

Ref: CB4/BC/8/20

Paper for the House Committee

**Report of the Bills Committee on
Legal Practitioners (Amendment) Bill 2021**

Purpose

This paper reports on the deliberations of the Bills Committee on Legal Practitioners (Amendment) Bill 2021 ("the Bills Committee").

Background

2. According to section 31A(1) of the Legal Practitioners Ordinance (Cap. 159), only barristers are eligible to be appointed as Senior Counsel ("SC") provided that the substantive eligibility requirements under section 31A(2) of Cap. 159 (including sufficient ability, standing and knowledge 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 officers¹ who are not barristers ("legal officers (non-barrister)") are not eligible for appointment as SC even if they take up the same amount of advocacy work as legal officers who are barristers, and satisfy the eligibility requirements.

The Legal Practitioners (Amendment) Bill 2021

3. The Bill was published in the Gazette on 9 July 2021 and given First Reading at the Council meeting of 14 July 2021. It seeks to amend section 31A of Cap. 159 so that a person (not being a barrister) who holds office as a legal

¹ "Legal officers" include (a) officers stipulated under section 2 of and Schedule 1 to 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).

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) (See Note 1) is eligible to be appointed as SC.

The Bills Committee

4. At the House Committee meeting on 16 July 2021, Members agreed to form a Bills Committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix**. Under the chairmanship of Hon YUNG Hoi-yan, the Bills Committee has held two meetings (one for electing the Chairman and one for meeting with the Administration). The Bills Committee has invited written views on the Bill, and no written submission has been received by the submission deadline on 6 August 2021. A joint submission from members of the public provided by a member of the Bills Committee after the deadline has been referred to the Administration for reply [LC Paper No. CB(4)1370/20-21(01)].

Deliberations of the Bills Committee

5. During the course of scrutiny, the Bills Committee has examined the policy objective of the Bill, effectiveness of the Bill on the retention of legal officers, professional conduct of legal officers appointed as SC and the impact of the Bill on legal practitioners in private practice. The major deliberations of the Bills Committee are set out in the ensuing paragraphs.

Policy objective

Requirement and selection mechanism for appointment of legal officers as Senior Counsel

6. In response to members' enquiry, the Administration has stressed that while the Bill enables legal officers (non-barrister) to be eligible for consideration to be appointed as SC, it does not alter the existing appointment mechanism of SC and will align with the merit-based selection principles. Members have expressed support to the proposal that, same as barristers in private practice and legal officers who are barristers, legal officers (non-barrister) should be eligible to be appointed as SC provided that the eligibility requirements are satisfied.

Retention of the title of Senior Counsel after leaving the office as legal officer

7. Members note that under the Bill, a legal officer (non-barrister) appointed as SC is only entitled to use the title of SC when holding office as a legal officer. Some members consider this unfair and contrary to the legislative intent of the Bill to give the same treatment and rights to all legal officers. As the

Administration has reiterated that there has always been no practical distinction between the duties of legal officers who are barristers and those who are not, and legal officers (non-barrister) should be eligible to be appointed as SC provided that the eligibility requirements as considered by CJ are satisfied, members consider that it is unfair to disallow legal officers (non-barrister) appointed as SC to retain the SC title after ceasing to be legal officers whilst legal officers who are barristers appointed as SC can do so. It may also be against the principle of selecting SC based on ability and merits in the interest of public.

8. In response, the Administration has advised that on the one hand, the Bill seeks to ensure that irrespective of whether they are barristers or not, all legal officers should be equally eligible for consideration to be appointed as SC upon satisfying the substantive eligibility requirements. On the other hand, the Bill also seeks to ensure that any rights of the legal practitioners in the private sector (including the opportunities for barristers in private practice to be appointed as SC) will not be affected, and that the professional demarcation between the barristers' and solicitors' branches as legal services providers will not be disturbed.

9. By proposing that a legal officer (non-barrister) appointed as SC is only entitled to use the title of SC when holding office as a legal officer, the Administration considers that a proper balance has been struck between the above two important objectives. The Administration has also advised that, if legal officers (non-barrister) appointed as SC are allowed to retain that title after leaving the Government and when practising in the private sector, it may cause confusion to the public as they may be practising as solicitors with an SC title.

10. Some members have enquired about the effect of clause 3(8) of the Bill (adding the proposed new section 31A(3A)) and the effect of removing that clause from the Bill. In response, the Administration has explained that this may give rise to ambiguity as to whether a person appointed as SC under the proposed new section 31A(1)(b) can still carry the title of SC when they no longer hold office as a legal officer. Such ambiguity should be avoided and is contrary to the legislative intent of the Bill.

11. On the other hand, some members have suggested that a new title distinctive from "Senior Counsel" should be created and those legal officers (non-barrister) who satisfy the eligibility requirements should be entitled to use that new title during and after they leave the office as legal officers. The Administration has replied that the main objective of the Bill is to ensure that all legal officers should be equally eligible for consideration to be appointed as SC upon satisfying the substantive eligibility requirements, and SC has been a well-established and reputable title for barristers and legal officers who are barristers. The Administration considers it not justified to create a new title which will be uncondusive to the main objective of the Bill, generate confusion to the public,

and may lead to disputes and unwarranted comparison regarding the relative merits of SC and the new title created.

12. Another member has suggested that, to facilitate the legal officers (non-barrister) appointed as SC to retain that title after leaving the office as legal officers, the Administration should consider allowing those who have switched to the barrister's stream before ceasing to be legal officers to retain the SC title continuously.

Effectiveness of the legislative proposal for the retention of legal officers

13. As legal officers (non-barrister) appointed as SC will only be entitled to use that title when they are holding the office, some members are of the view that the proposal may be unattractive for the purpose of retaining legal officers.

14. Some members have enquired about the number of legal officers (barrister and non-barrister) who have not less than 10 years of advocacy experience and may be eligible to be considered for appointment as SC by CJ. They also query whether legal officers (non-barrister) who aspire to be appointed as SC may opt for the traditional path of going through a short-term pupillage and becoming barristers, so that they may keep the SC title upon ceasing to be legal officers if they are appointed, instead of following the proposal under the Bill. If so, there is a question whether the Bill will only benefit a very small number of legal officers.

15. The Administration has advised that while the retention of legal officers is a desirable outcome, it is not the objective of the Bill and the number of persons who may benefit from the Bill is also not a major consideration. The Administration has reiterated that the main justification of the Bill is to uphold the equality principle that all legal officers should deserve the same treatment and rights including that they should be equally eligible for consideration to be appointed as SC upon satisfying the substantive eligibility requirements. The Administration has also stressed that the Bill, if passed, will not just benefit the current legal officers but also those newcomers in the years to come.

Professional conduct of legal officers (non-barrister) appointed as Senior Counsel

Relationship between legal officers and legal professional bodies

16. Some members are concerned about how the professional conduct of a legal officer (non-barrister) who is appointed as SC will be regulated, especially whether they will be subject to the Code of Conduct of the Hong Kong Bar Association ("Bar Association") since the SC appointed so far are all barristers. In response, the Administration has explained that first and foremost, all legal officers are civil servants who have to observe the Civil Service Regulations and

the Civil Service Code issued by the Civil Service Bureau. Legal officers also need to observe the code(s) and guideline(s) relevant to their duties, such as the Prosecution Code issued by the Department of Justice ("DoJ") for legal officers working as prosecutors in DoJ and the relevant court rules, etiquette and convention.

17. As regards whether the legal officers (non-barrister) appointed as SC will be subject to the regulation of legal professional bodies, the Administration has explained that legal officers are not required to be members of The Law Society of Hong Kong ("the Law Society") or the Bar Association. However, solicitors and barristers working as legal officers will still need to observe the relevant code regulating the professional conduct of solicitors and barristers issued by the Law Society and the Bar Association respectively.

Relationship between the Administration and the legal professional bodies on the appointment of legal officers as Senior Counsel

18. Members note that under the Bill, CJ may, after consultation with the chairman of the Council of the Bar Association ("the Bar Council") and the president of the Law Society, appoint as SC legal officers (non-barrister) who satisfy the eligibility requirements, which are the same as the appointment of barristers as SC. Some members are concerned about the scenario if any of the legal professional bodies raise(s) objection against the appointment.

19. In response, the Administration has stressed that under Cap. 159 it did not have any role in the consideration of a SC appointment at present or after passage of the Bill. It has pointed out that an application for appointment as SC will be lodged by a barrister in private practice, a legal officer who is a barrister or, after passage of the Bill, a legal officer (non-barrister) on one's own initiative but not the recommendation of any party, and such applicants should have considered whether the eligibility requirements can be satisfied. It is solely within CJ's authority and discretion to consider whether to appoint them as SC after consulting the chairman of the Bar Council and the president of the Law Society and considering whether the eligibility requirements are satisfied. Therefore, the Administration will not play any role in the process.

20. Some members have expressed that, while they fully respect the self-regulatory regime of the two legal professional bodies and other professional bodies in general, they are concerned whether the Administration has powers to intervene if the operation of these professional bodies is dominated by a small group of members or plagued with problems such as oversights and mistakes. In response, the Administration has pointed out that the self-regulatory regime dealing with matters relating to private practice is duly respected. However, whether it can intervene will depend on the presence of legal power to do so and the actual circumstances of the individual cases.

Impact on the legal practitioners in private practice

21. Noting the concerns expressed by legal practitioners in the private practice, especially those from barristers, and the Bar Association on the Bill, some members have enquired about the Administration's response to that. In response, the Administration has advised that it has consulted 30 legal professional bodies (including the Law Society and the Bar Association), a majority of which (including the Law Society) have indicated support of the Bill. Furthermore, the Secretary for Justice has written to the Bar Association thrice to address its views and concerns. In addition, members of the Panel on Administration of Justice and Legal Services have been consulted and they support the proposal as contained in the Bill in general.

22. Some members consider that, after passage of the Bill, the Administration should explore extending similar arrangement for legal officers (non-barrister) in the Bill to solicitors in private practice (in particular the solicitor advocates) so that they may be considered for appointment as SC. The Administration has reiterated the absence of practical distinction between legal officers who are barristers and those who are not, and has emphasized that legal officers (non-barrister) in Hong Kong, unlike solicitors in the private practice or their counterparts working in the Government of the United Kingdom (which the Administration has studied), are taking up an amount of advocacy work comparable to other legal officers who are barristers. In this connection, the situation is quite unique for them and may not be directly comparable to solicitors or solicitor advocates in the private practice.

23. Some members hold the view that the problem underpinning the Bill has been the demarcation of legal services providers into barristers' and solicitors' branches and the zeal of certain members in either branches to protect respective interests. In the long run, the continuous need and justification for such a demarcation may need to be reviewed. In response, the Administration has explained that the issues raised may be complicated and controversial and they are outside the scope of the Bill.

24. In response to members' enquiries, the Administration has explained on the details and mechanism of the appointment of a barrister as honorary SC under section 31A(4) of Cap. 159 and its difference from SC appointed under section 31A(1). Some members have expressed that while the appointment of honorary SC is outside the purview of the Bill, in order to establish genuine equality, the Administration may consider allowing solicitors (especially solicitor advocates) to apply for being appointed as honorary SC.

Proposed amendments to the Bill

25. The Administration has not proposed any amendment and the Bills Committee will not propose any amendment to the Bill.

Resumption of the Second Reading debate

26. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill. The Administration has indicated its intention to resume the Second Reading debate on the Bill at the Council meeting of 25 August 2021.

Advice sought

27. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 4
Legislative Council Secretariat
16 August 2021

**Bills Committee on Legal Practitioners (Amendment) Bill 2021
Membership list**

Chairman Hon YUNG Hoi-yan, JP

Members Hon Paul TSE Wai-chun, JP
Hon CHUNG Kwok-pan
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon SHIU Ka-fai, JP
Hon Tony TSE Wai-chuen, BBS, JP

(Total : 7 members)

Clerk Mr Lemuel WOO

Legal Adviser Mr Mark LAM

Date 23 July 2021