

7 July 2021

Mr Paul Harris, SC  
Chairman  
Hong Kong Bar Association  
LG2 Floor, High Court, 38 Queensway  
Hong Kong

Dear Mr Harris,

**Proposed amendments to the Legal Practitioners Ordinance  
(Cap. 159) (“LPO”) enabling a person holding office  
as a legal officer not being a Hong Kong barrister to be eligible  
for appointment as Senior Counsel (“the Proposal”)**

I refer to the letter dated 2 July 2021 from Ms Anita Yip, SC writing as the Acting Chairman (“your Letter”), relaying the views and comments of the Bar Council and your members on the Proposal. These views and comments have also been set out in a “position paper” uploaded to the website of the Hong Kong Bar Association (“HKBA”) and submitted to the Panel on Administration of Justice and Legal Services of the Legislative Council (“LegCo”) on 5 July 2021. Since some of our earlier clarifications appear to have been overlooked, I write again to put the Proposal back in perspective.

**Correct Understanding of the Proposal**

Since, at present, only legal officers who are barristers (as opposed to their non-barrister counterparts) are eligible for the appointment as Senior Counsel (“SC”), the Proposal seeks to provide equal treatment, in terms of eligibility for appointment to SC, to all legal officers with advocacy duties in this and other Departments who already have all the rights and privileges of both barristers and solicitors when handling matters relating to the Government.

There is no disagreement between us that the appointment to SC “is not intended merely as an honour for the recipients”. The Proposal

seeks to address, in line with the international development, the long dire need for fairly rewarding excellence to competent advocates solely based on merits without other artificial eligibility barriers. Under the unchanged selection mechanism and criteria set out in section 31A(1) of the LPO (including sufficient ability and standing, sufficient knowledge of the law, and requisite no-less-than-10 years' experience) which apply to all eligible applicants (including barristers in private practice and legal officers), only the ones who, in the opinion of the Chief Justice after consultation with the chairman of the Bar Council and the president of the Law Society, satisfy the substantive eligibility requirements set out in the LPO would be considered for appointment as SC on a merit basis.

Some grounds for objections in your Letter are apparently based on an unnecessary and unfair comparison between barristers in the private sector and legal officers.

First, the functions of legal officers and private legal practitioners are different and indeed not entirely comparable. Legal officers, shouldering important public functions, are also key players in Hong Kong's internationally-renowned solid legal infrastructure. All advocates regardless of whether they are in private practice or serving in the public sector should deserve the full recognition as worthy leaders carrying the SC title by the Chief Justice applying the same benchmark. We are unable to agree that any non-barrister legal officers appointed as SC would be of an "intra-departmental ranking". These officers are considered and assessed by the Chief Justice under the same eligibility requirements and their appointment as SC is purely based on merits. There should not be any distinction in terms of merits and standing among SC who are appointed after such a vigorous process, whether between those who are in private practice and those who are legal officers or between legal officers who are barristers and those who are not.

Second, your proposition that all SC must be with "total independence" and available to serve members of the public directly as their legal representatives ignores the fact that legal officers who are barristers are under the existing regime eligible for appointment as SC just as those practising at the bar. This has always been the case both before and after the enactment of sections 31A and 31B of the LPO in 1997 to give statutory underpinning to the relevant system of appointment. Among the ranks of those so appointed when serving as

legal officers, many of them actually joined the private practice or were appointed to the Bench upon leaving the Government service. There has been no suggestion ever of any doubt that SC in the public sector are not serving the public or the public interest whilst being legal officer or thereafter in another capacity. While they, being civil servants, cannot represent private clients/members of the public like those in private practice, they also owe duties to the general public as well as the Courts when discharging their public functions.

Third, whilst non-barrister legal officers to be eligible for appointment to SC under the Proposal are not subject to the Bar's Code of Conduct, their conduct, as lawyers, is governed by the codes of professional ethics applicable to their branch of profession; as legal officers by the stringent disciplinary regime applicable to legal officers and, in the case of legal officers acting as prosecutors, also this Department's Prosecution Code; and as civil servants by the Civil Service Code. Further, their performance and conduct as SC and advocates are also subject to scrutiny by the Court as well as the general public. I hope, and I believe, it is not the HKBA's intention to suggest that the Bar's Code of Conduct is superior above all.

Fourth, we take exception to the suggestion in your Letter that legal officers, under the governmental hierarchy, are prone to any impermissible influence and hence lack independence which is of "critical importance". Quite apart from the fact that, as explained above, all legal officers are expected to maintain the highest professional standards at all times, the suggestion ignores that fact that (a) even if a legal officer undertakes pupillage and is called to the Bar before being appointed as SC, s/he remains employed by the Government and (b) under the existing regime, legal officers who are barristers are also eligible for appointment as SC and they are employed by the Government.

We emphasise again that all SC appointees, whether now or under the Proposal, must satisfy the same substantive eligibility requirements under the LPO. If any candidate does not have the required standing or does not satisfy any of the substantive eligibility requirements, we trust that the Chairman of the Bar and the President of the Law Society would tender their fair and honest advice to the Chief Justice for his consideration about the eligibility of the candidate concerned.

The reason for the Proposal not allowing non-barrister legal officers to retain their SC titles upon ceasing to be legal officers is to avoid affecting any rights of the legal practitioners in the private sector, and the demarcation between barristers and solicitors in the private practice. This reflects our respect of the self-regulatory regime currently applicable to the legal profession.

### **Way Forward**

We trust that the above, similar to my earlier letters, will be presented in full to your Members and have addressed the concerns raised. The Legal Practitioners (Amendment) Bill 2021 effecting the Proposal will be gazetted on 9 July 2021 for introduction to the LegCo for first and second reading on 14 July 2021. In this regard, I enclose the relevant LegCo brief for your reference.

Yours sincerely,

( Ms Teresa Cheng, SC )  
Secretary for Justice

Encl.