

Legislative Council Brief

A. Title of the subsidiary legislation

Solicitors (Professional Indemnity) (Amendment) Rules 2020 (“Amendment Rules”) (Annex 1)

B. Introduction / Background

- (a) Compulsory professional indemnity cover for solicitors was introduced by the Law Society of Hong Kong (“Law Society”) in 1980. The current Professional Indemnity Scheme (“PIS”) was set up in 1989 under which indemnity was provided by the Hong Kong Solicitors Indemnity Fund (“Fund”). Pursuant to rule 3(1) of the Solicitors (Professional Indemnity) Rules (Cap. 159M) (“PIS Rules”), the Law Society is authorised to establish and maintain the Fund.
- (b) In general terms, the purpose of the PIS is to provide indemnity against loss arising from claims in respect of any civil liability incurred by a solicitor in connection with his/her practice.
- (c) The Fund is administered in accordance with the PIS Rules by the Hong Kong Solicitors Indemnity Fund Limited (“Company”), a company established by the Law Society for this purpose.

How claims are handled under the PIS

- (d) When an Indemnified (as defined in the PIS Rules) notifies the PIS of a claim, an intended claim or a circumstance which may give rise to a claim and the Indemnified makes a claim for indemnity under the PIS, managers of the PIS (currently ESSAR Insurance Services Limited (“ESSAR”)) will usually appoint from a panel of firms (“PIS Panel”):
 - (1) a firm to represent the Indemnified to handle the claim (“Defence Panel Solicitors”); and

- (2) another firm to advise the Company on indemnity issues in respect of the claim.

The appointment of the Defence Panel Solicitors is in the form of a joint retainer whereby they act for both the Indemnified and the Company.

- (e) Rule 17 of the PIS Rules currently provides that:

17. Panel of firms of solicitors

(1) The Council is to appoint a panel of firms of solicitors from which the Company may appoint a panel solicitor.

(2) The Company may, if it considers it necessary to do so, appoint a firm of solicitors which is not on the panel appointed by the Council under subrule (1) to act as a panel solicitor.

The Council appoints firms to the PIS Panel ("Panel Firms") by open tender. The appointment period is generally 5 years (the appointment periods prior to 2003 were shorter). Further, the Company may appoint firms outside the PIS Panel ("Non-Panel Firms") to act as the Defence Panel Solicitors if it considers it necessary to do so.

- (f) Paragraph 8(1)(a) of Schedule 3 to the PIS Rules provides, inter alia, that the Indemnified shall not incur any costs or expenses without the prior consent of the Company (such consent not to be unreasonably withheld). By virtue of paragraph 1(2)(e) of Schedule 3 to the PIS Rules, any costs or expenses incurred by an Indemnified in connection with a claim against the Indemnified without the Company's consent are excluded from indemnity.

C. Justification for introducing the subject amendments to the subsidiary legislation

- (a) Over the years, the PIS Claims Committee of the Company ("the Committee") has received few requests from Indemnifieds for the appointment of the Non-Panel Firms as the Defence Panel Solicitors. When considering these requests, the Committee noted that the PIS Rules have not clearly spelt out that it is mandatory for Indemnifieds to be represented by the Panel Firms as the Defence Panel Solicitors. The appointment of the Non-Panel Firms creates problems and difficulties in

the claims handling process, such as the following:

- (i) The service quality of the Non-Panel Firms varies. Whilst the Panel Firms are selected by the Council of the Law Society based on criteria such as their experience and knowledge in handling professional negligence claims, the Non-Panel Firms do not undergo the same assessment process.
 - (ii) The Panel Firms are experienced in preparing defence reports in a standardized format set out in the "*Panel Solicitors Guide*" prepared by ESSAR. Advice from the Non-Panel Firms, on the other hand, comes in all styles and format which may be time-consuming and problematic for ESSAR and the Committee to consider.
 - (iii) Prior to being appointed by the Council to the PIS Panel, all the Panel Firms are required to sign a letter of undertaking to the Law Society that they will not act for any party in making a claim against an Indemnified which claim may result in that Indemnified seeking an indemnity under the PIS. Appointments of the Non-Panel Firms are usually made on an ad-hoc basis, therefore they do not provide such an undertaking to the Law Society which could potentially invite conflicts.
 - (iv) The Company only pays panel rates agreed with the Panel Firms at their appointment (which are currently the same as the taxation rates). If a Non-Panel Firm refuses to abide by these rates and charges higher rates, the Indemnified may be prejudiced, as they will need to pay the difference themselves.
 - (v) The appointment of Non-Panel Firms defeats the purpose of the Law Society conducting an open tender for the PIS Panel - to help control the overall cost and service quality of the Panel Firms.
- (b) It is appreciated that some claims may require the expertise of firms outside the PIS Panel. In such cases, the Company will be in a position to resolve whether to exercise its discretion as set out in the proposed amendments to the PIS Rules and to consider the appointments of the Non-Panel Firms on a case by case basis.

- (c) In view of the above, it is proposed that the PIS Rules be amended to make it clear that the Indemnifieds are only to be represented by the Panel Firms as the Defence Panel Solicitors, but that the Company may exercise its discretion to appoint the Non-Panel Firms if necessary.

D. Explanation of main provisions

Salient changes are as follows:

- (a) Amending the definition of “related costs” in rule 2 to specify that “related costs” are those incurred with the Company’s prior written consent:

"related costs" (有關連訟費) means all costs and expenses-

(a) incurred with authorized insurers' or the Company's prior written consent in the defence or settlement of any claim against the indemnified or a former solicitor; or

(b) incurred by the Company in the exercise of its power under paragraph 8(1)(d) of Schedule 3;

- (b) Adding a third paragraph to rule 17 to provide that any person seeking indemnity under the PIS is to be represented by the Panel Firms as the Defence Panel Solicitors; and if that person wishes to be represented by a Non-Panel Firm, that person must obtain the Company’s prior written consent or else no indemnity will be provided in respect of the costs incurred by such Non-Panel Firm, as follows:

17. Panel of firms of solicitors

(1) The Council is to appoint a panel of firms of solicitors from which the Company may appoint a panel solicitor.

(2) The Company may, if it considers it necessary to do so, appoint a firm of solicitors which is not on the panel appointed by the Council under subrule (1) to act as a panel solicitor.

(3) Unless the contrary has been expressly agreed in writing by the Company-

(a) an indemnified, a former solicitor or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives are only to be represented by the panel solicitor appointed by the Company to represent them in connection with any claim for which Indemnity is sought under rule 10; and

(b) an indemnified, a former solicitor or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives must not instruct any other firm of solicitors to represent them in connection with any such claim or be provided with Indemnity in respect of costs incurred by them as a result of instructing any such other firm of solicitors.

- (c) Adopting the recommendation of the legal advisor of LegCo as set out in paragraph 22 of LC Paper No. CB(4)942/18-19 (**Annex 2**), all references of “him or her” and “he or she” in paragraph 3(2)(c) of Schedule 3 have been replaced by “that person” for the sake of consistency with the Chinese PIS Rules.

E. Legislative timetable

The Amendment Rules were gazetted on 24 January 2020 and will be tabled at LegCo on 12 February 2020. Subject to negative vetting by LegCo, the proposed Commencement Date is 1 May 2020.

F. Consultation with the relevant parties

Members of the Law Society have been kept informed of the proposed amendments in the following articles (**Annex 3**) published in the *Hong Kong Lawyer*, a copy of which had been distributed to every member of the Law Society (except for members who have chosen to opt out from the distribution list):

- (a) “From the Council Table” - November 2017 edition; and
(b) “From the Secretariat” - December 2019 edition.

No adverse comments have been received from members in relation to the

proposed amendments.

A paper dated 5 November 2019 was also prepared to consult the Panel on Administration of Justice and Legal Services (“Panel”) regarding the Amendment Rules. No adverse comment has been received from the Panel as of the time of writing this report.

G. Enquiries

Any enquiries concerning this amendment exercise can be directed to Ms. Gigi Liu, Assistant Director, Professional Indemnity Scheme of the Law Society at 3rd Floor, Wing On House, 71 Des Voeux Road Central, Hong Kong (Telephone No. 2846 0557).

24 January 2020

Solicitors (Professional Indemnity) (Amendment) Rules 2020

(Made by the Council of The Law Society of Hong Kong under section 73A of the Legal Practitioners Ordinance (Cap. 159) subject to the prior approval of the Chief Justice)

1. Commencement

These Rules come into operation on 1 May 2020.

2. Solicitors (Professional Indemnity) Rules amended

The Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg. M) are amended as set out in rules 3 to 6.

3. Rule 2 amended (interpretation)

(1) Rule 2, English text, definition of *Indemnity*—

Repeal

“is”

Substitute

“are”.

(2) Rule 2, definition of *related costs*, paragraph (a)—

Repeal

“Company’s consent”

Substitute

“Company’s prior written consent”.

4. Rule 10 amended (entitlement to Indemnity)

Rule 10(1), after “exclusions, set out in”—

Add

“rule 17(3) and”.

5. Rule 17 amended (panel of firms of solicitors)

After rule 17(2)—

Add

“(3) Unless the contrary has been expressly agreed in writing by the Company—

(a) an indemnified, a former solicitor or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives are only to be represented by the panel solicitor appointed by the Company to represent them in connection with any claim for which Indemnity is sought under rule 10: and

(b) an indemnified, a former solicitor or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives must not instruct any other firm of solicitors to represent them in connection with any such claim or be provided with Indemnity in respect of costs incurred by them as a result of instructing any such other firm of solicitors.”.

6. Schedule 3 amended (exclusions and conditions)

(1) Schedule 3, paragraph 3(2)(c)—

Repeal

“he or she”

Substitute

“that person”.

- (2) Schedule 3, English text, paragraph 3(2)(c)—

Repeal

“his or her”

Substitute

“that person’s”.

- (3) Schedule 3, paragraph 3(2)(c)(i)—

Repeal

“him or her”

Substitute

“that person”.

- (4) Schedule 3, paragraph 3(2)(c)(ii)—

Repeal

“him or her”

Substitute

“that person”.

Approved this 2nd day of January 2020.



Chief Justice

Made this day of 2020.

Explanatory Note

These Rules amend the Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg. M) (*principal Rules*) to provide that any person seeking indemnity under rule 10 of the principal Rules is to be represented by the firm of solicitors appointed by Hong Kong Solicitors Indemnity Fund Limited (*Company*) to act on that person's behalf. If that person appoints any other firm of solicitors, that person must obtain the Company's prior written consent or else no such indemnity will be provided in respect of the costs incurred.

Drafting issues

Annex 2

Amended (21) With regard to Rule 3(2) of L.N. 51 which amends the definition of "indemnity" under Rule 2 of Cap. 159M to "the indemnity to which an indemnified, a former solicitor, or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, a foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives is entitled under rule 10", the legal adviser of the Subcommittee considers that the singular verb "is" should be replaced with a plural verb "are" because the expression "their estate and legal representatives" is a plural noun. ESSAR agrees that the plural verb "are" should have been used. As the Law Society is continuing to make various other amendments to Cap. 159M, it will seek views of the Department of Justice ("DOJ) about this textual point and amend "is" to "are" in the next legislative exercise if DOJ agrees.

Amended (22) The legal adviser of the Subcommittee has pointed out that the term "他" in the Chinese text of paragraph 3(2)(c) of Schedule 3 to Cap. 159M is not entirely consistent with "he or she" in the English text. The legal adviser of the Subcommittee has suggested that the term "that person" (該人) may perhaps be used in lieu of the pronouns to ensure consistency between the two versions. The Law Society has taken note of the suggestion.

23. The Chairman has suggested that the term "該筆" in the Chinese version of paragraph 2(1)(a) and (b) of Schedule 3 to Cap. 159M should be replaced with "每一筆" in relation to "any one claim" in the English version. The Law Society has taken note of the suggestion.

Discussed & resolved the existing wording is correct, no need to amend.

Recommendation

24. The Subcommittee does not object to the two Amendment Rules.

Advice sought

25. The House Committee is invited to note the deliberations of the Subcommittee.

FROM THE COUNCIL TABLE

理事會議題

An Update on the Professional Indemnity Scheme

The Professional Indemnity Scheme ("PIS") provides compulsory professional indemnity to Hong Kong law firms against losses arising from civil liability incurred in connection with their practices. The terms and conditions of the PIS are set out in the Solicitors (Professional Indemnity) Rules (Cap. 159M) ("PIS Rules") where indemnity is currently provided by the Hong Kong Solicitors Indemnity Fund established by the Law Society.

The Council has been conducting an on-going review of the scope and operation of the PIS and the PIS Rules, and has approved the following proposals in principle:

- A. Increasing the limit of indemnity under the PIS from the existing HK\$10 million per claim to HK\$20 million per claim with no change to the PIS contribution calculation formula.
- B. Improving the coverage of the PIS by:
 - (i) narrowing the "principal fraud / dishonesty" exclusion (ie, para. 1(2)(c)(iii) of Schedule 3 to the PIS Rules) so that the exclusion will not apply to an "innocent partner"; and
 - (ii) providing indemnity for costs incurred in responding to or defending:
 - (a) an investigation or inquiry (except for any disciplinary proceedings by or under the authority of the Law Society) by law enforcement agencies; and
 - (b) criminal charges (but only if the Indemnified is acquitted of such charges).
- C. Amending the PIS Rules to:
 - (i) expressly set out the general current practice regarding appointment of defence solicitors in respect of claims made under the PIS – an Indemnified must appoint defence solicitors from the panel of firms of solicitors appointed by the Council under r. 17 of the PIS Rules, unless the Hong Kong Solicitors Indemnity Fund Limited agrees otherwise in writing;
 - (ii) clarify that where two Hong Kong law firms are in association, the practising certificates of solicitors working concurrently for both associated firms will be suspended if any one of such associated firms does not have a valid receipt under the PIS (as per r. 6(2) of the PIS Rules).

In addition to the above, changes are being made to the PIS Rules whereby foreign lawyers employed in Hong Kong firms will be treated no differently from assistant solicitors or consultants in the PIS contribution and deductibles calculation formula. When Solicitors Corporations are introduced as a new mode of operation, the PIS Rules will also be updated to cater for this new mode of business operation.

We endeavour to keep the PIS under continuous review to assist our members in overcoming challenges they may face when running their practices. Any comments on the above or any other suggestions on the PIS can be directed to adpis@hklawsoc.org.hk.

專業彌償計劃的更新

專業彌償計劃為香港律師行提供與律師執業業務有關所招致的民事法律責任上的申索的強制性專業彌償保障。專業彌償計劃的條款及細則載於《律師(專業彌償)規則》(第159M章)，目前由律師會成立的香港律師彌償基金提供上述彌償。

理事會一直對專業彌償計劃和《律師(專業彌償)規則》的範圍和運作進行檢討，並原則上批准了以下建議：

- A. 在專業彌償供款的計算公式不變的情況下，把專業彌償限額從現在的每項申索\$10,000,000港元增加到每項申索\$20,000,000港元。
- B. 通過以下方式提高專業彌償的覆蓋範圍：
 - (i) 縮窄「主管欺詐 / 不誠實」的免除範圍(《律師(專業彌償)規則》附表3第1(2)(c)(iii)段，使有關免除不適用於「無辜的合夥人」；及
 - (ii) 為以下回應或抗辯所支付的費用提供彌償：
 - (a) 執法機構的調查或查詢(由律師會進行或授權的任何紀律處分除外)；及
 - (b) 刑事指控(但只限獲彌償保障者被判定無罪的索償)。
- C. 修訂《律師(專業彌償)規則》：
 - (i) 明確訂明就專業彌償申索委任辯護律師的一般現行做法—根據《律師(專業彌償)規則》第17條，除非香港律師彌償基金有限公司另外書面同意，獲彌償保障者必須從理事會委任的律師行委員會內委任辯護律師；
 - (ii) 澄清在兩間香港律師行聯營的情況下，如其中任何一間聯營律師行並無具備專業彌償基金的有效收據，同時為兩間聯營律師行工作的律師之執業證書將被吊銷。(《律師(專業彌償)規則》第6(2)條)。

此外，對《律師(專業彌償)規則》的修訂還包括受香港律師行聘用的外地律師的專業彌償供款及免賠額計算公式，將與助理律師及顧問看齊。日後引入律師法團業務模式後，《律師(專業彌償)規則》也將更新，以配合這種新的業務模式。

我們致力不斷檢討專業彌償，以協助會員面對執業中可能面臨的挑戰。如對專業彌償計劃或上述對其更新的建議有任何其他意見，歡迎電郵至 adpis@hklawsoc.org.hk。



FROM THE SECRETARIAT

律師會秘書處資訊

Ms. Heidi Chu, Secretary General 秘書長朱潔冰律師

Update on the Professional Indemnity Scheme

Professional indemnity cover is a compulsory and an essential element to the practice of every solicitors' firm in Hong Kong. Such indemnity is provided by the Professional Indemnity Scheme ("PIS"), which operates in accordance with the Solicitors (Professional Indemnity) Rules (Cap. 159M) ("PIS Rules").

As part of the Council's on-going review of the PIS, a number of changes are in the pipeline and some have come into operation. This article provides an overall update.

The reforms that were implemented earlier this year related to the following:

- i) incorporating foreign lawyers employed in Hong Kong law firms into the formula for calculating PIS contributions and deductibles (effective from 1 July 2019);
- ii) increasing the indemnity limit of the PIS from HK\$10 million per claim to HK\$20 million per claim for claims first notified and first made against an Indemnified (as defined in the PIS Rules) on or after 1 October 2019.

The next change on the list, probably a relatively smaller change, will be to expressly set out in the PIS Rules the current practice regarding the appointment of defence solicitors to handle claims made under the PIS. When a claim for indemnity is made by an Indemnified under the PIS, Managers of the PIS (currently ESSAR Insurance Services Limited) will usually appoint a firm of solicitors to represent the Indemnified to handle the claim made against that Indemnified. Such firm of solicitors is selected from a Panel ("PIS Panel") appointed by the Council (usually for a term of five years) through open tender. The proposed change will set out clearly that, in relation to a claim for which indemnity is sought under the PIS, an Indemnified must be represented by defence solicitors

專業彌償保險計劃的最新動態

香港每間律師行執業均須強制投購專業彌償保障。專業彌償由專業彌償保險計劃（下稱「計劃」）提供，計劃根據《律師（專業彌償）規則》（第159M章）（下稱《規則》）運作。

理事會一直檢視計劃，計劃進行多項更改，有些已開始實施。本文總結了各項更改。

今年較早時實施的改革涉及以下方面：

- i) 把受僱於香港律師行的外地律師納入計算計劃供款和免賠額的方程式（自2019年7月1日起生效）；
- ii) 將2019年10月1日或之後對獲彌償保障者（定義見《規則》）的首次索賠限額從每項索賠1000萬港元提高至每項2000萬港元。

下一項更改（或許是相對較小的更改）是在《規則》中明確列明有關委任辯護律師處理根據計劃提出索賠的現行做法。當獲彌償保障者根據計劃提出彌償要求時，計劃管理人（現為恒利保險服務有限公司）通常會委任一所律師行代表獲彌償保障者處理對其的索賠。該律師行是通過公開招標由理事會任命的律師行委員會（下稱「委員會」）選出（任期通常為五年）。擬議的更改將明確規定，根據計劃提出的索賠必須由委員會選出的辯護律師代表，除非獲彌償保障者事先獲得香港律師彌償基金有限公司（下稱「公司」），由

from the PIS Panel unless the Indemnified has obtained the prior written consent of the Hong Kong Solicitors Indemnity Fund Limited ("Company", which was established to hold, manage and administer Hong Kong Solicitors Indemnity Fund from which indemnity is provided under the PIS), otherwise no indemnity will be provided in respect of the relevant costs incurred by the Indemnified. The amendments to the PIS Rules effecting this change are currently being finalised pending their gazettal in early 2020. The target commencement date is currently 1 May 2020.

Another proposed change that has been approved in principle by the Council relates to the narrowing of the scope of the "principal fraud/dishonesty" exclusion (ie para. 1(2)(c)(iii) of Schedule 3 to the PIS Rules) so that the exclusion will not apply to an "innocent Indemnified". Currently, no indemnity will be provided in respect of losses arising out of any claim brought about by the dishonest or fraudulent acts or omissions of an employee of an indemnified firm unless the Company is satisfied that the employee's dishonesty and fraud did not occur as a result of the recklessness, dishonesty or fraud on the part of any person who was a principal of the firm at the relevant time. The proposal is to change the PIS Rules so that indemnity will still be provided for those indemnified who did not commit, approve or sanction the dishonest or fraudulent act or omission. The legislative amendment exercise is in progress.

Other proposed changes which have been approved in principle by the Council and are being worked on include the following:

- i) clarification on where a solicitor is a partner, an employee or a consultant of more than one Hong Kong law firm, his or her practising certificate will be suspended if any one of such Hong Kong law firms does not have a valid receipt as required under rule 6(1) of the PIS Rules;
- ii) consequential updates to the PIS Rules in preparation for the introduction of solicitor corporations as a new mode of operation for legal practices;
- iii) clarification on how the PIS operates where the receipt of more than one Indemnified responds to a claim made under the PIS.

In addition to the above, the Board of the Company and the Council will conduct a wider policy review regarding suggestions to extend the coverage of the PIS to cover the costs incurred in responding to or defending (i) an investigation or inquiry by law enforcement agencies (except for any disciplinary proceedings by or under the authority of the Law Society of Hong Kong) and (ii) criminal charges (but only if the relevant Indemnified is acquitted of such charges).

The PIS serves to provide our members and the public with protection and the resources to meet unexpected eventualities in the long run. If you have any comments or suggestions, you are welcome to email us at adpis@hklawsoc.org.hk.

香港律師彌償基金持有、管理和營辦，根據計劃提供彌償)的書面同意，否則獲彌償保障者招致的相關費用將不獲彌償。實施更改《規則》的修訂目前正在定稿階段，預計將於2020年初刊憲。目標生效日期為2020年5月1日。

理事會原則上批准的另一項擬議更改涉及縮小「重大欺詐/不誠實」免除的範圍(《規則》附表3第1(2)(c)(iii)條)，以使免除不適用於「無辜的獲彌償保障者」。目前，由於律師行或獲彌償保障者的任何僱員的不誠實、欺詐性作為或不作為而引起的申索，不獲提供彌償，但如令彌償公司信納，該僱員的不誠實或欺詐性作為或不作為並非由於任何在有關時間擔任主管的人在處理或管理有關執業業務時罔顧後果或不誠實或有欺詐性作為或不作為而發生，則屬例外。提議更改《規則》，向沒有實行、同意或核准不誠實或欺詐行為或不作為的獲彌償保障者提供彌償。法律修訂工作正在進行中。

理事會原則上批准並正在研究的其他擬議更改包括：

- i) 澄清若一名律師是多於一間香港律師行的合夥人、僱員或顧問，而其中任何一間香港律師行沒有根據《規則》第6(1)條要求出示有效收據，則其執業證書將被暫停；
- ii) 為準備引入律師法團作為新的法律執業運作模式，相應更新《規則》；
- iii) 澄清在收到多個獲彌償保障者回應根據計劃提出的索賠時，計劃的運作方式。

除上述內容外，公司董事會和理事會將就擴大計劃的覆蓋範圍的建議進行更廣泛的政策檢討，以涵蓋回應或辯護(i)執法機構的調查或查詢產生的費用(由香港律師會或由香港律師會授權進行的任何紀律處分程序除外)，以及(ii)刑事指控(但僅在獲彌償保障者被裁定無罪的情況下)。

計劃旨在為會員和公眾提供保護和資源，以應對長遠的突發事件。如您有任何意見或建議，歡迎電郵我們(adpis@hklawsoc.org.hk)。