

供 2003 年 1 月 27 日討論用

立法會司法及法律事務委員會

《法律修訂及改革(雜項規定)條例草案》

《法律執業者條例》新訂的第 9AA 條的建議修訂

律師法團的背景

前律政署在 1995 年發表的《法律服務諮詢文件》，就香港法律服務提出多項建議。其中一項是建議准許律師成立公司以法人方式執業。根據法律規定，法人公司是一個法定實體，獨立於公司成員之外。有限責任公司的股東，其所須負擔的債務責任，只限於其本身所持股份的未付股本值。以法人公司經營業務的好處，是公司本身可用法人的身分集資、借貸和簽約。諮詢文件認為，只要施行適當的規管，律師應獲准以有限或無限責任的法人方式執業。

2. 律政署其後發表的《諮詢工作報告書及關於未來路向的提議》，顯示大部分的意見書都贊成准許律師成立公司以法人方式執業的建議。香港律師會贊成該項建議，並提議擬備詳細規例，規定在什麼情況下，律師可選擇透過公司執業。

3. 政府透過《法律服務立法(雜項修訂)條例草案》修訂《法律執業者條例》，條例草案於 1997 年 6 月底通過成為法例。根據修訂條文的規定，律師會可“按照(律師會)理事會規則”，批准或拒絕批准公司作為律師法團的申請。

律師法團規則擬稿(“規則擬稿”)

4. 律師會負責草擬有關規則，並於 2001 年 6 月發表規則擬稿，供會員評論。政府詳細研究規則擬稿，並從公眾利益角度向律師會提出意見。

5. 立法會司法及法律事務委員會在 2002 年 5 月 27 日的會議上審議規則擬稿。關於規則擬稿的現況，據我們所知，律師會現正就規則擬稿徵求終審法院首席法官的批准。

6. 政府在研究規則擬稿時提出多個疑問，其中一項關乎該擬稿第 3(2)及(3)條(見附件 A)。規則擬稿第 3(2)及第(3)條規定，一名並非律師的人也可成為律師法團的成員或董事。理由正如該規則所說明，這規定可令獨營執業者也可符合《公司條例》(第 32 章)的要求，即一間公司須有兩名成員及兩名董事才能成立。該規則訂明第二名成員或董事須就他所持有的一份股分簽立一份信託聲明書，以該名獨營執業者作為受惠人，公司的管理及控制權亦由該名獨營執業者擁有。

7. 政府先前關注到，倘若出現這種情況，則公眾人士未必知道該第二名成員(可能是社會知名/具聲望的人士)雖然擔任董事職位，但卻只是股分的受託人，並不參與公司的運作和管理。因此，律師會必須釐清該名不具法律資格的董事所擔任的角色。

8. 律師會回應我們的疑問時指出，這問題可透過《法律執業者條例》新訂的第 9AA 條(見附件 B)來解決，即加入“人員”一詞。至於新的《法律執業者條例》第 2(1)條(見附件 C)所載“人員”一詞的定義，則包括董事、經理等。這做法等同將根據規則擬稿第 3(2)(b)條獲委為董事的人納入新的《法律執業者條例》第 9AA 條的規管範圍內，而根據規則擬稿第 3(2)(a)條獲委為成員的人士，則已受新訂的第 9AA 條“圍制”。政府同意這項對該條例新訂的第 9AA 條所建議的修訂，並建議把這項修訂納入《法律修訂及改革(雜項規定)條例草案》。

《2002 年公司(修訂)條例草案》所加入的一人董事公司條文的影響

9. 鑒於在立法會司法及法律事務委員會 2002 年 12 月 13 日的會議上，有委員對上述條例草案的條文提出疑問，政府遂要求律師會評估《2002 年公司(修訂)條例草案》加入一人董事公司條文對所提建議的影響。律師會 2003 年 1 月 8 日的覆函副本載於(附件 D)。

10. 由於《公司條例》的修訂條文會於何時生效還是未知之數，故目前還須遵守現行公司法須有第二名董事的規定。

11. 律師會在考慮過這事宜後，認為如果該會建議在規則擬稿中加入類似《律師帳目規則》第 7A 條的條文，則可釋除委員會的部分疑慮。該條規則所針對的情況，即在特定情況下可委任並非律師的人簽署當事人帳戶的支票，並不是完全與這事宜截然不同。第 7A 條內容如下 -

7A(1) 任何人除非已獲下列任何一人以書面明確授權根據第 7 條從某當事人帳戶提取款項，否則不得如此提款 -

(a) ...

(b) ...

(c) 理事會應該當事人的律師或律師行向該會提出的書面申請，而在極為特殊的情況下及在該會認為適當的條件(如有的話)規限下所批准的人。

律師會建議可修訂規則擬稿第 3 條，在第 3(2)條中加入以下但書 -

“...但 -

(1) 該公司任何時候都須由獨營執業者管理及控制；

(2) 公司不得委聘任何人擔任公司的第二名成員或第二名董事，除非該第二名成員或第二名董事已獲理事會批准，而理事會只應獨營執業者或該公司提出的書面申請，以及在該會認為合適的條件(如有的話)規限下，方給予批准。”

12. 政府認為在規則擬稿中加入上述建議的額外條文，可提供更多保障，確保非律師的董事不會控制律師法團的帳目及管理。

律政司
2003 年 1 月

Rule 3(2) and (3)

Annex A

(2) To enable a sole practitioner to establish a solicitor corporation under section 7C(1) of the Ordinance and to comply with the requirements of the Companies Ordinance (Cap.32) that a company formed thereunder must have two members and two directors, a company may have—

- (a) as the second member any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council; and
- (b) as the second director any other individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap. 32) and who is not a member director or employee of another solicitor corporation

provided that—

- (i) the company shall at all times be managed and controlled by the sole practitioner;
- (ii) not more than one share of the company may be registered in the name of such second member who shall hold such share in trust for the sole practitioner; and
- (iii) such second member shall have executed a declaration of trust in favour of the sole practitioner in respect of the one share in the company which he or it holds in trust for the sole practitioner and the person who lodges an application under rule 2 shall furnish a copy of such declaration of trust to the Society.

(3) If the second member mentioned in subrule (2) ceases to hold the one share in the company in trust for the sole practitioner mentioned in subrule (2), such sole practitioner and the company shall procure that:

- (a) another individual person, whether a solicitor or not, who is eligible under the Companies Ordinance (Cap.32) and who is not a member director or employee of another solicitor corporation, or a corporation approved for the purpose by the Council, shall become a member of the company holding one share in the company within 6 months from the date on which such second member ceases to hold the one share in the company; and
- (b) an individual person or a corporation as aforesaid who or which shall become a holder of that one share in the company pursuant to subrule (3)(a) shall execute a declaration of trust in favour of such sole practitioner in respect of such share which he or it holds in trust for the sole practitioner and such sole practitioner shall furnish a copy of such declaration of trust to the Society within 6 months from the date on which such second member ceases to hold such share; and
- (c) the provisions in subrules (2)(i) and (ii) shall continue to apply to the company.

**"9AA. Misconduct of member or employee of
solicitor corporation or foreign
lawyer corporation**

Conduct of a person who is a member of, or is employed by, a solicitor corporation or a foreign lawyer corporation may be the subject of a complaint, and may be investigated, inquired into and dealt with under this Part in the same way as the conduct of a solicitor or employee of a solicitor or foreign lawyer may be investigated, inquired into and dealt with, but only in so far as the conduct relates to the practice carried on by the corporation."

Annex C

New section 2(1)

“officer” of a corporation means a director, manager, executive or secretary of the corporation



THE
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LP 5004/4/11C III

8 January 2003

Ms Kitty Fung, *u 8/1/03*
Senior Government Counsel,
Legal Policy Division,
Department of Justice,
1/f High Block,
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66, Queensway,
HONG KONG.

Dear Ms Fung,

Law Amendment & Reform (Miscellaneous Provisions) Bill
Proposed amendment to new s. 9AA Legal Practitioners Ordinance

Thank you for your letter dated 16 December.

I note that it is proposed to amend section 9AA of the Legal Practitioners Ordinance so as to include an officer of a solicitor corporation as being a person whose alleged misconduct may be investigated and dealt with by the Law Society.

There appears to be a conflict within the LegCo Panel as to whether sole proprietorships should be permitted to incorporate by taking advantage of the proposed amendment to s. 153A of the Companies Ordinance or whether the existing law requiring two directors is insufficient because one of the two might be a non-solicitor and a "front" for an other. Given that we do not know at present when the amendment to the Companies Ordinance is likely to take effect it would seem that we have to resolve the concerns over the appointment of a second, non-solicitor director.

Having considered this issue we take the view that it may allay some of the concerns within the Panel if we were to add to the draft Solicitor Corporation Rules a provision similar to that in the Solicitors Accounts Rules which deals with a situation not entirely dissimilar, namely the appointment of a non-solicitor to sign cheques on Clients' Accounts under certain circumstances. That Rule reads as follows:

7A(1) No money shall be drawn from a client account under Rule 7 unless one of the following persons has specifically authorized in writing its withdrawal, namely,

- (a)
- (b)
- (c) a person approved by the Council, which approval shall only be given in exceptional circumstances, upon an application in writing made to it by the solicitor or firm and subject to such conditions as the Council may think fit, if any.

....P2

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An amendment could be made to Rule 3 of the Solicitor Corporation Rules so as to add a proviso to sub-Rule (2) as follows:

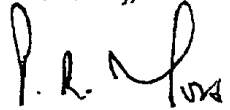
...provided that:-

- (1) the company shall at all times be managed and controlled by the sole practitioner;
- (2) no person shall be appointed and act as the second member or the second director referred to above unless such second member or second director have been approved by the Council, which approval shall only be given upon an application in writing made to it by the sole practitioner or the company and subject to such conditions as the Council may think fit, if any.

The requirement in the Solicitors Accounts Rules that consent should only be given in "exceptional circumstances" would not appear to be warranted in the context of these rules.

Perhaps you would be kind enough to let us know whether this meets your concerns and those of the LegCo Panel in which event the Solicitor Corporation Rules will be amended and re-submitted to the Chief Justice.

Yours sincerely,



Patrick Moss
Secretary General

cc Ms Rebecca Pun,
Administrative Assistant to the Chief Justice
Court of Final Appeal