

律政司
法律政策科

香港金鐘道66號
金鐘道政府合署高座1樓

圖文傳真：852-2180 9928
網址：www.doj.gov.hk



DEPARTMENT OF JUSTICE
Legal Policy Division

1/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong

Fax : 852-2180 9928
Web Site : www.doj.gov.hk

本司檔號 Our Ref.: LP 5004/4/15C Pt.36
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電話號碼 Tel. No.: 2867 2847

Urgent by Fax : 2845 0387

1 June 2012

Ms Heidi Chu
Secretary General
The Law Society of Hong Kong
3/F, Wing On House
71 Des Voeux Road Central
Hong Kong

Dear Ms Chu,

Legal Practitioners (Amendment) Bill 2010

Thank you for your letter dated 28 May 2012.

Having duly and carefully considered the matters referred to in your letter, the Department of Justice ("DoJ") is of the view that the proposed amendments to s7AC(1) and s7ACE are necessary to reflect the policy intent of the relevant sections. Furthermore, given the general agreement signified in the meeting of the Bills Committee ("BC") on 28 May 2012 to resume second reading of the Bill on 13 June 2012, and the fact that any further delay may jeopardise the successful passage of the Bill before the end of the current legislative term, there is practically little room to engage in further rounds of discussions on the issues. In the circumstances, the DoJ will proceed with the amendments to s7AC(1) and s7ACE which were discussed at the last BC meeting on 28 May 2012.

As regards the specific points mentioned in your letter, the DoJ would respond to them in the same order as set out in your letter:-

Section 7AC

In our view, services provided by law firms are “professional” in nature. It has always been our policy intent, as agreed by the BC, that the Bill should only offer a partial liability shield in the sense that innocent partners are protected from other partners’ professional defaults. However, all partners of an LLP will remain jointly and severally liable for the firm’s ordinary business obligations such as office rent and salaries of its staff. The amendment is made to remove any ambiguity that might arise from the use of the phrase “in the course of the business” in s7AC(1) as one might argue that the section, without the amendment, might have the effect of protecting innocent partners from the failure of another partner to pay ordinary business debts, such as office rent and salaries in that they are partnership obligations that were incurred “in the course of the business of the partnership”. The amendment proposed to s 7AC(1) i.e. to refer to “the provision of professional services by the partnership”, can more accurately reflect the policy intent of providing a partial shield for innocent partners.

In fact, we note that “partial shield” is commonly limited to “professional services”. For example, in paragraph 12.3 of its Policy Report on Limited Liability Partnership Legislation of December 1999, the Canadian Bar Association, British Columbia has described “Partial Shield” legislation as:-

“LLP legislation protects against personal vicarious liability for liabilities of the firm arising from negligent or otherwise wrongful acts or omissions of other members or employees of the firm in the provision of professional services while partners remain personally liable for the firm’s ordinary contractual obligations, such as debts.”
(emphasis added)

Section 7ACE

Addition of the word “separately”

- (a) The DoJ’s policy intent is to prevent innocent partners of LLPs from being jointly and severally **liable** for other partners’ professional default. It is not our intention to prevent clients from suing the firm which is vicariously liable for its members’ defaults. In fact, an LLP is not a separate legal entity and the partnership’s assets are owned by

all partners of the partnership. Accordingly, it is necessary to allow a client to sue all the partners collectively **in the name of the partnership** to enable the client to take enforcement actions against the partnership's assets.

- (b) It is DoJ's policy intent that the Bill, including s7AC(1), should only offer a partial shield. In addition, it is clear from s7ACC(3) (formerly s7AC(6) of the Bill) that s7AC(1) does not protect any interest of a partner in the partnership property from claims against the partnership. By adding the word "separately" in s7ACE(a), we would allow innocent partners to become a proper party of **proceedings against the partnership**, but **not** separate parties to the proceedings in their individual names. This is consistent with the policy intent of s7AC(1) and s7ACC(3) as mentioned above.
- (c) DoJ considers that its policy intent should be explicitly provided for in the principal legislation to facilitate better understanding by the public as well as lawyers and judges, and that is why we are proposing the amendment to s7ACE(a). As you know, DoJ is reviewing Order 81 of the Rules of the High Court and, if necessary, we will propose changes to it in due course.
- (d) At the BC meeting on 21 May 2012, the BC questioned whether s7ACE was necessary. Our original proposal to address the question, which was made to the Law Society ("LS") on 22 May, was to remove s7ACE in its entirety in order to clarify that innocent partners can be sued collectively with other partners for their interest in the partnership property. However, having considered LS' objection to removing s7ACE, we proposed to amend s7ACE instead. In our view, this is a pragmatic solution that would allow us to address LS' concern and respond to the BC's question on this issue at the same time.
- (e) Section 7ACE(b) is subject to the qualification that "apart from this section be bought by or against the partnership". In other words, s7ACE(b) may be subject to the overriding restriction in s7ACE(a). Hence, DoJ considers it necessary to amend s7ACE(a) to clarify its policy intent on this issue.

Deletion of "by or"

- (f) The principal policy of the Bill is to provide LLP protection for innocent partners, not to restrict them from being a separate party to proceedings brought by the partnership. Therefore, we consider it unnecessary to expand s7ACE to also cover legal proceedings brought by the partnership. Accordingly, we have sought to delete "by or" from s7ACE(a). The deletion of "by or" in s7ACE(b) is a consequential amendment to that made to s7ACE(a).
- (g) To elaborate on (f) above, we take the view that s7ACE(a) only operates in relation to the liability for "partnership obligation" in the context of s7AC(1) which term is defined in s7AA as meaning "in relation to a partnership, 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". In other words, s7ACE is irrelevant to proceedings between partners or between partners and the partnership and is only relevant to proceedings between an LLP and its client. Moreover, where a partnership brings proceedings against an innocent partner for contribution, it is not right to say that the innocent partner is not a "proper party" to the proceedings; rather he is a proper party and he is entitled to plead s7AC(1) as a defence.
- (h) By deleting "by or" from s7ACE, the section does not impose any restriction on proceedings brought by the partnership. Innocent partners are not restricted from joining the other partners in bringing counterclaims and/or proceedings against third parties in the name of the partnership. This should address LS' concern on this issue.

The DoJ considers that the Bill and the Committee Stage Amendments that will be presented at the resumption of second reading constitute a good proposal that balances the legal profession's interest on the one hand and consumer interest on the other. The BC has already held 16 meetings to closely scrutinise the Bill and it is satisfied with the Bill as amended by the CSAs. In the circumstances, the Administration considers it apt, after effort made in the past years on this matter, to finally conclude the exercise on the current basis and to resume the second reading of the Bill on 13 June 2012. Meanwhile, we assure you that the Administration will monitor the operation of

the future Ordinance when it comes into effect and resolve any difficulty that may be identified by amending the law, if necessary. We trust that we can count on LS' continued support in bringing this proposed legislation to fruition.

Yours sincerely,



(Ms Adeline Wan)
Deputy Solicitor General (General) (Acting)

c.c. LegCo Secretariat
(Attn : Ms Maisie Lam)

Fax No. 2185 7845