

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

**Recent Developments since the Bills Committee on 27 July 2011**

**Purpose**

This paper provides an update on the progress of the Administration’s discussions with The Law Society of Hong Kong (“LS”) on the issues raised at the Bills Committee (“BC”) meeting on 27 July 2011, the Administration’s response to the drafting issues raised by members at the BC meetings on 10 June, 15 June and 27 July 2011, as well as the latest proposed committee stage amendments (“CSAs”) to the Bill.

**Progress on Discussions with the LS on Issues raised at the BC meeting on 27 July 2011**

2. At the BC meeting on 27 July 2011, representatives of the LS attended before the BC and reiterated their objections in their earlier written submission to the BC of 29 June 2011. Among others, the LS demanded the then draft CSAs by the Administration be amended as follows:-

*On the provisions regarding designated partner(s) (“DP Provisions”)*

- (a) “Take out all proposed amendments in relation to the regulation of liability of the “designated partner””<sup>1</sup>

*On the time limit for clawback (“Clawback Period”)*

- (b) “Change “6 years” to “2 years””<sup>2</sup>

3. On 31 August 2011, the Administration met with representatives of the LS for an informal discussion on the matter. The Administration was told that the LS’ principal concern was the denial of LLP protection for the designated partner (“DP”) even if he was not negligent personally under the DP

<sup>1</sup> Paragraph 48(a) of the written submission by the LS dated 29 June 2011 (LC Paper No. CB(2)2263/10-11(01)).

<sup>2</sup> Paragraph 48(e)(iv) of the written submission by the LS dated 29 June 2011.

Provisions. After the meeting, the Administration proceeded to prepare a new set of CSAs by focusing on the LS' principal concern.

4. On 19 December 2011, the Administration met with representatives of the LS to inform them informally that we intended to introduce the following principal changes to the CSAs of June 2011 ("**the June CSAs**")<sup>3</sup> to address the LS' concerns. A copy Bill incorporating the new CSAs sent by the Administration to the LS for its detailed consideration immediately after the informal meeting on the same date is attached at **Annex A ("December Draft Bill & CSAs")**.

- (a) To simplify the CSAs generally. In particular, the drafting of s 7AC (Effect on liabilities of partners in limited liability partnership) and s 7AGA (How a partner becomes a designated partner<sup>4</sup>) are simplified.
- (b) To add a new s 7ACA(2) to more clearly state our policy intent, i.e. no LLP protection for a partner if the default is a) the partner's default, or b) a default of a partner, employee, agent or representative of the LLP firm under the partner's supervision.<sup>5</sup>
- (c) To add a new s 7ACA(4) such that LLP protection will only be denied for a matter during such time when there is no DP. This has relaxed and substituted the previous s 7AGA which required that an LLP must have a DP throughout the course of a matter it handled.
- (d) To add a new s 7ACB to provide protection to a DP if he can prove that a) another partner is in default or b) an employee, agent or representative of the LLP firm under the supervision of another partner is in default. This was added to address the LS' specific concern that under the DP Provisions, the DP would still be liable to the client even if he is not negligent personally.<sup>6</sup>
- (e) To add a new s 7ACD to make clear that a solicitor's duty under the Hong Kong Solicitors' Guide to Professional Conduct ("**Conduct Guide**") to keep a client informed of the identity of the supervising partner will not be affected.

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<sup>3</sup> LC Paper No. CB(2) 2056/10-11(01).

<sup>4</sup> Former section heading, "Designated partner for each matter".

<sup>5</sup> This is to state clearly our policy as already mentioned in paragraph 8 of the Explanatory Memorandum of the Bill which provides that "For example, a partner in a limited liability partnership may still be held responsible under the common law for vicarious liability arising from a default of an employee, agent or representative who is under the supervision of the partner".

<sup>6</sup> See paragraph 3 of this paper.

5. No policy changes were proposed by the Administration on the Clawback Period in the December Draft Bill & CSAs.

6. In mid-January 2012, the LS informed the Administration verbally that the LS Council was of the view that the December Draft Bill & CSAs were unacceptable and reiterated its demands that:-

- (a) the DP Provisions be removed from the December Draft; and
- (b) the Clawback Period be reduced from 6 years to 2 years.

7. On 2 February 2012 and 9 February 2012, the Administration met with the LS' representatives to further discuss our differences and how a proper balance could be struck between the interests of LLP partners and consumer protection.

8. At the 9 February 2012 meeting, the Administration proposed (subject to the final LLP legislation) to remove all the DP Provisions (in the form of the June CSAs) from the Bill and replace them by the following requirements ("**Requirements on Supervising Partner(s)**"):-

- (a) Each client matter of an LLP must be supervised by a partner.
- (b) An LLP shall keep the client informed of the identity of at least one partner who is responsible for the overall supervision of a client matter ("the **Supervising Partner**").
- (c) Failure of an LLP to keep the client so informed under (b) above will result in loss of LLP protection for all partners in respect of that particular client matter.
- (d) The Supervising Partner shall, [within a specified timeframe], at the request of the client, provide the client with a list of partners who, to the best knowledge of the Supervising Partner, are or were (as appropriate) responsible for the supervision of the whole or a particular part of the client's matter.

9. No policy changes were proposed by the Administration on the Clawback Period in the February 2012 meetings with the LS.

10. On 13 February 2012, the LS held a members' forum<sup>7</sup> to discuss and seek its members' view on whether they would support the Bill. The discussions at the members' forum were focused on the following two principal issues ("**Principal Issues**") :

- (a) The proposed replacement of the DP Provisions by the Requirements on Supervising Partner(s); and
- (b) The proposed 6 year Clawback Period.

11. After the LS' members' forum, the LS' members who had attended were asked to complete a survey on the latest proposal by the Administration. A copy of the survey was at **Annex B**. According to a letter from the LS' President to its members dated 14 February 2012, the survey result shows that:-

“about 95% of those who completed the survey do not support the LLP model as currently proposed by the Administration, but if the 6-year claw back is shortened, 71% are prepared to support it. In response to a question on the appropriate claw back period, 62% accept a 2-year period.”

### **Administration' Current Stance on the Principal Issues and Reasons**

12. Given their relative importance, the Administration would elaborate on and explain the reasons for our current stance on each Principal Issue below:-

#### **The proposed replacement of the DP Provisions by the Requirements on Supervising Partner(s)**

13. The idea to substitute the DP Provisions with the Requirements on Supervising Partners was first discussed at our meeting with the LS on 2 February 2012. After having given the matter our careful consideration, the Administration has come to the conclusion that the Requirements on Supervising Partners is an acceptable substitute for the DP Provisions to maintain a proper balance between protection of innocent partners and consumers, having regard to the on-going policy of DoJ in promoting Hong Kong as a leading centre for legal services and dispute resolution in Asia Pacific.

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<sup>7</sup> The forum was attended by approximately 200 members of the LS. The Panel members of the LS' forum were The Hon Margaret Ng, Legislative Council Member, Mr Frank Poon, Solicitor General, Mr Peter Wong, Deputy Solicitor General, Ms Adeline Wan, Senior Assistant Solicitor General, Mr. Junius Ho, Mr Huen Wong, Mr. Michael Lintern-Smith, Mr Joseph Li, Mr. Mr David Hirsch and Mr Amirali Nasir, representatives of the LS.

14. Our policy intent for the DP Provisions is to ensure that there is at least one LLP partner who shall be responsible to the client for the LLP's default. In our view, in practice, the Requirements on Supervising Partner(s) should achieve our policy intent for the following reasons:-

- (a) The four elements of the Requirements on Supervising Partner(s) (see paragraph 8 above) will enable the client to identify the supervising partner of his matter effectively and efficiently. In this connection, it is useful to note that the DP Provisions do not specify any category of partners who might act as the DP.<sup>8</sup> They also allow the DP to have LLP protection if he can satisfy the requirements of the newly proposed s 7ACB.<sup>9</sup> In contrast, by focusing on the supervising partners as proposed by the LS instead, the Requirements on Supervising Partner(s) would help clients to more readily identify the partner(s) who is/are responsible for supervision of his matter.
- (b) From the policy perspective, the only principal difference between the DP Provisions and the Requirements on Supervising Partner(s) is that the former imposes joint and several liability on the DP (after the client has established that there is default on the part of the LLP) while the latter requires the client to prove liability at common law and/or breach of the requirements of other relevant sections in the Bill on the part of the supervising partner for him to be liable to the client personally. In practice, for the reasons mentioned below, the difference is unlikely to be of significant importance, and that the latest proposal should be sufficient in rendering culpable supervising partners liable to their clients. The following are the reasons for our view:-
  - (i) First, in general, a partner is liable at common law for the negligence or wrongful act of a person under his supervision.
  - (ii) Second, as mentioned in paragraph 4(b) above, we have proposed to add a new s 7ACA(2) to more clearly state our policy intent that there shall not be LLP protection for a partner if the default is a) the partner's default, or b) a default of a partner, employee, agent or representative of the LLP firm under the partner's supervision. We have made clear to the LS

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<sup>8</sup> It was the Administration's policy to provide flexibility for each individual LLP firm to decide for itself on the category(ies) of partners that it considers most suitable to act as DPs for its firm.

<sup>9</sup> As mentioned in paragraph 4(d) above, the Administration had also proposed a defence for DPs in the newly s 7ACB to address LS' concerns that DP may become liable personally even if he is not negligent personally.

at our meeting on 2 February 2012 that this provision shall continue to be included in the future revised CSAs.

- (iii) Third, we have made clear to the LS at our meeting on 2 February 2012 that s 7ACA(1) which provides the following will continue to be included in the future revised CSAs:-

“Section 7AC(1) does not protect a partner from liability if the partner-

- (a) knew of the default at the time of its occurrence; and
- (b) failed to exercise reasonable care to prevent its occurrence.”

- (iv) From the policy perspective, we are convinced that if a partner does not fall within any of the categories as described in paragraphs 14(b)(i) to (iii) above, he should not be personally responsible to a client for the LLP’s default. Thus, we consider reasonable the latest proposal in delineating the extent of a supervising partner’s liability to the client for the LLP’s default.

- (c) In formulating the Requirements on Supervising Partners, the Administration has also given due consideration to the LS’ representations that the legal profession is highly disciplined<sup>10</sup> and that it would strengthen its Conduct Guide for LLPs.<sup>11</sup>

#### The proposed 6 years’ Clawback Period

15. As mentioned in paragraphs 5 and 9 above, the Administration has not proposed any changes to the Clawback Period despite the LS’ repeated requests for it to be shortened from 6 years to 2 years. The Administration has previously explained to the BC the considerations behind our current proposal for the clawback provision and why the 6 year Clawback Period (which is only one aspect of the proposal) would strike a proper balance between protection of LLP partners and consumer protection. That said, given that a great majority of the LS’ members who participated in the LS’ members’ survey do not support the 6 year Clawback Period, we would welcome views that the BC members might have on this particular issue before we conclude on the subject.

<sup>10</sup> For example, in paragraph 28 of the LS’ submission dated 6 August 2010 (LC Paper No. CB(2)2233/09-10(03)), the LS explained that “the legal profession is a highly disciplined and competitive profession. No partner will risk loosening up on supervision and damaging his hard earned reputation simply because the firm is an LLP.”

<sup>11</sup> For example, the LS represented in paragraph 6 of its submission dated 29 September 2010 (LC Paper No. CB(2)2328/09-10(01)) that “To address any concern that partners may try to avoid personal liability by not supervising the practice, the Law Society would agree to amend the Conduct Guide to make the obligations in Commentaries 1 and 2 under Principle 5.17 mandatory for solicitors operating as LLPs.”

16. To aid further consideration by the BC members, we would summarise the main points raised on this issue from when it was originally proposed in the Bill through its subsequent discussions at the BC stage together with (where appropriate) the Administration's comments on them for ease of reference below:-

*Clawback Period*

- (a) the Bill does not explicitly set out a time limit for the clawback provision which led to the LS raising the concern that "Section 7AI is unlimited in time"<sup>12</sup>. In its submission dated 6 August 2010, the LS asked that the clawback provision be either deleted in its entirety or a Clawback Period of 2 years from the date of distribution be inserted into the provision.<sup>13</sup>
- (b) In response, the Administration proposed a Clawback Period of 2 years from the date the claimant discovered the distribution made or could with reasonable diligence have discovered it.<sup>14</sup>
- (c) The LS did not agree with the Administration's proposal at (b) above on the ground that the proposed Clawback Period would be uncertain.<sup>15</sup>
- (d) Having taken into account the LS' views, the Administration proposed in January 2011 a Clawback Period of 6 years from the date of distribution. In so doing, the Administration has made reference to the 6 year limitation period that would otherwise be imposed by the Limitation Ordinance, Cap 347.<sup>16</sup> The Administration objected to the LS' proposal of 2 years' limitation period for two reasons: (i) clients are not privy to information about distribution of profits and assets by an LLP to its partners; and (ii) it usually takes more than two years for a client to obtain a first instance judgment on his claim for negligence against a law firm before he is in a position to enforce the judgment debt.<sup>17</sup>

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<sup>12</sup> Paragraph 18(a) of the LS' submission dated 29 September 2010 (LC Paper No. CB(2)2328/09-10(01)).

<sup>13</sup> Paragraphs 40 and 41 of LC Paper No. CB(2)2233/09-10(03).

<sup>14</sup> Para. 14(a) of the Administration's submission of November 2010 (LC Paper No. CB(2)344/10-11(01)).

<sup>15</sup> As summarized in para. 9 of the Administration's submission of January 2011 (LC Paper No. CB(2)888/10-11(01)).

<sup>16</sup> Section 4(1) of Cap. 347 provides, inter alia, that "actions to recover any sum recoverable by virtue of any Ordinance ..., other than a penalty or forfeiture or sum by way of penalty or forfeiture" shall not be brought after the expiration of six years from the date on which the cause of action accrued.

<sup>17</sup> Paragraph 10(b) of the Administration's submission of January 2011 (LC Paper No. CB(2)888/10-11(01)).

### *Relevance of the Bankruptcy Ordinance*

- (e) In its submission dated 29 September 2010, the LS expressed its view that the clawback provision was redundant on the basis that if an LLP became insolvent and its partners bankrupt, the Bankruptcy Ordinance would apply.

### *Administration's comments*

- (i) Please refer to **Annex C** attached for an extract of paragraphs 16 to 18 of our BC Paper dated November 2010<sup>18</sup>, which explains why, in the Administration's views, the Bankruptcy Ordinance cannot achieve the policy objective of the clawback provision.
- (ii) In addition, given that the "innocent partners" of an LLP are not jointly and severally liable for the LLP's default under the Bill<sup>19</sup>, there is simply no ground for a client judgment creditor to petition for bankruptcy of the innocent partners based on the LLP's default. Hence, it is important for the Bill to provide an express clawback provision for consumer protection purposes.

### *Prohibition vs. allowance of distributions*

- (f) At the BC meeting on 5 October 2010, the Administration explained that, unlike our proposal, some overseas jurisdictions in fact prohibited distribution of partnership property in breach of the relevant solvency tests and, in certain cases, went as far as requiring a partner who authorised the distribution be personally liable for the amount distributed.

### *Reasonable Assessment Defence*

- (g) At the BC meeting on 20 May 2011, the BC members indicated their support to the Administration's proposal of a 6 year Clawback Period. The Administration also proposed a defence for a partner in an LLP (or an assignee of a partner's share in the partnership) in the clawback provision to the effect that he would not be subject to the clawback provision if, based on the information at the time of distribution, it

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<sup>18</sup> LC Paper No. CB(2)344/10-11(01).

<sup>19</sup> Albeit that partnership property is not protected from claims against the LLP.



was reasonable to conclude that the partnership was able to meet the solvency tests after the distribution.<sup>20</sup>

- (h) At the BC meeting on 15 June 2011, the BC members asked whether the LS had agreed to the BC members' suggestion for the LS to issue a practice direction to its members on the Administration's proposed defence in (g) above. The Administration informed the BC that the informal response of the LS was that it would not consider this issue until the DP Provisions were resolved.
- (i) In its submission to the BC dated 29 June 2011, the LS asked, among others, the following:<sup>21</sup>

"Delete section 7AI [i.e. the clawback provision] in its entirety unless the following amendments are made:

(i)...

(ii) Amend section 7AI(1A) by deleting the last four words in the preamble "the person proves that" and by amending subsection (a) as follows:

*"immediately before making the distribution, the limited liability partnership made an assessment that the financial position of the partnership would not be as described in subsection (1) immediately after the distribution on the basis of:*

- (a) *financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances;*
- (b) *a fair valuation; or*
- (c) *any other method that is reasonable in the circumstances."*

- (j) As explained by the Administration at the BC meeting on 20 May 2011<sup>22</sup>, the Administration did not consider it appropriate to provide the safe harbours for making distributions as suggested by LS in (i) above. While the criteria as proposed by the LS might be relevant in justifying a distribution, the Administration was of the view that there might be other factors which were also relevant to the question as to whether the LLP had acted reasonably in making a distribution. In short, in our view, the courts should be allowed to make a ruling based on all relevant circumstances of the specific case concerned.

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<sup>20</sup> See LC Paper No. CB(2)2700/10-11, para 11.

<sup>21</sup> See paragraph 48(e)(ii) of the LS' submission dated 29 June 2011 (LC Paper No. CB(2)2263/10-11(01)).

<sup>22</sup> Paragraph 12 of the minutes of the BC meeting held on 20 May 2011 on LegCo's website (LC Paper No. CB(2)2700/10-11).

- (k) At the BC Meeting on 27 July 2011, the BC Chairman explained that the Bills Committee had arrived at the view that there should be no restriction against distribution by an LLP, that the Clawback Period should be 6 years, and that there should be a defence for making a distribution as proposed by the Administration.

17. In sum, the Administration is not convinced that a reduction of the Clawback Period to 2 years is justified. If we were to shorten the Clawback Period to 2 years, it might become necessary to consider whether other compensatory consumer protection measures should be introduced, such as special professional indemnity insurance requirements for LLPs, and/or whether we should include other additional safeguards to the Requirements on Supervising Partners. That said, we remain open to suggestions by the BC members on this issue, but we do not consider “2 years” to be reasonable from the consumer protection angle in the context of the HKSAR.

### **Drafting Issues raised by BC Members on 10 June, 15 June and 27 July 2011**

#### **10 June BC meeting**

18. At the 10 June 2011 BC meeting, BC members requested:-

- (a) that the word “But” in the then s 7AI(1A) which read “But a person who receives the distribution as described in subsection (1) is not liable as provided in subsection (2) if the person proves that.....” be deleted on the basis that it is unnecessary.

The Administration has duly considered the request and we propose to amend the word “But” to “However,” (see s 7AI (1A) in **Annex A** attached).

- (b) the Administration to consider whether it would be more appropriate to relocate the defence provisions of s 7AI(1A) to follow s 7AI(3) instead.

After due consideration, the Administration has decided not to relocate that section. In this respect, the relevant principles for organizing legislative provisions that the Administration has taken into account include –

- (i) More important provisions normally come before less important provisions.
- (ii) Provisions should where practicable follow a chronological sequence of events.

Section 7AI(1A) (*reasonable assessment*) is relevant to liability for clawback. It is directly related to the solvency tests in s 7AI(1). In other words, s 7AI(1A) is closely related to s 7AI(1) and is more important than s 7AI(2) which is on the quantum to be clawed back. Also, the key concept in s 7AI(1A) is the reasonable assessment which should take place before the distribution concerned which in turn precedes legal proceedings for clawback (that is the subject of s 7AI(3)). For these reasons, it is considered that s 7AI(1A) should be put after s 7AI(1).

#### BC meeting on 27 July 2011

19. At the BC meeting on 27 July 2011, the BC members suggested that:-

- (a) they were not satisfied with the drafting of the proposed new s 7AGA ([former section heading] Designated partner for each matter) as the notice provisions contained therein were convoluted and much more detailed than necessary.

As mentioned in paragraph 8 above, we have during our discussions with the LS in February 2012 now agreed to remove all the DP Provisions (including s 7AGA) from the Bill. In view of the BC members' comments, we shall also try to keep the drafting of the new CSAs for the Requirements on Supervising Partners as simple as practicable.

- (b) the future Ordinance might simply provide a framework for LLPs to comply with LS' practice directions without going into the related technical details.<sup>23</sup>

For consumer protection purposes, we consider it important that the Bill should include and provide legal status to the salient requirements of the Requirements on Supervising Partners. That said, we agree that the LS should be left to self-regulate its members on

<sup>23</sup> The BC Members were of the view that their revised proposal would obviate the need to amend the Ordinance should there be other circumstances in the future which called for a change in the arrangement.

other detailed requirements on LLPs as it deems necessary. As mentioned in paragraph 14(c) above, it is our expectation that the LS would strengthen its Conduct Guide for LLPs.

### **Latest Proposed Committee Stage Amendments**

20. Given their importance, the Administration would like to listen to the BC members' views on the Principal Issues before we revise the CSAs. We shall provide our revised draft CSAs for BC members' consideration as soon as practicable after the BC meeting on 1 March 2012.

**Department of Justice**  
**February 2012**

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**LEGAL PRACTITIONERS (AMENDMENT) BILL 2010**

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**PART IIAAA**

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## A BILL

To

Amend the Legal Practitioners Ordinance.

Enacted by the Legislative Council.

**1. Short title**

This Ordinance may be cited as the Legal Practitioners (Amendment) Ordinance 2010.

**2. Commencement**

This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

**3. Section 2 amended (Interpretation)**

Section 2(1) of the Legal Practitioners Ordinance (Cap. 159) is amended by adding –

““partnership” (合夥) includes a limited liability partnership as defined by section 7AA;”.

**4. Part IIAAA added**

The following is added immediately after section 7A –

### “PART IIAAA

#### LIMITED LIABILITY PARTNERSHIPS

**7AA. Definitions (Part IIAAA)**

(1) In this Part –

“business” (業務), in relation to a limited liability partnership, means the business of the partnership in providing services as a Hong Kong firm or a foreign firm;—

~~(a) in relation to a Hong Kong firm, means the business of practising as solicitors; and~~

~~(b) in relation to a foreign firm, means the business of practising or advising on foreign law;~~

~~“client” (客戶), in relation to a law firm, means a person who retains or employs the firm;~~

“default” (失責行為) means any negligent or wrongful act or omission, or any misconduct;

“designated partner” (指定合夥人) means a designated partner under section 7AGA;

“distribution” (分發), in relation to partnership property, means a transfer of money or other partnership property by a partnership to a partner, whether as a share of profits, return of contributions to capital, repayment of advances or otherwise;

“limited liability partnership” (有限法律責任合夥 有限責任合夥) has the meaning given by section 7AB;

“partnership obligation” (合夥義務), in relation to a partnership, means 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;

“partnership property” (合夥財產) has the same meaning as in the Partnership Ordinance (Cap. 38).

(2) If a law firm is constituted as a limited liability partnership when it commences business in Hong Kong, a reference in this Part to the date on which it becomes a limited liability partnership is a reference to the date on which it commences business in Hong Kong.



**7AB. Limited liability partnership**

For the purposes of this Part, a limited liability partnership is a partnership that is for the time being –

- (a) a Hong Kong firm or a foreign firm; and
- (b) designated by written agreement between the partners as a partnership to which this Part applies.

**~~7AC. Effect on liabilities of partners in limited liability partnership~~**

~~(1) Subject to subsections (3), (4) and (5), a partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises from a default of any other partner in the partnership, or of an employee, agent or representative of the partnership, in the course of the business of the partnership as a limited liability partnership.~~

~~(2) The protection of a partner from liability under subsection (1) applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise.~~

~~(3) Subsection (1) does not protect a partner from liability if the partner –~~

~~(a) knew or ought reasonably to have known of the default at the time of its occurrence; and~~

~~(b) failed to exercise reasonable diligence to prevent its occurrence.~~

~~(4) Subsection (1) protects a partner from the liability arising from a claim made against the partnership by a client only if –~~

- (a) ~~the partnership was a limited liability partnership at the time the cause of action for the claim accrued; and~~
- (b) ~~the client knew or ought reasonably to have known that the partnership was a limited liability partnership at that time.~~
- (5) ~~Subsection (1) does not protect any interest of a partner in the partnership property from claims against the partnership.~~
- (6) ~~If a partner is protected from liability under subsection (1) —~~
- (a) ~~the partner is not a proper party to any proceedings brought by or against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and~~
- (b) ~~the proceedings may, if they could apart from this section be brought by or against the partnership, continue to be brought by or against the partnership.~~

**7AC. Protection from liability of partners in limited liability partnership**

(1) A partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises in the course of the business of the partnership as a limited liability partnership from a default of —

- (a) another partner; or
- (b) an employee, agent or representative of the partnership.

(2) Subsection (1) applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise.

(3) Subsection (1) only applies if –

- (a) the partnership was a limited liability partnership at the time of the default; and
- (b) the client knew or ought reasonably to have known that it was a limited liability partnership at that time.

**7ACA. Limitations on section 7AC protection**

(1) Section 7AC(1) does not protect a partner from liability if the partner –

- (a) knew of the default at the time of its occurrence; and
- (b) failed to exercise reasonable care to prevent its occurrence.

(2) Section 7AC(1) does not protect a partner from liability if the default is –

- (a) the partner's default; or
- (b) a default of a partner, employee, agent or representative of the partnership who was under the supervision of the partner at the time of the default.

(3) Subject to section 7ACB, section 7AC(1) does not protect a partner from liability if he or she was a designated partner at the time of the default.

(4) Section 7AC(1) does not protect a partner from liability arising, in respect of a matter handled for a client, from a default that occurs during any time during which no partner is acting as a designated partner for the matter.

(5) Section 7AC(1) does not protect any interest of a partner in the partnership property from claims against the partnership.

**7ACB. When designated partner is not liable**

Section 7AC(1) extends to a partner who was a designated partner at the time of the default if he or she proves that the default is that of –

- (a) another partner; or
- (b) an employee, agent or representative of the partnership who was under the supervision of another partner at the time of the default.

**7ACC. Indemnification under partnership agreement not affected**

Nothing in this Part affects any right of a partner in a limited liability partnership to be indemnified by another partner, or any obligation of a partner to indemnify another partner, under a written agreement made between the partners.

**7ACD. Professional Conduct Guide not affected**

Nothing in this Part affects any duty that a solicitor has under The Hong Kong Solicitors' Guide to Professional Conduct to keep a client informed of the identity of the partner responsible for the supervision of a matter being handled for the client.

**7ACE. Effect of section 7AC(1) on proceedings**

If a partner is protected from liability by section 7AC(1) –

- (a) the partner is not a proper party to any proceedings brought by or against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and
- (b) the proceedings may, if they could apart from this section be brought by or against the partnership, continue to be so brought.

**7AD. Advance notice to Society in respect of limited liability partnership**

(1) A law firm must ensure that, at least 7 days before the date on which it becomes a limited liability partnership, a written notice of the following particulars is given to the Society –

- (a) the date on which the firm becomes a limited liability partnership;
- (b) the name of the partnership;
- (c) the name of each partner in the partnership;
- (d) each address at which the partnership carries on its business;
- (e) any other particulars prescribed by rules made under section 73.

(2) A law firm must ensure that, at least 7 days before the date on which it ceases to be a limited liability partnership, a written notice of that date is given to the Society.

~~(3) Subsection (1) does not apply to a foreign firm that is constituted as a limited liability partnership when it commences business in Hong Kong.~~

**7AE. Name of limited liability partnership**

A limited liability partnership must –

- (a) if it has a Chinese name, include the words “有限法律責任合夥有限責任合夥” as part of that Chinese name; and
- (b) if it has an English name, include the following as part of that English name –

- (i) the words "Limited Liability Partnership";  
or
- (ii) the abbreviation "LLP" or "L.L.P.".

**7AF. Notification of name by limited liability partnership**

(1) A limited liability partnership must display its name, in a clearly visible and legible manner, at or outside every office or place in which it carries on its business.

(2) A limited liability partnership must state its name, in a clearly visible and legible manner, in its correspondence, notices, publications, invoices and bills of costs, and on its websites.

**7AG. Notice by limited liability partnership to existing clients**

(1) Except as provided in subsection (2), a law firm must, within 30 days after it becomes a limited liability partnership, by written notice inform each of its existing clients of that fact.

(2) A specified foreign firm must, within 30 days after it becomes a limited liability partnership, by written notice inform each of its existing clients in Hong Kong of that fact.

(3) For the purposes of subsection (2), a foreign firm is a specified foreign firm if, before becoming a limited liability partnership, it has been carrying on, in a foreign jurisdiction, the practice of law as a partnership with limited liabilities under the law of that jurisdiction.

(4) A written notice issued under this section must be in a form specified by the Council.

(5) The form specified under subsection (4) must include a brief statement stating how liabilities of partners ~~of a law firm are affected by the law firm becoming a limited liability partnership under section 7AC.~~

in a law firm are affected under sections 7AC, 7ACA, 7ACB and 7ACD by the law firm becoming a limited liability partnership.

(6) In this section, “existing client” (現有當事人現有客戶), in relation to a law firm, means a person who is a client of the firm at the time the firm becomes a limited liability partnership.

(7) For the purposes of subsection (2), an existing client of a specified foreign firm is its existing client in Hong Kong if –

- (a) the client is a body corporate, and it has its registered office or a place of business in Hong Kong; or
- (b) the client is not a body corporate, and the last correspondence address provided by the client to the firm is in Hong Kong.

(8) This section does not apply to a law firm that is constituted as a limited liability partnership when it commences business in Hong Kong.

#### **7AGA. How a partner becomes a designated partner**

(1) A partner in a limited liability partnership is at any particular time a designated partner for a matter handled by the partnership for a client only if –

- (a) the partner is stated, in a written notice, as becoming such from the effective date of the notice and the notice –
  - (i) complies with section 7AGC(1); and
  - (ii) is signed by the partner;
- (b) that time is on or after the effective date of that notice; and

(c) the partner has not ceased to be such at that time under section 7AGB.

(2) Despite subsection (1), a partner is at any particular time on or after a date a designated partner for a matter if the partner –

(a) is under subsection (3) to be taken to be a designated partner for the matter from that date; and

(b) has not ceased to be a designated partner for that matter at that time under section 7AGB.

(3) One or more partners (each of whom is referred to as a “deemed designated partner”) in a limited liability partnership are to be taken to be designated partners for a matter handled by the partnership for a client from a date (“specified date”) if –

(a) there is no designated partner for the matter on the specified date, apart from each deemed designated partner being taken to be a designated partner from that date under this subsection; and

(b) within 30 days after the specified date –

(i) the client has acquired from each deemed designated partner actual knowledge of the fact that he or she is acting as a designated partner for the matter from the specified date; and

(ii) the client has acquired from at least one deemed designated partner actual knowledge of the effect of sections 7AC, 7ACA, 7ACB and 7ACD on liabilities of partners in a limited liability partnership.

(4) Subsection (3) does not make a partner a designated partner at the time a default occurs if at that time the client had not acquired the knowledge referred to in subsection (3)(b)(i) and (ii).



(5) To avoid doubt, this section does not absolve a person who is not a partner in a partnership from any liability that arises from the person holding himself or herself out as a designated partner.

#### **7AGB. How a partner ceases to be a designated partner**

A partner who is a designated partner for a matter ceases to be such only on the earlier of the following –

- (a) the date on which the person ceases to be a partner in the partnership; or
- (b) the effective date of a written notice that complies with section 7AGC(1), being a notice –
  - (i) which states that the partner ceases to be a designated partner for the matter from that date; and
  - (ii) which states the name of, and is signed by, at least one partner who becomes or continues to be a designated partner for the matter from that date.

#### **7AGC. Notice requirements**

(1) A notice referred to in section 7AGA(1)(a) or 7AGB(b) must be in a form specified by the Council and –

- (a) must state its effective date;
- (b) must contain –
  - (i) an explanation in plain language of the effect of sections 7AC, 7ACA, 7ACB and 7ACD on liabilities of partners in a limited liability partnership; and

(ii) any other particulars and information prescribed by rules made under section 73; and

(c) must be given on behalf of the partnership to the client as soon as practicable after the effective date and in any event within 30 days after that date.

(2) A notice has no effect on liability for a partnership obligation that arises from a default that occurred before it is given to the client in accordance with subsection (1)(c) even if that default occurred on or after the effective date stated in the notice.

(3) For the purposes of this Part, the "effective date" of a notice given by a limited liability partnership in accordance with this section is the date stated in the notice as the date from which a partner named in the notice becomes, continues to be or ceases to be a designated partner for a matter specified in the notice.

**7AH. Other requirements relating to practice of law firm in rules made under section 73**

Sections 7AD, 7AE, 7AF, 7AG, 7AGA, 7AGB and 7AGC~~7AF and 7AG~~ are in addition to, and do not affect, any other provisions relating to the practice of a law firm as prescribed by rules made under section 73.

**7AI. Provisions regulating distribution of partnership property**

(1) If a limited liability partnership makes a distribution of any of its partnership property to one or more persons (each being a partner or an assignee of a partner's share in the partnership), and immediately after the distribution –

(a) the partnership is or will be unable to pay its partnership obligations as they become due; or

(b) the value of the remaining partnership property is less than the partnership obligations,

then each of the persons is liable as provided in subsection (2).

~~(1) 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 provided in subsection (2).~~

(1A) However, a person who receives the distribution as described in subsection (1) is not liable as provided in subsection (2) if the person proves that –

(a) immediately before making the distribution, the limited liability partnership made a reasonable assessment that the financial position of the partnership would not be as described in subsection (1) immediately after the distribution;

(b) the partnership arrived at the assessment after exercising reasonable diligence and based on information obtained for the purpose of the assessment or otherwise available at the time of the assessment; and

(c) at the time of the distribution the person did not have, or (if the person is an assignee of a partner's share in the partnership) neither the person nor that partner had, any reason to doubt the correctness of that assessment.

(2) A person who receives the distribution as described in subsection (1)~~The partner or assignee who receives the distribution~~ is liable to the partnership for –

- (a) the value of the property received by the ~~partner or assignee as~~ person as a result of the distribution;  
or
- (b) the amount necessary to discharge the partnership obligations at the time of the distribution,

whichever is the lesser.

(3) Proceedings to enforce any of the liabilities arising under this section as a result of the distribution may be brought by –

- (a) the partnership;
- (b) any partner in the partnership; or
- (c) any person to whom the partnership owes any partnership obligation at the time of the distribution.

(4) In this section, a reference to partnership obligation is a reference to partnership obligation (whether actual or contingent).

(5) This section does not affect a payment made as reasonable compensation for current services provided by a partner to the partnership, to the extent that the payment would be reasonable if paid to a person who is an employee of, but not a partner in, the partnership as compensation for similar services.

(6) No proceedings to enforce a liability under this section may be commenced later than 6 years after the date of the distribution to which the liability relates.

#### **7AJ. List of limited liability partnerships**

(1) The Council must keep a list of law firms that are or have been limited liability partnerships.

- (2) The list must, in relation to each such law firm, contain –
- (a) its name;
  - (b) each address at which it carries on its business or, if it has ceased its business, each address at which it last carried on its business; and
  - (c) the date on which it first became a limited liability partnership and, if applicable, the dates from which or periods during which it has ceased to be a limited liability partnership.

(3) As soon as practicable after becoming aware of any matter that would require the list to be updated, the Council must update the list accordingly.

(4) For the purpose of enabling any member of the public to ascertain whether a law firm is, or has been, a limited liability partnership and to ascertain the particulars of the partnership, the Council must make the list available for public inspection, free of charge, at the office of the Council during office hours.

**7AK. No dissolution of partnership, etc.**

(1) The fact that a partnership becomes, or ceases to be, a limited liability partnership –

- (a) does not cause the partnership –
  - (i) to be dissolved; or
  - (ii) to cease continuing in existence as a partnership; and
- (b) does not affect any of the rights and liabilities (whether actual or contingent) of the partnership, or of any person as a partner, that have been acquired, accrued or incurred before the

partnership becomes, or ceases to be, a limited liability partnership.

(2) Subsection (1)(a) operates subject to any written agreement between the partners to the contrary.

**7AL. This Part to prevail over inconsistent agreement**

(1) In relation to a limited liability partnership, this Part prevails over any inconsistent provisions in any agreement between any persons, whether as partners in the partnership or otherwise.

(2) To avoid doubt, this section does not affect the operation of sections 7ACC and of section 7AK(2).

**7AM. Law not inconsistent with this Part ~~continues to apply~~ applies**

(1) All relevant laws, except so far as they are inconsistent with this Part, ~~continue to apply~~ in relation to a partnership that is a limited liability partnership.

(2) In this section, “relevant laws” (有關法律) means the Partnership Ordinance (Cap. 38) and every other law that applies in relation to a partnership (whether an enactment, or a rule of equity or of common law).”.

**5. Section 73 amended (Power of the Council to make rules)**

Section 73(1) is amended by adding –

“(df) in relation to the practice of limited liability partnerships –

(i) ~~prescribing the particulars and information for the purposes of sections 7AD(1)(e) and 7AGC(1)(b)(ii); and prescribing particulars for the purposes of section 7AD(1)(e); and~~

- (ii) regulating any matters of procedure or matters incidental, ancillary or supplemental to the provisions of Part IIAAA;”.

***Consequential Amendment***

**Summary Disposal of Complaints (Solicitors) Rules**

**6. Schedule amended (Scheduled items)**

The Schedule to the Summary Disposal of Complaints (Solicitors) Rules (Cap. 159 sub. leg. AD) is amended, under the heading “**Legal Practitioners Ordinance (Cap. 159)**”, by adding –

“2.	Section 7AD(1)	10,000	15,000
3.	Section 7AD(2)	10,000	15,000
4.	Section 7AE(a)	10,000	15,000
5.	Section 7AE(b)	10,000	15,000
6.	Section 7AF(1)	10,000	15,000
7.	Section 7AF(2)	10,000	15,000
8.	Section 7AG(1)	10,000	15,000
9.	Section 7AG(2)	10,000	15,000”.

**Explanatory Memorandum**

The purpose of this Bill is to amend the Legal Practitioners Ordinance (Cap. 159) (“the principal Ordinance”) to introduce limited liability partnerships for law firms in Hong Kong..

**Preliminary provisions**

2. Clauses 1 and 2 provide for the short title and commencement.
3. Clause 3 adds to section 2(1) of the principal Ordinance a new definition of “partnership” to make it clear that a reference to this term throughout the

**principal Ordinance and its subsidiary legislation generally includes a limited liability partnership.**



**New Part IIAAA of the principal Ordinance**

4. Clause 4 adds to the principal Ordinance a new Part IIAAA on limited liability partnerships, which consists of the proposed sections 7AA to 7AM.
5. The proposed section 7AA provides for the interpretation of expressions used in the new Part IIAAA.
6. The proposed section 7AB sets out the meaning of a “limited liability partnership” in the Bill, namely, a Hong Kong firm or a foreign firm (both terms are defined in section 2(1) of the principal Ordinance) that is designated by written agreement between the partners as a partnership to which the new Part IIAAA applies.
7. Under the Partnership Ordinance (Cap. 38), every partner in a firm is liable jointly and severally for certain wrongful acts or omissions for which the firm becomes liable. The proposed section 7AC varies this rule for law firms that are limited liability partnerships. According to the proposed section 7AC(1), a person will not, solely by reason of being a partner, become jointly or severally liable for any partnership obligation if the firm is a limited liability partnership and the partnership obligation arises from the default of another partner, or of an employee, agent or representative of the firm.
8. The object of the proposed section 7AC(1) is to protect an innocent partner against personal liability for the default of other members of the firm. This provision is not intended to change the common law position with respect to the general principles of negligence (see the proposed section 7AM). For example, a partner in a limited liability partnership may still be held responsible under the common law for vicarious liability arising from a default of an employee, agent or representative who is under the supervision of the partner. Also, a failure to establish a proper system of staff supervision can be the basis for a claim that all partners of a limited liability partnership are jointly and severally liable for negligence.
9. The proposed section 7AC(3) further provides that the protection under section 7AC(1) is not available to a partner in a limited liability partnership if he

or she knew or ought reasonably to have known of a default at the time of its occurrence, and failed to exercise reasonable diligence to prevent its occurrence. Moreover, a partner may be protected from the liability arising from a claim made by a client only if the partnership was a limited liability partnership at the time the cause of action for the claim accrued, and the client knew or ought reasonably to have known that the partnership was a limited liability partnership at that time (see the proposed section 7AC(4)).

10. Under the proposed section 7AD, a law firm must ensure that a written notice of its relevant particulars is given to The Law Society of Hong Kong (“the Law Society”) at least 7 days before it becomes, or ceases to be, a limited liability partnership. However, a foreign firm constituted as a limited liability partnership when it commences business in Hong Kong is not required to give a separate notice under the proposed section 7AD(1) because it will have already provided the relevant particulars to the Law Society for prior approval of its registration under Part IIIA of the principal Ordinance.

11. The proposed section 7AE requires that the name of a limited liability partnership must contain the words “有限責任合夥” if it is in Chinese, and the words “Limited Liability Partnership” (or the abbreviation) if it is in English. That name must be displayed at every place of business of the partnership and stated in its correspondence and other publications as required by the proposed section 7AF.

12. The proposed section 7AG requires an existing law firm to notify all its existing clients within 30 days after it becomes a limited liability partnership. However, an existing foreign firm only needs to notify its existing clients in Hong Kong if it has already been practising law as a partnership with limited liabilities under the law of another jurisdiction.

13. The proposed section 7AH makes it clear that any other requirements relating to the practice of law firms as prescribed by rules made by the Council

of the Law Society under section 73 of the principal Ordinance will not be affected by the proposed sections 7AD, 7AE, 7AF and 7AG.

14. The proposed section 7AI regulates the distribution of a limited liability partnership's property in circumstances where, as a result of the distribution, the partnership would be unable to pay its obligations as they become due, or the value of the remaining partnership property would be less than its obligations.

15. Under the proposed section 7AJ, the Council of the Law Society is required to keep a list of limited liability partnerships and to make the relevant information available for public inspection.

16. The proposed section 7AK provides that a partnership's existence as a partnership (subject to any contrary agreement between the partners), and the pre-existing rights and liabilities of the partnership and of its partners, will not be affected by the fact that it becomes, or ceases to be, a limited liability partnership.

17. While the proposed section 7AL further states that the new Part IIAAA prevails over inconsistent provisions in any agreement, the proposed section 7AM makes it clear that all relevant laws applicable to a partnership, except so far as they are inconsistent with that Part, remain applicable to a limited liability partnership.

#### Further provisions

18. Clause 5 amends section 73 of the principal Ordinance to empower the Council of the Law Society to make rules respecting the practice of limited liability partnerships for giving full effect to the new Part IIAAA.

19. Clause 6 makes a consequential amendment to the Summary Disposal of Complaints (Solicitors) Rules (Cap. 159 sub. leg. AD) so that a complaint against a breach of any requirement in the proposed sections 7AD to 7AG may be submitted to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel for disposal under the summary procedure provided by those Rules.



**SURVEY ON LLPs**

**Conducted at the Members' Forum on LLPs on 13 February 2012**

1. Do you support the LLP model as proposed by the Administration, namely, with the revised notification requirement (as set out in DOJ's proposal included in the handout) and the 6-year claw back (as set out in section 7AI included in the handout)?

- ☐ Yes  
☐ No

(Please tick as appropriate)

If the answer is No, please go to Question 2.

2. Will you support the LLP model as proposed by the Administration if the 6-year claw back (as set out in section 7AI included in the handout) is revised by replacing a shorter limitation period for claw back?

- ☐ Yes  
☐ No

(Please tick as appropriate)

If the answer is Yes, please go to Question 3

If the answer is No, please go to Question 4

3. What is the appropriate duration of the limitation period for claw back?

- ☐ 2 years from the date of distribution  
☐ 3 years from the date of distribution  
☐ 4 years from the date of distribution  
☐ Other - please specify

(Please tick as appropriate)

4. What is your main objection to the LLP model as proposed by the Administration?

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**- END -**

**Thank you very much for taking the time to complete the survey**



**Response to Law Society's Submission**

“16. The Bankruptcy Ordinance (Cap. 6) (“BO”) provides the following –

- (a) that in respect of a transaction which is at an undervalue entered into by a debtor<sup>24</sup> (who is later adjudged bankrupt) within 5 years before presentation of the bankruptcy petition against him<sup>25</sup>, the court can make an order to restore the position to what it would have been without the transaction<sup>26</sup>.
- (b) that where a debtor (who is later adjudged bankrupt), has within 2 years before presentation of the bankruptcy petition against him<sup>27</sup> given an unfair preference (which is not a transaction at an undervalue) to a person who is an associate of the debtor<sup>28</sup>, the court can make an order to restore the position to what it would have been had the debtor not given the unfair preference<sup>29</sup>.

17. Subject to the Law Society's further clarification, the Administration does not agree that the provisions against unfair preferences or transactions at an undervalue in the BO can achieve the objective of the proposed section 7AI for the following reasons –

- (a) Under section 50(3) of the BO<sup>30</sup>, a bankrupt debtor gives an unfair preference to a person if that person is one of the **debtor's creditors** or a **surety** or

<sup>24</sup> section 49(1) of the Bankruptcy Ordinance.

<sup>25</sup> section 51(1)(a) of the Bankruptcy Ordinance.

<sup>26</sup> section 49(2) of the Bankruptcy Ordinance.

<sup>27</sup> section 51(1)(b) of the Bankruptcy Ordinance.

<sup>28</sup> section 51(1)(b) of the Bankruptcy Ordinance.

<sup>29</sup> sections 50(1) and (2) of the Bankruptcy Ordinance.

<sup>30</sup> Under section 50(3) of the BO, a debtor gives an unfair preference to a person if (a) that person is one of the debtor's creditors or a surety or guarantor for any of his debts or other liabilities; and (b) the debtor does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the debtor's bankruptcy, will be better than the position he would have been in if that thing had not been done.

**guarantor** for any of his debts or other liabilities. It is clear that a partner having received property from an LLP is not a “person” that would trigger the operation of section 50(3).

- (b) Under section 49(3) of the BO<sup>31</sup>, a “transaction at an undervalue” involves passing of property by a bankrupt debtor to another person for no or undervalued consideration. Distributing partnership assets and profits to partners does not fall within subparagraphs (a), (b) or (c) of section 49(3) and thus is not a “transaction at an undervalue”.

18. By reasons as explained in paragraph 17 above, we do not consider the proposed section 7AI redundant. Instead, given the inadequacy of the BO provisions for such purpose, we consider the proposed section 7AI necessary for consumer protection.”

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<sup>31</sup> Section 49(3) of the BO provides:

“For the purposes of this section and sections 51 and 51A, a debtor enters into a transaction with a person at an undervalue if –

- (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
- (b) he enters into a transaction with that person in consideration of marriage; or
- (c) he enters into a transaction with that person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the debtor.”