SPEECH FOR OPENING OF THE LEGAL YEAR 2007

(Chief Justice, Secretary for Justice, President of the Law Society, Judges and Magistrates, Distinguished Guests, Members of the Legal Profession, Ladies and Gentlemen)

It is nearly a decade ago since HK came out of the long shadow of colonial rule, a rule which had become more and more benevolent as the deadline for the resumption of sovereignty approached and colonial government sought to make up for decades of benign neglect.

Looking back, it is difficult to credit that many people then had feelings of apprehension and, in some cases, anxiety as they awaited midnight on 30 June 1997. Some feared particularly for key constitutional institutions such as an independent judiciary supported by an independent bar and a competent and skilful solicitors' profession.

Ten years down the road and it is clear that those fears were largely misplaced. There were rocky moments at the start but they passed and, after a period of careful consolidation, Hong Kong has developed a mature justice system of its own that is the envy of almost all other countries in Asia. Its judges are manifestly its own; they are competent; they are versatile, and, above all else, they are independent and impartial in administering a venerable common law system within constitutional rights-based arrangements under the Basic Law.

The Bar, for its part, has developed too in that time. It has grown now to about a thousand. More and more barristers offer specializations in subjects that, ten or fifteen years ago, were barely known here or could only be sourced by wealthy clients who could afford to have resort to our distant cousins in the Inns of Court in London. The solicitors' side of the profession has also come on in leaps and bounds with the growing specialization and globalisation of legal services. At this juncture I am glad to say that this year the Law Society celebrates its centennial year. May I take this

opportunity to congratulate its President on this achievement and wish the institution every success for another 100 years.

After such a lengthy period of consolidation it is right that the justice system takes stock of itself and changes so that it can match the challenges of this new century. Changes like the ones proposed in the Civil Justice Reform package might be unwelcome to traditionalists but they are clearly needed. Also welcome, because it is necessary to make litigants have resort to the courts as a last resort, is the growing judicial interest in alternative dispute resolution and the growth of professional practice in this area. Another possible innovation in the next year or so may be the extension of higher rights of audience to some qualified solicitors. If it happens, this will come as a shock to the system to many barristers but the Bar does not, and will not, oppose changes in the justice system that can be clearly justified in the public interest.

It is right too that the Bar takes stock of itself too now. The debate about higher rights of audience has coincided with a period when the Bar has been investing many of its resources, both human and financial, in advocacy training and structured practical exercises for the new practitioner. Based on the experiences gathered from such training and looking at the experience of independent bars elsewhere, the Bar Council is convinced that the future of the Bar lies in assuring the public that its members have the necessary practical skills that entitle them to hold themselves out as skilled and independent advocates and are not merely persons entitled to plead a case before the courts which, after all, is the right of any person presenting his or her own case but is not advocacy.

The next Bar Council will have as a legacy from the outgoing council a policy decision that the Bar should, as a matter of priority, seek to develop its existing scheme for mandatory advanced legal education to include requirements that pupil barristers be expertly assessed for practical and advocacy skills before completing pupillage and starting practice.

It is contemplated that under the new regime it will no longer be sufficient for a neophyte barrister to rely on the elementary advocacy training received in the PCLL

course which is, after all, meant to serve entry into both sides of the profession. Those with the potential and the drive to be independent advocates do, of course, make the most of such common training and come to the Bar and make a success of it. But the Bar cannot afford to become a refuge for those who become advocates almost for want of anything better to do and who may not possess the necessary basic professional practical skills. It owes that to itself and to the public at large even though the cost of arranging such extra training may be significant.

With the possibility of enhanced advocacy and practical training for barristers, and the possibility of something along the same lines for solicitors who wish to acquire higher rights of audience, the focus for the next few years is likely to be on the need for lawyers to demonstrate the professional skills necessary to discharge the many responsibilities that fall upon the advocate and the willingness of the respective professional bodies to maintain and improve standards.

I hope government legal services keeps up with the changes that may be afoot in both professions. Although nearly all lawyers working for the government are qualified Hong Kong barristers or solicitors, they do not practice as such but, instead, practice as legal officers under the Legal Officers Ordinance and, as such, are not practising members of the Bar or Law Society.

That is regrettable in my opinion. Government lawyers may take the benefits of professional qualification but do not assume any of the burdens that go with it, including the making of financial contributions to the development of the professions that comes automatically with being a practising member of one or other of the two professional associations.

The community of lawyers would, I think, be a healthier body if government lawyers were wholly within the professional fold and were not loitering just outside it. Changes in the way rights of audience are earned by both solicitors and barristers may, in any event, require a re-think of the policy behind the ordinance. It, amazingly, still allows automatic qualification to lawyers qualified to practice in diverse common law jurisdictions, including the Canada, Zimbabwe and Singapore, and offers such lawyers the right to appear at all levels of court in Hong Kong, even if such right

would not be available to them at home if they, like solicitors qualified in Hong Kong and hired as legal officers, sought to practice by relying on their actual qualification. Such vestigial colonial privileges concerning the legal professions disappeared from the Legal Practitioners Ordinance years ago, and, in my view, rightly so.

Also remarkable is that there is now no shortage of lawyers willing to provide professional advocacy services to the government, either on a salaried full-time basis or through *ad hoc* arrangements, but that the Department of Justice continues to employ unqualified persons to handle contentious prosecutions before magistrates. Defenders of these arrangements say that unqualified prosecutors are good value and, besides, many of them are specially trained by qualified persons, popularly known as 'lay prosecutors', who are appointed as 'public prosecutors' under s.13 Magistrates Ordinance.

I have no reason to doubt the quality of the training, although it is not validated by any external body that I know of or by any of the legal professions, but the concept of 'lay prosecution' remains, in my view, oxymoronic though it is admittedly, a less frightening concept than 'lay dentistry' or 'lay surgery'.

Certainly a case can be made for employing unqualified persons as para-legals for non-contentious cases where no one's liberty is likely to be at risk but I submit that employing unqualified persons to prosecute contentious serious offences, i.e. imprisonable offences where people can and do go to prison for up to three years, and where professional judgment is called for during a trial, may indeed be good value for money by the bureaucratic standards of a civil service auditor, but it is not really acceptable in this day and age. It is also, in my opinion, a false economy to train public officers who can only prosecute offences in one court and cannot aspire to any other kind of legal work whilst they remain unqualified.

Employing unqualified persons to prosecute is, in any event, on the face of it, inconsistent with the UN Guidelines on the Role Of Prosecutors adopted in 1990 which lays down minimum standards for prosecutors, which standards include adherence to a code of professional conduct. The Bar's Code of Conduct, which applies to barristers when they defend or prosecute, is such a code. The Law Society

also has its own code. Unqualified persons providing legal services are, by definition, not bound by any professional code.

At this event last year I concluded my speech about the prolix and obscure legal language in some of our laws by urging change and reminding the custodians of our inherited colonial legal institutions that occasional revision was needed and that procrastination was simply the art of keeping up with yesterday. Although the Magistrates Ordinance has yet to be rendered into intelligible English or Chinese and lay-persons must still puzzle over the elaborate syntax of the early Victorian draftsman to work out what is going on, there are signs in another area that it has been recognized by the Administration that the status quo cannot be maintained because it is positively inimical to the development of a healthy justice system.

After almost a year of meetings with the Bar and the Law Society and other interested parties, agreement in principle has been reached recently to revise drastically the methodology under which barristers and solicitors are remunerated for doing publicly-funded criminal defence work. I spoke in graphic terms of the system's inadequacies two years ago and urged change because as things stood there was no incentive for talented barristers to do this necessary work.

I am pleased that change is coming though it is too early to say precisely how the changes will affect the remuneration that barristers and solicitors will receive except that I am confident that there will be significant improvements in key areas which will meet the concerns of the professions and the judiciary.

It remains for me to bid you all a prosperous New Year.

Philip Dykes SC
Chairman
Hong Kong Bar Association

8th January 2007