

LETTERHEAD OF THE LAW SOCIETY OF HONG KONG

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Direct Line :

15 October, 2001

Mrs. Percy Ma
Clerk to Subcommittee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mrs. Ma,

**Sub-committee on Solicitors (Professional Indemnity)
(Amendment) Rules 2001**

**Meeting on 16 October 2001 and follow up to
Meeting of 10 October 2001**

Thank you for your letter dated 10 October.

The Law Society has the following comments on the points raised in your letter: -

- (a) Extracts from the draft Solicitor Corporation Rules are annexed. In accordance with Rule 4(7) any laws, enactments, rules, regulations, practice directions and codes of conduct relating to the practice of a solicitor will continue to apply to solicitors within a solicitor corporation. A solicitor practising in a solicitor corporation must comply with the Solicitors (Professional Indemnity) Rules. Section 7 of the Legal Practitioners Ordinance provides that a person is qualified to act as a solicitor only if (inter alia) he is complying with the professional indemnity rules, or has been granted an exemption from compliance. Within the writer's recollection exemption has only once been granted to a solicitor in private practice.
- (b) (1) If the amendment rules are repealed the repeal takes effect on the date on which notice of the repeal is gazetted but has no effect in respect of acts carried out prior to that date. The contributions from members in respect of the indemnity year 2001/2 have already been collected and the premium

paid to re-insurers in accordance with the contractual obligations of HKSIF.

- (2) Validation for one year will have no effect on the current indemnity year (2001/2). However it will, of course, require the Law Society to repeat the exercise of seeking increases in contributions to meet the premiums payable to re-insurers for the third year of the contract and to fund claims in respect of that part of the claims exposure retained by the scheme.

Honourable members should appreciate that the Law Society has statutory authority to maintain a fund to provide indemnity against claims made by the public against members of the profession. In accordance with prudent management the fund is insured against loss through cover provided by re-insurers. The re-insurers will only provide indemnity cover if the premiums set out in the 5-year contract with each of them are paid. If the premium is not paid the re-insurers will not provide cover and the fund will have to look elsewhere for the money to pay claims. The Council has authority to make a call on members to make good any deficit in the fund and if there are insufficient moneys to pay the premium and all claims the Council will make such calls as are necessary in order to ensure that adequate re-insurance and funds are available to meet legitimate claims. Any solicitor who is unable to obtain professional indemnity cover under the Solicitors (Professional Indemnity) Rules because of inability of the HKSIF to provide that cover through lack of funds, will cease to be qualified to practise as a solicitor in accordance with section 7 of the Legal Practitioners Ordinance.

In accordance with its obligations and on the advice of its scheme managers and actuaries, the decision was taken by the Council of the Law Society on the recommendation of HKSIF and following a forum of its members, to enter into a 5 year contract with re-insurers in order to provide indemnity cover for solicitors until 2005. What is being suggested is that the Legislative Council should pass the amendment rules for a limited period at the end of which the former rules including the contribution formula will re-apply. The effect of that would be to prevent the Law Society from carrying out its statutory function of providing a self insured professional indemnity scheme and to place it in a position where it will be in breach of contract with re-insurers as well as depriving the public of the protection that the number of notified claims indicate is much needed. That surely would not be a result which the Legislature would wish to bring about?

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- (c) Whilst the Law Society has always said that it will consider risk banding this is not an issue that can be resolved in isolation or in haste. Professional indemnity insurance is inevitably a complex issue involving the correlation of risk against known factors and variables complicated by such issues as, for example, the fact that the cover is provided in the indemnity year of reporting a claim notwithstanding that the act giving rise to the claim may have occurred many years earlier as the result of negligence by a solicitor no longer employed by the firm reporting the claim. It has to be appreciated that the calculation of the formula for payment of contributions is a delicately balanced equation in which the variables of gross fee income, number of fee earners and claims loading and deductibles all play an intrinsic part. If one aspect is to be varied there would inevitably have to be adjustment to the other parts of the equation. There never has been an element of risk banding within the scheme for a variety of reasons not least of which is that historically the majority of the profession has engaged to a greater or lesser degree in conveyancing which is regarded by insurers as being the highest risk area of practice in Hong Kong. It should be noted also that some of the largest firms which are known to subsidise the scheme by payment of proportionately high premium for the cover provided do not practise conveyancing. If the contribution which these firms make to the total revenue was to be significantly reduced the shortfall in contributions would have to be compensated by a large increase in the contributions levied upon the conveyancing firms which traditionally have been the smaller, local firms. It is considerations such as these as well as the propensity for firms to change the nature of their practice during an indemnity year that need to be looked at carefully and resolved.

You mention "taking into account a firm's no claim record". The rules already provide for claims loading (See Schedule 1 para. 6 of the Solicitors (Professional Indemnity) Rules whereby those firms with a claim during the preceding indemnity year are required to pay a contribution at a level increased by up to 350% of the basic contribution over the following 4 years. Additionally on settlement of any claim a firm is required to pay a proportion of the claim dependent upon the number of principals, consultants and assistant solicitors that it has. These payments are known as deductibles and the amended rules provide for an increase in their level payable by firms with a bad claims history. (See clause 7(b)).

Members are no doubt aware of the time that it takes for legislation to be prepared and enacted before recommendations from a review agreed after consultation with members can be implemented. The Law Society regards the review as a matter of high priority but is determined that this costly and wide reaching exercise is carried out

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properly and effectively. It cannot be done overnight or even within a matter of months. A review of the scheme will take time and will probably require the input of a considerable amount of data from individual firms, the claims managers, actuaries and the Law Society. At present the Law Society is making enquiries to identify potential candidates for the review.

It would be unwise to attempt to rush such a review. Neither the Law Society, HKSIF, solicitors nor the public can afford to "get it wrong" because once change has been implemented it will be almost impossible to revert to an earlier format.

I might add that even if as a result of the review it is decided that there should be a Qualified Insurers Programme or its equivalent there would still need to be a fund maintained for the purpose of meeting claims which were notified prior to cessation of the existing mutual insurance scheme.

I shall be grateful if you will pass on this letter to all members of the sub-committee.

Yours sincerely,

Patrick Moss
Secretary General

PM/dp

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Extracts from the draft Solicitor Corporation Rules

3. Qualification for approval as a solicitor corporation

(1) Subject to the discretion of the Council pursuant to rule 2(5), a company is qualified to be approved as a solicitor corporation if —

- (a) it is a company limited by shares and formed and registered under the Companies Ordinance (Cap 32);
- (b) all the members of the company are directors or employees of the company;
- (c) all the directors of the company are members or employees of the company;
- (d) subject to subrule (2), every member and every director of the company is an individual:
 - (i) who is a solicitor holding a current practising certificate which is not subject to any condition other than the condition that he shall comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of the Ordinance; and
 - (ii) who is employed in the practice of a solicitor or a solicitor corporation in Hong Kong or who is practising as a solicitor on his own account or in partnership in Hong Kong or who is a member or director of a solicitor corporation or has been in any such employment or practice or has been a member or director of a solicitor corporation not more than 12 months prior to his becoming a member or director of the company;

4. Conduct of solicitor corporation

(1) The business of a solicitor corporation shall be limited to carrying on the Practice.

(2) A solicitor corporation shall at all times be managed and controlled by a solicitor or solicitors.

(3) A solicitor corporation shall at all times comply with these rules, including, in particular, rule 3(1), subject to any waiver of any of the requirements of rule 3(1) by the Council under rule 3(5).

(4) For the purpose of attending and voting at meetings, a member of a solicitor corporation shall not appoint as a proxy any person other than a solicitor who is a member, officer or employee of the solicitor corporation.

(5) A solicitor corporation shall provide the Society with a copy of all the documents it is required to submit to the Companies Registry under the Companies Ordinance (Cap.32) at or before the time limit provided for in the Companies Ordinance (Cap.32).

(6) A member, director or an employee of a solicitor corporation who is a solicitor, whether he holds a current practising certificate or not, shall not without the prior written consent of the Council —

- (a) hold in any capacity whatsoever including that of trustee, or own beneficially any interest in any share in any other solicitor corporation;
- (b) be or act as a director, consultant or employee of any other solicitor corporation;
- (c) be or act as a partner, consultant or employee of a firm; or
- (d) practise as a solicitor on his own account.

(7) These rules shall not operate to affect the applicability to a solicitor of any laws, enactments, rules, regulations, practice directions and codes of conduct relating to the practice of a solicitor by virtue only of the fact that the solicitor is practising as a solicitor in his capacity as a director, consultant or employee of a solicitor corporation.