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Panel on Administration of Justice and Legal Services

Background brief prepared by Legislative Council Secretariat

Solicitor Corporations Rules

Purpose

This paper highlights the past discussions of the Panel on Administration of Justice and Legal Services (AJLS Panel) on the progress of implementation of the recommendation on the incorporation of solicitors' practices in the last legislative term.

Background

2. In 1995, the then Attorney General's Chambers published a Consultation Paper on Legal Services which made a number of proposals regarding legal services of Hong Kong. One proposal was to allow solicitors to incorporate their practices as companies. An incorporated company is in law a separate legal entity, distinct from its members. Shareholders of a company with limited liability are only liable to the extent of the unpaid nominal capital of the shares which they own. The view expressed in the Consultation Paper was that, subject to proper safeguards, solicitors should be permitted to incorporate their practices with either limited or unlimited liability.

3. Clause 2 of the Legal Services Legislation (Miscellaneous Amendments) Bill 1996, which was enacted in June 1997, sought to add new provisions to the Legal Practitioners Ordinance (Cap. 159) to enable solicitors to incorporate their practices as solicitor corporations. These included amendments to sections 73 and 73A of the Legal Practitioners Ordinance to provide that the Council of the Law Society might make rules in respect of the establishment of solicitor corporations and fees payable to the Law Society for applications for registration as a solicitor corporation, as well as professional indemnity cover of solicitor corporations. The new provisions should take effect on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

4. The AJLS Panel held three meetings, on 19 December 2000, 27 May 2002 and 24 November 2003 respectively, to discuss the progress of implementation of the recommendation on the incorporation of solicitors' practices including the drafting of the Solicitor Corporations Rules (the draft Rules). At the Panel meeting on 24 November 2003, the Law Society briefed the Panel on specific provisions of the draft Rules, the Solicitor Corporations (Fees) Rules and the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules.

Major issues discussed by the Panel

Preparation of the draft Rules

5. In answer to members' enquiries, the Law Society informed the Panel that in preparing the draft Rules, the Society had undertaken research on issues relating to incorporation of solicitors' practices in some overseas common law jurisdictions. The Society pointed out that consideration of the issues involved detailed discussion on the way in which solicitor corporations would conform to existing practice rules, including those relating to the Solicitors Professional Indemnity Scheme, compliance with rules of conduct as well as other regulatory matters. The ultimate objective was to ensure that proper safeguards would be provided to users of legal services, while allowing solicitors greater flexibility in the manner in which they ran their practice.

6. The Law Society further informed the Panel that it would continue to study whether limited liability partnerships for legal practice (i.e. partnership of solicitors as a legal entity of limited liability under certain circumstances), which were a new development in England and Wales, would be a better alternative than solicitor corporations for Hong Kong.

Top-up insurance

7. At the Panel meeting on 27 May 2002, the Administration informed members that it had studied the draft Rules issued by the Law Society in June 2001 for comments by its members and the Administration. The Administration considered that the major outstanding issue of concern was in relation to insurance of solicitor corporations for the protection of consumers.

8. The Administration had noted that there was no provision in the draft Rules requiring a solicitor corporation to have insurance coverage before it could be approved as a solicitor corporation. The Administration considered it essential that, for the protection of consumers, adequate indemnity insurance should be taken out by solicitor corporations to cover civil claims made by their clients. The Administration suggested that the Law Society should consider whether the existing minimum coverage taken out by a solicitors firm was sufficient for solicitor corporations.

9. The Law Society informed the Panel that legislative amendments would be made to include solicitor corporations in the definition of “indemnified” under the Solicitors (Professional Indemnity) Rules. In its view, the cover provided by the existing Solicitors Professional Indemnity Scheme was sufficient protection for the public. Also, in addition to the mandatory \$10 million insurance coverage for each and every claim made by clients, it was not uncommon for some larger solicitors firms to take out additional indemnity insurance.

10. A member of the Panel expressed the view that the requirement of top-up insurance would defeat the legislative intent of incorporation of solicitors firms. The member pointed out that the reason why incorporation of solicitors was contemplated was that the present system was considered to be too onerous on solicitors firms as solicitors had to pay from their own private means, if necessary, for the faults of their partners even though they had nothing to do with the negligent act.

11. The Administration had reviewed its position and advised the Panel in November 2003 that it would not insist on the requirement of top-up insurance for solicitor corporations at the present stage. Whether the need for top-up insurance should be further assessed would depend on the outcome of the Law Society’s review on the existing Professional Indemnity Scheme and the practical operation of the Solicitor Corporations Rules.

12. The Law Society also explained that amendments would be made to the Solicitors (Professional Indemnity) Rules, which would put the solicitors and their staff working in a solicitor corporation in the same position as though they were practicing through the existing form of sole proprietorship or partnership. Any claims against a solicitor corporation would proceed against the Solicitors Indemnity Fund in the normal way.

Requirement in relation to member and director of a solicitor corporation

13. Under rule 3(1)(d)(i) of the draft Solicitor Corporations Rules, every member and every director of a solicitor corporation must be an individual who was a solicitor holding a current practicing certificate which was not subject to any condition other than the condition that he should comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of the Legal Practitioners Ordinance. The Law Society pointed out that with the coming into force of the Practising Certificate (Special Conditions) Rules, which enabled the Society to impose conditions on the practicing certificate of a solicitor, concern had been raised as to whether the conditions imposed by the Law Society would bar the solicitor from becoming a member or director of a solicitor corporation. The Law Society advised that its Council would further consider the matter and would introduce relevant amendment to the draft Rules, if necessary.

14. The Law Society also pointed out that rule 3(2) of the draft Rules required that a solicitor corporation established by a sole practitioner must have a second member.

A member of the Panel had suggested to the Law Society that it should review the drafting of rule 3(2) in the light of the relevant statutory requirements under the Companies Ordinance to achieve consistency.

Legislative timetable

15. The Law Society informed the Panel at the meeting on 24 November 2003 that it had sought the views of its members on the draft Rules. Its members would be consulted again if the Law Society Council considered that further amendments to the draft Rules were necessary. The finalised Rules would then be submitted to the Chief Justice for approval and gazetted. The Law Society expected that this could be done by early 2004.

Relevant papers

16. The following papers are attached for members' reference –

- (a) paper provided by the Law Society for the Panel meeting on 19 December 2000 (**Appendix I**);
- (b) paper provided by the Administration for the Panel meeting on 27 May 2002 (**Appendix II**);
- (c) paper provided by the Law Society for the Panel meeting on 24 November 2003 enclosing the draft Solicitor Corporations Rules, Solicitor Corporations (Fees) Rules, and the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules (**Appendix III**);
- (d) extract from minutes of the Panel meeting on 19 December 2000 (**Appendix IV**);
- (e) extract from minutes of the Panel meeting on 27 May 2002 (**Appendix V**); and
- (f) extract from minutes of the Panel meeting on 24 November 2003 (**Appendix VI**).

INCORPORATION OF SOLICITORS' PRACTICES

In 1995 the Government published a Consultation Paper on Legal Services which contained arguments in favour of allowing solicitors to incorporate their practices. (Para. 10.11 et seq.) The Consultation Paper suggested that the shareholders of such a practice would only be liable to the extent of the unpaid nominal capital of the shares which they owned. Compared to a partnership in which each of the partners is liable to the full extent of his partnership and private assets for any liability of the practice incurred by the partners or employees, incorporation is, on the face of it, an attractive proposition.

In consequence of this the Law Society supported the proposal and in due course amendments were made to the Legal Practitioners Ordinance through the Legal Services (Miscellaneous Amendments) Bill which passed into law in the end of June 1997. Those amendments were slightly unusual in that they provided the authority to enable solicitors to incorporate but left it to the Law Society to provide the rules under which incorporation was to take place.

Immediately after the change of sovereignty there was a collapse of the property market, the effective abolition of scale fees and a general economic recession. There were other more pressing livelihood issues occupying the Law Society at the time and an absence of any demand from members for rules to be promulgated to enable them to incorporate. Accordingly there was not the highest priority given to the drawing up of rules for incorporation.

However the Law Society undertook research on the issues relating to incorporation particularly in overseas common law jurisdictions including England & Wales, Australia, Canada, South Africa, Northern Ireland, New Zealand and Singapore although many such jurisdictions had marked differences from practice in Hong Kong. For example legislation in certain states in Australia allows providers of professional services to limit their liability. There has been a misconception that incorporation would enable a solicitor to limit all liability towards his client both in contract and in tort.

Having taken the advice of leading London counsel on this point the Law Society has been advised that the existing legislation does not permit solicitors to avoid liability to their clients in tort. Given the present state of the legislation in Hong Kong the reality is that a solicitor may be able to limit his contractual liability to a client of the corporation in the absence of any contractual personal duty to or fiduciary relationship with the client of

the corporation but unless he genuinely has no knowledge or involvement in the negligence of his partner/co-director he will remain jointly and severally liable with his co-director solicitors to the client. Consideration might well be given to placing a statutory cap on the tortious liability of solicitor directors with indemnity cover at least to that limit. This is the position in New South Wales where a Professional Standards Scheme applies and Western Australia is about to follow suit.

Recently we have ascertained that legislation is under discussion in Western Australia to enable solicitors to incorporate. Similarly in New South Wales where incorporation under the Legal Profession Act has existed since 1991 there are moves to enable practices to incorporate under the Corporations Act thus removing the anomaly that currently exists whereby solicitor corporations are not subject to the provisions of company law in the State. We understand that federal law in Australia permits the incorporation of bodies such as law firms and it has only been state law which has prevented law firms from incorporating with limited liability.

Having decided in principle on the most appropriate format for incorporation of a Hong Kong solicitor's practice the Law Society Council resolved to put out to tender the work of drafting the rules. In December 1998 an invitation to tender was circulated to all law firms and in mid January 1999 Messrs. Deacons, Graham & James were appointed. The firm proceeded to carry out further research on incorporation of practices and received up to date information from a number of overseas jurisdictions. A detailed comparative report on the legislation in other jurisdictions was submitted to the Law Society in June 1999 and the Society's working party met to consider the specific instructions to be given to the solicitors for drafting the rules. Detailed instructions were given in December after publication in Singapore of the Legal Profession (Amendment) Bill and in March the first draft was made available to the working party. Following consideration of the first draft at meetings of the working party further instructions were given and a second draft was submitted to the Law Society in June 2000. That draft was also discussed at length and further comments made as a result of which a third draft was received on 24 November. That draft is now under consideration and subject to some minor amendments will shortly be submitted to the Chief Justice for his approval and thereafter to the Law Draftsman.

Consideration of the issues has involved detailed discussion on the way in which solicitor corporations will conform to existing practice rules including those relating to the Hong Kong Solicitors Professional Indemnity Scheme, compliance with rules of conduct and regulatory matters all of which are intended to ensure that the way in which the profession conducts its business is maintained for the benefit of the public

yet allows solicitors greater flexibility in the manner in which they run their practices. A significant number of issues have had to be discussed and decided upon in order to achieve these ends. These include specific provisions to meet the likely demand for incorporation from sole practitioners who constitute more than 50% of the total number of firms in Hong Kong.

In England & Wales the Limited Liability Partnerships Bill received the Royal Assent in July 2000 and regulations are in the course of preparation which will lead to the first such bodies being incorporated in early 2001. It is the belief of many that LLPs constitute a more effective means of conducting a legal practice at the same time providing adequate safeguards to the public. However until they are seen in operation in England & Wales we are unable to advise as to whether this is an appropriate format for use in Hong Kong.

15th December 2000

The Law Society of Hong Kong

For discussion
on 27 May 2002

LegCo Panel on Administration of Justice and Legal Services

Solicitor Corporations Rules

Background

In 1995, the then Attorney General's Chambers published a Consultation Paper on Legal Services which made a number of proposals regarding Hong Kong legal services. One was a proposal to allow solicitors to incorporate their practices as companies. An incorporated company is in law a separate legal entity, distinct from its members. Shareholders of a company with limited liability are only liable to the extent of the unpaid nominal capital of the shares which they own. The advantages for conducting business are that an incorporated company can raise capital, borrow money and enter into contracts in its own capacity as a legal person. The view expressed in the Consultation Paper was that, subject to proper safeguards, solicitors should be permitted to incorporate their practices with either limited or unlimited liability.

2. The Report on the Consultation Exercise and Proposals for the way forward, subsequently published by the Attorney General's Chambers, revealed that the majority of the submissions supported the recommendation on the incorporation of solicitors' practices. The Law Society agreed with the recommendation and proposed to prepare detailed regulations regarding the conditions under which solicitors may elect to practise through a company.

3. The Administration introduced amendments to the Legal Practitioners Ordinance ("the Ordinance") through the Legal Services (Miscellaneous Amendments) Bill which was enacted at the end of June 1997. The amendments provide that the Law Society may "in accordance with the [Law Society] Council's rules" approve or refuse to approve an application for the approval of a company as a solicitor corporation.

The Draft Solicitor Corporations Rules (“the draft Rules”)

4. The Law Society undertook the drafting of the relevant rules. In June 2001, the Law Society released the draft Rules for comments by its members.

5. The Administration studied the draft Rules and provided its comments to the Law Society from the public interest angle. The Law Society answered our queries on a number of issues. The major outstanding issue relates to the insurance of solicitor corporations for the protection of consumers.

6. The Administration’s main comments on the draft Rules from the public interest point of view are set out below.

(1) Grounds of Refusal

7. Rule 2(5) and (7) of the draft Rules (at **Annex A**) provide that the Council of the Law Society should be of the opinion that its approval of a company or proposed company as a solicitor corporation is not contrary to the interests of the solicitors’ profession or the public. We considered that the Law Society seemed to suggest that the interests of the profession may differ from those of the public. We sought the Law Society’s justification for the reference to the interests of the solicitors’ profession in the draft Rules.

8. The Law Society replied that should such a conflict occur between the interests of the profession and the public, the Law Society would acknowledge its duty as a regulator of the profession on behalf of the public and act on the basis that the public interest was paramount. The Law Society agreed to amend the relevant draft provision to give effect to this intention.

(2) Qualification for approval

9. Rule 3(2) and (3) of the draft Rules (at **Annex B**) provide that a person who is not a solicitor may also be a member or director of a solicitor corporation. This would enable a sole practitioner to comply with the requirements of the Companies Ordinance (Cap.32) that a company formed under it must have two members and two directors. The rule provides that the

second member or director would need to execute a declaration of trust in favour of the sole practitioner in respect of the one share that he holds, and the management and control should remain with the sole practitioner.

10. The Administration commented to the Law Society that, if such a situation were to arise, the public may not be aware that the second member (who may be a well known/respected member of society), though being held out as director, is only a trustee of the share and that he is not involved in the operation and management of the company. We asked for the Law Society's clarification of the role of the non-legally qualified director and of the measures that should be taken for the adequate protection of the public.

11. The Law Society suggested that the problem be resolved by amending the new section 9AA of the Ordinance (at **Annex C**) to include an "officer" in the list of persons or entities which, in relation to misconduct, could be investigated, inquired into and dealt with under the Ordinance. A definition of "officer" would be added to section 2(1) of the Ordinance to include directors, managers, etc. This would effectively bring those appointed as directors under Rule 3(2)(b) of the draft Rules within the parameters of the new section 9AA of the Ordinance.

(3) Right of Appeal

12. A right of appeal against a decision of the Law Society is provided under Rule 8 of the draft Rules (at **Annex D**). The Administration suggested that, for the purpose of fairness to potential appellants, it should be specified in Rule 8 that, where the Council refuses an application, it must notify the applicant of the refusal and the grounds for such refusal within a specified period of time.

13. The Law Society agreed to amend Rule 8 to provide that the Law Society would give written grounds for refusal within 28 days of the decision to refuse an application made under the rules.

(4) Top-up insurance

14. The qualification for approval as a solicitor corporation is provided

under Rule 3 of the draft Rules. However, there is no provision requiring a corporation to have insurance coverage before it can be approved as a solicitor corporation. The Administration considers it to be essential for the protection of consumers that there be adequate indemnity insurance taken out by solicitor corporations to cover civil claims made by their clients. We advised the Law Society that, under the English Solicitors Incorporated Practice Rules 1988 (the “English Rules”), there is a requirement for a top-up insurance over and above the minimum requirement of indemnity insurance to be taken out by a solicitor’s firm. We asked the Law Society to consider a similar approach for Hong Kong.

15. The Law Society initially replied that the cover provided by the existing Hong Kong Solicitors Professional Indemnity Scheme (“PIS”) is sufficient protection for the public. It considered that whilst there might also be a claim against the solicitor corporation in contract, it would be subsumed in any action in tort brought against the solicitor or member of his staff in the solicitor corporation who would be covered under the PIS in respect of such action. In its view, it was difficult to conceive of any situation where the solicitor corporation might be liable but not the solicitor directors/members other than in actions in contract to which the usual commercial rules would apply. It considered that it might be prudent for directors to take out directors’ and officers’ cover but it did not believe that this should be mandatory.

16. The Administration considered that this would be insufficient from the public interest angle. In determining whether solicitor corporations ought to take out top-up insurance, we therefore asked the Law Society for information on other common law jurisdictions where solicitor corporations exist – i.e. whether or not they require top-up insurance and, if so, according to what formula.

17. The Law Society replied that it was contacting other jurisdictions where solicitor corporations are permitted and would revert to the Administration as soon as possible.

18. To enable us to consider whether top-up insurance is required of a solicitor corporation over and above the minimum requirement of indemnity

insurance to be taken out by a solicitor firm, we sought information from the Law Society of England and Wales regarding the rationale of top-up insurance required under the English Rules.

19. The Law Society of England and Wales replied that –

“The requirement for a “recognised body” to take out top-up insurance over and above the minimum required by the Indemnity Rules applies only to recognised bodies which have limited liability – i.e. limited companies or limited liability partnerships.

It was initially introduced in response to a concern expressed by the Master of the Rolls in 1988, at the time the rules were first made. Solicitors could then practise only in unincorporated partnerships without limitation of liability. A litigant awarded a sum in excess of the minimum indemnity cover (then one million pounds, as now) could pursue the personal assets of the partners to make up the difference between the award and the amount paid under the firm’s insurance. The Master of the Rolls was concerned at the possibility of a “gap” and the requirement for top-up insurance was introduced to meet this concern.”

20. The Administration’s view regarding the issue of insurance is that, in the interests of consumers, adequate insurance coverage should be taken out by solicitor corporations. The concern identified in England in respect of the “gap” in the compensation that may be obtainable in respect of a negligent solicitor in a solicitor corporation, as opposed to a negligent solicitor in a firm, appears to apply equally in Hong Kong. It is recommended that the Law Society consider whether the existing minimum coverage taken out by a solicitors’ firm is sufficient for solicitor corporations and whether top-up insurance should be required.

Department of Justice

May 2002

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2. Application for approval under section 7C(1) of the Ordinance

- (1) Any person who wishes to have a company or a proposed company approved as a solicitor corporation under section 7C(1) of the Ordinance shall apply to the Society.
- (2) An application made under subrule (1) shall be in Form 1 in the Schedule.
- (3) When an application is made under subrule (1), there shall at the same time be paid to the Society such fee as is prescribed by the [Solicitor Corporations (Fees)] Rules.
- (4) On receiving an application made under subrule (1), the Society may, in accordance with these rules, approve or refuse to approve the company or proposed company as a solicitor corporation.
- (5) Before approving a company or proposed company as a solicitor corporation, the Council shall be satisfied that the company or proposed company satisfies or will satisfy the qualifications for approval as a solicitor corporation and that such approval is not, in the opinion of the Council, contrary to the interests of the solicitors' profession or the public.
- (6) If the Society gives approval for a proposed company to be a solicitor corporation, the approval does not take effect until the company is formed and registered under the Companies Ordinance (Cap.32).
- (7). Any approval given by the Society pursuant to subrule (4) may be withdrawn by the Society at any time if the continuance of such approval is, in the opinion of the Council, contrary to the interests of the solicitors' profession or the public or if the relevant solicitor corporation ceases for any reason to be qualified for approval under rule 3 or otherwise.
- (8) Any approval given by the Society with respect to a solicitor corporation pursuant to subrule (4) shall expire where
 - (a) a winding-up order under the Companies Ordinance (Cap 32) is made by the High Court with respect to such solicitor corporation;
 - (b) a resolution for voluntary winding-up is passed with respect to such solicitor corporation; or
 - (c) a person is appointed receiver or manager of the property of such solicitor corporation.

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;
- (e) subject to subrules (2) and (3), every member of the company beneficially owns the share or shares he holds in the company;
- (f) the name of the company is in compliance with rules 6(1), (2), (4) and (5) and the company does not conduct its Practice under any other name; and
- (g) the memorandum and articles of association of the company are in compliance with the requirements of the Companies Ordinance (Cap.32) and these rules.

(2) To enable a sole practitioner to establish a solicitor corporation under section 7C(1) of the Ordinance and to comply with the requirements of the Companies Ordinance (Cap.32) that a company formed thereunder must have two members and two directors, a company may have—

- (a) as the second member any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council; and
- (b) as the second director any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap. 32) and who is not a member director or employee of another solicitor corporation

provided that—

- (i) the company shall at all times be managed and controlled by the sole practitioner;
- (ii) not more than one share of the company may be registered in the name of such second member who shall hold such share in trust for the sole practitioner; and
- (iii) such second member shall have executed a declaration of trust in favour of the sole practitioner in respect of the one share in the company which he or it holds in trust for the sole practitioner and the person who lodges an application under rule 2 shall furnish a copy of such declaration of trust to the Society.

(3) If the second member mentioned in subrule (2) ceases to hold the one share in the company in trust for the sole practitioner mentioned in subrule (2), such sole practitioner and the company shall procure that:

- (a) another individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council, shall become a member of the company holding one share in the company within 6 months from the date on which such second member ceases to hold the one share in the company; and
- (b) an individual person or a corporation as aforesaid who or which shall become a holder of that one share in the company pursuant to subrule (3)(a)

shall execute a declaration of trust in favour of such sole practitioner in respect of such share which he or it holds in trust for the sole practitioner and such sole practitioner shall furnish a copy of such declaration of trust to the Society within 6 months from the date on which such second member ceases to hold such share; and

- (c) the provisions in subrules (2)(i) and (ii) shall continue to apply to the company.

(4) If the second director of the company mentioned in subrule (2) ceases to act as such, the company shall procure that another individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) shall become a second director of the company within 2 months from the date on which such second director ceases to act as a director of the company.

(5) The Council may waive any of the requirements of subrule (1) where it considers it appropriate in the particular case.

**9AA. Misconduct of member or employee of
solicitor corporation or foreign
lawyer corporation**

Conduct of a person who is a member of, or is employed by, a solicitor corporation or a foreign lawyer corporation may be the subject of a complaint, and may be investigated, inquired into and dealt with under this Part in the same way as the conduct of a solicitor or employee of a solicitor or foreign lawyer may be investigated, inquired into and dealt with, but only in so far as the conduct relates to the practice carried on by the corporation.

8. Right of appeal against decisions of Society under these rules

- (1) An appeal against a decision of the Society under these rules shall lie to the Court and the provisions of Order 55 of the Rules of the High Court (Cap. 4 sub. leg.) shall apply to each such appeal save that the time for serving notice of motion of appeal shall be 21 days from the date of the decision and not 28 days as provided in Order 55 and the decision of the Court on any such appeal shall be final.
- (2) In any appeal under subrule (1) the Society shall be the respondent.
- (3) The hearing of every appeal under this rule shall be in open court unless, and to the extent to which, the Court otherwise directs.

Appendix III

SOLICITOR CORPORATIONS RULES
SOLICITOR CORPORATIONS (FEES) RULES
AMENDMENT TO THE SOLICITORS
(PROFESSIONAL INDEMNITY) RULES

1. The Legal Practitioners Ordinance (Cap 159) ("the ordinance") was amended by the Legal Services Legislation (Miscellaneous Amendments) Ordinance in 1997 to enable solicitors to incorporate their practices as solicitor corporations. The amendments which are contained in Part II AA of the ordinance are to take effect upon notice being given in the Government Gazette by the Secretary for Justice.
2. Section 7 D (1) of the amended ordinance provides that:
"a solicitor corporation is authorized to do anything that only a solicitor can lawfully do and is required to do anything that a solicitor is required to do by law."
3. Under amendments to section 2 of the ordinance a solicitor corporation becomes a "legal practice entity" which definition includes solicitors, foreign lawyers and law firms.
4. The amendments to the ordinance require the Council of the Law Society ("the Council") to make rules in respect of solicitor corporations.
5. The Council intends to make rules ("the Rules") in accordance with the draft at Annex A hereto in respect of solicitor corporations, in accordance with the draft at Annex B in respect of the fees payable to the Law Society for applications for registration as a solicitor corporation and in accordance with the amendments proposed in Annex C in relation to the professional indemnity cover of such corporations.

6. The Solicitor Corporation Rules

Rule 1

This contains definitions to be used in the context of the Rules.

Rule 2

The Rule provides for applications to be made for approval of the registration by the Law Society of a solicitor corporation. It requires the Council of the Law Society ("the Council") to be satisfied that the company or proposed company satisfies the qualifications for approval as a solicitor corporation as set out in Rule 3 and is not contrary to the public interest. Approval only takes effect once the solicitor corporation is formed and registered under the Companies Ordinance.

There is provision for the approval to be withdrawn in certain specified circumstances.

A fee is payable in accordance with the proposed Solicitor Corporations (Fees) Rules.

Rule 3

The rule sets out the grounds upon which a solicitor corporation may be approved. Amongst other requirements all members must be directors or employees of the company as must all directors. All members and directors must be individuals holding a current Practising Certificate and must have been in practice for the preceding 12 months.

Subject to certain exceptions referred to below every member must beneficially own his or her own shareholding in the company.

In order to assist sole practitioners who may wish to incorporate their practices provision is made in Rule 3 (2) to enable the requisite second member and director to be an individual other than a practising solicitor. This relaxation is qualified. It is only permitted in specified

circumstances as set out in Rule 3 (2) which include the requirement that the company is at all times managed and controlled by the sole practitioner, that only one share in the company may be vested in the second member who shall execute a declaration of trust in favour of the sole practitioner and that the written approval of the Council to the appointment is obtained.

Provision is made for the replacement of the second member in specified circumstances.

Rule 4

This rule deals with the way in which the solicitor corporation conducts its business and restricts it to the practice of law.

Rule 5

At all times the shares in a solicitor corporation must be held by solicitors who beneficially own them. They may not be held on behalf of other persons. Nor shall they be charged or be subject to any third party interests. The rule contains provision for the transfer of shares on death, striking off or bankruptcy and the non-exercise of voting rights in respect of such shares.

Rule 6

The rule sets out the requirements for the name of a solicitor corporation. This essentially follows the existing rules in respect of partnerships but permits the use of the pre-existing firm name as that of the solicitor corporation under certain prescribed conditions. The use of a name similar to that of an existing solicitor corporation or one which might mislead the public because of its similarity to that of an existing solicitor corporation is prohibited. The Council has power within 12 months of approval to require a solicitor corporation in such circumstances to change its name.

Rule 7

The certificate of approval given by the Council to a solicitor corporation is valid until revoked. It is not renewable annually.

Rule 8

The Council is required to state the grounds on which it has refused an application made under the Rules within 28 days and an appeal lies to the Chief Judge of the High Court in open court.

7. Consequential amendments are required to the Solicitors (Professional Indemnity) Rules. ("the indemnity rules")

The effect of the proposed changes will be to ensure that the solicitors and their staff working within a solicitor corporation will remain in the same position with regard to professional indemnity cover as though they were practising through the existing forms of sole proprietorship or partnership.

Since a solicitor corporation will be a body corporate it will enjoy limited liability thus limiting the members' exposure to the amount of their stake in the company. Business will normally be conducted with the solicitor corporation as the principal and not with the members who will be agents of the corporation and, unlike partners, not agents of each other. The corporation will be liable for the acts of its members in the ordinary course of business and any claims will be against the assets of the solicitor corporation. Generally speaking the personal assets of the solicitors within the corporation will not be subject to claims against the corporation.

However under the general law of agency a director as agent of the company may in certain circumstances be jointly and severally liable with the company for tortious acts committed by the company. For example if a director undertakes work negligently for the company he may be liable even though the tort is itself committed by the company. Similarly if a director personally directs or procures the commission of a tort he will be liable. A director is liable in tort for negligently causing

loss to any person with whom he has entered into a contract if the circumstances impose a personal duty on the director towards that person to act with proper skill or care e.g. in the relationship of solicitor and client. In the context of a solicitor corporation a solicitor director will have direct contact with the corporation's clients. Legal services to clients can only be provided by the exercise of personal skill and care of the solicitor director or the corporation's employees. Accordingly a solicitor director who acts negligently towards his clients may be personally liable in tort to the client notwithstanding that the client has entered into a contract with the solicitor corporation.

The amendment to Rule 6 of the Third Schedule to the indemnity rules is to make it clear that there is a limit to the liability of the indemnity fund if a claim is made against both the solicitor corporation and a negligent staff member/director/employee. That limit is the same limit applied to claims made against solicitors not practising within a solicitor corporation, namely HK\$10 million.

20 November 2003

doc. 72742

Annex A

SOLICITOR CORPORATIONS RULES

(Cap.159, Section [73])

1. Interpretation

In these Rules, unless the context otherwise requires—

"firm" means a firm as from time to time constituted, whether of a sole practitioner or as a partnership, carrying on the business of practising as a solicitor or as solicitors and whether conducted from one address or more than one address;

"Practice" means the business of practising as a solicitor (including the acceptance of obligations connected with and incidental to such practice as trustee, executor, attorney acting under a power of attorney, notary, tax agent, agent for patents, agent for trade marks, company secretary or company director) undertaken by the solicitor corporation, provided always that wherever any fees or other income accrue therefrom they inure to the benefit of that business;

"solicitor corporation" means a solicitor corporation approved by the Society under section 7C(1) of the Ordinance.

2. Application for approval under section 7C(1) of the Ordinance

(1) Any person who wishes to have a company or a proposed company approved as a solicitor corporation under section 7C(1) of the Ordinance shall apply to the Society.

(2) An application made under subrule (1) shall be in Form 1 in the Schedule.

(3) When an application is made under subrule (1), there shall at the same time be paid to the Society such fee as is prescribed by the Solicitor Corporations (Fees) Rules.

(4) On receiving an application made under subrule (1), the Society may, in accordance with these rules, approve or refuse to approve the company or proposed company as a solicitor corporation.

(5) Before approving a company or proposed company as a solicitor corporation, the Council shall be satisfied that the company or proposed company satisfies or will satisfy the qualifications for approval as a solicitor corporation and that such approval is not, in the opinion of the Council, contrary to the interests of the public.

(6) If the Society gives approval for a proposed company to be a solicitor corporation, the approval does not take effect until the company is formed and registered under the Companies Ordinance (Cap.32).

(7) Any approval given by the Society pursuant to subrule (4) may be withdrawn by the Society at any time if the continuance of such approval is, in the opinion of the Council, contrary to the interests of the public or if the relevant solicitor corporation ceases for any reason to be qualified for approval under rule 3 or otherwise.

(8) Any approval given by the Society with respect to a solicitor corporation pursuant to subrule (4) shall expire where—

- (a) a winding-up order under the Companies Ordinance (Cap 32) is made by the High Court with respect to such solicitor corporation;
- (b) a resolution for voluntary winding-up is passed with respect to such solicitor corporation; or
- (c) a person is appointed receiver or manager of the property of such solicitor corporation.

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;

- (e) subject to subrules (2) and (3), every member of the company beneficially owns the share or shares he holds in the company;
- (f) the name of the company is in compliance with rules 6(1), (2), (4) and (5) and the company does not conduct its Practice under any other name; and
- (g) the memorandum and articles of association of the company are in compliance with the requirements of the Companies Ordinance (Cap.32) and these rules.

(2) To enable a sole practitioner to establish a solicitor corporation under section 7C(1) of the Ordinance and to comply with the requirements of the Companies Ordinance (Cap.32) that a company formed thereunder must have two members and two directors, a company may have—

- (a) as the second member any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council; and
- (b) as the second director any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap. 32) and who is not a member director or employee of another solicitor corporation

provided that—

- (i) the company shall at all times be managed and controlled by the sole practitioner;
- (ii) no person shall be appointed and act as the second member or the second director referred to above unless such second member or second director shall have been approved by the Council, which approval shall only be given upon an application in writing made to it by the sole practitioner or the company and subject to such conditions as the Council may think fit, if any,
- (iii) not more than one share of the company may be registered in the name of such second member who shall hold such share in trust for the sole practitioner; and
- (iv) such second member shall have executed a declaration of trust in favour of the sole practitioner in respect of the one share in the company which he or it holds in trust for the sole practitioner and

the person who lodges an application under rule 2 shall furnish a copy of such declaration of trust to the Society.

(3) If the second member mentioned in subrule (2) ceases to hold the one share in the company in trust for the sole practitioner mentioned in subrule (2), such sole practitioner and the company shall procure that:

- (a) another individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council, shall become a member of the company holding one share in the company within 6 months from the date on which such second member ceases to hold the one share in the company; and
- (b) an individual person or a corporation as aforesaid who or which shall become a holder of that one share in the company pursuant to subrule (3)(a) shall execute a declaration of trust in favour of such sole practitioner in respect of such share which he or it holds in trust for the sole practitioner and such sole practitioner shall furnish a copy of such declaration of trust to the Society within 6 months from the date on which such second member ceases to hold such share; and
- (c) the provisions in subrules (2)(i) and (ii) shall continue to apply to the company.

(4) If the second director of the company mentioned in subrule (2) ceases to act as such, the company shall procure that another individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) shall become a second director of the company within 2 months from the date on which such second director ceases to act as a director of the company.

(5) The Council may waive any of the requirements of subrule (1) where it considers it appropriate in the particular case.

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.

5. Shares in solicitor corporation

(1) Subject to rules 3(2) and (3), a member of a solicitor corporation shall not hold any share in the solicitor corporation for another person. At all times the shares in a solicitor corporation must be held by members who are solicitors and who beneficially own the shares.

(2) A member of a solicitor corporation shall not create any charge or other third party interest over any share in the solicitor corporation.

(3) (a) Where a member of a solicitor corporation dies, the solicitor corporation shall ensure that any share or shares registered in his name at the time of his death is or are within 24 months of his death registered in the name of a solicitor who satisfies the requirements set out in rule 3(1)(d) or is or are repurchased by the solicitor corporation itself.

(b) A solicitor who satisfies the requirements set out in rule 3(1)(d) and who is the personal representative of a deceased member of a solicitor corporation may elect to be entered in the register of members of the solicitor corporation but no member shall hold any share or shares as personal representative for longer than 24 months from the date of the

death of the deceased member.

- (c) Where a beneficial owner of a share or shares in a solicitor corporation who is not the registered holder of such share or shares dies, a member may continue to hold such share or shares for the personal representative of the deceased for a period of not longer than 24 months from the date of the death, provided that voting rights shall only be exercised in respect of any share or shares held in reliance on this sub-paragraph where the only personal representative in respect of the deceased's beneficial interest in the share or shares is a solicitor and who satisfies the requirements set out in rule 3(1)(d).
- (4) (a) In respect of a member of a solicitor corporation, where the name of such member is removed from or struck off the roll of solicitors or where such member becomes bankrupt, any share or shares registered in the name of such member may, notwithstanding rule 3(1)(d), remain so registered for a period of not longer than 6 months from the date of the relevant event, provided that no voting rights shall be exercised in respect of any such share or shares while it remains so registered.
- (b) In respect of a beneficial owner of a share or shares in a solicitor corporation who is not the registered holder of such shares or shares, where the name of such beneficial owner is removed from or struck off the roll of solicitors or where such beneficial owner becomes bankrupt, the member who holds such share for the beneficial owner may continue to hold such share for the beneficial owner or, as the case may be, his trustee in bankruptcy for a period of not longer than 6 months from the date of the relevant event, provided that no voting rights shall be exercised in respect of any such share or shares held in reliance on this sub-paragraph.
- (c) In respect of a member of a solicitor corporation, where such member is suspended from practice by an order of a Solicitors Disciplinary Tribunal, any share or shares registered in the name of such member may, notwithstanding rule 3(1)(d)(i), remain so registered for a period of not longer than 6 months from the date of the relevant event, provided that no voting rights shall be exercised in respect of any such share or shares while it remains so registered.
- (5) A member of a solicitor corporation shall not exercise any voting rights in respect of any share held in breach of any part of this rule and any vote tendered in breach of this paragraph or any other part of these rules shall not be accepted by the solicitor corporation.
- (6) A solicitor corporation shall so far as possible ensure that its members comply with this rule.

6. Name and memorandum and articles of association of solicitor corporation

(1) Subject to subrules (2) and (4), the name of a solicitor corporation shall consist solely of the name or names of one or more solicitors who are members of the solicitor corporation.

(2) Subrule (1) shall not preclude—

- (a) the use of the name or names of one or more former members of that corporation;
- (b) the use of the name or part of the name of any predecessor firm or predecessor solicitor corporation in practice at the time of the formation of the corporation;
- (c) the use of the word "solicitor", "notary", "agent for trade marks" or "agent for patents" whether in the singular or the plural; or
- (d) the use of a name approved in writing by the Council.

(3) For the purposes of subrule (2), a firm shall be deemed a predecessor firm of a solicitor corporation if not less than one-third of the principals of such firm immediately prior to the formation of the solicitor corporation are members of the solicitor corporation at the time of its formation, and a solicitor corporation shall be deemed a predecessor solicitor corporation if not less than one-third of the members of such solicitor corporation immediately prior to the formation of the solicitor corporation in question are members of the solicitor corporation in question at the time of its formation.

(4) The name of a solicitor corporation must have the word "limited" as its last word.

(5) The name of a solicitor corporation shall not—

- (a) be the same as or, in the opinion of the Council, so similar to a name appearing on the roll of solicitor corporations kept by the Secretary General of the Society under section 7I of the Ordinance as to be likely to cause confusion to the public;
- (b) be the same as or, in the opinion of the Council, so similar to the name of a solicitor corporation which has been approved by the Society under rule 2(4) prior to the application in respect of the first-mentioned solicitor corporation under rule 2(1) or subrule (8) as to be likely to cause confusion to the public;
- (c) be the same as or, in the opinion of the Council, so similar to the name of a firm which has been established prior to the application in respect of the solicitor corporation under rule 2(1) or subrule (8) as to be likely to cause confusion to the public; or

(d) in the opinion of the Council, be offensive or otherwise contrary to the interests of the solicitors' profession.

(6) The memorandum of association of a solicitor corporation shall provide that its object is to carry on the business of practising as a solicitor and its object shall be limited to such.

(7) The articles of association of a solicitor corporation shall not contravene any of the provisions of these rules.

(8) A solicitor corporation which wishes to change its name or amend its memorandum or articles of association shall apply to the Society for approval in a form approved by the Society, accompanied by such documents and fee as the Society may require or prescribe.

(9) Any new name which a solicitor corporation proposes to adopt must be in compliance with subrules (1), (2), (4) and (5).

(10) Any amendment to the memorandum or articles of association of a solicitor corporation must not contravene any of the provisions of the Companies Ordinance (Cap.32) or these rules.

(11) The Society may refuse to approve an application made under subrule (8) but only as provided by these rules.

(12) Where a solicitor corporation has been approved under rule 2(4) with a name which—

- (a) is the same as or, in the opinion of the Council, too like a name appearing on the roll of solicitor corporations kept by the Secretary General of the Society under section 71 of the Ordinance;
- (b) is the same as or, in the opinion of the Council, too like a name which should have appeared on that roll of solicitor corporations at that time;
or
- (c) is the same as, or in the opinion of the Council, too like the name of a solicitor corporation which has been approved by the Society under rule 2(4) prior to the approval of the solicitor corporation concerned,

the Council may within 12 months of the approval of the solicitor corporation concerned, in writing, direct the solicitor corporation to change its name within such period as the Council may specify.

(13) The Society may withdraw the approval given under rule 2(4) in respect of a solicitor corporation if such solicitor corporation fails to comply with a direction under subrule (12).

7. Certificate of approval

A certificate of approval issued by the Society pursuant to section 7C(1) of the Ordinance shall be valid as from the date shown on the certificate as the date of issue until such certificate is revoked.

8. Right of appeal against decisions of Society under these rules

(1) The grounds for refusal of an application made to the Council under these Rules shall be provided in writing to the applicant within 28 days of such refusal;

(2) An appeal against a decision of the Society under these rules shall lie to the Chief Judge within one month of the applicant being informed of this decision. The decision of the court on any such appeal shall be final.

(3) In any appeal under subrule (1) the Society shall be the respondent.

(4) The hearing of every appeal under this rule shall be in open court unless, and to the extent to which, the Court otherwise directs.

SCHEDULE

FORM 1

**FORM OF APPLICATION FOR APPROVAL OF A
SOLICITOR CORPORATION**

1. Name of Corporation/Proposed Corporation

hereby applies to the Law Society for approval as a solicitor corporation pursuant to Section 7C(1) of the Legal Practitioners Ordinance.

2. The applicant is a company limited by shares.

3. The address of the applicant is : -

4. The registered office of the applicant is : - (if different from 3 above)

5. The solicitors who are/will be members of the applicant are : -

<u>Surname</u>	<u>Forenames</u>	<u>Current Practising Address</u>
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6. The solicitors who are/will be directors of the applicant are : -

<u>Surname</u>	<u>Forenames</u>	<u>Current Practising Address</u>
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-----	-----	-----
-----	-----	-----

7. Interests in shares held by nominees are as follows : -

a) ----- (full name of member) holds
 ----- (number) shares as nominee for

 (full name of beneficial owner) who is a solicitor of

 ----- (full practising address)

b) ----- (full name of member)
 holds ----- (number) shares as nominee for

 (full name of beneficial owner) who is a solicitor of

 ----- (full practising address)

Declaration of Compliance

It is declared that : -

- i) the applicant complies with Rule 3-6 and its members comply with Rules 3-5; and
- ii) the memorandum and articles of association of the applicant are such as to enable it
 - a) to continue to comply with Rules 3-6; and

b) so far as possible to ensure continued compliance by its members with Rules 4-6.

This application is dated _____ and is signed on behalf of the applicant by all its members and directors.

Signatures

Annex B

Solicitor Corporations (Fees) Rules

1. Citation

These rules may be cited as the Solicitor Corporations (Fees) Rules.

2. Fees

The fees set out in Schedule 1 are prescribed for payment under the Solicitor Corporations Rules made under the Ordinance.

3. Payment of fees

The fees set forth in Schedule 1 shall be paid to the persons named in the fourth column of such Schedule opposite such fees.

SCHEDULE 1**FEES PAYABLE UNDER THE SOLICITOR CORPORATIONS RULES**

Item	Section	Description	Payee	Fee \$
1.	2(3)	Application for approval of a solicitor corporation	The Law Society of Hong Kong	HK\$5,000

doc. 63409
26/11/2002

Annex C

SOLICITORS (PROFESSIONAL INDEMNITY) RULES**Proposed amendments****Rule 2**

Amend the definition of "Indemnified" so as to read, "indemnified" means the firm or solicitor corporation named in the receipt referred to in Rule 9, or any principal in the firm, any person employed in or in connection with the Practice (including any director or member of a solicitor corporation, any assistant solicitor, any assistant solicitor who is a consultant with the firm ... in connection with the Practice"

Amend the definition of "Practice" to include:

(j) a solicitor corporation,

Amend the definition of "principal" to read, " "Principal" means a partner or sole practitioner of a firm or a director of a solicitor corporation and shall also include any solicitor holding out as such a partner, sole practitioner or a director of a solicitor corporation.

Rule 6 Schedule 3

Amend Rule 6 (1) so as to read,

"The aggregate liability of the Fund for all claims arising from the same act or omission or in any claim where a solicitor corporation is named or could be named in proceedings, arising from the same act or omission or from causally connected acts or omissions and/or from a series of acts or omissions which relate to one originating cause (whether or not made or intimated or arising out of circumstances notified during the same indemnity period) against any indemnified or former solicitor or any combination of persons entitled to indemnity under these rules shall in no event exceed in total the indemnity limit determined in accordance with paragraph 2 or 3 whichever is smaller.

For the avoidance of doubt, the Fund shall not be liable for more than one claim arising from the same act or omission or from causally

**connected acts or omission and/or from a series of acts or omissions
which relate to one originating cause.**

Doc. 72552

**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 19 December 2000**

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V. Incorporation of solicitors' practices

(LC Paper No.CB(2)522/00-01(08) - Information paper provided by the Law Society of Hong Kong)

27. At the invitation of the Chairman, Mr Anthony CHOW introduced the information paper prepared by the Law Society on the present position of the issue of incorporation of solicitors' practices.

28. Mr CHOW informed members that the background to the matter was that in 1995, the Government published a Consultation Paper on Legal Services which contained arguments in favour of allowing solicitors to incorporate their practices. The Consultation Paper suggested that the shareholders of such a practice would only be liable to the extent of the unpaid nominal capital of the shares which they owned. To give effect to the proposal, legislative amendments were made to the Legal Practitioners Ordinance through the enactment of the Legal Services (Miscellaneous Amendments) Bill in June 1997. The amended legislation provided, among other things, that the Council of the Law Society should make the relevant Rules under which incorporation was to take place. Mr CHOW advised that the present position was that the Law Society, having undertaken some research on the issues relating to incorporation practices in some overseas common law jurisdictions, had appointed solicitors for drafting of the Rules. A third draft of the Rules was being considered by a working party of the Law Society. Subject to some minor amendments, the draft would be submitted to the Chief Justice for his approval and thereafter to the Law Draftsman.

29. The Chairman pointed out that the Rules, upon promulgation, was to put in place an effective regulatory framework to ensure that solicitors incorporations would provide professional legal services in compliance with existing rules of conduct and in a manner that best protected the benefits of the public. She asked whether the Law Society had sought the Administration's views in preparing the draft Rules.

30. Mr Anthony CHOW acknowledged the points made by the Chairman. He replied that since the enabling legislation was passed in 1997, the Law Society had undertaken research on incorporation practices in overseas jurisdictions including England and Wales, Australia, Canada, South Africa, Northern Ireland, New Zealand and Singapore. Many such jurisdictions had marked differences from the practice in Hong Kong, and had different reasons for

incorporation. He said that consideration of the issues had involved detailed discussion on the way in which solicitor incorporations should conform to existing practice rules, including those relating to the Hong Kong Solicitors Professional Indemnity Scheme as well as other regulatory matters. The ultimate objective was to ensure that proper safeguards would be provided to users of legal service, yet allowing solicitors greater flexibility in the manner in which they ran their practices. He added that as matters stood at present, the Law Society would consult the Administration in detail on law drafting matters, pending the Chief Justice's approval of the draft Rules due to be submitted by the Council of the Law Society.

31. Acting Solicitor General assured that the Administration would continue to assume the responsibility of safeguarding the interests of the public, monitoring progress and work closely with the Law Society on the matter. He pointed out that the Rules, when they were to be introduced into the Legislative Council (LegCo), would be subject to positive vetting procedure by the Council.

32. The Chairman said that it was a normal practice that before a Bill or a proposed subsidiary legislation was gazetted and introduced into LegCo, the content of the proposed legislation would be brought to the attention of the relevant committees of LegCo so that Members could have an early opportunity to appraise the legislative proposals and offer their views on the relevant issues. She requested the Law Society to provide the draft Rules to the Panel for discussion in due course, and also a paper to explain in detail what practical differences would incorporation make to solicitors conducting a practice in Hong Kong. Echoing the Chairman's views, Ms Emily LAU said that the Law Society should elaborate on how incorporation could better protect the interests of the public using legal services.

33. Referring to the last paragraph of the Law Society's paper which explained the position in England and Wales concerning Limited Liability Partnerships (LLPs) for legal practices, the Chairman sought the Law Society's views on whether LLPs might be a better alternative than incorporation of solicitors' practices in Hong Kong.

34. In response, Mr Anthony CHOW said that the concept of making partnership of solicitors a legal entity of limited liability under certain circumstances was a new development. In England and Wales, the Limited Liability Partnerships Bill received the Royal Assent in July 2000 and regulations were in the course of preparation. This would lead to the first such bodies being incorporated in early 2001. The Law Society believed that there were some benefits with LLPs as an additional means of conducting a legal practice and the Society was keeping a close watch on the progress in UK. He said that the Society would take up the matter with the Administration at an appropriate stage.

Action
Column

35. Mr Patrick MOSS said that as he saw it, one of the advantages with LLPs was the simplicity of administration afforded to solicitors, as opposed to incorporation where there would be the requirements of submitting reports on meetings and disclosure of accounts and so on. Hence, the savings in administrative costs could possibly be passed on to the clients.

36. In further response to the Chairman, Mr Anthony CHOW and Mr Patrick MOSS advised that in the case of a solicitor corporation, the solicitor who handled the case for a client of the corporation would still have unlimited liability towards that client. Given the present state of legislation in Hong Kong, a solicitor might be able to limit his contractual liability to a client of the corporation in the absence of any contractual personal duty to or fiduciary relationship with the client of the corporation. However, unless he genuinely had no knowledge or involvement in the negligence of his partner/co-director he would remain jointly and severally liable with his co-director solicitors to the client. In the end, each case had to be judged on its factual circumstances. Moreover, the existing legislation did not permit solicitors to avoid liability to their clients in tort.

37. In response to members' request, Mr Anthony CHOW said that the Law Society would revert in due course to enlighten the Panel on the latest developments relating to LLPs in other jurisdictions, and offer its views on whether and how LLPs might work out in Hong Kong.

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Society

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**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 27 May 2002**

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V. Incorporation of solicitors' practices
(LC Paper No. CB(2) 2056/01-02(02))

55. The Chairman said that according to the Administration's paper, the issue remained to be resolved was whether solicitor corporations should be required to take out top-up insurance. The Administration's view regarding the issue of insurance was that, in the interests of consumers, adequate insurance coverage should be taken out by solicitor corporations.

56. The Chairman invited representatives of the Law Society of Hong Kong to give their views on the matter.

57. Mr Patrick MOSS said that the Law Society considered the cover provided by the existing Hong Kong Solicitors Professional Indemnity Scheme (PIS) was sufficient protection for the public. Under the current arrangement, the Hong Kong Solicitors Indemnity Funds Limited (SIF) provided coverage of \$10 million in each and every claim to its membership. Of this amount, SIF retained the first \$1.5 million of every claim and reinsured the remaining \$8.5 million. In addition to the mandatory \$10 million insurance coverage, it was not uncommon for some larger solicitor firms to take out additional indemnity insurance. Mr MOSS pointed out that whilst there might also be a claim against the solicitor corporation in contract, it would be subsumed in any action in tort brought against the solicitor or members of his staff in the solicitor corporation who would be covered under the PIS in respect of such action. The Law Society therefore was of the view that it was difficult to conceive of any situation where the solicitor corporation might be liable but not the solicitor directors/members other than in actions in contract to which the usual commercial rules would apply. Moreover, even if additional coverage was required of solicitor corporations, the amount of compensation which a claimant would receive would not be more than that under the existing arrangement. Furthermore, amendments would be made to include solicitor corporation in the definition of "indemnified" under the Solicitors (Professional Indemnity) Rules.

58. Mr MOSS said that the reason why the English law required a solicitor's firm to take out top-up insurance to cover civil claims made by clients was because members of a solicitor's firm in England and Wales were not necessarily solicitors of England and Wales, and could include foreign lawyers and members of other professions from the European community. Such a situation was

different from that of Hong Kong. Mr MOSS further said that if solicitors in Hong Kong were required to take out additional insurance for the corporation, it would become unattractive for them to incorporate their practices, bearing in mind that the only benefit that one could really get from a solicitor corporation was that innocent directors might escape liability in tort.

59. Ms Miriam LAU asked the Administration to advise whether it was mandatory for a firm to take out top-up insurance before it could become a solicitor corporation, or whether it was a matter for the Law Society to decide. Representatives of the Administration responded that the Administration considered that the Law Society should consider whether the existing insurance coverage was sufficient from the public interest angle and recommended the Law Society to consider whether mandatory, instead of optional, top-up insurance was required. The concern identified in England in respect of the "gap" in compensation that might be obtainable in respect of a negligent solicitor in a solicitor corporation, as opposed to a negligent solicitor in a firm, appeared to apply equally in Hong Kong. In determining whether solicitor corporations ought to take out top-up insurance, the Administration had asked the Law Society for information on other common law jurisdictions where solicitor corporations existed, i.e. whether or not they required top-up insurance, and if so, according to what formula. The Law Society had replied that it was contacting other jurisdictions where solicitor corporations were permitted and would revert to the Administration as soon as possible.

60. Mr MOSS said that the risk of a "gap" mentioned by the Administration existed irrespective of whether a solicitor practised as a sole proprietor or a solicitor corporation because there was always a possibility for a solicitor to face a claim which was larger than the \$10 million mandatory insurance cover, or the mandatory insurance cover plus top-up insurance.

61. The Chairman said that requiring a solicitor to take out top-up insurance would defeat the legislative intent of incorporation of solicitor firms. The reason why incorporation of solicitor firms was contemplated was that the present system was considered to be too onerous on solicitor firms as solicitors had to pay from their own private means, if necessary, for the faults of their partners even though they had nothing to do with the case.

62. In order to help members to consider more carefully the proposal of top-up insurance, the Chairman requested the Administration to provide more information on the proposal, including the proposed amount of top-up coverage, how it was calculated, and the justification for the extent of the proposed top-up amount. The Chairman also requested the Law Society to provide information on the practice in other jurisdictions for the consideration of the Panel.

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63. In response to the Chairman's enquiry about the legislative timetable for the Solicitor Corporations Rules, Mr MOSS said that the approval of the Chief

Justice had to be obtained first. It was envisaged that the rules could be introduced into LegCo by the beginning of the next legislative session.

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**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 24 November 2003**

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V. Solicitor Corporations

(LC Paper Nos. CB(2)390/03-04(04) - (06); 394/03-04(01))

Submission from The Law Society of Hong Kong

59. Mr Patrick MOSS introduced the paper provided by The Law Society of Hong Kong which enclosed a copy of the Solicitor Corporations Rules, Solicitor Corporations (Fees) Rules and Amendment to the Solicitors (Professional Indemnity) Rules (LC Paper No. CB(2)394/03-04(01)). In the main, the paper explained that the Legal Practitioners Ordinance (Cap. 159) was amended by the Legal Services Legislation (Miscellaneous Amendments) Ordinance in 1997 to enable solicitors to incorporate their practices as solicitor corporations. The amendments required the Council of the Law Society to make rules in respect of the establishment of solicitor corporations and fees payable to the Law Society for applications for registration as a solicitor corporation, as well as professional indemnity cover of solicitor corporations. The amendments, which were contained in Part II AA of Cap. 159, should take effect on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

60. Mr MOSS took members through the Solicitor Corporations Rules (the Rules) attached at Annex A to the Law Society's paper clause by clause.

61. Mr MOSS remarked that there had been misunderstanding as to the effect of incorporation of solicitors' practices in relation to the level of liabilities of members of such corporations arising from actions in tort. He clarified that under the general law of agency, a director as agent of a company who undertook work negligently for the company might be liable even though the tort itself was committed by the company. In the context of a solicitor corporation, a solicitor director who had direct contact with the corporation's clients and who acted negligently towards his clients might be personally liable in tort to the client, notwithstanding that the client had entered into a contract with the solicitor corporation. Regarding professional indemnity cover, the proposed amendments to the Solicitors (Professional Indemnity) Rules would in effect put the solicitors and their staff working within a solicitor corporation in the same position as though they were practising through the existing forms of sole proprietorship or partnership, and any claims against the corporation would proceed against the Professional Indemnity Fund in the normal way.

62. Mr MOSS referred members to rule 3(1)(d)(i) of the Rules, which specified that subject to subrule (2), every member and every director of a solicitor corporation must be an individual who was a solicitor holding a current practising certificate which was not subject to any condition other than the condition that he should comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of Cap. 159. He said that with the coming into force of the Practising Certificate (Special Conditions) Rules, which enabled the Law Society to impose conditions on the practising certificate of a solicitor, concern had been raised as to whether the conditions imposed would bar the solicitor from becoming a member or director of a solicitor corporation. He informed members that the issue would be considered at a meeting of the Council of the Law Society on 25 November 2003. Subject to a resolution made by the Council on the matter, an amendment would be made to rule 3(1)(d)(i), if necessary.

63. Regarding the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules (Annex C to the Law Society's paper), Mr MOSS informed members that CJ had approved the amendments to Rule 6 of Schedule 3 to the Rules but had not yet approved the amendments to Rule 2.

Views of the Administration

64. Senior Government Counsel (Legal Policy Division) briefed members on the Administration's letter dated 17 November 2003 to the Panel (LC Paper No. CB(2)390/03-04(06)). She informed members that the Administration considered that the only outstanding issue regarding solicitor corporations was whether it was necessary for solicitor corporations to take out top-up insurance. In this connection, the Administration had agreed not to insist on a requirement for top-up insurance at this stage, after considering the circumstances put forward by the Law Society. The Administration also considered that whether the issue of top-up insurance should be further assessed would depend on the outcome of the Law Society's review on its existing professional indemnity scheme and the practical operation of the Solicitor Corporations Rules.

Issues raised by members

65. Referring to the condition in rule 3(2) of the Rules that a solicitor corporation established by a sole practitioner must have a second member in order to comply with the requirements of the Companies Ordinance, Ms Audrey EU asked whether the subrule was still required in the light of the amendments recently made to the Companies Ordinance. Mr Patrick MOSS responded that he was unaware that the amendments had been brought into effect. His personal view was that even if the amendment was passed, the safeguard in rule 3(2) might still be necessary. Ms Audrey EU pointed out that the reference to the Companies Ordinance might not be necessary. Mr MOSS agreed to follow up the issue raised.

66. Ms Audrey EU asked whether the proposed Rules on solicitor corporations had any precedents elsewhere and whether the formation of solicitor corporations would become the norm for legal practice after the Rules were passed.

67. Mr Patrick MOSS advised that there was similar legislation in some jurisdictions including Singapore. He added that he doubted many practitioners would actually incorporate their practice by establishing solicitor corporations, which, in his opinion, though suited the needs of some, were not a particularly effective way of running a legal practice. He further said that some people had supported the formation of solicitor corporations on the misunderstanding that practitioners could limit their liabilities and the problems associated with professional indemnity could be solved. However, this was not the case in reality.

68. The Chairman asked whether the Law Society had consulted its members on the Rules. Mr Patrick MOSS replied that the Law Society had sought views from its members about a year ago and minor amendments had been made to the Rules since then. He said that the members would be consulted again if the Council of the Law Society considered that further amendments were necessary.

69. In response to the Chairman, Mr Patrick MOSS said that the finalised Rules would be submitted to CJ for approval after the Council of the Law Society had resolved the relevant outstanding issues and a Chinese version of the Rules was prepared. The Rules would then be gazetted. He said that it was expected that this could be done by end of 2003/early 2004.

Way forward

70. The Chairman said that it was likely that a subcommittee would be formed to study the Rules in detail after the Rules had been tabled in LegCo. To facilitate future deliberations on the Rules, the Chairman requested the Law Society to provide a paper to explain -

- (a) the differences between legal practice in partnership and in a solicitor corporation after passage of the Rules; and
- (b) the differences between the liability of a legal practitioner in partnership and in a solicitor corporation under the existing Professional Indemnity Scheme of the Law Society.

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