

LC Paper No. CB(2)2701/03-04(01)

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29th May 2004

Mr. Robert Allcock,
 Solicitor General,
 Department of Justice,
 1st & 4th Floors, High Block,
 Queensway Government Offices,
 66 Queensway, Hong Kong

By fax (2869 0720) & by post*Dear Bob,*Review of Solicitors Professional Indemnity Scheme (PIS)

I refer to the paper of the Legal Policy Division of the Department of Justice on the captioned subject tabled at the last meeting of the Panel on Administration of Justice and Legal Services.

I understand the paper was prepared in response to the request of the Panel during its discussion on the way forward for the PIS presented by the Law Society at the meeting held on 26 April 2004, at which the representatives of the Law Society indicated that the Government's position on the current proposals for change is crucial. The proposals referred to two options for replacing the present PIS, on which the Law Society is consulting its members.

The paper appears to rule out both options until the establishment of a Policyholders' Protection Fund (PPF) which has not yet been adopted by the Insurance Authority, and even if adopted will take 3-5 years to establish. On this basis, the Government's position is that it opposes changing the present scheme. This is a very serious position to have taken, in view of the fact that there is consensus in the profession that the present scheme is unsatisfactory and should not be maintained, and the view is backed up by an indepth study carried out by independent consultants with expertise in the subject, instructed with the mandate of the members of the Law Society. The options being proposed are based on the recommendation of the consultant's report – the Willis Report which the paper quotes from liberally and with approval.

As LegCo member for the Legal Functional Constituency, I am deeply disturbed by this unusually negative and unhelpful attitude expressed by the Department of Justice. The Law Society and its members are facing a dire situation and are doing their best to find a solution which is affordable to practitioners and consistent with the public interest. This is a matter of great importance not only to practitioners, but involves the provision

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of legal services in the Hong Kong SAR as a whole. I am therefore anxious to put forward my views below for your consideration.

1. Legislative framework and background: The paper usefully sets out the legislative provisions and background. It is noteworthy that the public interest was sought to be protected by requiring solicitors to take out professional indemnity insurance for an adequate amount. This is consistent with the position stated in your letter of 11 May 2004 to the Law Society, and a letter of the Department of Justice to the LegCo sub-committee on the Solicitors (Professional Indemnity) (Amendment) Rules in 2001.

The legislative history shows that the scheme the Law Society chose to set up to meet its legal obligation was left to the Law Society as a self-regulating body, subject to the approval of the Chief Justice. What governed the choice of a Master Policy in 1980 and the change to a mutual fund in 1989 were practical considerations. Both forms were similar to a number of other jurisdictions, and neither the Government nor the Legislature of the day intervened.

Solicitors generally support the continuation of compulsory insurance. There is no pressing demand for the present amount of \$10 million per claim to be reduced. Thus solicitors do not seek to resile from their obligation to meet the public interest. All they ask is that they meet their obligation through a scheme which is viable in practice.

2. Public interest does not require solicitors to be insurers of last resort for each other: If this were required it would have been provided in the principal legislation. There is no evidence that the public is not adequately protected unless compulsory insurance is set up as a mutual fund. Professional indemnity in England and Wales is provided under a QIS. There is no suggestion that it does not provide adequate public protection.

3. The absence of PPF in Hong Kong: The paper suggests that a retention of mutuality of \$1.5 million proposed by the Law Society is not adequate protection for the public without a PPF in place. It argues that QIS in England and Wales is distinguishable because of the existence of PPF. However, as a London solicitors involved in the QIS informed LegCo's sub-committee on the Solicitors (Professional) (Amendment) Rules 2001, the significance of the PPF in England is peripheral. The proposal of a PPF in Hong Kong currently under consideration is still undecided. The consultation document on PPF issued by the Insurance Commissioner is not primarily meant for professional indemnity and contains no assessment of its effect. Above all, PPF may not be established in the HKSAR in the end because of insufficient support (e.g. the Hong Kong Federation of Insurers has submitted their views to the Commissioner opposing it). It would be most

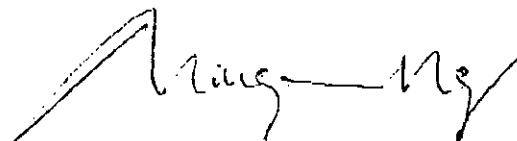
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unreasonable that solicitors should be required to be insurers of the last record for each other for good.

4. Public interest and vibrant legal services: The present PIS is deeply dissatisfactory for many reasons: moral hazard, poor management, inherent conflict of interest being some of them. As the experience in England and Wales demonstrates, risk management is most effective when solicitors have to seek their own insurance. An argument for compulsory insurance put forward in the paper is that otherwise the public will have confidence only in big firms and the small firms will be lost out. Under the present scheme, it is the small and medium firms which are the hardest and most immediately hit, so much so that these practitioners have been driven to fight for their survival. The very scene of only big firms can afford to practise in Hong Kong now looms large. These equally important questions should be addressed, and the Department of Justice should facilitate the Law Society's plan to address them.

As pointed out in the paper, change requires legislative amendment and that takes time. If the present window is missed, solicitors may have to endure the present hardship for a long time. In view of all the above, I earnestly hope that as the official responsible for legal policy, you will reconsider the Government's position.

Yours sincerely,



Margaret Ng

c.c. Mr. Michael Lintern-Smith
President
Law Society of Hong Kong

Clerk
Panel on Administrative of Justice and Legal Services
Legislative Council