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*Q.C., S.C., J.P.***Legal Practitioners (Amendment) Bill 2021**Revised version

- (1) The legal profession in HK follows the English tradition of a split profession composing of barristers and solicitors. They are members of the sole professional bodies allowed to practice law and work in the Courts of HK. These lawyers work either in Chambers (barristers) or with Firms (solicitors). There are also those who work as employed lawyers (in-house lawyers) either in Government (Department of Justice) or in the private sector.
- (2) Barristers (known as Counsel in Court) who obtain a certain level of experience, expertise and prominence may be appointed as Senior Counsel (Queen's Counsel before the resumption of sovereignty). This title and privilege is only available to Barristers under Section 31A of the Legal Practitioners Ordinance(LPO).
- (3) The Right of Audience before the Courts was extended to include "Legal Officers" during colonial time as there was a shortage of qualified lawyers in HK. The Colonial Attorney General had to recruit from places such as Australia and New Zealand (part of the common law network) whose lawyers were not allowed to private practise in HK. A significant portion of criminal prosecutions before the Courts were handled by these lawyers as "legal officers" under the LPO. However, after the advent of the three law schools at Universities in HK, a lot of PCLL graduates entered the legal profession as either Barristers or Solicitors. As a result, a lot of the Legal Officers working in the Department of Justice today are either Barristers or Solicitors governed by their respective professional bodies and under their Code of Conduct and Discipline provisions. It must be noted that the PCLL qualification allows the person holding it to practise either as a Barrister or Solicitor without taking any further professional examination. It is common for a PCLL holder whether in private practice or working in Government to change from one to the other in the course of their legal work.
- (4) The present proposed amendment to the LPO arises from an internal staff retention problem within the Department of Justice. There appears to be a problem of keeping senior staff (that joined the DOJ as solicitors) who appear in the local Courts regularly and proficiently (i.e. of Senior Counsel quality under Section 31A), if they are not recognised and rewarded by appointment as Senior Counsel. The reason why they could not apply to become Senior Counsel is because they chose not to switch from being solicitors to become barristers instead. They are free to do so but they object to the 3 months pupillage (reduced from the general rule of 12 months) required for the change. It should be noted that there is always a certain proportion of DOJ barristers appointed to become Senior Counsel in the Chief Justice's list of Silk (as Senior Counsel are known

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within the profession) appointments every year. The problem of staff retention in the DOJ concerns only those solicitors experienced in Court work refusing to become Barristers because of the 3 months pupillage which is characterised as demeaning to them. It should be noted that a minimum learning of the differences between the two professions and the application of the relevant Code of Conduct is essential in practise and should never be regarded as demeaning. Even a senior Silk who wishes to become a solicitor should serve a minimum period of training in order to learn about how to handle client's accounts and the Law Society Code of professional conduct.

- (5) The objection of the proposed amendment to delete the requirement that only a barrister can be appointed as Senior Counsel [existing Section 31A(1)] to include "a person (not being a barrister) who holds office as a legal officer" is objectionable because it creates a category of Senior Counsel who not only are not Counsel (and therefore not subject to the Bar's Code of Conduct and the Bar's discipline) but instead are solicitors under a separate Code of Conduct or for that matter a person who is not under the jurisdiction of either professional bodies. The split profession is well recognised in HK and the public is aware that Senior Counsel are barristers who practice under the Bar's Code of Conduct and discipline. How would the public come to grips with the concept that there are some Senior Counsel who are not Counsel but solicitors under the proposed amendment?
- (6) Furthermore, the proposed amendment stipulates that a legal officer appointed as Senior Counsel "is entitled to use the title, and to enjoy the status, of Senior Counsel only while holding office as a legal officer". In effect, the proposed amendment is really to create an "elevated office title" for legal employees of the DOJ and not a development connected with the profession of barristers. Is this not a disproportionate interference with the status and operation of an established profession for the sake of an office title to induce solicitors not to leave the DOJ? Could not the DOJ come up with a sufficient title to these senior employed lawyers such as Deputy Law Officer (the DPP is a Law Officer) which is connected with the hierarchy of the DOJ?
- (7) Consideration should be given to a proposed amendment to Section 31A (4) instead. Section 31A (4) deals with the appointment of "honorary Senior Counsel" by the Chief Justice to various senior legal persons within Government such as the Director of Legal Aid; the Official Receiver; and the Director of Intellectual Property. A proposal to amend Section 31A (4) to add a Section 31A (4)(e) to include "a legal officer in the DOJ with not less than 10years experience" should be sufficient to address the retention of senior staff problems with the DOJ. There is no distinction in practise between Senior Counsel and Honorary Senior Counsel, both have S.C.behind their name and respected in the same way. The significance of the order of precedence is more apparent than real, especially when the title is only available whilst the legal officer remain in the employ of the DOJ. This will be a proper and proportionate proposal as it will not destroy the

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present integrity of Senior Counsel as Leading Counsel of the Bar settling an example to junior Counsel in both professional conduct and ability apart from an elevated status. Nor will it create a hybrid creature who is not a barrister but misleads the public as a senior barrister.

- (8) Alternatively, discussions should be entered between the DOJ and the Bar as to a waiver of the 3 months pupillage requirement for solicitor legal officers with the exquisite experience and thereby join the ranks of the Bar as their other colleagues who apply for Silk every year. I am sure the Bar will be positive in such discussions faced with the substantial negative impact to the senior structure of the Bar under the present proposals.

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