

**HONG KONG BAR ASSOCIATION'S
POSITION PAPER ON
THE LEGAL PRACTITIONERS (AMENDMENT) BILL 2008**

1. The Bar has been invited by the Department of Justice to comment on the draft Legal Practitioners (Amendment) Bill 2008 ("Draft Bill") which deals with the higher rights of audience of solicitors.
2. Apart from setting out the proposed legislative provisions, the Draft Bill contains drafting notes ("Drafting Notes") relating to the policy and administration of the new regime together with matters of drafting. Insofar as may be necessary, this position paper will also deal with some of the questions raised in the Drafting Notes.
3. Given the time frame for the legislative process, this paper will primarily focus on some of the core issues in respect of certain provisions in the Draft Bill. As to matters which purely concern matters of drafting and presentation of the proposed legislative provisions, the Bar will provide further comments in due course.

Higher Rights Assessment Board

4. As pointed out in Note 1 of the Drafting Notes in respect of the proposed section 39E, the functions of the Higher Rights Assessment Board are not specifically set out. For the sake of clarity, the Bar takes the view that it is desirable to set out the function and power of this Board.
5. The proposed section 39E(2)(a) stipulates that the chairperson of the Assessment Board must be a judge of the Court of First Instance nominated by the Chief Justice. This proposed provision is more restrictive than the recommendation contained in paragraphs 49 and 67(4) of the Final Report published by the Working Party on Solicitors' Right of Audience in October 2007 ("Final Report") where the term "senior judge" is used. The proposed section 39E(2) as it now stands would prevent a judge of the Court of Appeal to be the chairperson. The Bar takes the view that this is unduly restrictive and should be revised so that both judges of the Court of First Instance and

the Court of Appeal may be appointed to be the chairperson of the Assessment Board.

Qualifying experience

6. One major concern in respect of the Draft Bill is that the proposed provisions on “qualifying experience” in section 39F do not seem to be consistent with the recommendations set out in the Final Report.
7. It is clear from the Final Report that a solicitor should not be granted higher rights of audience unless he or she is able to demonstrate adequate litigation and advocacy experience. The Working Party has recommended that five years’ post-qualification experience be a pre-requisite to apply for higher rights of audience and that an applicant should be required to show at least three years of relevant litigation experience.
8. In considering whether “qualifying experience” is attained, section 39F(2) of the Draft Bill takes into account an applicant’s practice as a barrister or a solicitor. Whilst in the normal course of events, a barrister who has practised for a few years should presumably be expected to acquire some litigation experience, the same cannot be said for solicitors, given the wide variety of their work, which may or may not be associated with litigation. However, the requirements for “qualifying experience” in section 37F(2) make no reference whatsoever to litigation experience which is the key element for the purpose of assessing an application for higher rights of audience. The Bar takes the view that this important issue must be specifically and clearly addressed in the Draft Bill.
9. The Final Report also suggests that an applicant be required to provide full information in relation to his litigation and advocacy experience during the three years prior to the date of the application. Such a requirement for “recent experience” does not seem to be reflected in the Draft Bill, particularly in view of note 1(a) of the Drafting Notes under section 39F(2) which states as follows:-

“As to the years of post-qualification practice, we assume that separate periods may be aggregated... Then, we assume that there is no need for the qualifying experience to have been acquired immediately before, or within a period before, the application.”

10. If different periods in aggregate are to be taken into account, one must not lose sight of the fact that an applicant's experience as a solicitor or barrister may be truncated in such a way that a substantial part of practice was carried out quite a long time ago and that his recent experience could be rather limited. In the circumstances, it is necessary to consider if the legislation should impose any time limit for the separate periods in aggregate to be taken into account. Further, the significance of an applicant's demonstration of his recent advocacy and litigation experience should be reflected in the legislative provisions.
11. Paragraph 59 of the Final Report recommends that in addition to satisfying the minimum periods of post-qualification practice and litigation experience, candidates should be able to obtain higher rights of audience by going through either the "Qualification Route" or the "Exemption Route". Section 39F of the Draft Bill deals with the Exemption Route but appears to be silent on the Qualification Route whereby an applicant is required to pass an advocacy course approved by the Assessment Board. The Bar takes the view that it will be desirable to deal with the Qualification Route expressly in the proposed legislative provisions.

Restrictions on higher rights of audience granted

12. As stated in the Final Report, the Bar supports the view that a candidate, if successful, should be granted higher rights of either civil or criminal proceedings or both. Hence, it should be stipulated in s.39I that the Assessment Board may grant higher rights of audience and also impose restrictions on such rights. Otherwise, the Assessment Board's power to grant higher rights of audience which is restricted to a particular kind of proceedings may be in question. This fortifies our above view that the power and function of the Assessment Board should be expressly spelt out in the proposed section 39E.

Definition of Higher Rights of Audience

13. The existing rights of audience of solicitors are not defined in any statute. Given that "higher" rights of audience are to be granted under the proposed

new regime, the Bar takes the view that a proper definition of rights of audience should be included.

14. In this regard, we would like to point out that the definition set out in the proposed amendments to section 2(1) is not precise as higher rights of audience should mean those which are not currently enjoyed by solicitors and thus should not include hearings in chambers in the Court of First Instances (which can be conducted by solicitors).

Sanctions

15. If a person without higher rights of audience purports to have such rights and appears in a hearing accordingly, such conduct, *prima facie*, has the effect of misleading the court (to the effect that he is qualified to appear when he is in fact not) and may even amount to contempt of court. This is similar to the situations envisaged in sections 44 and 45 of the current Legal Practitioners' Ordinance (in particular, the situation where a solicitor, not being a qualified notary public, practices as a notary public). The Bar is of the view that there should be criminal sanctions in this regard.
16. Section 50 of the current legislation provides that no costs in respect of anything done by an unqualified person acting as a solicitor shall be recoverable in any action, suit or matter by any person whomsoever. The Bar suggests that s.50 be revised so that it can also apply to a case where a person without higher rights of audience purports to have such rights and appear in a hearing accordingly.

Hong Kong Bar Association
24 November 2008