

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

**Administration’s Response to the Hon. LAU Kong Wah’s Comments and  
Suggestions on the Bill**

**Background**

The Legislative Council Secretariat requested the Administration to respond to certain comments and suggestions made by the Hon. LAU Kong Wah in his letter to the Legislative Council Secretariat on 24 May 2011, LC Paper No.CB(2)1900/10-11.

2. As requested, the Administration would like to reply to the points raised by the Hon. Lau Kong Wah in his letter in the same order as follows:

**General Observations**

2. (1) A consumer would normally seek compensation from the LLP and/or its defaulting partner(s) before taking legal proceedings against them. He would typically instruct a law firm to issue a letter before action demanding the LLP and/or defaulting partners for payment of compensation, say within 14 days, failing which he would commence formal legal proceedings without further notice.
- (2) If the consumer obtains judgement against the LLP and/or its defaulting partner(s), and they fail to pay the judgment debt to the consumer, he can take enforcement actions against any one or all of them.
- (3) (a) The proposed s 7AI(1) of the Bill provides that:

“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 provide in subsection (2)”

(b) Furthermore, the proposed s 7AI(3) provides as follows:-

“Proceedings to enforce any of the liabilities arising under this section as a result of the distribution may be brought by.....

(c) any person to whom the partnership owes any partnership obligation at the time of the distribution.”

Hence, as long as the LLP owes any partnership obligation (whether actual or contingent) at the time of the distribution to the consumer, the consumer can commence clawback actions as against a partner (who needs not be the defaulting partner) or his assignee who has received a distribution and as a consequence of which<sup>1</sup> the LLP is unable to meet any one of the two liquidity-asset tests in the proposed s 7AI(1)(a) and (b).

(c) The Administration is proposing that clawback actions must not be commenced later than 6 years after the date of the distribution.

(d) The claimant is entitled to take clawback actions against anyone or more of the LLP partners and/or his assignees who have received the distribution separately or to take a clawback action against all of them at the same time.

### **Mediation**

3. (1) As part of the Civil Justice Reform, the former Chief Justice issued Practice Direction 31 (PD31). PD31 has come into effect since 1 January 2010 and it applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ (with some exceptions which are not relevant for the present purposes).

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<sup>1</sup> Please note that, as mentioned in the 6<sup>th</sup> BC meeting on 20 May 2011, we are proposing to change “as a consequence of” to “immediately after”.

- (2) Paragraph 4 of PD31 provides as follows:

“In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation.”

- (3) Paragraph 5 of PD31 further provides as follows:

“The Court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation where:

- (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation in accordance with paragraph 13 of this PD.
- (2) A party has a reasonable explanation for not engaging in mediation. The fact that active without prejudice settlement negotiations between the parties are progressing is likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. The fact that the parties are actively engaged in some other form of ADR [Alternative Dispute Resolution] to settle the dispute may also provide a reasonable explanation for not engaging in mediation in the meantime.”

- (4) Given the above requirements in PD31, the Administration does not consider it necessary for the Bill to provide for a separate mediation regime to regulate clawback actions.

#### **Identity of responsible partner**

4. (1) It was proposed in item (4) under the heading of “Clause 4, section 7AC of the Bill” of the “Principal proposals for amending the Legal Practitioners (Amendment) Bill 2010”, LC Paper No. CB(2)1852/10-11(01), circulated by the Administration at the 20 May 2011 Bills Committee meeting that:

“an LLP must appoint at least a partner as the responsible partner for each and every individual matter it handles throughout the course of the matter” (see subparagraph i) thereof); and

“the notice must [among others]:

1. be in writing;
  2. name a partner as the responsible partner(s) for the matter”  
(see subparagraph iv) thereof)
- (2) As such, the Administration considers that, in principle, the above written notification requirement would be adequate to ensure that all LLPs would clearly inform their clients of the identity of the responsible partner(s) for each and every client matter handled by them.
- (3) For further details of the notification mechanism, members are referred to the relevant draft CSAs that will be discussed in the Bills Committee meetings of 2 and 10 June 2011.

**Department of Justice**  
**31 May 2011**

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