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~ THE LAW SOCIETY OF SINGAPORE ~

**LAW SOCIETY'S RESPONSE TO THE MINISTRY OF LAW'S
PUBLIC CONSULTATION ON THE PROPOSED LICENSING
SCHEME FOR INDEPENDENT COUNSEL**



THE LAW SOCIETY
OF SINGAPORE

1 INTRODUCTION

The Council's views on the Ministry of Law's Consultation Paper ("the Paper") on the proposed licensing scheme for Independent Counsel ("proposed IC Scheme") are based on the following principles that any additional scheme for admission of foreign barristers should:

- (a) not be lightly undertaken without a detailed evaluation of the present ad-hoc admission scheme for Queen's Counsel ("QC Scheme") and the ultimate direction of the Singapore Bar; and
- (b) promote access to justice by members of the public as a key consideration as opposed to reinforcing perceptions that there is a limited pool of Singapore litigation lawyers.

2 THE PREMISES IN THE PAPER

2.1 The Council notes that the objective of the Scheme is to make available the services of top counsel ("Independent Counsel") in commercial and financial disputes (paragraph 9). However, the proposed IC Scheme is based on the following premises in the Paper:

- (a) As the local bar is a small one, the pool of litigation lawyers available to deal with the rapidly growing number of substantial and complex commercial disputes is correspondingly limited (paragraph 1);
- (b) The Chief Justice alluded to the shortage of Senior Counsel who could provide advocacy services in commercial and financial disputes (paragraph 1);
- (c) The addition of such Independent Counsel would add further depth and breadth to a vibrant legal scene, and provide wider choice to clients in the financial and commercial marketplace (paragraph 3); and
- (d) The greater diversity of legal representation in important commercial and financial disputes would in turn maintain Singapore's eminence as a business and financial centre (paragraph 3).

2.2 The Council is disappointed that no detailed information or statistics have been provided in the Paper to support each of the above-mentioned premises.

2.3 In particular, there is no explanation as to how a small panel of Independent Counsels can improve the local legal scene and provide wider choice to clients.

2.4 It is also difficult to understand why the Paper proposes (at paragraph 4) that section 15 of the Legal Profession Act ("Act"), which allows ad-hoc admission of Queen's Counsel, be amended to allow ad-hoc admission for advocacy in the same areas of law as Independent Counsel licensed under the new scheme. Would there be a "lower" class of Queen's Counsels?

3 A DETAILED EVALUATION OF THE PRESENT QC SCHEME AND THE ULTIMATE DIRECTION OF THE SINGAPORE BAR SHOULD BE CONDUCTED

- 3.1 The Paper does not mention whether any detailed evaluation of the present QC Scheme had been conducted and did not examine why the present QC Scheme failed to achieve the same desired outcomes of the proposed IC Scheme, namely, to promote a more vibrant legal scene and provide wider choice to clients in the financial and commercial marketplace.
- 3.2 We note that the Courts have observed that with the maturing of the local Bar and increasing number of Senior Counsels, the QC Scheme would become "increasingly incongruous in our statute books": *Re Millar Gavin James QC* [2008] 1 SLR(R) 297 at [46]. The judicial perspective appears to be that the QC Scheme is purely transitional and will ultimately be repealed.
- 3.3 Even as far back as 10 October 1996, the then Minister for Law, Professor S Jayakumar, said in Parliament that the Singapore legal profession had developed a long way since the early days of the Act. He reiterated (as he indicated in 1991) that the QC Scheme was never meant to be a permanent feature of our legal landscape. He further mentioned that the legislative intent was to progressively reduce our dependence on the QC Scheme, commensurate with the development of the Singapore bar, bearing in mind three factors:
- (a) The differences in Singapore's legal system and the systems in which the QCs operate;
 - (b) For the foreseeable future, Singapore may still need QCs in civil cases, particularly commercial and banking cases; and
 - (c) The development and appointment of SCs in Singapore.
- 3.4 The Paper however does not address the Judiciary's perspective or the legislative intent of the QC Scheme and does not explain why, if the QC Scheme should ultimately be abolished, the proposed IC Scheme should now be introduced at this advanced stage of the growth and development of the Singapore bar, 14 years after the introduction of the Senior Counsel scheme.
- 3.5 It is therefore difficult to accept that a new scheme for admission of foreign barristers should be introduced to reverse the legitimate expectations of the legal profession and the Law Society that a strong domestic Singapore Bar is the ultimate goal. More importantly, the long-term impact of the proposed IC scheme on the development of the Singapore Bar has not been addressed.
- 3.6 The Council also notes that one of the conditions of the proposed IC Scheme is that the "Independent Counsel can only be instructed through Singapore law firms and when so instructed, they are to select a Singapore-qualified lawyer to work with them as a junior". We believe this is intended to ensure the passing of "superior" skills to the local profession. But would this not already be the case under section 15 of the Act?
- 3.7 In this regard, the Council also does not find the rationale that the proposed IC Scheme would give small and medium sized law practices the opportunity to use the services of top counsel convincing. Based on feedback received by Council from practitioners in small and medium sized law practices:

- (a) they were not optimistic that Independent Counsels would retain them as Senior Counsels or as supporting solicitors;
- (b) Independent Counsel would have better relations with larger firms, and so would retain them for logistical support; and
- (c) The Independent Counsels may create a monopoly, and there is no guarantee that these Independent Counsels will be able to devote their time to Singapore litigation.

4 PROMOTION OF ACCESS TO JUSTICE BY MEMBERS OF THE PUBLIC SHOULD BE THE KEY CONSIDERATION

4.1 Although the proposed IC scheme is intended to give wider choice to consumers of legal services and to promote "equality of arms", this is unlikely to be borne out in practice for two reasons:

- (a) The ordinary consumer who requires a quality counsel to represent him in commercial and financial disputes against, for example, financial institutions, is unlikely to be able to afford the fees of an Independent Counsel; and
- (b) Even if the ordinary consumer is able to afford the services of an Independent Counsel, he is likely to incur increased costs arising from the Independent Counsel's lack of familiarity with Singapore civil procedure and legal system.

4.2 Instead, the proposed IC scheme will only reinforce the unsupported perceptions that there is a limited pool of Singapore litigation lawyers to handle the increasing number of the commercial and financial disputes.

4.3 Moreover, it seems to ignore the realities of modern litigation practice that in complex cases, teams of lawyers are involved in the preparation and presentation of the case. By focusing on the need to have SCs or QCs of the same or nearly the same stature and seniority in such cases, this appears to reinforce popular misconceptions in the media on the nature of litigation.

4.4 Furthermore, the proposed IC scheme appears to pander to the perceptions of a small minority who, for some reason or other, take the view that where the opposing side is represented by a top SC, the only alternative is to engage a top QC because the other litigation lawyers in Singapore, whether SCs or otherwise, are just not good enough in a "life-and-death" commercial case. Would not the proposed IC scheme seek to reinforce, rather than dispel, such perceptions? Has the right balance been struck between catering to a small minority's perceptions with the long-term interests of the development of the Singapore Bar?

4.5 Another reason for the proposed IC Scheme is that SCs from the larger law firms are disqualified from acting against financial institutions because their firms may be representing these institutions in related or other matters (paragraph 10). Thus the concern seems to be that there will be very few SCs for the consumer to select from for the purpose of representing him in a commercial or financial dispute. However, this view is premised on the assumption that quality local litigation lawyers who are not SCs, are not in a position to represent these claimants. If the proposed IC Scheme is implemented, such litigation lawyers would have even fewer opportunities to act in such cases and the development of the Singapore Bar would be impeded. In any event, there is no reason why the

present ad hoc scheme under section 15 of the Act cannot be tweaked to cater to such a situation.

5 CONCLUSION

- 5.1 If, notwithstanding the above objections, the Ministry is of the view that a further injection of foreign barristers into the Singapore legal profession is necessary, we are of the view that the appropriate approach is not to introduce the proposed IC Scheme as it is fundamentally flawed, but to revamp the present QC Scheme.
- 5.2 The proposed IC scheme is opaque, and on that argument alone, it would be difficult for the Law Society to support it. On the other hand, the QC scheme under section 15 is transparent and subject to public scrutiny. The right to appear in the Singapore Courts should be matched with an equally transparent application process under the proposed IC scheme, as is the case for all applicants to the Singapore Bar.
- 5.3 A revamped QC scheme would incorporate additional statutory criteria for ad hoc admission which would serve to protect the legal profession by ensuring that only a select group of top QCs are admitted to the Singapore Bar without adversely affecting the development of the Singapore Bar. We suggest the following broad criteria for discussion and would be happy to meet with the Ministry to refine the criteria:
- (a) The applicant's preferred QC must be, at the time of application, a QC and has been a QC for a continuous period of 10 years before the application;
 - (b) The applicant's preferred QC must have at least 10 years' experience in his area of specialisation or be acknowledged by his peers as being in the top tier in his area of specialization;
 - (c) The applicant must show that he is not able to retain an SC or any other local lawyer with the necessary experience and expertise to conduct the case; and
 - (d) The Court should retain a residual discretion to admit a QC in the circumstances of the case in the interests of justice and fairness.

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