Re: Legal Practitioners (Amendment) Bill 2023 ("**the Bill**")

<u>SUBMISSIONS OF THE HONG KONG BAR ASSOCIATION ("HKBA")</u>

1. The HKBA refers to the Legal Practitioner (Amendment) Bill 2023 ("the Bill"), which proposes amendments to the Legal Practitioner's Ordinance (Cap 159) relating to the admission of overseas lawyers as barristers in Hong Kong for cases concerning national security and related matters.

2. In essence, the Bill provides that a person must not be admitted as a barrister "*for a case concerning national security*" unless the Chief Executive ("**CE**") "*has sufficient grounds for believing that the person's practising or acting as a barrister for the case does not involve national security* ***<u>or</u>*** *would not be contrary to the interests of national security*" (emphasis added). The Bill then provides for a procedural framework which seeks to ensure that the CE's discretion as provided for in the Bill can be exercised in such a way that best protects national security.

3. The HKBA agrees that *ad hoc* admission of overseas lawyers for cases involving national security should be dealt with on a case-by-case basis as opposed to a complete ban. The HKBA supports the implementation of a system which, while achieving the spirit and objectives embodied in the Interpretation by the Standing Committee of the National People's Congress on 30 December 2022, also provides the fairest protection possible of legitimate rights and interests of parties, and which procedures are most efficient.

4. The HKBA notes that under the traditional common law principles, questions concerning whether something is "*in the interests of national security"* is recognised as something within the purview of the Executive, and is not a matter for judicial decision. As stated by Lord Hoffman in *Home Secretary v Rehman* [2003] 1 AC 153 at paragraph 50:

> *"On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether*

something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

5. The HKBA in principle supports the proposals in the Bill insofar as it seeks to place the question of whether a matter, or a person participating in a case, concerns national security in the purview of the CE as opposed to the Courts. This is consistent with both Article 47 of the Law of the People's Republic of China on Safeguarding National Security in the HKSAR ("**NSL**") as well as traditional common law principles.

6. However, whether a case concerns national security will not always be clear, especially in cases which do not directly concern any provision or offence under the NSL, and which do not appear to the parties involved to concern national secrets. Litigants and their local legal representatives will benefit from clearer and more certain guidance when advising the prospects of success of an application for *ad hoc* admission, the evidence required, and the procedure to follow, particularly in cases that do not involve any provision or offence under the NSL, especially civil cases, such as:

   (a) What do the parties have to do to assess whether their case is one "*concerning national security*"? Would it depend on the general factual matrix of the case or the nature of the particular issues to be adjudicated or the evidence that is expected to be adduced?

   (b) What would be the nature and quality of the reasons and evidence that would be required to justify the application for *ad hoc* admission?

7. With respect to the powers of the CE as provided for in ss.27C, 27D and 27E of the Bill, the HKBA has the following queries:

   (a) It is noted that the pre-application screening process under s.27C will be determined by the CE, with reasons and supporting evidence to be adduced by the applicant. It is noted that the CE may consult the SJ in the process. If the SJ is consulted, what impact will this role have on the SJ's usual role in applications for *ad hoc* admission?

(b) In respect of the ss.27C, 27D and 27E certificate issuing process, will the applicant or the person admitted (as the case maybe), or the parties involved in the case, be afforded further opportunities to make representation or submissions to the CE before the CE makes the relevant decision?

8. With respect to the review mechanism as provided for in s.27E of the Bill, this has the potential of creating uncertainty as to the legal representation in the process of the litigation. If, for example, an overseas counsel has been admitted to appear for a party in a case and the review mechanism is initiated very close or during the trial or the hearing, this could potentially cause prejudice to the party concerned, leaving him not properly represented. Would there be any measures to mitigate the potential prejudice to the party in such cases?

9. In relation to the new section 27F, which stated that a decision by the CE under the new section 27C, 27D or 27E is not liable to be questioned or challenged in any court of law:

(a) There is a strong interpretative presumption against the exclusion of judicial review when similar provisions were challenged in Court in other jurisdictions. The corollary that an ouster clause can only be effective by the "most clear and explicit words": see for example **R (Privacy International) v Investigatory Powers Tribunal** [2019] UKSC 22 (at §37).

(b) Section 27F only makes a "decision made by the Chief Executive" unreviewable. But as Lord Carnwath says, a decision or a determination that is not within the designated area that the decision-maker is entitled to have reference to, is not a decision within the meaning of the empowering legislation at all (at §§36, 54, 105, 107).

(c) In section 27B (2) of the Bill, the Chief Executive is only entitled to have reference to two overlapping "designated areas*"*. The first is that the "person's practicing or acting as a barrister for the case does not involve national security". The second is that the "person's practicing or acting as a barrister for the case would not be contrary to the interest of national security".

(d) In other words, there could still be arguments on what factors the CE had taken into account and whether he considers matters outside the scope of whether the person's acting as a barrister for the case involves national security, or whether the person's acting as a barrister for the case is contrary to the interest of national security. There could in turn be arguments on whether the decision is rendered legally invalid and not a decision within s.27F of the Bill. This is a technical matter which should be considered.

Dated 11 April 2023

HONG KONG BAR ASSOCIATION