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1997 pact not calmed lawyers' fears — Litton

By LINDY COURSE

Some barristers' anxieties and fears about the future have not been totally allayed by the joint declaration, the outgoing chairman of the Bar Association, Mr Henry Litton, QC, said last night.

In his statement to the Bar's annual general meeting, Mr Litton said he was aware of tensions beneath the surface of the Bar during the past year, which has resulted in anonymous letters, apparently from barristers, in the press.

"These fears regarding future political and constitutional changes have surfaced at a time when, because of the downturn in business in Hongkong (particularly in the property field), some junior barristers have found themselves under-employed."

While the Bar Committee was sympathetic to these barristers, Mr Litton said if the Bar was to retain its independence, it must be accepted that nobody owes the Bar a living.

He went on to outline some other issues which have concerned the Bar Committee over the past 12 months.

The rise in the number of overseas Queen's Counsel appearing in Hongkong courts leapt from 57 applications in 1978 to 101 for the first 11 months last year and caused anxiety.

So in January last year, the committee drew up guidelines to control overseas admissions to try to "confine such cases within proper limits."

Mr Litton stressed that the Bar was not trying to exclude overseas silks in those cases where their particular knowledge and expertise could be used.

The Bar opposed five applications last year, only two of which were pursued.

Mr Litton

The Attorney-General supported the Bar in both cases and the applications were turned down.

The Chief Justice, in a judgment published in the Bar's annual statement, drew up guidelines, which were similar to those of the Bar.

Sir Denys Roberts said the paramount factor is the public interest, and it was in the public interest that there should be a strong and independent local Bar.

But if the local Bar cannot meet the needs of Hongkong clients, it is also in the public interest that overseas counsel should be admitted.

"The general rule that a litigant is entitled to counsel of his choice means no more than that he has a right to choose counsel who are available and entitled to practise. He has no right to demand that overseas counsel be admitted for the purpose of representing him."

The onus lies on the applicant to show why an overseas counsel should be admitted and some examples given by Sir Denys were:

- That no local counsel of appropriate skill and experience is available.
- That the case is unusually difficult or complicated.
- That specialist knowledge not available from the local Bar is required.
- That the case is of such a nature as to make it desirable for overseas counsel to appear, for example, a case involving a well-known local personality.
- That no local counsel of appropriate skill and experience is available at a fee within the client's range whereas an overseas counsel is.

Mr Litton repeated that the Bar Association was against the use of lay adjudicators in complex commercial trials instead of a jury.

Some members did not think it was the right time to introduce radical changes in criminal trials.

They also did not like the fact that the judge and assessors did not have to give a reason for their verdict.

Many members felt improving and strengthening the system of trial by jury, for instance, reactivating the panel of special jurors, would be more useful, said Mr Litton.

But he added some proposals would be supported by most barristers, like the proposal that adjudicators be used in district courts as well as the High Court.

Turning to localisation of the judiciary, Mr Litton said it was particularly important in the magistracies, where Cantonese and other indigenous dialects should be encouraged.

Mr Litton recognised that how rapidly this should come about is a delicate issue, for while Hongkong remains a leading world trade and financial centre, it should develop laws and legal institutions along the same lines as the rest of the Commonwealth.

But he said there should be a "genuine and dedicated endeavour" towards localisation.

He criticised the recent recruitment for local magistrates as being "unimaginative" — a small advertisement which appeared in the classified columns of the SCM Post on November 19 allowed just one week for applications.

Cynics may say this advert was mere "window-dressing," said Mr Litton.

He went on to urge the Government to repeal mandatory sentencing for possessing an offensive weapon under section 33 of the Public Order Ordinance.

Instead, he said the Government should substitute a guideline for six months' jail for the mandatory sentence.

A Causeway Bay Court magistrate in November said the Attorney-General usurped the magistrate's sentencing discretion when he proceeds under this section rather than section 17 of the Summary Offences Ordinance which deals with the same offence and leaves the magistrate to decide on a sentence up to $5,000 fine and two years' jail.

Another magistrate acquitted two youths charged under section 33 shortly afterwards because "one has to be particularly careful in considering the evidence in any charge which carries a mandatory sentence."

Mr Litton said the minimum six-month jail sentence inevitably leads the magistrate to look for a higher degree of proof for conviction or, alternatively, a lesser degree of doubt for acquittal.

"It may well be that the Legal Department's assertion that the mandatory sentence has a deterrent effect is very wide of the mark, and that on the contrary defendants have had a better chance of being acquitted since 1972 when this section was enacted."

The committee was aware that some members were dissatisfied about the assignment of criminal cases in the High Court by the Legal Aid Department.

"It is thought by some that the work is concentrated in far too few hands."

But Mr Litton said it would not be proper for them to go too far in influencing the distribution of work by the Legal Aid Department.

He said the Director of Legal Aid was aware of the problems and that the Committee had now submitted a "legal aid panel" of barristers available for High Court work.