THE LAW SOCIETY OF SINGAPORE

The Law Society of Singapore
39 South Bridge Road S(058673)

t: +65 6538 2500 f: + 65 6533 5700
www.lawsociety.org.sg

Sender's Fax: 6533 5700
Sender's DID: 6530 0226
Sender's Email: represent@lawsoc.org.sg

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Permanent Secretary
Ministry of Law
100 High Street
#08-02 The Treasury
Singapore 179434

BY E-MAIL & POST
E-mail:
Gloria_LIM@mlaw.gov.sg

Attn: Ms Gloria Lim
Director, Legal Industry Division

Dear Sirs

PUBLIC CONSULTATION ON LEGAL PROFESSION (AMENDMENT) BILL 2012

We refer to your e-mail dated 5 December 2011 inviting the Law Society to provide its feedback on the draft Legal Profession (Amendment) Bill 2012.

The proposed amendments to the Legal Profession Act ("Act") were referred to the relevant committees of the Law Society for views. The Admissions Committee's views are set out below. The Council of the Law Society has considered the Committee's views and shares their views in this regard.

(A) Ad hoc admission of Queen's Counsel (and equivalent)

Premises of the Consultation Paper

1. The Committee notes that the proposed amendments to section 15 of the Act are based on the following premises stated in the Ministry's Consultation Paper ("the Paper"):

   (a) in the earlier public consultation on the proposed licensing scheme for Independent Counsel ("the proposed IC Scheme"), the proposed IC scheme was intended to address the shortage of Senior Counsel who could provide advocacy services in commercial and financial disputes (paragraph 4);

   (b) feedback received by the Ministry subsequently at dialogue sessions with the legal fraternity showed support for measures to provide clients with greater possibility of engaging Independent Counsel through the existing *ad hoc* admission route under section 15 of the

Act, rather than through the proposed IC Scheme (paragraphs 4 and 5); and

(c) therefore, the Ministry proposes to widen the scope for *ad hoc* admission of Queen's Counsel (and equivalent) from overseas jurisdictions to appear in Singapore Courts. However, in cases involving purely domestic areas such as criminal, family, constitutional and administrative law, there will be a significantly higher threshold for their admission (paragraph 6).

Abolition of tests of sufficient difficulty and complexity and circumstances of the case

2. To widen the scope for the existing *ad hoc* admission route, the Ministry proposes to amend section 15(1) of the Act to revert to the pre-1991 position by deleting the phrase "where the court is satisfied that it is of sufficient difficulty and complexity and having regard to the circumstances of the case". Effectively, the first two parts of the three-stage test which the Singapore Courts have adopted since 1991 would be abolished. It follows that the Singapore Courts would concomitantly be conferred a broader discretion in deciding whether a QC (or equivalent) should be admitted for a particular case after the following minimum statutory criteria are satisfied:

   (a) the applicant holds Her Majesty's Patent as Queen's Counsel or any appointment of equivalent distinction;

   (b) the applicant does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and

   (c) the applicant has special qualifications or experience for the purpose of the case.

3. The Committee's view is that the Ministry's proposed amendments serve to liberalise the *ad hoc* admission regime to allow QCs (or equivalent) to be admitted to do any kind of work that they have "special qualifications or experience for", without having regard to the necessity or proportionality in a particular case. Moreover, they do not sufficiently take into account the public interest that there should be a strong and independent local Bar. In particular, the proposed amendments are likely to send the incorrect signal to the public that sufficient difficulty and complexity of the case and the circumstances of the case are no longer relevant factors to be considered by the Singapore Courts in deciding whether a QC (or equivalent) should be admitted. The Committee believes that this is not the Ministry's intention because even in the pre-1991 position, sufficient difficulty and complexity was a relevant factor in *ad hoc* admissions: see *Re Phillips Nicholas Addison QC* [1979-1980] SLR(R) 111.

4. No doubt, these concerns may be addressed by case law interpreting the new section 15 after it is enacted. But as a matter of principle, the proposed amendments need to send a stronger signal acknowledging the public interest in having a strong and independent local Bar. This is especially critical given that the Ministry is also proposing to restrict the right of appeal from a High Court decision on the admission of a QC (the Committee will address this issue separately in this response). With greater liberalisation of the *ad hoc* admission regime, more QCs may be admitted (from which leave to appeal may be rejected). But increasing the number of admitted QCs is not in the public interest if there are local counsel who are capable, able and willing to represent the relevant party.

5. Also, the availability of local counsel cannot simply be left to the market or judicial discretion to regulate. Firstly, the market is imperfect as the lawyer's fees (whether QC or local counsel) is not the only factor that the client would consider in selecting his counsel. Thus, the fact that

the client desires a QC to represent him in a commercial and financial dispute does not necessarily mean that the client was unable to find local counsel whose fees were lower than those of the QC. Secondly, serious efforts should be made to locate suitable local counsel before an *ad hoc* admission application is made. This is because by the time the application is heard by the Court, it may be inefficient or too late to require inquiries to be made of the availability of local counsel.

6. Therefore, in order to accord due weight to the public interest in having a strong and independent local Bar, the proposed amendments should at least indicate that the *ad hoc* admission of QCs is not as a matter of course (ie no regard to the availability of local counsel at all) when the regime is liberalised. This would still achieve the stated objective ie to address the shortage of Senior Counsel who can provide advocacy services in commercial and financial disputes due to conflicts of interest. In this regard, the Committee has considered two proposals which are listed as follows:

   (a) to retain the phrase "having regard to the circumstances of the case" in section 15(1) [Proposal A]; or

   (b) to amend section 15(1)(c) to read: "has special qualifications or experience that are not for sufficient reason otherwise available for the purpose of the case." [Proposal B]

7. Both proposals would preserve the need for the availability of local counsel as a relevant factor in deciding whether a QC should be admitted, while affording flexibility to the Court in deciding the weight of this factor. The proposed wording in each proposal is wide enough to cover both the absence of local expertise and the unavailability of such local expertise through conflict of interest or other reasons. In particular, Proposal A has the advantage of giving the Court 20 years of case law as a starting point in determining the relevant factors for *ad hoc* admission. There is no reason why a broader judicial discretion should not have regard to these factors. For Proposal B, the phrase "sufficient reason" has some jurisprudential basis as it has been the subject of local case law concerning the transfer of cases from the Subordinate Courts to the High Court under the Subordinate Courts Act.

Expansion of "special reason" threshold in section 15(2) beyond criminal law

8. While the Committee welcomes the application of the "special reason" threshold in section 15(2) to more domestic areas of practice beyond criminal law, it is not clear whether the issue of the dearth of Senior Counsel is only confined to commercial and financial disputes. It would appear to the Committee that there is not only a dearth of local specialists in constitutional and administrative law, but also a dearth of local jurisprudence in this area. The Ministry may wish to consider how best to increase the pool of constitutional and administrative law specialists given that with increasing globalization and cross-border disputes, a lack of such expertise may hamper Singapore lawyers in appearing in foreign courts to make constitutional/administrative law arguments.

Restriction of right of appeal from High Court decision

9. The Committee notes that the proposed additions of sections 15(6A) and (6B) seek to restrict the right of appeal from a High Court in that the leave of a Judge is required. If the Judge refuses or grants leave to appeal, no appeal would also be allowed from that decision.

10. The Committee is of the view that any decision refusing or granting an application for *ad hoc* admission should be as of right as there are wider public interest and policy considerations beyond the interests of the parties that the Court of Appeal should have an opportunity to

decide on. Administrative considerations in restricting the right of appeal should be subject to the paramount public interest that is involved in such applications. It is also unclear to the Committee whether, on a comparative analysis, there are other jurisdictions which have limited the right of appeal from a lower Court's decision to the final Court in such a manner. In any event, the proposed amendments do not reflect the true pre-1991 position which the Committee understands to be the Ministry's intention in liberalizing the existing *ad hoc* admission regime.

(B) Persons who may act as counsel in arbitration proceedings

11. The Committee agrees with the Ministry's proposal that lawyers who have been suspended or struck off the roll of their respective jurisdictions should not be permitted to act as counsel in arbitration proceedings in Singapore.

12. As for not allowing non-lawyers and parties themselves to act as counsel in such arbitration proceedings, the Committee has divided views because on the one hand, such a prohibition may affect the ease of use of Singapore as an arbitration centre, while on the other hand, it would be desirable to maintain the standards of arbitration proceedings in Singapore.

(C) Mandatory Continuing Professional Development requirements

13. The Council has no comments on the proposed amendments in this regard.

(D) Disciplinary proceedings

14. The Council has no comments on the proposed amendments in this regard.

Thank you for giving the Law Society the opportunity to give its views in this matter.

Yours faithfully

Alvin Chen
Chief Legal Officer
Director, Representation and Law Reform

cc (1) Council
(2) Admissions Committee