

立法會
Legislative Council

Ref : CB2/BC/2/09

LC Paper No. CB(2)1226/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Wednesday, 27 July 2011, at 4:30 pm
in Conference Room A of the Legislative Council Building

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

Attendance by invitation : The Law Society of Hong Kong
Mr Joseph LI
Chairman of the Working Party on LLPs

Mr David HIRSCH
Member of the Working Party on LLPs

Mr Michael LINTERN-SMITH
Member of the Working Party on LLPs

Mr Huen WONG
Member of the Working Party on LLPs

Ms Heidi CHU
Secretary General

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

Action

I. Meeting with the Law Society of Hong Kong and 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)2056/10-11(01), CB(2)2263/10-11(01) and CB(2)2456/10-11(01)]

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

2. The Bills Committee received views from the Law Society of Hong Kong ("LS") on its position on the Legal Practitioners (Amendment) Bill 2010 ("the Bill") as amended by the latest draft Committee Stage amendments ("CSAs") proposed by the Administration, details of which were set out in LS's letter dated 29 June 2011 enclosing a submission (LC Paper No. CB(2)2263/10-11(01)) and its supplementary submission tabled at the meeting (LC Paper No. CB(2)2456/10-11(01)). Copies of the paper

Action

entitled "Principal proposals for amending the Legal Practitioners (Amendment) Bill 2010" provided by the Administration (LC Paper No. CB(2)1852/10-11(01)), which was classified as "Restricted to Members" at the request of the Administration, were distributed to the representatives of LS attending the meeting.

Liability of designated partner

3. LS pointed out that there was no cause for concern that partners in a solicitors firm operating as a limited liability partnership ("LLP") would abandon proper supervision to avoid personal liability. Even if there was such a case, consumers would not be disadvantaged because they could pursue against the LLP and prove that the firm as a whole was responsible for the default. There was no question of the clients having to find who the responsible partner was in such circumstances. If the court concluded that all partners were negligent for the firm's failure to put in place or implement an adequate system of supervision, the personal assets of all partners would be subject to judgement.

4. LS held the view that the Administration's proposal of not applying the limitation on liability to the designated partner in respect of that matter would have the unintended consequence of creating a general partnership between the designated partner and the negligent partner within the firm, as the designated partner would automatically lose the entitlement to liability protection even though he/she might be innocent and in the absence of any proof of negligence on his/her part. In addition, it was not uncommon that a matter would involve more than one partner overseeing different aspects (e.g. estate, finance, intellectual property, etc.) of that matter. If all these partners were named as the designated partners for the matter, all of them had to shoulder personal liability even in aspects where they were not at fault. If only one of the partners was named as the designated partner for the matter, he/she had to be liable for the default of other partners even though he/she was innocent. While the Administration had proposed to introduce a CSA to the proposed section 7AC(2) such that the application of liability protection could be subject to any written agreement between the partners, LS considered that a cross indemnity among partners was just a way of transferring liability by contract but an innocent partner who was named as the designated partner for the matter would remain liable under the legislation. This only replicated by contract the liability situation that would apply in a general partnership.

5. Solicitor General (Acting) ("SG(Atg)") said that the issue in question was whether an avenue of defence should be provided for the designated partner. The Administration's policy intent was that the designated partner, who should be responsible for the overall supervision

Action

of the matter, would not be protected from liability in respect of that matter. It was noted that in the State of New York in the United States, as well as Manitoba and Ontario of Canada, a partner in an LLP also had to be held responsible for liability arising from a default of an employee who was under the control and supervision of the partner. SG(Atg) said that the Administration would study the issue of whether the designated partners named in the written notice, who were responsible for overseeing different aspects of the matter, should only be held liable for defaults arising in their responsible area.

6. While agreeing that a partner should be held liable for the default committed by the employee for whom the partner was directly responsible in a supervisory role, LS considered that the designated partner should only be responsible to handle client relationship matters and he/she should be afforded the protection from liability if he/she was innocent. The designated partner would inform the client who suffered loss as a result of a default of an LLP which partner was responsible for the default, whether by committing the act himself/herself or through the lack of supervision or otherwise. This would obviate the need for the client to identify the responsible partner to claim damages for negligence. In the event that an LLP had failed to establish a proper supervision system that the designated partner was unable to inform the client who was the responsible partner, that failure could be the basis for a claim that all partners of the LLP were negligent and therefore should be liable.

7. The Chairman advised that in discussing the CSAs proposed by the Administration to substitute the constructive knowledge elements in the proposed section 7AC(3)(a) with a requirement for an LLP to serve a written notification on its clients to confirm the identity of the responsible partner(s) for each and every individual matter it handled throughout the course of the matter, members of the Bills Committee shared the view that a basic principle for consideration was the need to provide safeguards for consumer protection by providing certainty on the identity of the responsible partner(s) to the clients prior to the occurrence of the default so as to avoid the possibility that a claimant had to drag into legal proceedings to pursue against all partners because no supervising partner could be identified as being responsible for the case. It was also noted that the Bill and the proposed CSAs were not intended to change the common law position with respect to the general principles of negligence. The Chairman further said that whether the proposed CSAs were objectionable because they were drafted in too great detail could be an issue for consideration.

8. Senior Assistant Law Draftsman ("SALD") said that on the one hand, LS considered that a supervising partner should not be liable for the

Action

negligence of an employee unless the supervising partner was negligent in supervision. On the other hand, the Administration proposed that negligence of an employee rendered the supervising partner liable even in the absence of the proof of negligence in supervision. SALD pointed out that, in the case of a law firm that was a sole proprietorship, negligence of an employee rendered the sole proprietor liable even in the absence of the proof of negligence in supervision. The Chairman suggested the Administration and LS to discuss the issue and forge a consensus on the policy.

Clawback of a distribution of partnership property

9. LS pointed out that it was not common in LLP provisions of other jurisdictions to provide clawback of distributions of partnership property. Most other major jurisdictions, such as New York, simply relied on the general insolvency or fraudulent transfers provisions that applied to all business organisations including LLPs. If the Bills Committee was of the view that the Bill should provide clawback provisions, LS proposed that clawback actions should not be commenced later than two years after the date of the distribution to which the liability related. As regards the Administration's proposal to introduce a defence to a partner or an assignee who received a distribution based on a reasonable assessment that the distribution would not result in the partnership being or would be unable to pay its partnership obligations as they became due or the value of the remaining partnership property being less than the partnership obligations, LS considered that the reasonable assessment test was unworkable in the absence of defined criteria. The question of uncertainty and unpredictability also remained unresolved.

10. SG(Atg) said that in New York, the clawback period was six years from the date of the cause of action accrued or two years from its discovery, whichever was later, while in some jurisdictions, the clawback period varied between two to four years. LS pointed out that there was no clawback provision in the New York LLP legislation, and that the clawback period was based on that of the New York insolvency law. SG(Atg) replied that the relevant New York provisions were provided in the *Debtor and Creditor Law* in relation to fraudulent conveyances and that the provisions applied to both bankruptcy and non-bankruptcy situations. LS suggested that the insolvency law be used instead of the proposed section 7AI for clawback. The Chairman said that LS' position on the clawback period had already been made known to the Bills Committee in previous meetings.

Action

11. The Chairman advised that the Bills Committee had arrived at the view that there should be no restriction against distributions by an LLP and clawback provisions, including an explicit provision to provide that no clawback actions in relation to a distribution could be commenced after six years from the date of distribution and a defence for distributions, should be provided in the Bill. Members also noted LS's proposed amendments to the proposed section 7AI as set out in paragraph 48(e) of its submission.

Drafting issues

12. The Chairman said that she was not satisfied with the drafting of the proposed new section 7AGA as the notice provisions contained therein were convoluted and much more detailed than necessary. As she saw it, the Ordinance should provide a framework on the requirements for the written notice without the need to go into technical details. LLPs would be required under the legislation to comply with the content requirements of the written notice specified by the Council of LS by way of practice directions. This could obviate the need to amend the Ordinance should there be other circumstances in the future which called for a change in the arrangement. Mr Paul TSE shared the Chairman's concern. SG(Atg) agreed to consider members' suggestion, but also mentioned that the Ordinance would need to deal with the consequences of non-compliance of the requirements for the written notice.

II. Way forward

13. Ms Audrey EU asked whether LS would lobby support from Members of the Legislative Council on its proposals if the Administration maintained its position on the issues of concern. LS said that efforts had been and would continue to be made to hold informal discussions with Members to explain its proposals. In the event that the Bill was ultimately passed in its present form, LS would not render its support for the Ordinance as the latest modified LLP structure had become wholly unattractive to the legal profession that it no longer served as an additional choice of a mode of solicitors' practice. The Chairman said that it would be a pity not to take forward the legislation after lengthy discussion among Members, LS and the Administration. Mr Paul TSE expressed similar views, adding that in the drafting of the Bill, the Administration had placed too much focus on consumer protection and too little on the need to modernise the legal infrastructure to facilitate Hong Kong to catch up with the global trend.

14. SG(Atg) said that a key policy intent of the Bill was to strike proper balance between facilitating the development of the legal profession on the

Action

one hand and protecting consumers of legal services on the other hand. The Administration would like to continue its discussion with LS and make the best endeavour to forge a consensus on issues regarding the notification requirements and the liability of designated partner. LS also indicated its willingness to continue its discussion with the Administration after the summer recess.

15. The Chairman suggested and members agreed that the next meeting would be scheduled after a consensus between the Administration and LS had been reached on the issues raised at the meeting. The Secretariat would liaise with the Administration to confirm the meeting date having regard to the progress of the discussion between the Administration and LS.

16. There being no other business, the meeting ended at 6:00 pm.

Council Business Division 2
Legislative Council Secretariat
28 February 2012

**Proceedings of the meeting of the
Bills Committee on Legal Practitioners (Amendment) Bill 2010
on Wednesday, 27 July 2011, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000815	Chairman	Opening remarks	
000816 - 002454	The Law Society of Hong Kong ("LS") Chairman	Presentation of views [LC Paper Nos. CB(2)2263/10-11(01) and CB(2)2456/10-11(01)]	
002455 - 003157	Chairman Admin	The Administration's response to the views expressed by LS	
003158 - 005423	Chairman Admin Ms Audrey EU LS	The Chairman's recap on the discussion of the Bills Committee on the liability of designated partner and further elaboration by LS on its view on the issue	
005424 - 005652	Ms Audrey EU Chairman LS	Whether LS would lobby support from Members on its proposals if the Administration maintained its position on the issues of concern	
005653 - 010410	LS Admin Chairman	The Chairman's recap on the discussion of the Bills Committee on the distribution of partnership property under the proposed section 7AI and further elaboration by LS and the Administration on their views on the issue	
010411 - 010903	LS	The position of LS on the Bill if it was ultimately passed in its present form	
010904 - 011707	Chairman Admin Mr Paul TSE	Way forward and the drafting of the proposed new section 7AGA	
011708 - 011909	Chairman Admin LS	The schedule for further discussion between the Administration and LS on issues of concern	
011910 - 012344	Admin Chairman	The liability of a supervising partner under general partnership for the default committed by the employee for whom the partner was directly responsible in a supervisory role	
012345 - 012655	LS Admin Chairman	The benefits to be brought about by the introduction of limited liability protection to the development of the legal profession in Hong Kong	
012656 - 012823	Chairman	Concluding remarks	