

LEGISLATIVE COUNCIL BRIEF

Legal Practitioners Ordinance (Chapter 159)

LEGAL PRACTITIONERS (AMENDMENT) BILL 2021

INTRODUCTION

At the meeting of the Executive Council on 6 July 2021, the Council ADVISED and the Chief Executive ORDERED that the Legal Practitioners (Amendment) Bill 2021 (Bill), at **Annex**, should be introduced into the Legislative Council.

Annex

JUSTIFICATIONS

2. According to section 31A(1) of the Legal Practitioners Ordinance (LPO), only barristers are eligible to be appointed as Senior Counsel (SC) provided that the substantive eligibility requirements under section 31A(2) of the LPO [including sufficient ability, standing and knowledge of the law as considered by the Chief Justice of the Court of Final Appeal (Chief Justice), and the requisite no-less-than-ten years' experience] (see relevant provisions in paragraph 11 below) are satisfied. In other words, under the current regime legal officers¹ who are not barristers (for example solicitors) are not eligible for appointment as SC even if they take up the same amount of advocacy work as those who are barristers, and satisfy the substantive eligibility requirements stipulated under section 31A(2) of the LPO.

3. Having considered the following key justifications, it is proposed that the section should be amended-

- (a) the proposal reflects the fact that there has always been no practical

¹ "Legal officers" include (a) officers stipulated under section 2 and schedule 1 of the Legal Officers Ordinance (LOO) (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).

distinction between the duties of legal officers who are barristers and those who are not, and allows those who satisfy the substantive eligibility requirements but are not admitted as barristers to receive a fair recognition.

Section 3 of the LOO provides that legal officers, regardless of whether they are admitted as a barrister in Hong Kong, shall in respect of the matters mentioned in section 4(1) of the LOO (relating to the Government) have all the rights of barristers and solicitors duly admitted under the provisions of the LPO. For example, in the Department of Justice (DoJ), for all relevant purposes relating to professional duties and work, there is no distinction between barristers and solicitors except that they would be appropriately robed as barristers or solicitors, as the case may be, when appearing at open court hearings in the District Court or above. Therefore, unlike private legal practitioners, there is no practical distinction between the roles and duties of legal officers who are barristers and those who are solicitors². We therefore consider that all legal officers should deserve the same treatment and rights, including that legal officers irrespective of whether they are barristers or not should be equally eligible for consideration to be appointed as SC upon satisfying the substantive eligibility requirements under section 31A(2) of the LPO;

- (b) the proposal aligns with the merit-based selection principle and is in the public interest. According to section 31A(1) of the LPO, the Chief Justice may, after consultation with the chairman of the Council of the Hong Kong Bar Association (Bar Association) and the president of the Law Society of Hong Kong (Law Society), appoint as SC barristers who satisfy the eligibility requirements.

As pointed out by the Chief Justice at the Ceremony for the Admission of the New Senior Counsel on 29 May this year,

“The power of appointment [of SC], like all public law powers, must be exercised for the furthering of the public interest. Indeed it is this public interest that underscores the unique status and responsibilities of the rank of Senior Counsel. These responsibilities include...setting and maintaining the highest professional standards of integrity and competence, carrying on the fine traditions of the Bar and its commitment to the rule of law which is a cornerstone of our society, setting an example to and helping pupils and young practitioners, contributing to the affairs of the Bar and making time available for public service when called on.

When making an appointment for silk, the Chief Justice therefore

² Through appropriately arranging legal officers to perform a variety of duties and different posting arrangements, legal officers could gain exposure to and experience of different levels of legal work. This usual practice is in line with the principle of meritocracy in appointment and could also use public resources effectively.

looks for candidates who have by their practice at the junior bar demonstrated not only their depth of expertise and eminence in their areas of practice but also characters, qualities, abilities and potentials that make them suitable persons to discharge the responsibilities I have just outlined in the service of the public interest....As a mark of distinction, it represents a public recognition by the Judiciary and the legal profession of an appointee's achievements to date, of his or her excellence, experience and expertise. As a badge of responsibility, it denotes our community's trust and expectation that an appointee will put his or her excellence and experience to good use by faithfully discharging the responsibilities placed on them, thereby serving the public interest."

The proposal is in line with the "public interest" referred to in the above quoted address, and is also conducive to the Chief Justice's exercise of discretion to appoint, based on ability and merits and in the interest of public, those suitable ones (including eligible barristers in private practice and legal officers) as SC; and

- (c) given the sole object of the amendment exercise is to permit a person (not being a barrister) who holds office as a legal officer (including a person deemed to be a legal officer) to be also eligible for appointment as SC without otherwise changing the eligibility requirements or other aspects relating to the appointment of SC under the LPO, the proposal does not affect any rights of the legal practitioners in the private sector (including the opportunities for barristers in private practice to be appointed as SC), nor disturb the professional demarcation between the barristers' and solicitors' branches as legal services providers, especially when under the proposal a legal officer (non-barrister) appointed as SC is only entitled to use the title of SC when holding office as a legal officer. More importantly, the proposal does not alter the selection mechanism and criteria of appointment of SC. Same as barristers in private practice, legal officers are equally required to satisfy the series of eligibility requirements under section 31A of the LPO, including possessing sufficient ability, standing and knowledge of the law and having the requisite experience, to be appointed as SC by the Chief Justice.

THE LEGAL PRACTITIONERS (AMENDMENT) BILL 2021 (THE BILL)

4. The main provision of the Bill is clause 3 which amends section 31A of the LPO so that a person (not being a barrister) who holds office as a legal officer (as defined by section 2 of the LOO and including a person deemed to be a legal officer for the purposes of the LOO) is eligible to be appointed as an SC upon satisfaction of the relevant eligibility requirements.

LEGISLATIVE TIMETABLE

5. The legislative timetable is as follows –

Publication in the Gazette	9 July 2021
First Reading and commencement of Second Reading debate	14 July 2021
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

6. The implications of the proposal are set out below-

- (a) The proposal has financial and civil service implications in that it will avoid disruption to the work of the DoJ (or the relevant department as the case may be) by removing the technical requirement for legal officers who are not admitted as barristers to take leave and serve pupillage outside the Government for getting themselves so admitted and become eligible for appointment as SC. These officers usually occupy senior managerial positions and handle complicated cases. Apart from avoiding disruption to work, the proposal will (a) save expenses, for example, briefing out costs and acting pay, that may be incurred if the legal officers concerned have to take leave to serve pupillage; (b) reduce strain on manpower on the work units to which the relevant legal officers belong; and (c) improve morale of legal officers who are not barristers. The exact amount of annual saving arising from the proposal would depend on the duration of pupillage that would be required to be undertaken by each individual officer under the existing arrangement and the complexity and length of cases which would otherwise be briefed out.
- (b) The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, productivity, environmental, sustainability, family or gender implications. The Bill will not affect the current binding effect of the LPO.

PUBLIC CONSULTATION

7. The Legislative Council's Panel on Administration of Justice and Legal Services was consulted on the legislative proposal at its meeting on 21 June 2021 and the Panel supported the legislative proposal.

8. The DoJ has already briefed the Chief Justice and the legal sector on the above legislative proposal. Organisations from the sector include the Bar Association, the Law Society, and the other bodies specified for the legal subsector as provided in Annex 6 of the Schedule to the Chief Executive Election Ordinance. The Law Society and some legal bodies have expressed clear support to the proposal. Pending receipt of the substantive response from the Bar Association which felt the need to conduct a consultation with its members, the DoJ wrote to its Chairman twice to dispel unwarranted misunderstandings about the proposal and made it clear that the proposal would not affect any rights of the legal practitioners in the private sector nor confuse the different roles of solicitors and barristers in private practice. The Bar Association made a reply to the DoJ on 2 July 2021 expressing its opposition to the proposal. The DoJ will continue to engage in further communication with the Bar Association with a view to addressing its concern.

PUBLICITY

9. A press release will be issued on or around 7 July 2021. A spokesperson will be available for media enquiries.

ENQUIRY

10. Any enquiry on this brief can be addressed to Mr William Liu, Deputy Law Officer (Civil Law) (Acting) at Tel. No., 3918 4318 or Mr Christopher Ng, Senior Government Counsel at Tel. No., 3918 4030.

BACKGROUND

11. The appointment of SC in Hong Kong is governed by Section 31A of the LPO

“31A. Appointment of Senior Counsel

- (1) The Chief Justice may, after consultation with the chairman of the Bar Council and the president of the Society, appoint as Senior Counsel barristers who satisfy the eligibility requirements of subsection (2).
- (2) A barrister is eligible for appointment as a Senior Counsel if he—
 - (a) has, in the opinion of the Chief Justice, sufficient ability and standing as a barrister, and sufficient knowledge of the law, to be accorded that status; and
 - (b) has the requisite experience; and
 - (c) is practising at the bar in Hong Kong or is practising as an advocate while he holds office as a legal officer within the meaning of the Legal Officers Ordinance (Cap. 87).
- (3) For the purposes of subsection (2)(b), a barrister has the requisite experience for appointment as a Senior Counsel if he has, for not less

- than 10 years in aggregate, done one or both of the following—
- (a) practised at the bar in Hong Kong; or
 - (b) practised as an advocate while he holds office as a legal officer within the meaning of the Legal Officers Ordinance (Cap. 87).
- (4) The Chief Justice may, after consultation with the chairman of the Bar Council and the president of the Society, appoint a barrister as honorary Senior Counsel if he—
- (a) is a member of the academic staff of a faculty or school of law of a university in Hong Kong; or
 - (b) holds office as Director of Legal Aid or as a Deputy Director or Assistant Director of Legal Aid; or
 - (c) holds office as Official Receiver or an office specified in Part I of Schedule 2 to the Bankruptcy Ordinance (Cap. 6); or
 - (d) holds office as Director of Intellectual Property or an office specified in Part I of Schedule 1 to the Director of Intellectual Property (Establishment) Ordinance (Cap. 412),
- and who has, in the Chief Justice's opinion, provided distinguished service to the law of Hong Kong.
- (5) The appointment of a person as a Senior Counsel in an honorary capacity does not confer on the person a right to act as an advocate in proceedings before the courts of Hong Kong and will not accord precedence before the courts."

Department of Justice
7 July 2021

A BILL

To

Amend section 31A of the Legal Practitioners Ordinance so that a person (not being a barrister) who holds office as a legal officer is eligible to be appointed as a Senior Counsel.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Legal Practitioners (Amendment) Ordinance 2021.

2. Legal Practitioners Ordinance amended

The Legal Practitioners Ordinance (Cap. 159) is amended as set out in section 3.

3. Section 31A amended (appointment of Senior Counsel)

(1) Section 31A(1)—

Repeal

everything after “appoint”

Substitute

“any of the following persons who satisfies the eligibility requirements set out in subsection (2) as a Senior Counsel—

- (a) a barrister;
- (b) a person (not being a barrister) who holds office as a legal officer.”.

(2) Section 31A(2)—

Repeal

“barrister is eligible for appointment as a Senior Counsel if he”

Substitute

“person is eligible for appointment as a Senior Counsel if the person”.

(3) Section 31A(2)(a), after “barrister”—

Add

“or legal officer”.

(4) Section 31A(2)(c)—

Repeal

everything after “while”

Substitute

“holding office as a legal officer.”.

(5) Section 31A(2), Chinese text—

Repeal

“則該大律師”

Substitute

“則該人士”.

(6) Section 31A(3)—

Repeal

“barrister has the requisite experience for appointment as a Senior Counsel if he”

Substitute

“person has the requisite experience for appointment as a Senior Counsel if the person”.

(7) Section 31A(3)(b)—

Repeal

everything after “while”

Substitute

“holding office as a legal officer.”.

- (8) After section 31A(3)—

Add

“(3A) If the Chief Justice appoints a person mentioned in subsection (1)(b) as a Senior Counsel, the person is entitled to use the title, and to enjoy the status, of Senior Counsel only while holding office as a legal officer.”.

- (9) After section 31A(5)—

Add

“(6) In this section—

legal officer (律政人員) has the meaning given by section 2 of the Legal Officers Ordinance (Cap. 87), and includes a person deemed to be a legal officer for the purposes of that Ordinance.”.

Explanatory Memorandum

Currently, under section 31A of the Legal Practitioners Ordinance (Cap. 159) (*LPO*), only a barrister (within the meaning of the LPO) is eligible to be appointed as a Senior Counsel.

2. The sole object of this Bill is to amend section 31A of the LPO 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) (*LOO*) and including a person deemed to be a legal officer for the purposes of the LOO) is eligible to be appointed as a Senior Counsel.
3. The Bill does not otherwise change the eligibility requirements or other aspects relating to the appointment of Senior Counsel under the LPO.