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Hong Kong

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(Attn : Miss Kitty Fung
Government Counsel)

Dear Kitty,

Legal Practitioners (Amendment) Bill 1999

In order to facilitate a full discussion by the Bills Committee of the legal issues discussed in our previous correspondence, I set out below my response to your reply dated 10 November 1999 :

Clause 3 - new section 8AAA

"Any jurisdiction" may be construed as (a) one out of a number of jurisdiction, the particular choice being unimportant, and (b) every jurisdiction, no matter which one. By amending "any jurisdiction" to "a jurisdiction", the possibility of the second interpretation would be eliminated.

Clause 5 - section 13

Based on the Administration's observation that the cross-reference to "第(1)款" is appropriate and consistent with section 13(2), please consider amending the English text accordingly.

Clause 6 - new section 13A

Has the Law Society given comments?

Clause 7- section 27

In my view, "before" is different from "immediately before", and the absence of the element "at least" would reflect a different policy intent. Would the

Administration consider amending section 27(2)(b)(i) along the following line : "在緊接認許申請的日期前至少連續 3 個月一直居於香港"?

Clause 11 - section 31

Please explain the reason for enacting the conditions for admission in the subsidiary legislation and identify the empowering provision for making such subsidiary legislation. In particular, is the empowering provision sufficiently wide to enable subsidiary legislation to be made in respect of those barristers qualified for admission by virtue of section 27(1)(a)(v) before its repeal by the present Bill?

Clause 12 - new section 31C

To reflect the policy more accurately, would the Administration consider amending section 31(1)(f) to the effect that a barrister shall not be qualified to practise as such if he is an employed barrister. Although such restriction is presently provided in the Code of Conduct, it would be different if the Ordinance so prescribes, especially when the Bill proposes to introduce a new category of employed barristers.

The publication in the Gazette by the Bar Council of employed barristers who have obtained employed barrister's certificates would prejudice those who do not have such certificates. Your reply that the employed barristers are always free to apply for such certificates would not apply to those barristers who do not satisfy any of the criteria in section 31C(2).

Clause 15 -section 72AA

Your reply did not contain any explanation for preserving the power of the Chief Justice to make rules in duplication with the power of the Bar Council. In this connection, you may wish to compare the new section 72AA(c) which would replace section 30(4) in empowering the Bar Council to prescribe fees for the issue of the practising certificates for barristers.

Although section 30(4) was introduced in 1991, the subsequent Legal Practitioners (Fees) (Amendment) Rules of 1994, 1998 and 1999 were all made by the Chief Justice under section 72. Although my colleagues and I have raised query on two occasions, the Bar Council replied that they were satisfied with the arrangements. Our Division has taken the opportunity to study the background of enacting section 30(4) and are inclined to think that the power of the Chief Justice to make such rules under section 72 has been displaced since 1991, when the Bar Council was specifically empowered to make such rules.

Prior to the Legal Practitioners (Amendment) Ordinance 1991 (70 of 1991) (the amending ordinance), practising certificates for barristers were issued by the Registrar of the Supreme Court and the fees paid went to general revenue, which was why the Chief Justice was then empowered under section 72 of the principal ordinance to make rules regulating their fees.

This was subsequently changed by the amending ordinance, which substituted the Bar Council for the Registrar in section 30(1), making the Bar Council responsible for issuing the practising certificates and prescribing their fees. At the same time, a new section 30(4) was added to specifically empower the Bar Council to make rules, subject to the prior approval of the Chief Justice, to regulate, among other things, the fees payable for the practising certificates. Section 72 was not amended.

In the LegCo Brief issued by the then Attorney General's Chambers on 8 May 1991, it was stated in paragraph 10 that -

> "The Bar Association wishes similarly to issue its own certificates and retain the revenue. Practising certificates will only be issued to members of the Bar Association, which is similar to the restriction imposed by the Law Society. With control over the issuance of practising certificates the Bar will be seen to be independent and self-regulating."

The prescribing of fees is regarded as part and parcel of the issuance of practising certificates. The retention by the Chief Justice of his power to make rules to regulate the fees of the practising certificates under section 72, which gives no role at all to the Bar Council, would appear to be contrary to that intention and for this reason, may have been displaced by the new power given to the Bar Council in that respect.

I trust that the above information would be relevant when you consider the policy of allowing duplicate powers to make rules.

I would appreciate it if we could discuss the above issues prior to clause-by-clause examination of the Bill by the Bills Committee. As spoken, I look forward to receiving your draft Committee Stage amendments if possible before the first Bills Committee meeting on 24 January 2000.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

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