THE LAW SOCIETY OF HONG KONG 香港律師會

Legal Practitioners (Amendment) Bill 2009
Submissions

Introduction

1. The Legal Practitioners (Amendment) Bill 2009 ("Bill") represents the culmination of several years of debate and study on the questions whether and if so to what extent rights of audience in the Court of First Instance and above should be granted to appropriately experienced solicitors. The Bill follows on from a Report of a Working Party commissioned by the Chief Justice to examine the issue and, indeed, adopts most if not all of the recommendations in that Report.

2. The proposals are significant, not only to solicitors and the legal profession as a whole, but to the public whom the two branches of the profession serve. These proposals have the full support of the Law Society and the Bar, the Administration and the Judiciary. They are sensible and modest. One important factor noted at the outset of the deliberations of the Working Party is the importance of maintaining the independence and sustainability of the Hong Kong Bar. The deliberations, public consultation and final recommendations of the Working Party were conducted and considered with that very much in mind.

3. The view of the Law Society is that, if anything, the admission to higher rights of senior members of the solicitors' branch of the profession may result in improved standards at the Bar and strengthen it as an institution. It goes without saying that a strong, independent and sustainable Bar is in the best interests of both branches of the legal profession, the rule of law and the competitiveness of Hong Kong as a centre of legal excellence.

4. The proposals clearly and rightly lay great stress on high standards of advocacy, both written and oral. In this regard, solicitors seeking higher rights will be those with considerable recent advocacy experience, and demonstrated ability. Only those with 5 years post-qualification experience *and* recent and considerable litigation experience will be considered suitable. The aim of these aspiring solicitor-advocates will be to match the best standards of advocacy currently practiced at the Bar.

5. Advocacy is already practiced by litigation solicitors in the current system. Solicitors, as advocates, practice in the District Court and Magistrates Courts without restriction, in both civil and criminal cases. So too, solicitors practice oral advocacy in Chambers hearings in all of the higher courts of the Court of Final Appeal, Court of Appeal, and the Court of First Instance. Solicitors involved in litigation in the higher courts are, as a matter of everyday practice, involved in preparation of court documents and skeleton arguments for use in open court hearings.

Advocacy Course

6. Under the Bill, the Higher Rights Assessment Board ("the Board") will have the power and responsibility to establish Rules, and within such Rules, to prescribe requirements for the sitting by applicants for higher rights of examinations and training in advocacy (ss 39L, 73CA(1)). As such, the design and content of training and examinations will not be a matter for the Law Society or the Bar, *per se*.

7. The Bill provides for *some* candidates (excluding those whose experience is such that the Board is prepared to grant a Higher Rights certificate without such requirement) to be required to sit examinations in various types of written and oral advocacy. Whether such persons undergo a course before taking the examinations will be a matter for the Board to prescribe.

8. The Law Society has long been involved in advocacy courses for solicitors, and currently there are a number of such courses being offered to solicitors. The Committee will be aware that for a number of years now it is a requirement of the Law Society that all solicitors complete a certain number of hours of "Continuing Professional

Development" or CPD each year. Courses are designed to cater to the level of experience and the particular area or areas in which solicitors practice.

9. The Law Society and the Hong Kong Academy of Law have had extensive experience in organising advocacy courses for solicitors presented by judges, barristers and solicitors. The outline of the current structured advocacy programme run by the Hong Kong Academy of Law is attached (**Appendix 1**). The courses may be suitably modified for the examinations when the relevant rules on the structure and scope of the examinations are prescribed. In anticipation of the Bill, the Law Society's Working Party on Higher Rights has, based on an estimate of the number of solicitors who might apply for higher rights, compiled a detailed costing of the advocacy examinations on the assumption that the applicants have to pass:

    - a written examination of 2 hours on litigation practice and procedure;
    - a written examination of half-an-hour on advocacy ethics for civil or criminal proceedings as the case may be;
    - a practical assessment on advocacy skills in the form of a mock trial lasting for up to 3 hours

10. These courses could well be implemented within a reasonable period after the passage of the Bill, so that the first examinations might occur within say, 6 months, subject to the approval of the Board. The Law Society and the Academy of Law offer their full support to the Board in this regard.

Code of Conduct

11. The *Hong Kong Solicitors' Guide to Professional Practice ("Guide")* provides standards for solicitor-advocates. For example, Chapter 10, paragraph 10.01 of the *Guide* provides that:-

> *"A solicitor in the role of an advocate has additional obligations and responsibilities which are comparable to those of a barrister who is acting as an advocate."*

The commentary to paragraph 10.01 further provides:-

"A solicitor-advocate should therefore acquaint himself with the provisions of the Code of Conduct for the Bar of Hong Kong and in particular those appearing under the section 'Conduct at Court'."

12. The Law Society Council concluded that it would be appropriate for there to be a separate *Code of Conduct ("Code")* to set forth and make clear the high standards of professional conduct to be complied with by those granted higher rights. A copy of the draft *Code* had been sent to the Chief Justice and the Bar; the draft, which is now before the Committee, adopted the English equivalent as a template. The Bar Association's Code has been reviewed and forms the basis of other provisions in the draft *Code.*

Some of the more salient features of the draft *Code* include:-

(1) Advocates must not

(a) engage in conduct whether in pursuit of their profession or otherwise which is

(i) dishonest or otherwise discreditable to an advocate

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal professional into disrepute;

(b) engage directly or indirectly in any occupation if their association with that occupation may adversely affect the reputation of advocates or prejudice their ability to attend properly to the interests of clients.

(2) Advocates must take all steps which it is reasonable in the circumstances to take to ensure that:-

(a) Their practices are administered competently and efficiently and properly staffed having regard to the nature of the practice;

(b) proper records are kept;

(c) all employees and staff in the practice:

(i) carry out their duties in a correct and efficient manner; and

(ii) are made clearly aware of such provisions in this Code as may affect or be relevant to the performance of their duties.

(3) Advocates:

(a) must in all their professional activities be courteous and act promptly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time and to ensure that professional engagements are fulfilled;

(b) must not undertake any task which:

(i) they know or ought to know they are not competent to handle;

(ii) they do not have adequate time and opportunity to prepare or perform; or

(iii) they cannot discharge within a reasonable time having regard to the pressure of other work;

(c) must read all briefs delivered to them expeditiously;

(d) must have regard to any relevant written standards adopted by the Law Society for the conduct of professional work;

(e) must inform the client forthwith:

(i) if it becomes apparent that they will not be able to do the work within a reasonable time after receipt of instructions;

(ii) if there is an appreciable risk that they may not be able to undertake a brief or fulfil any other professional engagement which they have accepted.

13. All solicitor advocates will be bound by the *Code* pursuant to Law Society Practice Direction I(2) which came into effect on 1 June 1995. Practice Direction I(2) requires compliance with the *Guide* and any breach may constitute a disciplinary offence and such breaches will be dealt with by referral to the Solicitors' Disciplinary Tribunal.

Concluding remarks

14. The Law Society welcomes the proposed legislation as a landmark in the development and enhancement of the commercial competitiveness of the legal profession, and as a logical and, indeed, inevitable step forward. Among other benefits, it will remove the somewhat anomalous restrictions on solicitor advocates who at present represent clients

without restriction in Chambers hearings in the higher courts but who, at present, can no longer conduct the case for the client once the case moves from Chambers to open Court.

15. The Law Society looks forward to the speedy passage of the Bill, and in particular to the admission to higher rights of the first group of Solicitor-Advocates in 2010.

The Law Society of Hong Kong

1 September 2009

128024

Appendix

Advocacy Training

Programme Outline

Title of Workshops		Duration
Workshop 1:	Case Analysis	half-day
Workshop 2:	The Criminal Trial Procedure & Evidence	half-day
Workshop 3:	Professional Ethics	half-day
Workshop 4:	Non-Trial Criminal Advocacy Bail Application and Plea in Mitigation	full-day
Workshop 5:	Civil Practice Interlocutory and Trial Procedure	full-day
Workshop 6:	Written Advocacy I – Drafting in Civil Cases	full-day
Workshop 7:	Written Advocacy II – Written Advocacy in the Criminal Trial	half-day
Workshop 8:	Trial Advocacy I – Openings and Closings	full-day
Workshop 9:	Trial Advocacy II – Examination of Witnesses	full-day
Workshop 10:	Written Advocacy III – Skeleton Arguments in Civil and Criminal Proceedings	full-day
Workshop 11:	Civil Advocacy I – Order 13 and Order 14	full-day
Workshop 12:	Civil Advocacy II – Interlocutory Injunctions	full-day

.126645 v2