



THE

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24 March 2009

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Panel on Administration of Justice and Legal Services
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By hand

Dear Dr. Ng,

Re: Limited Liability Partnerships for Solicitors' Practices

At the meeting of the Panel on Administration of Justice and Legal Services held on 16 December 2008, the Law Society was requested to advise the Panel of its current position on solicitor corporations and whether it would continue its work on drafting the rules on solicitor corporations should LLPs be introduced.

Solicitor Corporations Rules

The implementation of the Solicitor Corporations Rules has been delayed by some problems encountered during the drafting process. The problems have been resolved and the effort is now focused on drafting the consequential amendments to the Solicitors (Professional Indemnity) Rules. It is expected that both Rules can be finalised soon.

Continuation with the work on Solicitor Corporations Rules despite the introduction of LLPs

Solicitor corporations and LLPs are two different types of vehicle through which solicitors may carry on their legal practice. A comparison of the major features is attached.

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In other jurisdictions like Singapore, both types of vehicle do co-exist. Depending on the circumstances of individual practices, some solicitors may find solicitor corporations more suitable while some may consider LLPs more attractive. To allow its members more options and freedom to choose the best business mode that suits their needs, the Law Society will continue to pursue the introduction of both forms of practice.

Further, over 40% of Hong Kong law firms are sole proprietorships. LLPs which require two or more solicitors to form will not be available as an option to these sole proprietors.

It is therefore important that solicitor corporations which permit only one member and/or director be implemented so that sole proprietors will also have the choice of a limited liability vehicle through which to carry on their practice.

The Chair has requested the Administration to provide the Panel with information on the following issues and the Society is pleased to explain its position on each of them:

Liability of solicitor partners on operational cost of the business

Most other professions have long been permitted to operate with full limited liability. The Legal Practitioners Ordinance has also been amended to allow solicitors to practise through solicitor corporations.

In fact, it is quite common for law firms to carry out the necessary administrative functions in connection with the running of the practice through service companies.

Limited liability of solicitor partners on the operational cost of the business has never been an issue and it should not therefore be a cause of concern in connection with the LLP proposal.

The introduction of LLPs is a convenient opportunity to simplify the artificial structure of routing the engagement of administrative services (including the employment of staff) through service companies. No useful purpose is served by requiring LLPs to artificially complicate their structure at additional cost to form service companies simply to achieve the same result.

Further, banks, landlords and suppliers of an LLP are free to insist that partners of the LLP provide guarantees of specific obligations. Employees are afforded statutory protection under the Employment Ordinance and their position is in no way changed when compared with their employment through service companies.

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Liabilities of assistant solicitors and consultants under LLPs

The introduction of LLPs is not intended to change the common law position with respect to the proof of negligence against an individual.

Whether a person is negligent will be determined in accordance with the existing law of tort, irrespective of his position in the LLP. Where a person is found by the Court to be negligent, whether by committing the act himself or through the lack of action or supervision or otherwise, he should be personally liable.

The Working Party takes the view that this approach which is the existing position is the most appropriate.

The Working Party does not therefore consider it necessary to change by legislating any default position whereby if no partner is found to be negligent, all partners should share the liability equally.

Legislating how liability ought to be allocated is against the interest of the public.

A default rule where all partners are required to share liability when no single partner is found negligent creates a perverse disincentive against seeking to identify the partner who is properly responsible.

The outcome distorts a basic objective of the tort system, which is to identify the responsible party and allocate responsibility accordingly.

Further, the Working Party survey of LLP laws in other jurisdictions did not find any jurisdiction that had considered it necessary to adopt such a default rule.

Apart from Hong Kong solicitors, firms also engage foreign lawyers to provide advice on foreign law. Foreign lawyers are considered staff of a firm and the supervision requirement over foreign lawyers as staff of the firm is the same as that over Hong Kong solicitors.

In the Hong Kong Solicitors' Guide to Professional Conduct, it is provided that "*a sole practitioner and each partner is prima facie responsible for the acts or omissions of his firm and this extends to the acts or omissions of his partners and staff.*" (Principle 2.03).

Foreign lawyers are staff of a firm and partners of the firm are prima facie responsible for their acts and omissions in the same way as they are for assistant solicitors and clerks of the firm. Whether the partners of the firm are negligent or not and the extent of their responsibility is a matter for the Court to decide based on the particular facts of the case.

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If a firm engages a relatively junior foreign lawyer to provide to the public legal services on the law of his jurisdiction of admission, but the firm itself has neither expertise in the area nor any proper system of supervision or quality assurance in place, the firm leaves itself vulnerable to claims of negligence and negligent supervision. Given that a court may still apply common law tort principles in this case, firms will be incentivised to supervise the foreign lawyers properly to avoid such claims.

Under rule 5 of the Foreign Lawyers Registration Rules (Cap 159, sub.leg.), a foreign lawyer with less than 2 years of post qualification experience in the full time practice of foreign law shall not practise foreign law as an employee of a Hong Kong firm unless the Society is satisfied with the supervision arrangement in relation to his practice in the firm. Approval for employment in such cases will only be granted if there is a person who is qualified in the same jurisdiction as the foreign lawyer and sufficiently experienced in supervising the work of the foreign lawyer.

Insurance requirements of LLPs

With respect to insurance, it is proposed that the statutory professional indemnity limit of HK\$10 million per claim remains in place for LLPs. On the basis of the historical experience in payouts for claims, the limit of HK\$10 million per claim is generally adequate to meet current demands.

Position of international law firms

An LLP survey was conducted in May 2008. Although the questionnaire was sent to Hong Kong firms only, some of the firms that responded were international law firms and expressed support for the introduction of LLPs in Hong Kong.

Many international law firms already are organised as LLPs in their home jurisdictions, and we believe that the support of such firms for the introduction of LLPs is based on a desire to have their limited liability status recognised under Hong Kong law. It is proposed that the same standard of liability would apply to all LLPs conducting legal practice in Hong Kong.

Urgency

To promote Hong Kong as a financial services centre of world class excellence, the best professional talent must be attracted here. The archaic concept of unlimited exposure for others' negligence, which is no longer found in other professions, is a major disincentive to talented people from joining the legal profession as well as to existing legal practices from expansion and development.

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The Law Society of Hong Kong

Dr. Hon Margaret Ng
Chair
Panel on Administration of Justice and Legal Services
Legislative Council

24 March 2009

The Law Society has prepared a full report on the LLP proposal with a set of draft legislation and initiated the discussion of the proposal with the Administration since 2004. There is strong expectation from the legal profession that the necessary legislation be finalised and introduced before LegCo within the current session. We strongly urge that the Administration accord top priority to the finalisation of the legislation.

Yours sincerely,



Joseph C.W. Li
Chairman
Working Party on Limited Liability Partnerships

Encl.

c.c. Mr. Ian Wingfield, Solicitor General, Department of Justice

	LLP	Solicitor Corporation
Formation	Formed by partnership agreement	Formed by incorporation
Composition *	Two or more solicitors qualified to be partners in a law firm under the Legal Practitioners Ordinance	<ul style="list-style-type: none"> - Every member or director of the company is a solicitor holding an unconditional practising certificate - All members are directors or employees of the company - All directors of the company are members or employees of the company - May have only one director and/or one member
Prior approval of the Law Society on formation	Not required provided that the formation is in accordance with the provisions of the Legal Practitioners Ordinance	Required
Liability	A solicitor is personally liable for his own negligence or wrongful acts committed during the course of his practice, but he is not personally liable for any obligations or liabilities of the partnership or any other person solely by reason of the fact that he is a partner of the firm	<ul style="list-style-type: none"> - Limited liability for members - In respect of personal liability in tort of any agent acting on behalf of a principal, there is authority that if the agent assumes personal responsibility towards the third party and the third party reasonably relied on the agent's assumption of liability, the agent can be personally liable *

- *Yazhou Travel Investment Company Limited v David Geoffrey Allan Bateson and Paul Anthony Starr formerly trading as Bateson Starr, Lo W K Gwen and Kau Kin Wah* HCA6888 / 2000 (Judgment dated 28 January 2004).
- *Williams v Natural Life health Foods Ltd. [1998] 1 WLR 280*

	LLP	Solicitor Corporation
Legal entity	Not a separate legal entity	A separate legal entity
Taxation	Partners subject to profits tax (current rate for unincorporated business: 15%)	<ul style="list-style-type: none"> - Solicitor corporation subject to profits tax (current rate for corporations: 16.5%) - Members who are resident outside Hong Kong may be subject to double taxation on the company's income - Company may be liable to foreign corporation tax on its branch profits
Professional Indemnity Insurance	Subject to the Solicitor (Professional Indemnity) Rules (up to HK\$10 million per claim)	Subject to the Solicitors (Professional Indemnity) Rules (up to HK\$10 million per claim)
Requirements on disclosure of limited liability status	Yes – include LLP in its name	Yes – include “Limited” in its name
Non-financial reporting	Subject to Law Society requirements on reporting of practice particulars and business registration requirements	Subject to Law Society requirements on reporting of practice particulars and provisions in the Companies Ordinance
Financial reporting	No financial disclosure requirements	Subject to provisions in the Companies Ordinance
Conversion	Conversion by agreement among the partners and registering as an LLP with the Business Registration Ordinance and notifying the Law Society of the change of status	By incorporation and transfer of assets to the solicitor corporation