

**立法會**  
**Legislative Council**

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LC Paper No. CB(2)1178/11-12  
(These minutes have been seen  
by the Administration)

**Bills Committee on Legal Practitioners (Amendment) Bill 2010**

**Minutes of meeting**  
**held on Friday, 10 June 2011, at 8:30 am**  
**in Conference Room B of the Legislative Council Building**

- Members present** : Dr Hon Margaret NG (Chairman)  
Hon Albert HO Chun-yan  
Hon LAU Kong-wah, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Paul TSE Wai-chun
- Member absent** : Hon Miriam LAU Kin-ye, GBS, JP  
Hon Ronny TONG Ka-wah, SC
- Public Officers attending** : Ms Adeline WAN  
Senior Assistant Solicitor General  
Department of Justice
- Ms Betty CHEUNG  
Senior Assistant Law Draftsman  
Department of Justice
- Mr Christopher NG  
Senior Government Counsel  
Department of Justice
- Ms Ida CHAN  
Senior Government Counsel  
Department of Justice
- Mr Bernard YUE  
Government Counsel  
Department of Justice

**Clerk in attendance** : Miss Mary SO  
Chief Council Secretary (3) 3

**Staff in attendance** : Miss Winnie LO  
Assistant Legal Adviser 7

Ms Maisie LAM  
Senior Council Secretary (2) 5

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**I. Meeting with the Administration**

[LC Paper Nos. CB(2)1852/10-11(01), CB(2)1914/10-11(01),  
CB(2)1938/10-11(02), CB(2)2029/10-11(01) and  
CB(2)2056/10-11(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Proposed new section 7AGA – Designated partner for each matter

2. Senior Assistant Solicitor General ("SASG") advised that the Administration's latest proposed Committee Stage amendments ("CSAs") on the new section 7AGA as set out in LC Paper No. CB(2)2056/10-11(01) ("the second draft of CSAs") were for drafting improvement purpose to simplify the proposed section 7AGA originally proposed in LC Paper No. CB(2)1914/10-11(01) ("the first draft of CSAs"). Members' comments on other provisions in the first draft of CSAs were also taken into account in preparing the second draft of CSAs. As the latest proposed CSAs had only been finalised on the day of the meeting, the Administration had yet to invite comments from the Law Society of Hong Kong ("LS") on the latest CSAs.

*Consequence of failing to comply with the notification requirement*

3. SASG and Senior Assistant Law Draftsman ("SALD") explained the second draft of CSAs and said that the proposed new sections 7AGA(5), (6), (7) and (8) were fall-back provisions proposed in response to LS's view that in the event that a client had actual knowledge of the identity of the responsible partner, all other partners of a solicitor firm operating as a limited liability partnership ("LLP") should continue to be allowed to rely on the proposed section 7AC(1) for protection in the particular case even if the LLP had failed to comply with the requirement for serving a written notice on its clients stating the designated partner(s) for the matter. The provisions prescribed the circumstances under which a partner of an LLP would be deemed a designated partner for a matter, who would not be protected under

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the proposed section 7AC(1) in respect of the matter, even though the notification requirement in the proposed new section 7AGA(2)(b) was not complied with.

4. SASG and SALD further elaborated that the proposed new section 7AGA(5)(a) had specified the three triggering events that resulted in the need to have a new designated partner in order to satisfy the requirement for at least one partner of the partnership acting as designated partner. Under the proposal, the LLP and/or innocent partner had to prove that the client had the requisite knowledge specified in the proposed new section 7AGA(6) and that the knowledge was acquired from the relevant partner at a time specified in the proposed new section 7AGA(7). As specified in the proposed new section 7AGA(8), the date from which a person became a designated partner for a matter under the proposed new section 7AGA(5) would be the date of the triggering event.

Admin

5. The Chairman invited the Administration to consider deleting the words "it is proved that" in the proposed new section 7AGA(5)(c), as the burden of proof under the common law principles would apply. Mr Paul TSE agreed with the Chairman's view.

*Liability of the designated partner*

6. The Chairman sought the Administration's view on the submission from LS dated 9 June 2011 (LC Paper No. CB(2)2029/10-11(01)) which referred to the first draft of CSAs and stated, among others, that the proposed new section 7AC(2A)(b) (unchanged in the second draft of CSAs) was wholly unacceptable as the imposition of strict liability on the designated partner had effected a fundamental change to the LLP structure and went against the principle that the introduction of LLP did not intend to change the common law position with respect to the proof of negligence.

7. SASG responded that the Administration was surprised by the aforesaid view expressed by LS in its submission, as the policy intent all along was that the designated partner, being the responsible partner, would not be protected from liability in respect of the matter. SASG advised that there had been lengthy discussions between the Administration and LS on the issue of the constructive knowledge element in the proposed section 7AC(3) in the Bill. To strike a balance between addressing the concern of LS over the constructive knowledge element and protecting consumer interests, the Administration had proposed to remove the constructive knowledge element in the proposed section 7AC(3) and add the new section 7AGA to the Bill requiring a solicitor firm operating as an LLP to appoint at least one partner of the partnership to act as designated partner for each and every matter it handled for a client throughout the course of the matter.

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Given that the designated partner would be the responsible partner in respect of the matter, it went without saying that the designated partner would not be entitled to the LLP protection provided under the proposed section 7AC(1). As such, the requirement to have at least one designated partner for each and every individual matter an LLP handled would obviate the need for the consumers to identify the responsible partner to claim damages for negligence.

8. The Chairman and Ms Audrey EU agreed with the Administration's view that a designated partner for the matter at the time of the default from which the partnership obligation arose should not be a partner protected under the proposed section 7AC(1). The Chairman remarked that the proposed arrangement conformed to the local practice that all solicitors' firms would have a partner supervising each and every case as affirmed by members who were partners of solicitors' firms during past discussions. Whilst not subscribing to LS's view, Mr Paul TSE said that the concern of LS might arise from the practice of international firms that a number of partners would be named as fee earners of a matter while the case was in fact handled by, say, junior solicitors. Giving the fee earners protection under the proposed section 7AC(1) might not be in the best interest of the consumers. Mr Albert HO expressed similar views. The Chairman, Mr Albert HO and Mr Paul TSE considered it justifiable that the fee earners, who were regarded to have a supervising role in the matter, would lose the LLP protection in respect of the matter if they were named in the written notice as designated partners.

9. SASG advised that there would be no specific requirement for the appointment of the responsible partners under the Bill. To strike a proper balance between protecting consumer interests and allowing flexibility for the LLP to decide who would be the designated partner(s) for each and every individual matter it handled throughout the course of the matter, the Administration had proposed a CSA to amend the proposed section 7AC(2) (which stated that the protection of a partner from liability under the proposed section 7AC(1) applied irrespective of whether the liability was in the form of indemnification, contribution or otherwise) was qualified by the phrase "Subject to any written agreement between the partners to the contrary".

10. Members agreed that the relevant CSAs to the Bill had achieved the legislative intent of protecting innocent partners of an LLP on the one hand and protecting consumer interests on the other. The Administration was requested to further discuss with LS on the Administration's policy position on the liability of designated partner.

Admin

Proposed section 7AI – Provisions regulating distribution of partnership property

*The liquidity-asset test*

11. SASG advised that the Administration would introduce a CSA to the proposed section 7AI(1) to replace the expression "as a consequence of which" with "and immediately after the distribution" with a view to providing more clarity and certainty in the implementation of the liquidity-asset test.

12. Mr Paul TSE sought explanation on whether the decision made or the action taken by an LLP to make a distribution of its partnership property to a partner or assignee would constitute a distribution under the proposed section 7AI(1). SASG advised that to avoid doubt, the Administration had proposed a CSA to add a definition of "distribution" in the proposed section 7AA so that it meant, in relation to partnership property, 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.

*Defence for distributions made after financial assessment*

13. SASG advised that the Administration would propose another CSA to add a new section 7AI(1A) to provide a defence to a clawback action if an LLP or a partner in an LLP (or an assignee of a partner's share in the partnership) established that, based on the information at the time of distribution, it was reasonable to conclude that the financial position of the partnership was able to meet the dual liquidity-asset test as described in the proposed sections 7AI(1)(a) and (b) after the distribution. SALD supplemented that an amendment which was textual in nature would be made to the CSA as set out in LC Paper No. CB(2)2056/10-11(01).

14. Mr Albert HO was of the view that the provision of a defence for distributions made after financial assessment was not in the best interest of consumers. From the perspective of clients, the provision of the defence would make the clawback actions uncertain as it would be for the court to decide whether a defence could be established, hence the question of whether a distribution would be liable to be clawed back under the proposed section 7AI. In particular, the test of "reasonable assessment" in the proposed new section 7AI(1A)(a) was too low a threshold for the defence for distributions made after financial assessment.

15. SASG advised that the proposal to provide a defence for distributions made after financial assessment was put forward against the background that LS was concerned about on what basis an LLP might determine whether

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partnership property might be distributed without fear of being clawed back. The Chairman said that members had agreed at earlier meetings that the proposal of the Administration to provide a defence for distributions made after financial assessment had struck a balance between protecting the interest of consumers and at the same time enabling an LLP to make distributions to its partners in proper circumstances. As regards the defence for distributions made after financial assessment, the Chairman said that the Administration might wish to seek the view of the Consumer Council on whether a higher threshold, e.g. "due diligence" instead of "reasonable diligence", and "reasonable assessment" in the proposed new section 7AI(1A), should be set to better safeguard the interest of consumers.

16. Mr Paul TSE noted from paragraph 12 of LS's submission that LS was of the view that in the proposed new section 7AI(1A)(c), the reference to "doubt" as to the correctness of the assessment was very vague and had proposed to lower the threshold such that "at the time of the distribution the person did not know, or (if the person is an assignee of a partner's share in the partnership) neither the person nor that partner knew that the assessment was incorrect."

17. Mr Albert HO suggested that LS should promulgate a code of practice or a Practice Direction on the assessment (referred to in the proposed new section 7AI(1A)) in respect of whether the financial position of the LLP could meet the liquidity-asset test after the distribution. The Chairman concurred that the promulgation of a guide on the assessment by LS would safeguard the interest of consumers. Mr Albert HO further suggested that a provision should be added in the Bill to require LS to promulgate such a guide. However, the Chairman considered that such a provision should not be added in the Bill as the court would be prudent in deciding whether an LLP had met the requirement in the proposed new section 7AI(1A) for invoking the defence. The Administration was requested to seek the view of LS on the suggestions.

Admin

18. The Chairman suggested and members agreed to further consider the threshold for the defence for distributions made after financial assessment under the proposed section 7AI at the next meeting.

Admin

19. On the drafting of the defence provisions, the Chairman suggested that the Administration could consider deleting the word "But" in the proposed new section 7AI(1A) and the word "immediately" in the proposed new section 7AI(1A)(a). Ms Audrey EU concurred that the word "But" in the proposed new section 7AI(1A) is unnecessary. Mr Paul TSE was of the view that the word "upon" instead of the word "immediately after" would be more appropriate for the purpose of the provision under the proposed new section 7AI(1A)(a).

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20. Referring to LS's suggestion to delete the words "the person proves that" in the proposed new section 7AI(1A) as set out in paragraph 11 of its submission, SASG advised that the policy intent was that the burden of proof for the defence for distributions made after financial assessment should lie on the defendant but not the client. The defendant would be the party against whom the claim was made, i.e. the partner or assignee who received the distribution. According to the proposed section 7AI(2), the partner or assignee who received the distribution was liable to the partnership for the value of the property received by the partner or assignee as a result of the distribution; or the amount necessary to discharge the partnership obligations at the time of distribution, whichever was the lesser. To invoke the defence for distribution made after financial assessment, the proposed new section 7AI(1A)(c) required the partner or assignee to prove that at the time of the distribution he or she did not have (or in the case an assignee receiving the distribution, neither the assignee nor that partner have) any reason to doubt the correctness of the assessment made by the LLP in respect of the financial position of the partnership.

21. Mr Paul TSE considered that the proposed new section 7AI(1A) had not taken into account circumstances whereby the person who received the distribution might be unable to bear the burden of proof, e.g. the person had died or become mentally incapacitated. The Chairman further pointed out that according to the proposed section 7AI(3), proceedings to enforce any of the liabilities arising under section 7AI as a result of the distribution might 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. Hence, it would be more appropriate to relocate the defence provisions to follow the proposed section 7AI(3). At the request of the Chairman, the Administration agreed to consider the Chairman's suggestion.

Admin

## **II. Date of next meeting**

22. Members agreed to hold the next meeting on 15 June 2011 at 8:30 am to consider the outcome of the Administration's discussion with LS on the issues of liability of designated partner and threshold for the defence for distributions made after financial assessment.

23. There being no other business, the meeting ended at 10:40 am.

**Proceedings of the meeting of the  
Bills Committee on Legal Practitioners (Amendment) Bill 2010  
on Friday, 10 June 2011, at 8:30 am  
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000342	Chairman Admin Clerk	Opening remarks	
000343 - 000608	Chairman Admin Clerk	Continuation of clause-by-clause examination of the Legal Practitioners (Amendment) Bill 2010 ("the Bill") and examination of the draft Committee Stage amendments ("CSAs") proposed by the Administration to the Bill (The Bill and LC Paper Nos. CB(2)1852/10-11(01), CB(2)1938/10-11(02) and CB(2)2056/10-11(01))	
000609 - 002008	Chairman Admin	<i>7AGA – Designated partner for each matter</i>  The Administration's confirmation that, in the draft CSAs, according to the proposed new section 7AGA(4), a person who was a designated partner for a matter under the proposed new section 7AGA(2)(b) or 7AGA(5) would cease to be such on the date the person ceased to be a partner of the partnership, even though the limited liability partnership ("LLP") concerned had not issued a notice for such purpose	
002009 - 002218	Chairman Ms Audrey EU Admin	The Administration advised that its latest proposed CSA on the new section 7AGA was for drafting improvement purpose and comments from the Law Society of Hong Kong ("LS") on the latest CSAs had yet to be invited	
002219 - 003009	Chairman Ms Audrey EU Admin	The fall-back provisions (i.e. the proposed new sections 7AGA(5), (6), (7) and (8)) prescribing the circumstances under which a relevant partner of an LLP would be deemed a designated partner for a matter even though the notification requirement in the proposed new section 7AGA(2)(b) was not complied with	
003010 - 003056	Chairman Admin	The submission dated 9 June 2011 from LS on the first draft of CSAs proposed by the Administration to the Bill (LC Paper No. CB(2)2029/10-11(01))	
003057 - 003123	Admin	The Administration advised that the drafting of the second draft of CSAs to add a new section 7AGA had been revised having taken into account the comments of LS as set out in paragraph 13 of its submission on the first draft of CSAs	
003124 - 004724	Chairman Admin Ms Audrey EU Mr Paul TSE Mr Albert HO	Discussion on the concern of LS on the liability of designated partner as set out in paragraphs 2 to 10 of its submission  The Administration was requested to further discuss with LS on the Administration's policy position on the liability of designated partner	<b>Admin (para. 10 of the minutes refers)</b>

Time marker	Speaker	Subject	Action required
004725 - 004936	Chairman Admin	The Administration advised that the person who signed the notice referring to him as the responsible partner shall be liable for "holding out" even if he was in fact not a partner of an LLP	
004937 - 005013	Admin	<i>7AH – Other requirements relating to practice of law firm in rules made under section 73</i>  Members raised no questions on the proposed section 7AH and the proposed CSA to the section	
005014 - 005444	Admin Chairman Ms Audrey EU Mr Paul TSE	<i>7AI – Provisions regulating distribution of partnership property</i>  The Administration was invited to consider deleting the word "But" in the proposed new section 7AI(1A) in the second draft of CSAs	<b>Admin (para. 19 of the minutes refers)</b>
005445 - 005703	Chairman Admin	The suggestion of LS to delete the words "the person proves that" in the proposed new section 7AI(1A) as set out in paragraph 11 of its submission	
005704 - 010003	Chairman Ms Audrey EU Admin Mr Paul TSE	<i>7AGA – Designated partner for each matter</i>  The Administration was invited to consider deleting the words "it is proved that" in the proposed new section 7AGA(5)(c) in the second draft of CSAs	<b>Admin (para. 5 of the minutes refers)</b>
010004 - 011541	Admin Chairman Mr Albert HO Mr Paul TSE	<i>7AI – Provisions regulating distribution of partnership property</i>  The Administration was requested to consider redrafting the proposed new section 7AI(1A) in the second draft of CSAs taking into account the issues raised by members on the burden of proof for the defence for distributions made after financial assessment	<b>Admin (para. 21 of the minutes refers)</b>
011542 - 011754	Chairman Mr Paul TSE Admin	The Administration advised that a transfer of money or other partnership property by a partnership to a partner or assignee would constitute a distribution under the proposed section 7AI(1) in the second draft of CSAs	
011755 - 014030	Chairman Mr Albert HO Admin Mr Paul TSE Mr LAU Kong-wah	Discussion on the threshold for the defence for distributions  The Administration was invited to consider deleting the word "immediately" in the proposed new section 7AI(1A) in the second draft of CSAs	<b>Admin (para. 19 of the minutes refers)</b>
014031 - 014252	Chairman Admin	Members raised no questions on the proposed sections 7AI(4) and (5) in the bill and the proposed new section 7AI(6) in the second draft of CSAs	
014253 - 014338	Chairman Admin	<i>7AJ – List of limited liability partnerships</i>  Members raised no questions on the proposed section 7AJ	

Time marker	Speaker	Subject	Action required
014339 - 014832	Mr Albert HO Admin Chairman Mr LAU Kong-wah	<i>7AI – Provisions regulating distribution of partnership property</i>  The Administration was requested to seek the view of LS on the suggestion of promulgating a code of practice or Practice Direction on the assessment in respect of whether the financial position of the LLP could meet the liquidity-asset test after the distribution	<b>Admin (para. 17 of the minutes refers)</b>
014833 - 014946	Chairman Admin	<i>7AK – No dissolution of partnership, etc.</i>  Members raised no questions on the proposed section 7AK	
014947 - 015035	Chairman Admin	<i>7AL – This Part to prevail over inconsistent agreement</i>  Members raised no questions on the proposed section 7AL and the proposed CSA to the section	
015036 - 015112	Chairman Admin	<i>7AM – Law not inconsistent with this Part continues to apply</i>  Members raised no questions on the proposed section 7AM and the proposed CSA to the section	
015113 - 015206	Chairman Admin	<u>Clause 5 – Section 73 amended (Power of the Council to make rules)</u>  Members raised no questions on the proposed section 73(1)(df)	
015207 - 015309	Chairman Admin	<u>Clause 6 – Schedule amended (Scheduled items)</u>  Members raised no questions on the proposed amendments to the Schedule to the Summary Disposal of Complaints (Solicitors) Rules (Cap. 159 sub.leg. AD)	
015320 - 020033	Chairman ALA7 Admin	The latest CSAs proposed by the Administration in response to issues raised by members at the meeting on 2 June 2011 (CB(2)2056/10-11(01))	
020034 - 020804	Chairman Clerk Mr LAU Kong-wah Admin	Date of next meeting	