

Hong Kong Bar Association
Position concerning the Secretary for Justice's Proposal on
Amendment to Eligibility of Application for the Status of Senior Counsel

The Secretary for Justice has proposed to amend the Legal Practitioners Ordinance ("the Proposal") to enable those legal officers in government Departments who are not barristers, to be appointed Senior Counsel without requiring them (a) to be admitted to the Bar or (b) to serve a mandatory 3-month pupillage.

The Bar Council has considered the Proposal carefully and consulted the membership of the Bar. There is overwhelming opposition to the Proposal.

This opposition arises in large part because the Proposal ignores the fact that appointment to Senior Counsel ("SC") is intended for acknowledged leaders of the Bar and marks the holder as having risen to the top of the profession of barrister. It is not intended merely as an honour for the recipients. Senior Counsel are available to serve any member of the public who relies on that title as a guarantee of outstanding professional competence and, critically important, total independence, subject to a code of honour which all barristers must follow.

The Bar's Code of Conduct is partly written but also consists of the unwritten ethics and conventions which are the traditions of the Bar. Pupillage is when these unwritten elements of the code of strict probity are imparted and learned. Every barrister must complete 12 months of pupillage to the Bar's exacting standards but as a special dispensation, legal officers are only required to serve a bare minimum of 3 months.

In the words of the Chief Justice, the institution serves an important “public interest that underscores the unique status and responsibilities of the rank of SC. These responsibilities include ... setting and maintaining the highest professional standards of integrity and competence, carrying on the fine traditions of the Bar and its commitment to the rule of law which is a cornerstone of our society, setting an example to and helping pupils and young practitioners, contributing to the affairs of the Bar and making time available for public service when called on.”

Under the terms of the Proposal, the proposed legal officer SCs would never be barristers, and would only enjoy the title whilst employed by the government. Termination of their employment would automatically cancel their designation as SC. In other words, it would be an intra-departmental ranking, wholly different from the concept and status of SC as a leader of the Hong Kong Bar.

The Proposal would involve creating a category of SC for legal officers who are neither barristers, nor members of the Hong Kong Bar and are not subject to the Bar’s Code of Conduct, and which is conditional on remaining in government service. The Hong Kong Bar Association does not consider that this is in the public interest.

The Proposal would not enlarge the number of SC available to the public because these Departmental advocates would be wholly employed by the government.

In carrying out their governmental duties, the legal officer’s duty primarily is to the superior hierarchy within the Department.

By way of contrast, a SC's duty is to both his client and the court, a duty that may, on occasions, require him to decline to proceed with a prosecution or pursue a civil claim if, in his or her professional judgment, it would be wrong to do so.

This is a striking illustration of the critical importance of the independent Bar to the public interest, particularly when a SC is instructed to prosecute on fiat or to conduct or defend a civil claim on behalf of the SAR.

The path to SC status has been taken successfully by eligible barrister members of the DoJ since 1997 and still remains open to legal officers subject only to becoming a barrister and serving pupillage.

Under the current Legal Practitioners Ordinance, legal officers who are not barristers but who have acquired the requisite advocacy experience can easily transfer to the Bar and, after the 3-month pupillage, stand on equal terms with other candidates for appointment as SC. Such an appointment cannot be lost if and when they leave government. We consider that the 3-month pupillage requirement is appropriate even for experienced advocates as it will inevitably involve a broadening of experience and exposure to the pressures and challenges of life at the private bar, which are different from those of Government service. We understand that under existing arrangements a legal officer who wishes to undertake such pupillage with a view to applying for silk may be allowed to retain his/her DoJ salary during the pupillage, so that it involves no financial barrier to the officer in question.

It is therefore wrong to suggest that the current situation acts as a bar to legal officers who merit the opportunity to be appointed silk.

Since 1997, Hong Kong's SC and Junior barristers have served and continue to serve the public in a variety of ways: undertaking pro bono work and undertaking legally aided cases for heavily discounted fees.

Senior Counsel have customarily served on and chaired various public commissions and boards such as the IPCC, Exchange Fund Advisory Committee, Takeovers Appeal Committee, Securities and Futures Appeal Panel and Town Planning Appeal Board, without remuneration.

The public's image of the impartiality and independence of SC, combined with their acknowledged legal expertise and judgment, is vital to the public's perception of good governance. It is their independence that gives meaning and significance to the role of barrister, demanding that they carry out their professional duties without fear or favour.

Nor should it be forgotten that Hong Kong's SC's devotion to the public interest is particularly evidenced by the number of silks who accept invitations to become judges of the High Court, even though this meant abandoning their high fee earning practices for a modest judicial salary.

The public's perception of SC is not of a senior government official. Creating a rank which is only valid so long as the holder remains in government service would never confer the same distinction as appointment to silk in the traditional manner.

Recognition of excellence within the DoJ can readily be achieved by a designation appropriate to the role and function of the individual legal officer. If better recognition is thought necessary this could be given by creating an appropriate new title such as Senior Government Advocate (SGA) or Senior Law Advocate (SLA).

We believe that that would be a more appropriate way forward than the present proposal which we cannot support.

Dated: 5 July 2021.

Hong Kong Bar Association