

**《2010 年法律執業者(修訂)條例草案》
 (“《條例草案》”)委員會**

2011 年 7 月 27 日法案委員會會議後的近期發展

目的

本文件闡述當局與香港律師會(“律師會”)討論 2011 年 7 月 27 日法案委員會會議上所提事項的最新進展、當局對 2011 年 6 月 10 日、6 月 15 日及 7 月 27 日法案委員會會議上委員所提有關草擬上的事宜所作的回應，以及就《條例草案》所建議的最新委員會審議階段修正案(“修正案”)。

**與律師會討論 2011 年 7 月 27 日法案委員會會議上所提事項的
進展**

2. 在 2011 年 7 月 27 日法案委員會會議上，律師會代表出席會議並重申律師會早前在 2011 年 6 月 29 日致法案委員會的意見書所提的反對意見，當中包括律師會要求對當局當時所提出的修正案擬稿，作出以下修訂：

有關指定合夥人的條文(“指定合夥人條文”)

(a) “剔除所有有關規管“指定合夥人”的法律責任的建議修訂”¹

¹ 見律師會 2011 年 6 月 29 日的意見書第 48(a)段(立法會 CB(2)2263/10-11(01)號文件)。

有關退還已分發的合夥財產的時限(“退還財產期”)

(b) 將“6年”改為“2年”²

3. 當局於2011年8月31日與律師會代表會面，就有關事宜進行非正式討論。當局獲告知律師會主要關注的是，根據指定合夥人條文，即使指定合夥人本身並無疏忽，也會失去有限責任合夥的保障。當局於會後針對律師會的主要關注事項，着手擬備新一套修正案。

4. 當局於2011年12月19日與律師會代表會面，非正式地向他們表示我們擬對2011年6月的修正案(“6月修正案”)³作出以下主要修訂，以釋除律師會的關注。該次非正式會面後，當局隨即在同日把已納入新修正案的《條例草案》文本(“12月《條例草案》及修正案擬稿”)，送交律師會作詳細審議。該文本現載於附件A。

(a) 全面簡化修正案，尤其是簡化第7AC條(有限法律責任合夥對合夥人的法律責任的影響)及第7AGA條(合夥人如何成為指定合夥人⁴)的草擬方式。

(b) 加入新的第7ACA(2)條，更清楚訂明我們的政策原意，即如有下述情況，某合夥人不會獲得有限法律責任合夥保障：a)有關的失責行為由該合夥人造成；或b)造成該失責行為的律師行的合夥人、僱員、代理人或代表由該合夥人監督。⁵

² 見律師會2011年6月29日的意見書第48(e)(iv)段。

³ 立法會CB(2)2056/10-11(01)號文件。

⁴ 舊標題為“每項事宜均須有指定合夥人”。

⁵ 加入這項條文，是為了清楚說明《條例草案》摘要說明第8段所述的政策，該段訂明“例如，有限責任合夥的合夥人在普通法下可能仍須對受其監督的僱員、代理人或代表的失責行為負責。”

- (c) 加入新的第 7ACA(4)條，訂明就某事宜而言，只會在沒有指定合夥人期間，才不能獲得有限法律責任合夥保障。這項規定放寬並取代先前第 7AGA 條的規定，即在處理某事宜的整段期間，均須有一位指定合夥人。
- (d) 加入新的第 7ACB 條，訂明如某指定合夥人證明該失責行為由以下人士造成，便可獲得保障：a)該合夥人的另一名合夥人；或 b)由另一名合夥人所監督的律師行的僱員、代理人或代表。加入這項條文，是爲了釋除律師會對根據指定合夥人條文，即使指定合夥人本身並沒有疏忽，仍須對當事人負上法律責任的特別關注。⁶
- (e) 加入新的第 7ACD 條，訂明律師根據《香港事務律師專業操守指引》(“《操守指引》”)須將負責監督的律師的身分及其後的更新通知該當事人的責任，並不受到影響。

5. 當局並沒有在 12 月《條例草案》及修正案擬稿就退還財產期提出政策上的修改。

6. 在 2012 年 1 月中，律師會口頭通知當局，律師會理事會認為不能接受 12 月《條例草案》及修正案擬稿，並重申要求如下：

- (a) 從 12 月擬稿中刪除指定合夥人條文；以及
- (b) 把退還財產期由 6 年減至 2 年。

7. 在 2012 年 2 月 2 日和 2012 年 2 月 9 日，當局與律師會代表舉行會議，進一步討論雙方的分歧，以及如何在有限法律責任合夥的合夥人利益與保障消費者之間取得適當平衡。

⁶ 見本文件第 3 段。

8. 在 2012 年 2 月 9 日的會議上，當局建議(但須以最終的有限法律責任合夥法例為準)從《條例草案》刪除所有指定合夥人條文(載於 6 月修正案)，並以下述規定(“監督合夥人的規定”)取代：

- (a) 有限法律責任合夥當事人的每項事宜必須由一名合夥人負責監督。
- (b) 有限法律責任合夥須將最少一名負責整體監督其事宜的合夥人(“監督合夥人”)的身分及其後的更新通知當事人。
- (c) 有限法律責任合夥如沒有按照上文(b)項的規定讓當事人知悉監督合夥人的身分，所有合夥人即失去就該項當事人事宜的有限法律責任合夥保障。
- (d) 監督合夥人須應當事人的要求，[於指定時間內]，盡其所知向當事人提供一份當時或曾經(視何者適用而定)負責監督當事人全部或某部分事宜的合夥人名單。

9. 在 2012 年 2 月與律師會舉行的會議上，當局並沒有就退還財產期提出政策上的修改。

10. 律師會在 2012 年 2 月 13 日舉行會員論壇⁷，討論《條例草案》並就是否予以支持徵詢會員意見。該論壇集中討論以下兩個主要問題(“主要問題”)：

- (a) 建議以監督合夥人的規定取代指定合夥人條文；以及
- (b) 建議的 6 年退還財產期。

⁷ 出席論壇的律師會會員約有 200 人。主持該論壇的小組成員為立法會吳靄儀議員、法律政策專員潘英光先生、副法律政策專員黃慶康先生、高級助理法律政策專員尹平笑女士，以及律師會的代表何君堯先生、王桂壠先生、史密夫先生、李超華先生、David Hirsch 先生和黎雅明先生。

11. 出席律師會會員論壇的會員其後獲邀填寫一份關於當局最新建議的問卷，該問卷副本載於附件 B。根據律師會會長在 2012 年 2 月 14 日給會員的函件，調查結果顯示：

“在填寫該份問卷的會員當中，約有 95% 不支持當局目前提出的有限責任合夥模式，但如當局把 6 年退還財產期縮短，則有 71% 願意給予支持。關於退還財產期的合適期限，有 62% 接受以兩年為限。”

當局對主要問題的現行立場及理由

12. 考慮到主要問題較為重要，當局會在下文就每個主要問題闡述現行立場並解釋理由：

建議以監督合夥人的規定取代指定合夥人條文

13. 我們與律師會在 2012 年 2 月 2 日所舉行的會議上首次討論以監督合夥人的規定取代指定合夥人條文的構思。當局已審慎考慮有關事宜，並顧及律政司一直推行的政策是推動香港成為亞太區首要的法律服務和解決爭議中心，繼而得出結論，認為可接受以監督合夥人的規定取代指定合夥人條文，藉以在保障無辜的合夥人與保障消費者之間維持適當的平衡。

14. 有關指定合夥人條文的政策原意，是確保至少有一名有限法律責任合夥的合夥人須就有限法律責任合夥的失責行為向當事人負責。我們認為，實際上，監督合夥人的規定應可達致我們的政策原意，理由如下：

- (a) 監督合夥人的規定的四項要素(見上文第 8 段)，會有助當事人有效而迅速地識別負責監督其事宜的合夥人身分。在

這方面，值得注意的是，指定合夥人條文並無指明哪類合夥人可擔任指定合夥人⁸。如指定合夥人符合新建議的第7ACB條⁹的規定，有關條文亦容許該合夥人獲得有限法律責任合夥的保障。與律師會建議把焦點集中在監督合夥人的建議相比，監督合夥人的規定能有助當事人更容易識別負責監督其事宜的合夥人身分。

- (b) 從政策角度來看，兩者的唯一主要分別，在於指定合夥人條文訂明，當事人證明有限法律責任合夥有失責行為後，指定合夥人負有共同和各別的法律責任，而監督合夥人的規定則規定當事人須證明，監督合夥人因普通法所定的法律責任及／或違反《條例草案》其他相關條文的規定，而須向當事人負上個人法律責任。實際上，基於下述理由，這個分別應不會有重大意義，而最新的建議應足以令應對失責行為負責的監督合夥人須向其當事人負上法律責任。我們持這個看法的理由如下：

- (i) 首先，一般而言，根據普通法，合夥人必須對其監督的人所作的疏忽或錯誤的作為，負上法律責任。
- (ii) 其次，正如上文第4(b)段所述，我們已建議加入新的第7ACA(2)條，更清楚訂明我們的政策原意，即如有下述情況，某合夥人不會獲得有限法律責任合夥的保障：a)有關的失責行為由該合夥人造成；或 b)造成該

⁸ 當局當初的政策是為有限法律責任合夥律師行提供靈活性，讓個別的律師行自行決定其認為最適合擔任其律師行指定合夥人的合夥人類別。

⁹ 正如上文第4(d)段所述，當局亦建議在新的第7ACB條為指定合夥人提供一項免責辯護，以釋除律師會對指定合夥人即使沒有涉及失責行為也可能須負上個人責任的關注。

失責行為的律師行的合夥人、僱員、代理人或代表由該合夥人監督。我們已在 2012 年 2 月 2 日的會議上向律師會表明，日後經修訂的修正案仍會加入這項條文。

(iii) 第三，我們已在 2012 年 2 月 2 日的會議上向律師會表明，日後經修訂的修正案仍會加入第 7ACA(1)條，該條規定如下：

“在下述的情況下，第 7AC(1)條並不會使某合夥人免責－

(a) 該合夥人在失責行為發生時，知道該行為；及

(b) 該合夥人沒有採取合理程度的謹慎以阻止該行為發生。”

(iv) 從政策角度來看，我們相信，如某合夥人不屬上文第 14(b)(i)至(iii)段所述的類別，便不應因有限法律責任合夥的失責行為而須對當事人負上個人法律責任。因此，對於最新建議界定監督合夥人因有限法律責任合夥的失責行為而須對當事人負上法律責任的範圍，我們認為是合理的。

(c) 當局制訂監督合夥人的規定時，已充分考慮律師會的意見，即法律專業是紀律嚴明¹⁰的專業，律師會會就有限法

¹⁰ 舉例來說，律師會在 2010 年 8 月 6 日的意見書第 28 段(立法會 CB(2)2233/09-10(03)號文件)解釋，“法律專業是紀律嚴明、競爭激烈的專業。沒有合夥人會純因律師行屬有限法律責任合夥而甘於冒疏於監督和損害得來不易的聲譽的風險。”

律責任合夥加強其《操守指引》。¹¹

建議的 6 年退還財產期

15. 如上文第 5 及第 9 段所述，儘管律師會多番要求把退還財產期由 6 年減至 2 年，當局並沒有建議修改退還財產期。當局早前已向法案委員會解釋現行建議的退還已分發合夥財產規定背後的考慮因素，以及為何 6 年退還財產期(這只是建議的其中一部分)可在保障有限責任合夥的合夥人與保障消費者兩者之間取得適當平衡。儘管如此，鑑於參加律師會會員意見調查的大部分律師會會員均不支持 6 年退還財產期，我們希望先聽取法案委員會委員在這方面的意見，其後才作決定。

16. 為協助法案委員會委員進一步考慮此事，我們將《條例草案》提出原來建議後至法案委員會階段委員討論期間，關於此事宜所提出的意見重點，連同當局的回應(如適用)，撮載於下文，以便參考：

退還財產期

(a) 《條例草案》沒有明確訂定退還已分發合夥財產規定的時限，令律師會提出“第 7AI 條並無時限”的關注¹²。律師會在 2010 年 8 月 6 日的意見書中，要求刪除全部退還財產的規定，又或在條文加入退還財產期為分發日期起計 2 年的

¹¹ 舉例來說，律師會在 2010 年 9 月 29 日的意見書第 6 段(立法會 CB(2)2328/09-10(01)號文件)表示，“為釋除就合夥人可能藉不監督執業情況而試圖逃避個人法律責任這方面的疑慮，律師會會同意修訂《操守指引》，規定以有限法律責任合夥模式經營的律師必須履行原則第 5.17 條評論 1 及 2 所載的義務。”

¹² 律師會 2010 年 9 月 29 日的意見書第 18(a)段(立法會 CB(2)2328/09-10(01)號文件)。

規定。¹³

- (b) 當局對以上的回應是建議制定為期 2 年的退還財產期，由申索人發現所作出的分發或盡了合理努力後本可發現有關分發的日期起計。¹⁴
- (c) 律師會不同意上文(b)項所述的當局建議，理由是建議的退還財產期並不明確。¹⁵
- (d) 經考慮律師會的意見後，當局在 2011 年 1 月建議，將退還財產期定為分發日期起計 6 年。當局提出這項建議時，已參考《時效條例》(第 347 章)就這類事宜所訂的 6 年時效期限。¹⁶當局基於兩個理由反對律師會建議的 2 年時效期限：(i)當事人對於有限責任合夥向其合夥人分發利潤及資產並不知情；以及(ii)當事人就律師行疏忽而提出申索，通常需時超過 2 年才取得一審判決書，然後始能強制執行判定債項。¹⁷

《破產條例》的相關性

- (e) 律師會在 2010 年 9 月 29 日的意見書中表示，退還已分發合夥財產規定是多餘的，因為如果有限法律責任合夥無力

¹³ 立法會 CB(2)2233/09-10(03)號文件第 40 及 41 段。

¹⁴ 當局 2010 年 11 月的意見書第 14(a)段(立法會 CB(2)344/10-11(01)號文件)。

¹⁵ 正如當局在 2011 年 1 月的意見書第 9 段所撮述(立法會 CB(2)888/10-11(01)號文件)。

¹⁶ 香港法例第 347 章第 4(1)條訂明的事項包括“追討憑藉任何條例……而可予追討的款項的訴訟”，於訴訟因由產生的日期起計滿 6 年後，不得提出，“但有關款項如屬罰金或沒收款項或屬作為罰金或沒收款項的款項則除外”。

¹⁷ 當局 2011 年 1 月的意見書第 10(b)段(立法會 CB(2)888/10-11(01)號文件)。

償債而合夥人破產，《破產條例》便會適用。

當局的回應

- (i) 請參閱我們在 2010 年 11 月提交法案委員會的文件¹⁸第 16 至 18 段的摘錄(載於附件 C)，當中解釋為何當局認為《破產條例》不能達致退還已分發合夥財產規定背後的政策目的。
- (ii) 此外，由於根據《條例草案》，有限法律責任合夥的“無辜合夥人”無須對有限法律責任合夥的失責行為負上共同及個別的法律責任¹⁹，屬判定債權人的當事人根本沒有理據基於有限法律責任合夥的失責行為而針對無辜合夥人提出破產呈請。因此，《條例草案》明文訂出退還已分發合夥財產規定以保障消費者，至為重要。

禁止分發 對 容許分發

- (f) 當局在 2010 年 10 月 5 日法案委員會會議上解釋，事實上，一些海外司法管轄區規定，合夥人如未能通過相關償債能力驗證，則禁止分發合夥財產；在若干情況下，甚至規定授權作出分發的合夥人，必須對所分發的款額負上個人法律責任。這與我們的建議不同。

合理評估的免責辯護

- (g) 在 2011 年 5 月 20 日法案委員會會議上，法案委員會委員

¹⁸ 立法會 CB(2)344/10-11(01)號文件。

¹⁹ 儘管就針對有限法律責任合夥的申索而言，合夥財產不獲保障。

表示支持當局建議的 6 年退還財產期。當局亦建議，在退還已分發合夥財產規定中，為有限法律責任合夥的合夥人(或合夥人於該合夥中的股份的承讓人)提供免責辯護，訂明假如根據作出分發時的資料，可合理地推斷該合夥於分發後能通過償債能力驗證，則有關人士無須遵從退還已分發合夥財產規定²⁰。

- (h) 在 2011 年 6 月 15 日法案委員會會議上，法案委員會委員詢問，關於法案委員會委員所建議，由律師會就上文(g)段所述當局建議的免責辯護，向屬下會員發出執業指引一事，律師會是否同意。當局告知法案委員會，律師會的非正式回應是，在指定合夥人條文的問題解決前，該會不會考慮此事。
- (i) 律師會在 2011 年 6 月 29 日提交法案委員會的意見書中，提出多項要求，包括：²¹

“除非作出以下修訂，否則刪除第 7AI 條[即退還已分發合夥財產規定]整條條文：

(i)

(ii) 修訂第 7AI(1A)條，把英文本的引言部分的最後 4 個字“the person proves that(中文意譯為“能證明”)”刪除，並以下述方式修訂(a)段：

“在緊接作出有關分發之前，有關的有限法律責任合夥已

²⁰ 見立法會 CB(2)2700/10-11 號文件第 11 段。

²¹ 見律師會 2011 年 6 月 29 日的意見書第 48(e)(ii)段(立法會 CB(2)2263/10-11(01)號文件)。

根據以下方法作出評估，認為該合夥在緊接該項分發之後的財政狀況，不會如第(1)款所描述者：

(a) 根據在當時情況屬合理的會計常規及原則擬備的財務報表；

(b) 某項公平估值；或

(c) 在當時情況下屬合理的另一方法。”

(j) 正如當局在 2011 年 5 月 20 日的法案委員會會議上所解釋²²，當局認為不宜按上文第(i)段所載的律師會建議，為作出分發訂定安全港條文。儘管律師會建議的準則或與令某項分發有充分理據相關，但當局認為，對於有限法律責任合夥作出某項分發是否合理的問題，可能還有其他相關因素。簡而言之，我們認為，應由法庭根據個別案件的所有相關情況作出裁決。

(k) 在 2011 年 7 月 27 日的法案委員會會議上，法案委員會主席解釋，該委員會所得的共識是：不應對有限法律責任合夥作出分發施加限制、退還財產期應訂為 6 年，以及應按當局所建議為作出分發提供免責辯護。

17. 總括來說，當局並不認同，把退還財產期減至 2 年的建議具有充分理據。如果我們將退還財產期減至 2 年，我們便可能有需要考慮是否須訂立其他保障消費者的補償措施，例如為有限法律責任合夥訂立特別的專業彌償保險規定，以及／或考慮我們是否應在監督合夥人規定中加入其他保障條文。儘管如此，我們仍然歡迎法案委

²² 載於立法會網站的法案委員會 2011 年 5 月 20 日會議紀要第 12 段(立法會 CB(2)2700/10-11 號文件)。

員會委員就此議題提出建議，惟我們認為從保障香港特區消費者的角度來說，“2年”的退還財產期並不合理。

法案委員會委員在 2011 年 6 月 10 日、6 月 15 日及 7 月 27 日 所提草擬上的事宜

6 月 10 日法案委員會會議

18. 在 2011 年 6 月 10 日法案委員會會議上，委員要求：

- (a) 把當時的英文文本第 7AI(1A)條中“**But a person who receives the distribution as described in subsection (1) is not liable as provided in subsection (2) if the person proves that.....**”的“**But**”字刪去，理由是該字並非必要。

當局經充分考慮有關要求，現建議把該條文英文文本中的“**But**”字修訂為“**However,**”(見隨付的附件 A 所載第 7AI(1A)條)。

- (b) 當局考慮把第 7AI(1A)條的免責辯護條文移至第 7AI(3)條後面會否更為恰當。

經充分考慮後，當局決定不更改該條文的位置。在編排法律條文方面，當局曾考慮的相關原則包括：

- (i) 較重要的條文通常置於較次要條文前面。
- (ii) 在切實可行範圍內，應按事件時序編排條文。

第 7AI(1A)條(*合理的評估*)與退還款項的法律責任相關，並與第 7AI(1)條的償債能力驗證直接有關。換言之，第 7AI(1A)條與第 7AI(1)條密切有關，而且較關於退還款額的第 7AI(2)條更為重要。此外，第 7AI(1A)條的基本概念

是，合理的評估應在有關財產分發之前進行，而有關分發應在退還財產的法律程序之前作出(這是第 7AI(3)條的主題)。基於上述原因，我們認為第 7AI(1A)條應置於第 7AI(1)條後面。

2011 年 7 月 27 日法案委員會會議

19. 在 2011 年 7 月 27 日法案委員會會議上，委員表示：

- (a) 他們對建議新增的第 7AGA 條([舊標題]每項事宜均須有指定合夥人)的草擬方式未感滿意，因為當中的通知條文累贅難明，細節亦遠超所需。

正如上文第 8 段所述，我們在 2012 年 2 月與律師會討論時，已同意從《條例草案》中刪除所有指定合夥人條文(包括第 7AGA 條)。考慮到法案委員會委員的意見，我們就監督合夥人的規定草擬新的修正案時，亦會在切實可行範圍內盡量簡單。

- (b) 日後的條例可能只為有限法律責任合夥遵從律師會的執業指引提供一個框架，而不會詳述相關的技術細節。²³

為保障消費者，我們認為《條例草案》應加入監督合夥人規定中的主要規定，並給予法律地位，這點至為重要。儘管如此，我們同意應由律師會自行規管會員，對有限法律責任合夥施加認為需要的其他詳細規定。正如上文第 14(c)段所述，我們預期律師會會就有限法律責任合夥加強其《操守指引》。

²³ 法案委員會委員認為，根據其修訂建議，日後如因其他情況而需要更改有關安排，也可無需修訂條例。

最新建議的委員會審議階段修正案

20. 考慮到主要問題的重要性，當局會在聽取法案委員會委員對主要問題的意見後，才修訂修正案。我們會在 2012 年 3 月 1 日舉行的法案委員會會議後，在切實可行範圍內盡快提交經修訂的修正案擬稿，供法案委員會委員審議。

律政司

2012 年 2 月

#369845 v3 (GTU#726914)

LEGAL PRACTITIONERS (AMENDMENT) BILL 2010

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A BILL

To

Amend the Legal Practitioners Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Legal Practitioners (Amendment) Ordinance 2010.

2. Commencement

This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

3. Section 2 amended (Interpretation)

Section 2(1) of the Legal Practitioners Ordinance (Cap. 159) is amended by adding –

““partnership” (合夥) includes a limited liability partnership as defined by section 7AA;”.

4. Part IIAAA added

The following is added immediately after section 7A –

“PART IIAAA

LIMITED LIABILITY PARTNERSHIPS

7AA. Definitions (Part IIAAA)

(1) In this Part –

“business” (業務), in relation to a limited liability partnership, means the business of the partnership in providing services as a Hong Kong firm or a foreign firm;—

~~(a) in relation to a Hong Kong firm, means the business of practising as solicitors; and~~

~~(b) in relation to a foreign firm, means the business of practising or advising on foreign law;~~

~~“client” (客戶), in relation to a law firm, means a person who retains or employs the firm;~~

“default” (失責行為) means any negligent or wrongful act or omission, or any misconduct;

“designated partner” (指定合夥人) means a designated partner under section 7AG;

“distribution” (分發), in relation to partnership property, means a transfer of money or other partnership property by a partnership to a partner, whether as a share of profits, return of contributions to capital, repayment of advances or otherwise;

“limited liability partnership” (有限法律責任合夥有限責任合夥) has the meaning given by section 7AB;

“partnership obligation” (合夥義務), in relation to a partnership, means any debt, obligation or liability of the partnership, other than debts, obligations or liabilities of the partners as between themselves, or as between themselves and the partnership;

“partnership property” (合夥財產) has the same meaning as in the Partnership Ordinance (Cap. 38).

(2) If a law firm is constituted as a limited liability partnership when it commences business in Hong Kong, a reference in this Part to the date on which it becomes a limited liability partnership is a reference to the date on which it commences business in Hong Kong.

7AB. Limited liability partnership

For the purposes of this Part, a limited liability partnership is a partnership that is for the time being –

- (a) a Hong Kong firm or a foreign firm; and
- (b) designated by written agreement between the partners as a partnership to which this Part applies.

~~7AC. Effect on liabilities of partners in limited liability partnership~~

~~(1) Subject to subsections (3), (4) and (5), a partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises from a default of any other partner in the partnership, or of an employee, agent or representative of the partnership, in the course of the business of the partnership as a limited liability partnership.~~

~~(2) The protection of a partner from liability under subsection (1) applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise.~~

~~(3) Subsection (1) does not protect a partner from liability if the partner –~~

~~(a) knew or ought reasonably to have known of the default at the time of its occurrence; and~~

~~(b) failed to exercise reasonable diligence to prevent its occurrence.~~

~~(4) Subsection (1) protects a partner from the liability arising from a claim made against the partnership by a client only if –~~

- ~~(a) the partnership was a limited liability partnership at the time the cause of action for the claim accrued; and~~
- ~~(b) the client knew or ought reasonably to have known that the partnership was a limited liability partnership at that time.~~

~~(5) Subsection (1) does not protect any interest of a partner in the partnership property from claims against the partnership.~~

~~(6) If a partner is protected from liability under subsection (1) —~~

- ~~(a) the partner is not a proper party to any proceedings brought by or against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and~~
- ~~(b) the proceedings may, if they could apart from this section be brought by or against the partnership, continue to be brought by or against the partnership.~~

7AC. Protection from liability of partners in limited liability partnership

(1) A partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises in the course of the business of the partnership as a limited liability partnership from a default of —

- (a) another partner; or
- (b) an employee, agent or representative of the partnership.

(2) Subsection (1) applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise.

(3) Subsection (1) only applies if –

- (a) the partnership was a limited liability partnership at the time of the default; and
- (b) the client knew or ought reasonably to have known that it was a limited liability partnership at that time.

7ACA. Limitations on section 7AC protection

(1) Section 7AC(1) does not protect a partner from liability if the partner –

- (a) knew of the default at the time of its occurrence; and
- (b) failed to exercise reasonable care to prevent its occurrence.

(2) Section 7AC(1) does not protect a partner from liability if the default is –

- (a) the partner's default; or
- (b) a default of a partner, employee, agent or representative of the partnership who was under the supervision of the partner at the time of the default.

(3) Subject to section 7ACB, section 7AC(1) does not protect a partner from liability if he or she was a designated partner at the time of the default.

(4) Section 7AC(1) does not protect a partner from liability arising, in respect of a matter handled for a client, from a default that occurs during any time during which no partner is acting as a designated partner for the matter.

(5) Section 7AC(1) does not protect any interest of a partner in the partnership property from claims against the partnership.

7ACB. When designated partner is not liable

Section 7AC(1) extends to a partner who was a designated partner at the time of the default if he or she proves that the default is that of –

- (a) another partner; or
- (b) an employee, agent or representative of the partnership who was under the supervision of another partner at the time of the default.

7ACC. Indemnification under partnership agreement not affected

Nothing in this Part affects any right of a partner in a limited liability partnership to be indemnified by another partner, or any obligation of a partner to indemnify another partner, under a written agreement made between the partners.

7ACD. Professional Conduct Guide not affected

Nothing in this Part affects any duty that a solicitor has under The Hong Kong Solicitors' Guide to Professional Conduct to keep a client informed of the identity of the partner responsible for the supervision of a matter being handled for the client.

7ACE. Effect of section 7AC(1) on proceedings

If a partner is protected from liability by section 7AC(1) –

- (a) the partner is not a proper party to any proceedings brought by or against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and
- (b) the proceedings may, if they could apart from this section be brought by or against the partnership, continue to be so brought.

7AD. Advance notice to Society in respect of limited liability partnership

(1) A law firm must ensure that, at least 7 days before the date on which it becomes a limited liability partnership, a written notice of the following particulars is given to the Society –

- (a) the date on which the firm becomes a limited liability partnership;
- (b) the name of the partnership;
- (c) the name of each partner in the partnership;
- (d) each address at which the partnership carries on its business;
- (e) any other particulars prescribed by rules made under section 73.

(2) A law firm must ensure that, at least 7 days before the date on which it ceases to be a limited liability partnership, a written notice of that date is given to the Society.

~~(3) Subsection (1) does not apply to a foreign firm that is constituted as a limited liability partnership when it commences business in Hong Kong.~~

7AE. Name of limited liability partnership

A limited liability partnership must –

- (a) if it has a Chinese name, include the words “有限法律責任合夥有限責任合夥” as part of that Chinese name; and
- (b) if it has an English name, include the following as part of that English name –

- (i) the words "Limited Liability Partnership";
or
- (ii) the abbreviation "LLP" or "L.L.P."

7AF. Notification of name by limited liability partnership

(1) A limited liability partnership must display its name, in a clearly visible and legible manner, at or outside every office or place in which it carries on its business.

(2) A limited liability partnership must state its name, in a clearly visible and legible manner, in its correspondence, notices, publications, invoices and bills of costs, and on its websites.

7AG. Notice by limited liability partnership to existing clients

(1) Except as provided in subsection (2), a law firm must, within 30 days after it becomes a limited liability partnership, by written notice inform each of its existing clients of that fact.

(2) A specified foreign firm must, within 30 days after it becomes a limited liability partnership, by written notice inform each of its existing clients in Hong Kong of that fact.

(3) For the purposes of subsection (2), a foreign firm is a specified foreign firm if, before becoming a limited liability partnership, it has been carrying on, in a foreign jurisdiction, the practice of law as a partnership with limited liabilities under the law of that jurisdiction.

(4) A written notice issued under this section must be in a form specified by the Council.

(5) The form specified under subsection (4) must include a brief statement stating how liabilities of partners ~~of a law firm are affected by the law firm becoming a limited liability partnership under section 7AC.~~

in a law firm are affected under sections 7AC, 7ACA, 7ACB and 7ACD by the law firm becoming a limited liability partnership.

(6) In this section, “existing client” (現有當事人現有客戶), in relation to a law firm, means a person who is a client of the firm at the time the firm becomes a limited liability partnership.

(7) For the purposes of subsection (2), an existing client of a specified foreign firm is its existing client in Hong Kong if –

- (a) the client is a body corporate, and it has its registered office or a place of business in Hong Kong; or
- (b) the client is not a body corporate, and the last correspondence address provided by the client to the firm is in Hong Kong.

(8) This section does not apply to a law firm that is constituted as a limited liability partnership when it commences business in Hong Kong.

7AGA. How a partner becomes a designated partner

(1) A partner in a limited liability partnership is at any particular time a designated partner for a matter handled by the partnership for a client only if –

- (a) the partner is stated, in a written notice, as becoming such from the effective date of the notice and the notice –
 - (i) complies with section 7AGC(1); and
 - (ii) is signed by the partner;
- (b) that time is on or after the effective date of that notice; and

(c) the partner has not ceased to be such at that time under section 7AGB.

(2) Despite subsection (1), a partner is at any particular time on or after a date a designated partner for a matter if the partner –

(a) is under subsection (3) to be taken to be a designated partner for the matter from that date; and

(b) has not ceased to be a designated partner for that matter at that time under section 7AGB.

(3) One or more partners (each of whom is referred to as a “deemed designated partner”) in a limited liability partnership are to be taken to be designated partners for a matter handled by the partnership for a client from a date (“specified date”) if –

(a) there is no designated partner for the matter on the specified date, apart from each deemed designated partner being taken to be a designated partner from that date under this subsection; and

(b) within 30 days after the specified date –

(i) the client has acquired from each deemed designated partner actual knowledge of the fact that he or she is acting as a designated partner for the matter from the specified date; and

(ii) the client has acquired from at least one deemed designated partner actual knowledge of the effect of sections 7AC, 7ACA, 7ACB and 7ACD on liabilities of partners in a limited liability partnership.

(4) Subsection (3) does not make a partner a designated partner at the time a default occurs if at that time the client had not acquired the knowledge referred to in subsection (3)(b)(i) and (ii).

(5) To avoid doubt, this section does not absolve a person who is not a partner in a partnership from any liability that arises from the person holding himself or herself out as a designated partner.

7AGB. How a partner ceases to be a designated partner

A partner who is a designated partner for a matter ceases to be such only on the earlier of the following –

- (a) the date on which the person ceases to be a partner in the partnership; or
- (b) the effective date of a written notice that complies with section 7AGC(1), being a notice –
 - (i) which states that the partner ceases to be a designated partner for the matter from that date; and
 - (ii) which states the name of, and is signed by, at least one partner who becomes or continues to be a designated partner for the matter from that date.

7AGC. Notice requirements

(1) A notice referred to in section 7AGA(1)(a) or 7AGB(b) must be in a form specified by the Council and –

- (a) must state its effective date;
- (b) must contain –
 - (i) an explanation in plain language of the effect of sections 7AC, 7ACA, 7ACB and 7ACD on liabilities of partners in a limited liability partnership; and

(ii) any other particulars and information prescribed by rules made under section 73; and

(c) must be given on behalf of the partnership to the client as soon as practicable after the effective date and in any event within 30 days after that date.

(2) A notice has no effect on liability for a partnership obligation that arises from a default that occurred before it is given to the client in accordance with subsection (1)(c) even if that default occurred on or after the effective date stated in the notice.

(3) For the purposes of this Part, the "effective date" of a notice given by a limited liability partnership in accordance with this section is the date stated in the notice as the date from which a partner named in the notice becomes, continues to be or ceases to be a designated partner for a matter specified in the notice.

7AH. Other requirements relating to practice of law firm in rules made under section 73

Sections 7AD, 7AE, 7AF, 7AG, 7AGA, 7AGB and 7AGC~~7AF and 7AG~~ are in addition to, and do not affect, any other provisions relating to the practice of a law firm as prescribed by rules made under section 73.

7AI. Provisions regulating distribution of partnership property

(1) If a limited liability partnership makes a distribution of any of its partnership property to one or more persons (each being a partner or an assignee of a partner's share in the partnership), and immediately after the distribution –

(a) the partnership is or will be unable to pay its partnership obligations as they become due; or

(b) the value of the remaining partnership property is less than the partnership obligations,

then each of the persons is liable as provided in subsection (2).

~~(1) If a limited liability partnership makes a distribution of any of its partnership property to a partner, or to an assignee of a partner's share in the partnership, as a consequence of which —~~

~~(a) the partnership would be unable to pay its partnership obligations as they become due; or~~

~~(b) the value of the remaining partnership property would be less than the partnership obligations,~~

~~then the partner or assignee is liable as provided in subsection (2).~~

(1A) However, a person who receives the distribution as described in subsection (1) is not liable as provided in subsection (2) if the person proves that —

(a) immediately before making the distribution, the limited liability partnership made a reasonable assessment that the financial position of the partnership would not be as described in subsection (1) immediately after the distribution;

(b) the partnership arrived at the assessment after exercising reasonable diligence and based on information obtained for the purpose of the assessment or otherwise available at the time of the assessment; and

(c) at the time of the distribution the person did not have, or (if the person is an assignee of a partner's share in the partnership) neither the person nor that partner had, any reason to doubt the correctness of that assessment.

(2) A person who receives the distribution as described in subsection (1)~~The partner or assignee who receives the distribution~~ is liable to the partnership for –

- (a) the value of the property received by the ~~partner or assignee as~~person as a result of the distribution;
or
- (b) the amount necessary to discharge the partnership obligations at the time of the distribution,

whichever is the lesser.

(3) Proceedings to enforce any of the liabilities arising under this section as a result of the distribution may be brought by –

- (a) the partnership;
- (b) any partner in the partnership; or
- (c) any person to whom the partnership owes any partnership obligation at the time of the distribution.

(4) In this section, a reference to partnership obligation is a reference to partnership obligation (whether actual or contingent).

(5) This section does not affect a payment made as reasonable compensation for current services provided by a partner to the partnership, to the extent that the payment would be reasonable if paid to a person who is an employee of, but not a partner in, the partnership as compensation for similar services.

(6) No proceedings to enforce a liability under this section may be commenced later than 6 years after the date of the distribution to which the liability relates.

7AJ. List of limited liability partnerships

(1) The Council must keep a list of law firms that are or have been limited liability partnerships.

- (2) The list must, in relation to each such law firm, contain –
- (a) its name;
 - (b) each address at which it carries on its business or, if it has ceased its business, each address at which it last carried on its business; and
 - (c) the date on which it first became a limited liability partnership and, if applicable, the dates from which or periods during which it has ceased to be a limited liability partnership.

(3) As soon as practicable after becoming aware of any matter that would require the list to be updated, the Council must update the list accordingly.

(4) For the purpose of enabling any member of the public to ascertain whether a law firm is, or has been, a limited liability partnership and to ascertain the particulars of the partnership, the Council must make the list available for public inspection, free of charge, at the office of the Council during office hours.

7AK. No dissolution of partnership, etc.

(1) The fact that a partnership becomes, or ceases to be, a limited liability partnership –

- (a) does not cause the partnership –
 - (i) to be dissolved; or
 - (ii) to cease continuing in existence as a partnership; and
- (b) does not affect any of the rights and liabilities (whether actual or contingent) of the partnership, or of any person as a partner, that have been acquired, accrued or incurred before the

partnership becomes, or ceases to be, a limited liability partnership.

(2) Subsection (1)(a) operates subject to any written agreement between the partners to the contrary.

7AL. This Part to prevail over inconsistent agreement

(1) In relation to a limited liability partnership, this Part prevails over any inconsistent provisions in any agreement between any persons, whether as partners in the partnership or otherwise.

(2) To avoid doubt, this section does not affect the operation of sections 7ACC and ~~section 7AK~~(2).

7AM. Law not inconsistent with this Part continues to apply

(1) All relevant laws, except so far as they are inconsistent with this Part, ~~continue to apply~~ in relation to a partnership that is a limited liability partnership.

(2) In this section, “relevant laws” (有關法律) means the Partnership Ordinance (Cap. 38) and every other law that applies in relation to a partnership (whether an enactment, or a rule of equity or of common law).”.

5. Section 73 amended (Power of the Council to make rules)

Section 73(1) is amended by adding –

“(d) in relation to the practice of limited liability partnerships –

- (i) ~~(i) prescribing the particulars and information for the purposes of sections 7AD(1)(e) and 7AGC(1)(b)(ii); and prescribing particulars for the purposes of section 7AD(1)(e); and~~

- (ii) regulating any matters of procedure or matters incidental, ancillary or supplemental to the provisions of Part IIAAA;”.

Consequential Amendment

Summary Disposal of Complaints (Solicitors) Rules

6. Schedule amended (Scheduled items)

The Schedule to the Summary Disposal of Complaints (Solicitors) Rules (Cap. 159 sub. leg. AD) is amended, under the heading “**Legal Practitioners Ordinance (Cap. 159)**”, by adding –

“2.	Section 7AD(1)	10,000	15,000
3.	Section 7AD(2)	10,000	15,000
4.	Section 7AE(a)	10,000	15,000
5.	Section 7AE(b)	10,000	15,000
6.	Section 7AF(1)	10,000	15,000
7.	Section 7AF(2)	10,000	15,000
8.	Section 7AG(1)	10,000	15,000
9.	Section 7AG(2)	10,000	15,000”.

Explanatory Memorandum

The purpose of this Bill is to amend the Legal Practitioners Ordinance (Cap. 159) (“the principal Ordinance”) to introduce limited liability partnerships for law firms in Hong Kong..

Preliminary provisions

2. Clauses 1 and 2 provide for the short title and commencement.
3. Clause 3 adds to section 2(1) of the principal Ordinance a new definition of “partnership” to make it clear that a reference to this term throughout the

principal Ordinance and its subsidiary legislation generally includes a limited liability partnership.

New Part IIAAA of the principal Ordinance

4. Clause 4 adds to the principal Ordinance a new Part IIAAA on limited liability partnerships, which consists of the proposed sections 7AA to 7AM.
5. The proposed section 7AA provides for the interpretation of expressions used in the new Part IIAAA.
6. The proposed section 7AB sets out the meaning of a "limited liability partnership" in the Bill, namely, a Hong Kong firm or a foreign firm (both terms are defined in section 2(1) of the principal Ordinance) that is designated by written agreement between the partners as a partnership to which the new Part IIAAA applies.
7. Under the Partnership Ordinance (Cap. 38), every partner in a firm is liable jointly and severally for certain wrongful acts or omissions for which the firm becomes liable. The proposed section 7AC varies this rule for law firms that are limited liability partnerships. According to the proposed section 7AC(1), a person will not, solely by reason of being a partner, become jointly or severally liable for any partnership obligation if the firm is a limited liability partnership and the partnership obligation arises from the default of another partner, or of an employee, agent or representative of the firm.
8. The object of the proposed section 7AC(1) is to protect an innocent partner against personal liability for the default of other members of the firm. This provision is not intended to change the common law position with respect to the general principles of negligence (see the proposed section 7AM). For example, a partner in a limited liability partnership may still be held responsible under the common law for vicarious liability arising from a default of an employee, agent or representative who is under the supervision of the partner. Also, a failure to establish a proper system of staff supervision can be the basis for a claim that all partners of a limited liability partnership are jointly and severally liable for negligence.
9. The proposed section 7AC(3) further provides that the protection under section 7AC(1) is not available to a partner in a limited liability partnership if he

or she knew or ought reasonably to have known of a default at the time of its occurrence, and failed to exercise reasonable diligence to prevent its occurrence. Moreover, a partner may be protected from the liability arising from a claim made by a client only if the partnership was a limited liability partnership at the time the cause of action for the claim accrued, and the client knew or ought reasonably to have known that the partnership was a limited liability partnership at that time (see the proposed section 7AC(4)).

10. Under the proposed section 7AD, a law firm must ensure that a written notice of its relevant particulars is given to The Law Society of Hong Kong ("the Law Society") at least 7 days before it becomes, or ceases to be, a limited liability partnership. However, a foreign firm constituted as a limited liability partnership when it commences business in Hong Kong is not required to give a separate notice under the proposed section 7AD(1) because it will have already provided the relevant particulars to the Law Society for prior approval of its registration under Part IIIA of the principal Ordinance.

11. The proposed section 7AE requires that the name of a limited liability partnership must contain the words "有限責任合夥" if it is in Chinese, and the words "Limited Liability Partnership" (or the abbreviation) if it is in English. That name must be displayed at every place of business of the partnership and stated in its correspondence and other publications as required by the proposed section 7AF.

12. The proposed section 7AG requires an existing law firm to notify all its existing clients within 30 days after it becomes a limited liability partnership. However, an existing foreign firm only needs to notify its existing clients in Hong Kong if it has already been practising law as a partnership with limited liabilities under the law of another jurisdiction.

13. The proposed section 7AH makes it clear that any other requirements relating to the practice of law firms as prescribed by rules made by the Council

of the Law Society under section 73 of the principal Ordinance will not be affected by the proposed sections 7AD, 7AE, 7AF and 7AG.

14. The proposed section 7AI regulates the distribution of a limited liability partnership's property in circumstances where, as a result of the distribution, the partnership would be unable to pay its obligations as they become due, or the value of the remaining partnership property would be less than its obligations.

15. Under the proposed section 7AJ, the Council of the Law Society is required to keep a list of limited liability partnerships and to make the relevant information available for public inspection.

16. The proposed section 7AK provides that a partnership's existence as a partnership (subject to any contrary agreement between the partners), and the pre-existing rights and liabilities of the partnership and of its partners, will not be affected by the fact that it becomes, or ceases to be, a limited liability partnership.

17. While the proposed section 7AL further states that the new Part IIAAA prevails over inconsistent provisions in any agreement, the proposed section 7AM makes it clear that all relevant laws applicable to a partnership, except so far as they are inconsistent with that Part, remain applicable to a limited liability partnership.

Further provisions

18. Clause 5 amends section 73 of the principal Ordinance to empower the Council of the Law Society to make rules respecting the practice of limited liability partnerships for giving full effect to the new Part IIAAA.

19. Clause 6 makes a consequential amendment to the Summary Disposal of Complaints (Solicitors) Rules (Cap. 159 sub. leg. AD) so that a complaint against a breach of any requirement in the proposed sections 7AD to 7AG may be submitted to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel for disposal under the summary procedure provided by those Rules.

SURVEY ON LLPs

Conducted at the Members' Forum on LLPs on 13 February 2012

1. Do you support the LLP model as proposed by the Administration, namely, with the revised notification requirement (as set out in DOJ's proposal included in the handout) and the 6-year claw back (as set out in section 7AI included in the handout)?

- ☐ Yes
☐ No

(Please tick as appropriate)

If the answer is No, please go to Question 2.

2. Will you support the LLP model as proposed by the Administration if the 6-year claw back (as set out in section 7AI included in the handout) is revised by replacing a shorter limitation period for claw back?

- ☐ Yes
☐ No

(Please tick as appropriate)

If the answer is Yes, please go to Question 3

If the answer is No, please go to Question 4

3. What is the appropriate duration of the limitation period for claw back?

- ☐ 2 years from the date of distribution
☐ 3 years from the date of distribution
☐ 4 years from the date of distribution
☐ Other - please specify

(Please tick as appropriate)

4. What is your main objection to the LLP model as proposed by the Administration?

- END -

Thank you very much for taking the time to complete the survey

對香港律師會的意見書的回應

“16. 《破產條例》(第 6 章)訂明：

- (a) 就債務人²⁴(其後被判定破產)於提出針對債務人的破產呈請之前的 5 年期間內²⁵，以低於一般價值而訂立的交易，法院可作出命令，將狀況回復到不曾訂立該項交易便本會出現的狀況²⁶。
- (b) 就債務人(其後被判定破產)於提出針對債務人的破產呈請之前的 2 年期間內²⁷，向債務人的一名有聯繫人士²⁸ 給予一項不公平的優惠(並非以低於一般價值訂立的交易)，法院可作出命令，將狀況回復到假若該債務人不曾給予該項不公平的優惠便本會出現的狀況²⁹。

17. 除非律師會作出進一步澄清，不然，政府當局不同意《破產條例》內針對不公平的優惠或以低於一般價值而訂立的交易的條文可以達至建議的第 7AI 條的目的，原因如下：

²⁴ 《破產條例》第 49(1)條

²⁵ 《破產條例》第 51(1)(a)條

²⁶ 《破產條例》第 49(2)條

²⁷ 《破產條例》第 51(1)(b)條

²⁸ 《破產條例》第 51(1)(b)條

²⁹ 《破產條例》第 50(1)及(2)條

(a) 根據《破產條例》第 50(3)條³⁰，限制債務人將不公平的優惠給予他人的規定，針對的受惠人是破產債務人的其中一名債權人或是該債務人的任何債項或其他負債的保證人或擔保人。很明顯，已從有限責任合夥收取財產的合夥人並不是一個可啟動第 50(3)條運作的人。

(b) 根據《破產條例》第 49(3)條³¹，“以低於一般價值而訂立的交易”涉及破產債務人不收取任何代價或以低於一般價值的代價，轉移財產予另一人。分發合夥資產和盈利予合夥人不屬於第 49(3)條第(a)、(b)或(c)段的範圍，因此這項分發不是一項“以低於一般價值而訂立的交易”。

18. 根據上文第 17 段所闡述的理由，我們不認為建議的第 7AI 條是多餘的。反之，鑑於《破產條例》條文在這方面有不足之處，我們認為必須訂立建議的第 7AI 條，以保障消費者。”

#368848 v2 (GTU#726922)

³⁰ 根據《破產條例》第 50(3)條，如有以下情況，任何債務人即屬將不公平的優惠給予任何人：(a)該人是該債務人的其中一名債權人或是該債務人的任何債項或其他負債的保證人或擔保人；及(b)該債務人作出任何事情或容受作出任何事情，而(在任何其中一種情況下)該等事情具有將該人置於比假若該人不會作出該等事情便本會出現的狀況較佳的狀況的效力。

³¹ 《破產條例》第 49(3)條訂明：

“(3)就本條以及第 51 及 51A 條而言，如有以下情況，任何債務人即屬與任何人以低於一般價值而訂立交易—

- (a) 該債務人向該人作出饋贈或以其他方式與該人訂立交易，而交易的條款訂定該人不收取任何代價；
- (b) 該債務人以結婚為代價，與該人訂立交易；或
- (c) 該債務人為一項代價而與該人訂立一項交易，而該項代價的價值(以金錢或金錢等值衡量)明顯地低於該債務人提供的代價的價值(以金錢或金錢等值衡量)。”