



Law Council
OF AUSTRALIA

Office of the President

11 February 2019

Ms Melissa Pang
President
Law Society of Hong Kong
3/F, Wing On House
71 Des Voeux Road, Central
Hong Kong

By email: hc@hklawsoc.org.hk

Dear President Pang

Review of the foreign lawyers' regulatory regime

Thank you again for the Law Society's hospitality during my recent visit for the Opening of the Legal Year.

I write on behalf of the Law Council of Australia in relation to your request for input on proposed changes to Hong Kong's foreign lawyer regulatory regime. I understand that the deadline for responses fell on 31 December 2018, however the Law Council is pleased to offer these submissions in the hope these may still be of some assistance to you in considering this important matter.

The submissions outlined below expand upon the issues raised during our meeting in January 2019 and in my letter of 17 January 2019.

As you know, the Law Council greatly values our long relationship with the Law Society of Hong Kong and appreciates the opportunity to discuss current issues affecting the practise of law in Hong Kong and the region.

The importance of Trade in Legal Services

Trade and investment, particularly at the international level, cannot occur in a legal vacuum. While profit from trade in legal services is important to individual lawyers and law firms, transnational legal services underpin trade and investment across the economy. Fully integrated legal services (i.e. legal services that combine advice on local, foreign and international law), particularly in the transnational commercial and business space, are an essential enabling service that underpins international trade and investment.

Lawyers follow clients and the demand for transnational legal services sits within the broader context of international demand for goods, services and investment. Improved conditions of access for lawyers into overseas markets will have a broader positive impact on overall trade, the availability of foreign investment and the efficiency with which transactions are conducted and disputes concluded.

Overall demand for fully integrated legal services is growing, driven by the growing importance of cross border trade and investment. The availability of these services is underpinned by the implementation of domestic regulation that permits local and foreign lawyers to work together flexibly, to jointly provide advice on local and foreign law.

The Law Council, as the national representative body for Australia's legal profession, urges the Law Society of Hong Kong to consider the potential impacts of the regulatory changes being considered. The Law Council is keen to see that Hong Kong's well-deserved reputation as a leading international legal services market is maintained and enhanced by the outcome of the current review.

Hong Kong law not to be practised by unqualified persons

We note that this review was initiated following concerns from Hong Kong lawyers that some foreign lawyers were purporting to provide services in relation to Hong Kong law, in breach of rule 12 of the Foreign Lawyer Registration Rules.

The Law Council agrees that only "competent, qualified and admitted persons should practise Hong Kong law in Hong Kong" and observes that the same requirement applies in all Australian jurisdictions with respect to the practise of Australian law.

Proposed changes to minimum ratios of local and foreign lawyers

The Law Council is concerned that increasing the ratio of local to foreign lawyers may have unintended, negative consequences on some law firms, especially those with a focus on providing multijurisdictional legal services. You have noted that registered foreign law firms in Hong Kong which transition to establishment as Hong Kong law firms often emphasise providing multi-jurisdictional legal expertise, which is important for their multinational clients.

In particular, the Law Council is concerned that any minimum ratio of local to foreign lawyers will artificially limit the growth of these multi-jurisdictional legal services.

For example, a Hong Kong firm (or a registered association of a Hong Kong firm and a foreign firm) that currently advises on the laws of Hong Kong and Country A may decide to establish a new team of lawyers specialising in the laws of Country B. This change responds to client demand for services covering not only the laws of Hong Kong and Country B but also Country A and Country B, all three jurisdictions together, and Country B only.

In addition to significant investment required to establish this new team of Country B lawyers, the changes under consideration will also oblige the firm to employ two additional lawyers qualified to practise law in Hong Kong for every new lawyer qualified to practise in Country B.

Law firms, especially those exposed to highly competitive international markets, cannot financially sustain the employment of such large numbers of lawyers, regardless of their jurisdiction of qualification, unless this is supported by client demand. Although the domestic market for legal services specialising in Hong Kong law is significant, the global market for multi-jurisdictional legal services is vastly larger.

The situation that emerges is that the range of services that can be offered by firms in Hong Kong will be determined according to the demand for lawyers qualified to advise on the laws of Hong Kong, rather than the level of demand for multijurisdictional legal services. This may in fact have a negative impact on the promotion of local talent, should a foreign law

firm determine that it is more profitable to expand its business in another market (for example by establishing its team of Country B lawyers in Country C).

Further, the Law Council is aware that many foreign lawyers, working alongside local counterparts, support justice and the public interest in Hong Kong by providing pro-bono legal assistance. Should foreign lawyers be further restricted from working in Hong Kong, including by increased minimum ratios of local to foreign lawyers, it is foreseeable that this could significantly impact the availability of these services.

Rather than increasing the minimum ratio of local to foreign lawyers, the Law Council respectfully suggests that the Law Society of Hong Kong consider reducing this ratio, with a view to removing this requirement altogether. It is the Law Council's submission that this would not be incompatible with rule 12 of the Foreign Lawyer Registration Rules, which it is suggested should be maintained and enforced.

Increase in the conversion period

The Law Council does not recommend increasing the minimum period of establishment for foreign firms before becoming eligible to apply for establishment as a Hong Kong law firm. The Law Council's overall position in relation to minimum periods of prior establishment is that there is no necessary connection between the period of time that a foreign firm has been established in a jurisdiction and its capacity to meet other requirements for establishment as local law firm in that jurisdiction.

Rather than serving the public interest or facilitating the multi-jurisdictional practise of law to meet client demand, minimum periods of prior establishment only serve to deter and delay the establishment of firms that would otherwise meet the necessary standards required of local lawyers to establish a new law firm.

The Law Council submits that eligibility to seek establishment should be contingent on a firm meeting the same substantive requirements as currently apply to the establishment of a new local law firm. In this regard, we note the requirements under rules 4A and 4B of the Solicitors' Practice Rules, which relate to the proper supervision and management of work undertaken by Hong Kong law firms.

We also note that these requirements do not include any waiting period in the event that a Hong Kong Firm is established solely by one or more lawyers qualified to practise law as a principal in Hong Kong.

Forms of commercial association can range from short-term ad hoc relationships formed between two firms to full scale mergers between local and foreign firms. Permitting individual lawyers and law firms to adopt the commercial structure that best suits their value proposition and to respond quickly to changing circumstances in the market (particularly affected by prior establishment requirements) will help to ensure that the greatest possible range of transnational legal services continue to be available in Hong Kong. The Law Council submits that doing so is manifestly in the interests of their clients and serves the public interest.

Like the legal profession in Hong Kong, the Australian legal profession is supported by:

- high quality qualifications and continuing legal education requirements;
- strong professional norms in favour of regulatory compliance and observance of robust ethical obligations;
- the integrity of Australia's system of professional regulation; and

- the high degree of experience and expertise in international practice brought about through Australia's well-established acceptance of the practise of foreign law by foreign lawyers as an important part of Australia's legal services market.

In this respect, we note that Australian lawyers rely heavily on personal reputation and the reputation of their firm for providing high quality legal services. The reputational risk of any international venture is carefully considered as part of any process for determining whether to expand to a new market. This risk is a substantial deterrent to establishing firms in Hong Kong to take advantage of or exploit local client groups or make speculative investments overseas.

Transitional periods and changes in fees

The Law Council supports the use of transitional periods and the implementation of reasonable fees to enable the Law Society to perform its role in overseeing the practise of foreign law in Hong Kong, including through the registration of foreign lawyers.

However, it is noted that the complexity of local regulatory requirements in relation to foreign lawyers is directly linked to the cost of overseeing those requirements. Wherever possible, the Law Council urges the adoption of measures that are the least burdensome necessary to achieve the desired regulatory outcome.

In the case of Australian lawyers, the Law Council notes the existence of extensive Australian regulation governing the practise of Australian law, wherever that takes place, and the existence of other professional duties, such as duties to the Court. These already serve to guide the conduct of legal practise by Australian lawyers and are a common feature across most legal jurisdictions. Excessive regulation may only serve to duplicate what is already in place, without necessarily resulting in increased protection for clients or the public interest.

If you require any additional information or would like to discuss these submissions further, please contact Margery Nicoll, Deputy CEO and Director International, on +61 2 6246 3723 or at Margery.Nicoll@lawcouncil.asn.au.

I look forward to continuing to work productively with you and your colleagues at the Law Society of Hong Kong in the year ahead.

Yours sincerely



Arthur Moses SC
President