THE LAW SOCIETY OF HONG KONG 香港律師會

Response by the Law Society to the Chief Justice's Consultation Paper on Solicitors' Rights of Audience

Question 1 ***In line with the principle set out at paragraph 3 of the paper, and provided a scheme can be devised which does not endanger the continued existence of an independent Bar, do you agree that rights of audience in the higher courts should be extended to suitably qualified solicitors (see paragraphs 3 and 18 to 21 of the paper)?***

- The Law Society firmly believes that it is in the interests of court users and the public, as well as in the interests of the solicitors' profession and the Bar, that higher rights of audience are granted to solicitors. By giving more choice, reducing costs and raising standards of advocacy, public confidence in the court system will be enhanced.

- The reasons for this were fully set out in the Law Society's original Position Paper of May 2002, all of which remain valid. In response to the Consultation Paper, 97% of the 1,000 odd solicitors and firms contacting the Law Society favour the grant of higher rights of audience (" HRA"). Some 77 % of practising solicitors are aged between 25 and 40. In the words of the President of the Law Society, *"Ours is therefore a young and vital profession"* (*Hong Kong Lawyer* June 2006 edition at pages 2-3). The Presidents added:

  "The Law Society considers higher rights of audience to be of particular importance to the younger members of our profession, because young people with a talent of advocacy can pursue a full career as an advocate while being

enabled to acquire their skills in an environment where the accumulated expertise and experience of an entire law firm will be available to nurture their talents".

- The Law Society has also received expressions of support for solicitor advocates and higher rights of audience from representatives of a wide range of commercial organisations, and potentials users of court services.

- The existing system of restricting solicitors from appearing in the higher courts has to a large degree artificially created a barrier that discourages good advocates in the solicitors' profession from developing their talent and skills to the fullest extent that would better serve the public interests of Hong Kong in the long term. Hong Kong is an international city, with a widely accepted legal system, but yet it is the only major jurisdiction in the world that still imposes the mandatory two lawyers' rule for higher court representation in public trials. The international business community has difficulty understanding why two fees are mandatory when a case is heard in the higher courts.

- The Government of the Hong Kong SAR has been advocating for years that Hong Kong has all the ingredients to be an international dispute resolution centre. The reform of the archaic system inherited from England and Wales (which has since been abandoned) is long overdue. The right of free choice of lawyers for representation in the courts is a fundamental right guaranteed by the Basic Law (BL35). Free competition among competent legal advocates to represent their clients in the courts is clearly in the interest of the public and in the long term interests of Hong Kong as an international city.

- It must be remembered that competence of our lawyers, both solicitors and barristers, in advocacy is one of the crucial elements in enhancing the reputation of Hong Kong as a leading centre for international dispute resolution in Asia. This serves not only Hong Kong but also mainland China and other parts of Asia. The pool of advocates must be enlarged to meet the challenges and demands ahead of us.

- We emphasise we do not advocate fusion of the professions. Survival of an independent Bar is important to the solicitors' profession. There will always be instances where matters come to solicitors who do not have litigation experience, or do not have sufficient experience, expertise or time to deal with a particular piece of advocacy. There will be occasions when it is cost-effective to use a barrister. The best interests of a solicitor's client must remain paramount. In those circumstances, work will still be referred to the Bar. This has been the experience in the District Court.

- In England and Wales after the liberalization of the HRA accreditation system, it is now relatively straightforward, and indeed in some firms routine, for litigation solicitors to acquire HRA at some point between three and five years post qualification experience (" PQE"). The Bar has thrived in the face of this actual or potential competition, and indeed has grown in size since the introduction of HRA in England and Wales. Fears that the local Bar will be extinguished are unfounded. The practising Bar in England and Wales has risen from 12,982 to 14,623 barristers between 2001 and 2005.

- In Australia a fused profession has still developed a class of counsel or advocates, who act very much as barristers do in England and Wales or in Hong Kong, to fulfil the same need for specialist advocates as will remain in Hong Kong after the introduction of HRA.

- Any suggestion the standards of advocates will be adversely affected by the granting of HRA to solicitors is unfounded. It is the firm belief of the Law Society that the granting of HRA to suitably qualified and experienced advocates will in fact improve the standards of the pool of what will become Barristers / Solicitor-Advocates available to be briefed in the CFI, CA and CFA.

- Better trained advocates will help promote Hong Kong, especially in mediation and international arbitration. Solicitors already undertake a substantial amount of arbitrations in Hong Kong and overseas and having solicitors, who have the experience of HRA, conducting arbitrations overseas will improve the image of Hong Kong and its legal profession overseas.

Question 2a ***Do you think that a solicitor's eligibility for higher rights of audience should be related to his years of post-qualification practice and, if so, what should be the minimum period of practice required (see paragraphs 22 to 24 and 28)?***

- The Law Society believes a solicitor's level of post-qualification experience is relevant, and should form a basic benchmark for eligibility to acquire HRA. Although newly admitted solicitors and barristers have shared, to a significant extent, a common education, qualification, and training, it is recognized that barristers may be given greater and earlier exposure to advocacy than will trainee solicitors.

- In the Position Paper, five years PQE was chosen, and we maintain that position now. We emphasise this is in fact to err on the side of caution, and members of the profession have rightly pointed out there is a reasonable argument to say the PQE level should be three rather than five years, as in England and Wales.

- Five years PQE is the level at which solicitors are eligible to become Magistrates or District Judges. We understand also that in practice the amount of time it may take a solicitor to acquire the necessary experience in England and Wales is still up to five years. We are content to maintain the level at five years PQE. With two years as a trainee, solicitors at this level will already have seven years experience.

- This is a responsible stance adopted by the Law Society. With five years PQE, qualified solicitor-advocates in Hong Kong will be far more mature professionally to provide advocacy services than junior barristers. It is therefore inappropriate to compare junior barristers with solicitor-advocates that will emerge from the new reformed regime.

Question 2b ***Do you think that there should be a limit on the number of solicitors who may be granted higher rights of audience in any year (see paragraphs 25 to 27)?***

- There should certainly not be any form of quota, as this will represent a serious distortion to the enhanced competition and the raising of quality of advocacy which HRA will bring. Success in examinations is measured in almost all cases by merit rather than by a quota system, and in the same way those who are of the

requisite standard, and wish to obtain HRA, should be entitled to do so without artificial limits, and without restrictive practices. Otherwise, bright advocates may be kept out. There is no quota on how many barristers may be admitted.

- The requirement that solicitors, to exercise HRA, must have five years PQE, giving 7 years experience in total, will operate as an effective filter on the number of solicitor advocates admitted. Although, with some 6,000, the solicitors' profession is much larger than the Bar in Hong Kong, the number of solicitors who specialise in litigation, and who have the experience, seniority, time and desire to obtain higher rights of audience through the accreditation process we outline below, will not be significant. Arguments that there will be a flood of solicitor advocates are misconceived. Even in England and Wales, where it is now relatively easier for solicitors to obtain HRA, the statistics quoted above show the Bar continues to thrive. Members of the Working Party consulted with their colleagues in London, from which it seems clear that the significant cut in Legal Aid, as well the streamlining effect of the *Woolf Reforms*, have had a much more significant impact on the workload of the Bar than have any solicitor advocates.

- Granting of rights of audience in the manner proposed will still result in a system more restrictive than that in England and Wales, Australia and other common law jurisdictions around the world. To restrict it further by quota is neither necessary nor justified.

Question 2c ***In England and Wales, there are four ways in which a solicitor can qualify for higher rights of audience. Should a similar approach be followed in Hong Kong and, if not, what approach do you favour (see paragraphs 29 and 30)?***

- The Law Society does not advocate adopting the four route approach currently in use in England and Wales.

- Two of these routes in England and Wales are about to be abolished (the Exemption Route and the Accreditation Route). That would leave the Development Route (a series of study and examination courses, leading to a form of apprenticeship or pupillage), together with the Exemption Route for those who already hold an HRA qualifications in another jurisdiction.

- The Law Society accepts some form of accreditation system should be implemented, and indeed will positively require that this should be an essential element of the granting of HRA, to maintain the standards of advocacy before the higher courts.

- The Law Society proposes an accreditation system whereby appropriate assessments are made of a candidate's skill in written and oral advocacy, evidence and higher court procedure.

- The accreditation system is proposed to work, in broad outline, as follows:

  (1) The relevant solicitor will need to have five years PQE dealing with litigation matters. That experience should be dealing with court based litigation, although it will be permissible to have spent time dealing with other forms of contentious business, such as arbitrations, mediation or regulatory investigations. For those applying for civil HRA, this experience should be predominantly civil rather than criminal, but need not be exclusively civil. The converse would apply to those seeking criminal HRA.

  (2) Litigation experience gained in other comparable jurisdictions will be counted, so that for example a three years PQE English litigation solicitor, who then passes the Overseas Lawyers' Qualification Examination ("OLQE") and spends two years doing litigation in Hong Kong, will meet this criterion.

  (3) The candidate will need to demonstrate sufficient experience of advocacy in the lower courts or otherwise. The exact quantity and quality of what is required will need to be considered. In England and Wales initially it was necessary to show up to thirty applications made as advocate in the period leading up to an application for HRA. That was flexible, to the extent that someone who had merely undertaken time summonses would not pass the test. On the other hand, someone who had conducted a smaller number of hearings, but which were substantial, for example fully contested arbitration hearings, or trials in the County Court, would pass even though they did not literally have the required number of

applications. Experience of sitting behind counsel in the High Court will be relevant and counted, since it is very useful as a training experience.

(4) A candidate will take relevant assessments for the granting of HRA. These will consist first of a limited written assessment in High Court procedure, ethics and evidence. Those solicitors who have substantial experience of High Court litigation (albeit not as advocate) would be granted exemption. Training courses will be made available.

(5) There will then be an assessment of advocacy skill. This will take the form of conducting a mock case, over one or two days. It will be run very much as a real trial. In advance, candidates will need to produce a written pleading, which will be marked. Nevertheless, for the actual trial, standard pleadings will be given to all candidates to ensure equality and fairness of the test. Candidates will have to prepare and submit a written skeleton. The trial will consist of all the usual steps, including oral opening and closing, examination, cross-examination and re-examination of factual and expert witnesses. Some form of interlocutory application may be included.

(6) Training will be made available for this, using the NITA method, or some equivalent, whereby candidates are given feedback on their performance both on the spot, and by review of videotape. Attendance at training will be optional only however.

(7) Separate assessments will be run for civil and criminal HRA. Qualification for civil HRA will not give criminal HRA, or vice versa. However, a solicitor could proceed to take both assessments and in this way gain both civil and criminal HRA.

(8) It will be possible to take the relevant procedure, evidence and advocacy courses and assessments in the period from three to five years PQE, so that a solicitor, upon reaching five years PQE, having shown the relevant experience and passed the relevant assessments, will be eligible to be granted HRA and exercise them forthwith. We emphasise again that by

this stage seven years experience as a solicitor (including traineeship) will have been gained.

- In addition to the Accreditation Route, we propose a limited Exemption Route. Senior practitioners in Hong Kong, with clear and substantial advocacy experience in Hong Kong, could be granted higher rights of audience on the basis of their existing experience. This is intended as a route to enable a body of solicitor advocates to commence exercising HRA, and demonstrate the value of it. Having such solicitor advocates would also assist in the process of accreditation and training of more junior lawyers.

- Applicants for exemption will need to demonstrate substantial advocacy experience in Hong Kong within existing rights of audience, over many years, on the basis of which it is thought appropriate to grant them HRA without needing to follow the Accreditation Route. This might apply to barristers with substantial advocacy experience before they converted to join the solicitors' profession. Experienced advocates, who have conducted many application and trials over many years, including dealing with witnesses in for example arbitrations, may also qualify. Applicants for exemption could apply for either civil HRA, or criminal HRA or both.

- It is, however, the Law Society's view that such an exemption route should not be a means to allow overseas advocates a fast track. Therefore, for example, in future an advocate coming to the solicitors profession from overseas, would need to follow the accreditation route as above in order to obtain HRA, in the same way as they must take the OLQE, even if they hold an overseas HRA.

- Suggestion has been made that there should be some form of traineeship, mini-pupillage or the equivalent. The accreditation system is to ensure solicitors have sufficient litigation and advocacy experience in the lower courts or otherwise, and pass assessments in the procedure, ethics, evidence and advocacy skills to be able to practice advocacy in the higher courts. Our proposed accreditation scheme ensures that candidates will have gained sufficient experience before being eligible to obtain HRA, and in that context any form of post-qualification pupillage or apprenticeship is out of place and unnecessary.

- In addition, the experience in London shows it is very difficult for many potential solicitor advocates, particularly those from smaller firms, to find a mentor or pupil master who has the time and ability to undertake this role (the current English "Development Route" to HRA includes a period of quasi-pupillage as the final step).

Question 2d ***Should a solicitor be granted unrestricted higher rights of audience in relation to any proceedings, or should he only be granted higher rights in relation to a particular area of law or a particular type of proceedings (see paragraphs 31 to 33)?***

- The Law Society accepts that the technical procedures, as well as the practicalities of handling a jury, involved in criminal proceedings are sufficiently different to those involved in civil proceedings, that a solicitor who has dealt entirely with civil proceedings only should not be granted HRA on the basis of that experience alone for criminal proceedings. The converse equally applies.

- The Law Society proposes there should be separate HRA qualifications for civil proceedings, and for criminal proceedings.

- There are a number of anomalies as to whether particular proceedings should be classified as civil or criminal. A list of these would be drawn up, and it is proposed that solicitors holding either the civil or the criminal qualification would be eligible to conduct these proceedings where HRA are needed. Examples are *Habeas Corpus* or judicial review from a criminal trial.

Question 2e ***Which body or person should grant higher rights of audience (see paragraphs 34 to 37)?***

- The Law Society administers the solicitors' profession, and should be responsible for administering the granting of HRA. HRA in England and Wales is granted by the Law Society. In reality, this is the only body in a position to do so, and indeed the Law Society has a statutory duty in this regard.

- The Law Society accepts there needs to be some independent oversight of the accreditation system, such that its equality and fairness can be seen, which is both in the interests of the candidates themselves, as well as in the interest of the

Judiciary in having confidence that solicitor advocates are properly trained and qualified. The Judiciary itself should undertake this role.

- We described in response to Question 2(c) above the proposed accreditation and exemption routes. The Law Society will administer the accreditation and exemptions itself. It will issue the HRA qualification, and notify the Judiciary of those who have qualified.

- Relevant courses would be run by the Law Society, or under its supervision in conjunction with a suitable educational body. This process was followed in England and Wales, where for example Nottingham Law School ran such courses under the supervision of the Law Society. Such study courses would be optional only, so that candidates who did not feel they needed training could proceed to take the assessments without attending these courses.

- Although strictly beyond the scope of this question, it is useful to address here how such a scheme would be implemented. Primary legislation is the purest manner for the granting of HRA to solicitors, but having reviewed the position, this is not strictly necessary. We believe it is within the powers of the Judiciary, by means of Practice Directions or amendment to the Rules of the High Court, to permit holders of higher rights of audience qualifications to appear before them. The Court controls its own procedures. The Law Society also believes it has sufficient power within its existing primary and subsidiary legislation to adopt a form of "Higher Rights of Audience Qualification Rules" which would set out in detail how, in what manner, and on what basis solicitors could qualify for HRA. The Law Society would administer the process pursuant to such rules. Accordingly, it is believed that no primary legislation or amendment to the Law Society's Memorandum and Articles, is necessary.

- The Law Society accepts the process needs to be transparent and fair, and seen to be such. An Assessment Board will be formed comprising members of the Law Society and members of the Judiciary. A composition previously suggested is 3 suitably qualified Law Society representatives, and 2 Judges, or retired Judges, of High Court level or above. This body's task will be to approve the content of the relevant evidence/procedure and advocacy assessment tests. It will, however, be

up to the Law Society and the educational institution to design and run courses which are sufficient to give candidates the (optional) training they needed to meet these tests and assessments.

- The Board's second function will be to monitor litigation and advocacy experience. This Board will therefore assess applications from candidates to ensure that this experience is sufficient for them to take the assessments. The Board will supervise the marking of examination papers. The Board will assess the oral advocacy assessment or "mock trials" referred to above. In England and Wales, it was at least initially a retired Judge who sat as the "Judge" for the oral advocacy assessment, although a Law Society representative was also in attendance, and was consulted. In fact, those solicitors who had reached this last stage of the process were of very high quality, and most were easily able to demonstrate good advocacy to the standard required for the assessment.

- The Board's final function would be to assess applications for exemption.

Question 2f ***Should the Law Society be responsible for the conduct and discipline of solicitors granted higher rights of audience and, if not, which body should take on this role (see paragraph 38)?***

- The Law Society is responsible by statute for the conduct and discipline of solicitors, in all aspects of their work. This is a matter of professional autonomy.

- The Law Society is charged with this regulatory function, and it applies equally to solicitors acting as advocates within the scope of their current rights of audience, as well as to solicitors doing non-advocacy and non-contentious work.

- The Law Society is accordingly already aware of the relevant standards and codes of conduct and exercises its regulatory function over solicitor advocates at present.

- HRA do not present any unique features which would justify a departure from Law Society supervision.

- In England and Wales, relevant principles of ethics were introduced in relation to solicitor advocates to reinforce the duties of a solicitor, when an advocacy

situation arises, to take an objective decision in the best interests of the client as to whether that solicitor him or herself, or other advocates in the solicitors' own or a different firm, or counsel, was the most appropriate advocate for the particular task. This should be adopted in Hong Kong.

The Law Society of Hong Kong

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