

**A PROPOSAL FOR EXTENSION OF HIGHER RIGHTS OF AUDIENCE
("HRA")
TO SOLICITORS QUALIFIED IN HONG KONG**

I. INTRODUCTION - A PROPOSAL FOR CHANGE OF HRA PRACTICE

Hong Kong's dynamic political, economic and social development has greatly increased the amount of regulation, law - making, and need for legal services in the territory. As the demands placed on the legal profession in Hong Kong increase, more flexible, efficient, equitable and cost-effective approaches to legal service delivery are required to accommodate the rapid change. An extension of **HRA** to solicitors in Hong Kong would be a major step toward liberalisation and establishment of a modern, fair system which promotes quality, choice, and value for money for the public who need the help of an advocate. It is not the purpose of this proposal to advance a case for fusion of the two branches of the legal profession.

A. Extension of HRA to solicitors before all courts:

All eligible and accredited barristers and solicitors ("Legal Practitioners") should have the right to present cases in the higher courts, not just barristers in private practice.

To ensure maintenance of high standards which protect the public interest, Legal Practitioners should be able to obtain full **HRA** only if they meet training and knowledge requirements (including rules of professional conduct). There should be common rules of conduct regulating all Legal Practitioners. Although **HRA** must be reserved for only qualified Legal Practitioners, standards should not be misused to impose undue restrictions on qualified lawyers.

B. Current restriction upon Solicitors' HRA:

There are at present approximately 5,500 members of the legal profession in Hong Kong. However, only 700 (i.e.< 15%) have the right of audience before the higher courts (when not in chambers), i.e. the CFI, CA & CFA. Why is there this elite? The creation of the distinctions in the legal profession in Hong Kong was largely, if not wholly, influenced by the pre-1990 English system. However, in England and in most other Commonwealth jurisdictions the restrictions upon one branch of the legal profession to exercise full HRA either no longer exist or are in the process of being dismantled.

Notwithstanding that in Hong Kong all those studying to enter the legal profession must undergo the same legal education, Hong Kong is one of the last jurisdictions in the world which still maintains a formal and practical distinction between the branches of its legal profession: barristers and solicitors. Indeed it is difficult to identify any other significant common law jurisdiction which maintains and defends the distinction.

The restrictions upon solicitors to exercise HRA in Hong Kong are a matter of practice and custom, rather than restriction imposed by law.

In 1995, the Government published a Green Paper on Legal Services. It stated:

The Administration believes that rights of audience should be based on competence, rather than on whether the person involved happens to be qualified as a solicitor or barrister. This being so, the Administration

considers that rights of audience in the higher courts should be extended to some or all solicitors.

C. Improvement and modernisation of legal services through HRA:

The extension of **HRA** would increase competition between advocates, create more accessible and affordable legal services and improve the quality of advocacy available to the public. Lawyers would enjoy more flexibility and mobility within the profession and have broader career opportunities and choices. Clients would benefit from greater continuity in legal services and greater freedom of choice from a larger pool of advocates.

II. THE CURRENT ENVIRONMENT

A. Current approach to reform

There is an existing public commitment to reform of Legal Services, which has gained momentum since the reunification of Hong Kong to the Mainland.

B. Public concern over legal fees

There is an existing public concern about the level of legal fees. No doubt this concern arises in part from a failure on the part of users of legal services fully to appreciate the value of services provided to them.

As far as advocacy is concerned, however, the fees of senior advocates continue to increase despite the recent recession. A number of factors have contributed to this:-

1. Increasing levels of court work as commercial and regulatory claims increase;
2. The ability to bring in experienced senior counsel from other jurisdictions has been inhibited in the name of a strong independent local bar. This has resulted in an insufficient pool of talent in the higher reaches of the local Bar and has led to ever increasing fees at that level.

C. 1998 report on HRA of the Lord Chancellor in the UK

In June 1998, the Lord Chancellor published a Consultation Paper on the reform of rights of audience. While it is not suggested that Hong Kong should follow the reform process in the UK any more than it should continue to follow the historical position in the UK, the Consultation Paper makes a number of points which strike a chord in the local context. The Consultation Paper points out in particular:-

1. There remain features of the way the profession is organised which the Government believe stifle innovation and maintain rigid structures, limiting consumer choice and increasing the expense of going to law.
2. The right to maintain properly high entry standards to a profession must not be misused to impose restrictive practices for the benefit of those already established in the profession. There is a public interest in ensuring that properly qualified lawyers can practise their profession without being subject to unnecessary restrictions.

3. Over time, increasing choice and increasing competition between advocates should tend to improve standards of advocacy and drive down costs.

Reference is also made to the section of the paper dealing with the various arguments put forward by the Bar against reform – particularly those relating to independence, quality of advocacy, breadth of experience and the junior Bar. Some of these arguments are briefly summarised below. Given that the fee differential between senior members of the Local Bar and their opposite numbers in the UK is in some cases a multiple of 3 or 4 times, the arguments in favour of reform are correspondingly enhanced in the local context.

III. HRA PRACTICE IN HONG KONG

A. Background on the division of the Hong Kong legal profession

During the nineteenth century in Hong Kong, the legal profession underwent several stages of fusion and division. However, it was not until the beginning of the twentieth century that the divided nature of the Hong Kong legal profession took its current form as two distinct branches -- barristers and solicitors.

B. Training requirements for Hong Kong barristers and solicitors

Currently, barristers and solicitors who qualify in Hong Kong have the same legal education in terms of their law degree and professional examinations. However, those who choose to become barristers must undergo one year of “pupillage” - an apprenticeship to an experienced barrister. Solicitors undergo a two year apprenticeship as a trainee solicitor.

C. Restriction of HRA for solicitors in higher courts:

Solicitors can deal directly with the public and are commonly engaged in work such as conveyancing, probate, the preparation of commercial and financial documentation and litigation. However, Hong Kong solicitors do not have the general right to appear in the higher courts.

Yet Hong Kong solicitors already have, and routinely exercise, rights of audience in the lower courts, in the Masters’ and High Court Chambers, and in arbitration. Specifically, solicitors have the right to appear in the Magistracy and the District Court, certain preliminary proceedings in the High Court and Court of Appeal, and appeals to the High Court from magistrates’ decisions. Solicitors are not entitled to conduct High Court trials nor to appear before the Court of Appeal in open court.

Hong Kong solicitors are already highly active and experienced within the court system - in practice, at least as many cases heard in Hong Kong courts are argued by solicitors as barristers, since the greatest number of cases are heard in the lower courts. To close the door on solicitors at the higher court level seems to be an arbitrary and artificial barrier indeed.

C. Exclusive HRA for barristers in higher courts:

Barristers specialise in advocacy and consultancy work. All barristers have unlimited rights of audience before the courts, meaning they can appear on behalf of a party to proceedings in any court. Yet, generally, unless an instructing solicitor or his representative is present, Hong Kong barristers are not permitted to: act directly for a client without instructions from a solicitor;

appear in court, take instructions from a lay client nor interview witnesses. Traditionally, barristers work as sole practitioners, either alone or with other barristers in offices known as sets of chambers.

Thus, HRA in the higher courts of Hong Kong is currently the monopoly of barristers in private practice. All litigants in the higher courts are forced to employ a barrister, in addition to the solicitor who is already working on their case. This seems to be an unreasonable restriction both on the public's ability to choose the services of the lawyers they want, and on the ability of most qualified lawyers to offer services to the public.

IV. PRINCIPAL DISADVANTAGES TO CURRENT HONG KONG HRA PRACTICE

A. Higher fees through duplication of work/costs:

Currently the public must pay fees for the services of two lawyers, a solicitor and a barrister. Legal fees would be reduced if solicitors were able to appear in higher courts. The total case preparation time for a solicitor already familiar with the case details would be much shorter than the time required for a barrister who must start from the beginning to become familiar with the case. Furthermore, with an increase in numbers of advocates, total advocate fees would become more competitive and affordable to the public.

In most cases, the significant extra effort and expense necessary to brief counsel does not seem to result in any significant or proportional increase in quality of results. Indeed, instructing counsel, often done at the last minute, results in inadequately informed barristers, higher legal costs, overly burdened solicitors and reduction in quality of service to clients.

B. Limited choice of advocate:

The small pool of approximately 800 barristers in Hong Kong is actually even tinier, since many of these barristers specialise and practice only in specific areas. By extending HRA to solicitors, the pool of available advocates would be enlarged by increasing the opportunity for clients to be represented by their solicitor when appropriate and convenient. As a result, the public would have greater quality, efficiency and choice in their hiring of a court representative.

C. Lack of continuity:

Under the current system, the solicitor is often only able to fulfil the client's requirements for a trial advocate by instructing a barrister.

The public suffers significant inconvenience since the solicitor relied on throughout the proceedings is prohibited from appearing in higher court. Instead, barristers who are complete strangers are brought into high court trials, often at the last-minute, and at considerable expense.

Continuity, efficiency and consistency of service would be easier to achieve if the same legal practitioners were involved with the same file from start-to-finish.

D. Lower quality of advocacy:

The process of self selection does not necessarily lead to the best able to be advocates necessarily being available for higher court advocacy. At present, following a common legal education only those who have chosen (usually before any experience of legal practice) to be called to the bar, rather than be admitted as solicitors, have rights of audience in the higher courts. That choice may be dictated by factors such as family or social connections, financial means to support them through the early years of practice at the bar, etc. It is less likely to be dictated by real ability as an advocate.

By introducing a common accreditation system, only those who have proven themselves able, willing and competent to present cases before the higher courts will be qualified so to do. Consequently, the quality of advocacy should be improved.

E. Incomprehension of the public:

A valid point made by the Lord Chancellor's Consultation Paper, and sometimes overlooked by lawyers simply because they have become inured to it, is the fact that the system is very difficult to justify to members of the public. Why should litigants have to pay for two lawyers when one could suffice?

V. HRA PRACTICE IN COMMON LAW JURISDICTIONS

In England, HRA practice developed piecemeal over the centuries with decisions regarding HRA decided primarily by the judiciary. In general, until late 1993, English barristers in private practice had full HRA in all the courts while solicitors only had significant rights of audience in lower courts.

A. 1993 - Approval by Lord Chancellor of extended HRA in England:

In 1989, the Lord Chancellor opened the debate on granting HRA to solicitors. The Courts and Legal Services Act of 1990 was the first piece of legislation in England to systematically address the issue of HRA. (The UK government had determined that "*restriction on rights of audience in higher courts as advocate stifled innovation, maintained rigid structures, limited consumer choice and increased expense of going to law*".)

In December of 1993 the Lord Chancellor and four senior judges approved the Law Society application for HRA for solicitors in the higher courts in both criminal and civil proceedings. The Law Society of England requires that solicitors seeking to exercise HRA in higher courts must demonstrate experience of advocacy and familiarity with the relevant higher court, a test of evidence and civil procedure in that court, and satisfactory completion of an advocacy training course.

B. 1998 - Governmental announcement of HRA reform

In June of 1998, the English government announced a major reform of the HRA regime. Under the new regime (currently put out to consultation), all solicitors and barristers will acquire full HRA before all courts upon qualification, subject to their meeting training requirements set by the professional bodies. At the same time, the government has stressed its support for a strong, independent Bar.

In Hong Kong, the Government looked at the issue of HRA in its Green Paper on Legal Services in 1995. In 1996, the AG's Chambers issued its paper "*The Way Forward*",

that proposed a study of the state of the bar in other common law jurisdictions where solicitors can acquire full HRA. This study was completed in May 1996, and a copy is attached.

VI. ARGUMENTS FOR HONG KONG STATUS QUO AND COUNTER-ARGUMENTS

The Hong Kong Bar must balance its interest in maintaining the status quo, and its principal claims of barristers' independence and expertise against the public interest in more affordable, efficient, equitable and cost-effective legal services.

A. The independence/conflicts of interest argument:

The Bar claims that solicitors lack sufficient independence and thus often have disqualifying conflicts of interest. The Bar claims that barristers are not affiliated to any particular commercial or political interest, are usually self-employed solo practitioners offering services on a case-by-case basis, and can therefore furnish more detached advice. Another argument is that no mechanism exists between a solicitor and a lay client to ensure that the solicitor selection of a barrister is made independently, objectively and impartially.

Counter-argument:

Barristers may be just as susceptible to improper pressure as solicitors, especially since barristers tend to specialise in specific practices, and to depend on regular instructions from particular firms or clients. In practice, many barristers who work for a select group of solicitors and clients are no more independent than a law firm employee.

If necessary, special rules can be promulgated to create a mechanism between solicitor and lay client to ensure independent and impartial selection of a barrister by solicitor.

Maintaining independence and freedom from conflicts of interest is an ethical mandate for all lawyers, irrespective of the nature of their engagement, practice or payment.

B. The quality of advocacy/breadth of experience argument:

The Bar claims that solicitors lack sufficient experience and high standards of advocacy. The Bar argues that its members offer a high degree of competence due to competition within the bar and the fact that barristers are not burdened with commercial or conveyancing practice and so are able to concentrate on court related work and to offer specialist skills and advice.

Counter-argument:

This is a circular argument, with no empirical support of the Bar's argument that barristers are more proficient advocates than solicitors, or that given the opportunity, solicitors could not be as good or better advocates than their barrister counterparts. Some solicitors lack the experience needed to become a high quality advocate because of the HRA restrictions - extension of HRA would remedy this problem. With equivalent training, opportunity, and ability, all lawyers should be equally likely to be effective advocates.

Effective advocacy does not necessarily require a natural gift for oral expression. Rather, it requires skilled preparation, analysis, execution and performance, skills which can be learned and developed. Furthermore, the Bar

and Law Society should promulgate new rules detailing additional experience, training and knowledge required of solicitors seeking to appear in the high courts, to ensure maintenance of high standards of advocacy.

This argument would be more compelling if it was applied with rigour to the Bar. However, under the current system, for barristers and solicitor-advocates alike, improvements in advocacy come only through observation and trial and error. Barristers and solicitors in Hong Kong are trained through the same educational system. No formal advocacy training is required for either trainee solicitors or pupil barristers. Once established in chambers, the Bar's rules do not prevent inexperienced, and incompetent barristers from leading a prosecution.

A further point, frequently overlooked, is that there is little incentive for a senior advocate to bring on a more junior advocate after pupillage. There would be considerably more incentive for a law firm to do so. A junior advocate in a law firm is also likely to obtain a wider variety of work than would be possible for a young barrister of equivalent seniority.

C. The role of the Bar argument:

The Bar claims that extension of HRA to solicitors would diminish the predominance of the Bar in the higher courts and reduce the size and competence of the local Bar.

Counter-argument:

Extension of HRA would not necessarily affect the current status, independence and role of the Bar and does not mean that the available prosecution work would be divided equally between both branches of the legal profession.

Most likely, barristers would continue to receive the vast majority of instructions. Furthermore, the experience of England shows that the number of solicitors who would wish to qualify as solicitor advocates would be low and therefore the number would not have a significantly detrimental effect on the Bar. The experience of Australia demonstrates that no matter what the formal structure of the profession, if there is a market for self-employed specialist advocates and consultants, a pool of such specialists will remain or emerge.

Moreover, as a principle, barristers should be employed because of their skills and competitive fees, not because the Bar has, essentially, a monopoly. The government's responsibility is to promote the public interest, not to safeguard the supply of barrister work.

D. The maintenance of the rule of law argument:

The maintenance of the rule of law is, rightly, one of the cornerstones of the Hong Kong way of life. The Bar has argued with great effect that the maintenance of a strong independent bar is a crucial factor in maintaining the principle of the rule of law.

Counter-argument:

In terms of HRA, this argument turns out only on the Bar being a crucial factor in maintaining the principle, but on it being effectively the only factor. If so, it would follow that it is the Bar and the Bar alone which keeps in check the

Judiciary on the one side and the solicitors' side of the legal profession on the other. This is manifestly not the case.

The rule of law is in any event not associated solely with the conduct of legal proceedings in Court. It relies on the continued existence of a highly developed legal system where in practice the great bulk of drafting and advising is non-contentious. It is paradoxically another feature of the current system that were solicitors unable to identify and instruct in relation to litigation where the rule of law is in issue, the Bar would in fact have no role at all.

In short, the need for a strong independent bar cannot be equated with exclusive rights of audience in the higher courts.

E. The “large law firm” argument:

This argument predicts that the immediate consequence of the extension of HRA will be the swamping of the Bar by the large law firms. A similar concern is raised by small firms who believe that as a result of the reform they will be denied access to the specialist skills of Counsel in handling litigation of substance.

Counter-argument:

The most obvious counter argument is that this has not, in fact, happened anywhere. Even in fused jurisdictions there are always those who prefer to specialise in advocacy, and to work alone, the Australian Bar being a prime example. The small law firms would themselves provide the economic incentive for this. However, the matter does not stop there.

There is little evidence of a lack of competition in the junior bar; indeed there have been complaints that it is already overpopulated. The real difficulty lies with the upper reaches of the Bar where for the reasons given earlier, competition is practically non-existent. It is precisely that area where increased competition is likely to occur and where such competition would be most desirable in the public interest.

F. The cost-effectiveness argument:

The Bar argues that there are no demonstrable cost benefits to offer higher rights of audience. It claims that even in jurisdictions where solicitors have rights of audience, it is more cost-effective for solicitors to instruct counsel than to appear themselves. The Bar argues that a barristers' overheads are significantly lower than those of solicitors since they do not employ a large number of support staff. Furthermore, they argue that clients' interests are safeguarded since solicitors negotiate fees with barrister on behalf of clients.

Counter-argument:

Solicitor-advocates could offer a much more cost-effective service than barristers, especially with adequate safeguards, and perhaps revisions in the solicitor code of conduct. Although in simple cases, instructing a barrister may sometimes be less costly, and in complicated cases, the costs may sometimes be about the same, in the typical case, a solicitor with **HRA** would usually be more cost-effective than without **HRA**.

Briefing, updating and reviewing proceedings with a barrister requires a great deal of time, since work must be summarised and organised for this special

purpose. Charges also increase due to the cost of keeping a solicitor present during the proceedings. A reduction of costs may take place since a solicitor advocate conducts the case from start-to-finish. In the average case, if the lawyer has **HRA**, the lawyer could avoid the time and costs necessary to properly instruct the barrister at every stage of decision-making, advice and representation requiring the service of counsel.

G. The availability/informed choice argument:

The Bar asserts that a barrister is bound by the Bar's "Cab-rank" rule to accept any instructions to appear before a Court in the field in which he practices at his usual fee. Thus, each barrister is available generally through solicitors to every client. Solicitors have no such rule.

The Bar also claims a client is better able to make an informed decision on his employment of a barrister, since the decision is made by a client on the basis of a solicitor's professional assessment of case requirements.

Counter-argument:

If solicitors were able to obtain **HRA**, special rules could be provided for in the solicitor rules of conduct to assure availability of a solicitor and informed choices for the client.

For instance, the purpose of the cab rank rule is to ensure that a solicitor can obtain the services of a suitable barrister to represent his or her lay client. Thus, to address the availability argument, a specific rule could be promulgated which prohibits a solicitor from making a condition of providing services that advocacy services should be provided by that solicitor or the solicitor's firm or agent. Another specific rule could be promulgated requiring that a solicitor-advocate must respond to client instructions without regard to external circumstances such as the gravity, complexity and likely cost of the case, the solicitor's relationship with client, etc.

To address the informed choice argument, a specific rule could be promulgated to ensure that a lay client received proper advice over the choice of an advocate.

VII. REGULATORY FRAMEWORK IN HONG KONG FOR CHANGE OF HRA PRACTICE

A joint working party of solicitors, barristers, government lawyers and the Bench would need to revise regulations governing qualifications for admission, admission procedure, the conduct of legal practice, discipline, etc.

A. Powers of Chief Justice :

The Chief Justice has the implied power to allow a change to the rules relating to solicitor's conduct under the *Legal Practitioners Ordinance (s.72)(c)(iv)*. The *Legal Practitioners Ordinance* would set out an agreed system of governance on issues such as education, admission, discipline and expulsion.

The Rules Committee, headed by the Chief Justice, has the power to make rules regarding procedure and practice in the Court, under the *High Court Ordinance (s.54)*

B. Powers of Law Society:

The Council of the Law Society of Hong Kong has the explicit power to make rules governing professional practice, solicitor conduct and any continuing solicitor legal education or training. *The Solicitors' Practice Rules* and the *Hong Kong Solicitors' Guide to Professional Conduct* are the rules which regulate solicitors' professional conduct. To ensure proper professional conduct by solicitors exercising HRA in higher courts, the Law Society should amend these rules to make specific reference to new practices.

The most significant fallacy in all of the Bar's arguments opposing HRA for solicitors, is that *some* solicitors already enjoy HRA: Those employed by the Government in the Department of Justice. It cannot be said that solicitor advocacy in the Higher Courts is untested. It cannot be said that solicitor advocates cannot represent competently clients in the Higher Courts. It cannot be right that the Government should enjoy a greater choice of advocates (i.e. between its own employees and access to the bar) than the people of Hong Kong.

VIII. PROPOSAL FOR EXTENSION OF HRA

A. Create system of common accreditation:

Upon qualification all Legal Practitioners would have the restricted rights of audience which are at present available to all solicitors. In order to progress to higher court advocacy, the practitioner would have to be accredited and granted higher courts HRA. The Law Society and the Bar would jointly determine appropriate rules and procedures to create a system of common accreditation for both solicitors and barristers qualified in Hong Kong.

B. Elevate District Court jurisdictional maximum requirement:

The current proposal to increase the jurisdiction should: (1) remove congestion in the High Court system, leaving the High Court judges to deal with complex matters and appeals. (2) provide a sufficient source of work on less complex and lower value matters for barristers and solicitors to hone and develop trial skills.

C. Remove anomalies in the existing High Court jurisdictions:

There are number of anomalies in the jurisdiction of the Hong Kong High Court where in other jurisdictions (e.g. England & Wales) solicitors without HRA have rights of audience. Further there are specialist areas where there simply are no specialists at the Bar, rather the specialists are found to be in practice as solicitors. In tandem with the increase in District Court jurisdiction, in the following matters all Legal Practitioners should have unrestricted rights of audience:

- Vendor / purchaser summonses
- Originating Summonses in court where evidence will be restricted to affidavit / affirmation
- Appeals from the District Court to Court of Appeal, where the trial was conducted by a legal practitioner without Higher HRA
- Family matters
- Admiralty jurisdiction for matters heard on Motion

- Companies Winding-Up proceedings
- Committal proceedings

IX. CONCLUSION

A. Extend HRA to solicitors to increase flexibility, efficiency, equity, and cost-effectiveness of Hong Kong legal system:

The extension of HRA for solicitors would improve the quality of legal services for the public and the nature of legal practice for lawyers. Extension of HRA would retain the potential of excellence in Hong Kong's legal profession, while permitting greater diversity and flexibility. Solicitors with appropriate ability and accreditation would have the opportunity to be an advocate in the High Court. With an increase in the number of advocates, market forces would make advocacy more competitive, increase advocate quality and lower advocacy fees.

For Hong Kong's citizenry, extension of HRA would make navigating the legal system easier and more cost-effective. The public would be represented by their own solicitor at the level of court of their preference. The public would enjoy the continuity of service from and access to a single solicitor throughout a case. The public would be offered a larger, more competitive and higher quality pool from which to choose their advocate. Thus, extension of HRA would lead to a more equitable, efficient and competitive legal system, in the interest of the Hong Kong people.

**The Law Society of Hong Kong
Working Party on Higher Rights of Audience
16 February 2000**

36563