on Legal Practitioners (Amendment) Bill 2021

List of relevant papers

Date	Meeting	Paper
21.6.2021	Panel on Administration of Justice and Legal Services	Agenda
23.6.2021	Panel on Administration of Justice and Legal Services	Submission from a member of the public on issues relating to the professional development for legal profession (Chinese version only)
5.7.2021	Panel on Administration of Justice and Legal Services	Submission from the Hong Kong Bar Association dated 5 July 2021 relating to the Secretary for Justice's legislative proposal on Amendment to Eligibility of Application for the Status of Senior Counsel
7.7.2021	-	Legislative Council Brief
9.7.2021		The Bill
15.7.2021	-	Legal Service Division Report