

**LAW SOCIETY'S SUBMISSION ON CLAUSE 36 IN PART 10 OF
STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2007**

Background

1. Clause 36 in Part 10 of the Statute Law (Miscellaneous Provisions) Bill 2007 deals with the proposed amendments to section 53(1) of the Legal Practitioners Ordinance ("Ordinance").
2. Under section 53(1) of the Ordinance (Annexure 1), if a solicitor intends to employ or remunerate any person whose practising certificate has been determined by virtue of section 6(7) of the Ordinance in consequence of having become bankrupt, or whose registration was cancelled other than removal from the roll and who has not been re-registered or whose registration is suspended, he is required to seek the Law Society's written permission which may be given for such period and subject to such conditions as the Law Society thinks fit.
3. Section 6(7) of the Ordinance (Annexure 2) provides that when a solicitor becomes bankrupt, his practising certificate shall automatically determine.
4. Section 39A(3) of the Ordinance (Annexure 3) provides that when a foreign lawyer becomes bankrupt, the registration of the foreign lawyer is automatically cancelled.

Justification

5. The policy intent of section 53(1) is to protect public interest by empowering the Society to take timely steps to ensure proper supervision over a solicitor with financial problems working in a law firm. An obvious concern is that the solicitor may be tempted to misappropriate clients' money.
6. When a law firm applies for permission to employ a bankrupt solicitor as a paralegal or a clerk under section 53(1), if approval is granted, the Society will normally impose the following conditions:
 - (a) the firm has to inform its clients the capacity in which the bankrupt solicitor is employed, i.e. as a paralegal or a clerk;
 - (b) the bankrupt solicitor is not allowed to handle clients' money.
7. On the basis of such policy intent, there is no reason why a distinction has to be made between:
 - (a) a solicitor who holds a practising certificate when he becomes bankrupt; and
 - (b) one who does not have a practising certificate when he becomes bankrupt.

The reason triggering off the need to obtain prior approval of employment from the Society (namely, bankruptcy status at the time of employment) is still there irrespective of whether the solicitor falls into the former or latter case.

8. However, under section 53(1), a solicitor who does not hold a practising certificate when he becomes bankrupt appears to fall outside the section. The same applies to a foreign lawyer. This loophole is contrary to the policy intent and it is proposed that the section be amended to clear any ambiguity.

Proposed amendments

9. It is proposed that section 53(1) be amended to make it clear that a law firm which intends to employ a bankrupt solicitor or foreign lawyer should apply to the Law Society for written permission to do so, irrespective of whether he holds a practising certificate or of his registration status at the time of his bankruptcy.
10. Section 53(1) marked up with the proposed amendments is attached at **Annexure 4**.

Consultation

11. The recommendation to propose the legislative amendments was made after careful consideration and deliberation at the relevant Committee and at the Standing Committee on Standards and Development comprising representatives from a wide cross section of the profession. The recommendation was then considered and endorsed by the Council of the Law Society which comprises representatives elected from the profession.
12. The proposed amendment is consistent with the policy intent underlying the existing provision. The aim is to remove any ambiguity and possible loophole in the regulation of the employment conditions of bankrupt solicitors and foreign lawyers in law firms for protection of the public interest.
13. No general consultation on the proposal is therefore considered necessary in the circumstances.
14. Further, when asked by the Department of Justice whether the Hong Kong Corporate Counsel Association had been consulted in this amendment exercise, the Society had explained that section 53(1) only applies to employment of solicitors and foreign lawyers in Hong Kong law firms and does not extend to the employment of in-house solicitors by corporations and the Society therefore did not consider it relevant to consult the Association.

- (4) A foreign lawyer or foreign firm shall not take a solicitor into partnership or employ a solicitor who holds a practising certificate or a barrister who holds a practising certificate.
- (5) Where a Hong Kong firm and a foreign firm have an agreement as described in section 39C(1) and they are not registered as an Association, the partners or the sole practitioners of each firm commit an offence.
- (6) A person who commits an offence under this section is liable to a fine of \$500,000.

51. Application of penal provisions to body corporate

- (1) If any act is done by a body corporate, or by any director, officer or servant thereof, of such a nature or in such a manner as to be calculated to imply that the body corporate is qualified or recognized by law as qualified to act as a solicitor, the body corporate shall be guilty of an offence and shall be liable on summary conviction to a fine of \$500,000, and, in the case of an act done by a director, officer or servant of the body corporate, such person shall also be guilty of an offence and shall be liable on summary conviction to a fine of \$500,000.
- (2) For the avoidance of doubt, it is hereby declared that in sections 45, 46, 47, 48, 49, 50 and 50B, references to unqualified persons and to persons include references to a body corporate.

52. Solicitors not to commence or defend actions while in prison

- (1) No solicitor whilst a prisoner in any prison shall as a solicitor, in his own name or in the name of any other solicitor, sue out any writ or process, or commence, prosecute or defend any action or any matter in bankruptcy.
- (2) Any solicitor commencing, prosecuting or defending any such action or matter in contravention of this section shall be incapable of maintaining any action for the recovery of any costs in respect of any business done by him whilst so confined as aforesaid, and he and any solicitor permitting him to commence, prosecute or defend any such action or matter in his name shall be guilty of contempt of the court in which such action or matter was commenced or prosecuted and may be punished accordingly.

53. Employment by solicitor or foreign lawyer of persons struck off or suspended

- (1) No solicitor shall, in connection with his practice as a solicitor, without the written permission of the Society which may be given for such period and subject to such conditions as the Society thinks fit, employ or remunerate any person who, to his knowledge, -
 - (a) is disqualified from practising as a solicitor by reason of the fact that his name has been struck off the roll of solicitors or is suspended from practising as a solicitor or whose practising certificate has been determined by virtue of section 6(7) in consequence of having become bankrupt; or
 - (b) was a foreign lawyer whose registration was cancelled other than under section 19 and who has not been re-registered or is a foreign lawyer whose registration is suspended.
- (1A) No foreign lawyer shall, in connection with his practice as a foreign lawyer, without the written permission of the Society which may be given for such period and subject to such conditions as the Society thinks fit, employ or remunerate any person who, to his knowledge, was a foreign lawyer whose registration was cancelled other than under section 19 and who has not been re-registered or is a foreign lawyer whose registration is suspended.

- (2) A person shall not be disqualified from admission as a solicitor by reason only that-
 - (a) a solicitor who employed him or acted as his principal for the whole term or such part of a term of a trainee solicitor contract as may be prescribed by the Council has neglected or omitted to take out a practising certificate; or
 - (b) the name of the solicitor who employed him as a trainee solicitor or acted as his principal for any period has after the termination of that period been removed from or struck off the roll of solicitors.
- (3) Where a person who was admitted as a solicitor on the basis of an intention referred to in subsection (1A)(b) fails to reside in Hong Kong for at least 3 months immediately after his admission, the Court may, on the application of the Society, order that the person's name be removed from or struck off the roll of solicitors.

5. Roll of solicitors

- (1) The Registrar shall keep a roll of all solicitors admitted by the Court under section 4 and shall have the custody of the roll of solicitors and of all documents relating thereto and shall allow any person to inspect the roll during office hours without payment.
- (2) The Registrar, upon production of a certificate of admission signed by a judge and upon payment to the Registrar and to the Society of such fees as may be prescribed by the Chief Justice, shall enter on the roll of solicitors the name of the person admitted.
- (3) The Chief Judge may, if he thinks fit, at any time order the Registrar to replace on the roll of solicitors the name of a solicitor whose name has been removed or struck off the roll of solicitors.

6. Practising certificates - solicitors

- (1) The Society, on application in writing by a solicitor in the month of November in any year in a form approved by the Council and on payment of such fee as may be so prescribed, shall, subject to subsection (3), issue to the applicant a practising certificate as a solicitor for the period of one calendar year from 1 January next following the date of the application.
- (1A) A practising certificate issued to a solicitor admitted under section 3(1AD) before the repeal of that provision by the Legal Practitioners (Amendment) Ordinance 1994 (60 of 1994) is subject to the condition that the solicitor shall not practise on his own account or in partnership.
- (2) A practising certificate issued under subsection (1) shall be in such form as may be prescribed by the Council.
- (3) A practising certificate shall not be issued under subsection (1) unless the applicant has, where necessary, delivered to the Council an accountant's report under section 8, complied with any indemnity rules made by the Council under section 73A or is exempt from them and has paid to the Society the membership subscription in respect of the year for which the practising certificate is to be issued.
- (4) Notwithstanding subsection (1), the Society may, upon such conditions as it thinks fit, permit an application for a practising certificate to be made under this subsection at any time and upon such application may issue to the applicant a practising certificate for any period not exceeding one calendar year and ending on 31 December in the year in which it is issued.

- (5) Notwithstanding subsection (1), the Society may-
- (a) refuse to issue a practising certificate on such grounds as may be prescribed by the Council;
 - (b) issue a practising certificate to an applicant subject to such conditions as may be prescribed by the Council.
 - (c) issue a practising certificate to an applicant subject to the condition that he shall comply with any continuing legal education rules made under section 73;
 - (d) refuse to issue a practising certificate if the applicant has not complied with any continuing legal education rules made under section 73; or
 - (e) amend an already issued certificate by adding such conditions as may be prescribed by the Council.
- (5A) Where the Society considers that a solicitor has not complied with conditions imposed under subsection (5) or (6) it may, after affording the solicitor the opportunity to make representations, suspend or cancel the solicitor's practising certificate with or without refunding the certificate fee.
- (6) It shall be a condition of a practising certificate issued for the first time on or after 1 August 1976 to any solicitor who does not satisfy the Council that since being admitted as a solicitor he has been bona fide employed in the practice of a solicitor in Hong Kong for at least 2 years prior to his application for such practising certificate, that he shall not practise as a solicitor on his own account or in partnership until he satisfies the Council that since being admitted as a solicitor he has been bona fide employed in the practice of a solicitor in Hong Kong for at least 2 years.
- (6A) If the Council considers that an applicant has acquired substantial experience in the law either in Hong Kong or elsewhere, the Council may waive the 2 year employment requirement in subsection (6) or it may reduce the period of 2 years to a period it considers appropriate.
- ✓ (7) Where the name of a solicitor is removed from or struck off the roll of solicitors or where a solicitor becomes bankrupt, the practising certificate of that solicitor shall automatically determine and in any such case no part of the fee paid in respect thereof shall be repayable.
- (8) The publication in the Gazette by the Society of a list of the names and addresses of those solicitors who have obtained practising certificates for the period stated therein shall, until the contrary is proved, be evidence that each person named therein is a person qualified under section 7 to act as a solicitor and to whom a practising certificate for the period stated in such list has been issued under this section; and the absence from any such list of the name of any person shall, until the contrary is proved, be evidence that such person is an unqualified person.
- (9) Where the Society, in the exercise of the powers conferred on it under subsection (5) or (5A), refuses to issue a practising certificate, issues a certificate subject to conditions, amends a certificate by adding conditions or suspends or cancels a certificate, the solicitor may appeal to the Chief Judge against the decision of the Society within 1 month of being notified of it.
- (10) Where the Council refuses to disapply subsection (6) in the case of an applicant who claims to have acquired substantial experience in the law, either in Hong Kong or elsewhere, the applicant may appeal to the Chief Judge against the decision of the Council within 1 month of being informed of that decision.

PART IIIA

FOREIGN LAWYERS AND FOREIGN FIRMS

39A. Foreign lawyers

- (1) The Society may register as a foreign lawyer a person who, not being a solicitor who holds a practising certificate or a barrister who holds a practising certificate, is qualified to practise foreign law.
- (2) Solicitor-client privilege exists between a foreign lawyer and his client to the same extent as the privilege exists between a solicitor and his client.
- ✓ (3) Where a foreign lawyer becomes bankrupt the registration of the foreign lawyer is automatically cancelled.

39B. Foreign firms

- (1) The Society may register as a foreign firm a firm -
 - (a) in which all of the partners who intend to practise in Hong Kong are foreign lawyers or the sole practitioner of which is a foreign lawyer; and
 - (b) that intends to have within 2 months after registration, a place of business in Hong Kong for the purpose of practising or advising on foreign law.
- (2) Where a firm was registered as a foreign firm on the basis of an intention referred to in subsection (1)(b) but fails to establish a place of business in Hong Kong within 2 months after its registration, the Society may cancel the firm's registration.

39C. Associations

- (1) The Society may register as an Association a Hong Kong firm and one or more foreign firms if the Hong Kong firm and the foreign firm or firms have, or intend to have within 2 months after the registration, an agreement under which fees, profits, premises, management or employees are shared between the Hong Kong firm and the foreign firm or firms.
- (2) Where the Hong Kong firm and the foreign firm or firms fail to enter into an agreement referred to in subsection (1) within 2 months after registration of the Association, the Society may cancel the Association's registration.

39D. Hong Kong firms may employ foreign lawyers

Subject to rules made under section 73(1)(dc), a Hong Kong firm may employ a foreign lawyer.

**Proposed Amendments to section 53(1) of the
Legal Practitioners Ordinance**

53. Employment by solicitor or foreign lawyer of persons struck off or suspended

(1) No solicitor shall, in connection with his practice as a solicitor, without the written permission of the Society which may be given for such period and subject to such conditions as the Society thinks fit, employ or remunerate any person who, to his knowledge, -

(a) is disqualified from practising as a solicitor by reason of the fact that his name has been struck off the roll of solicitors or is suspended from practising as a solicitor or ~~whose practising certificate has been determined by virtue of section 15(7) in consequence of having become bankrupt or is an undischarged bankrupt~~

(b) was a foreign lawyer whose registration was cancelled other than under section 19 and who has not been re-registered or is a foreign lawyer whose registration is suspended ~~or~~

~~(c) is a person referred to in section 39A(1) who~~

~~(i) has not been registered as a foreign lawyer under that section; and~~

~~(ii) is an undischarged bankrupt~~

(1A)