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Panel on Administration of Justice and Legal Services

Background brief for the meeting on 22 January 2007

Recovery agents

Purpose

This paper provides information on the past discussions of Members of the Legislative Council on issues relating to companies/organizations which assist victims to recover damages, usually arising from personal injuries cases, in return for a fee as a percentage of the recovered damages.

2. Various names have been used to describe such companies/organizations. This paper adopts the one used by the legal professional bodies in their submissions to the Panel, i.e. recovery agents (RAs).

Background

3. In the 2001-2002 session, the Panel conducted a review of the current legislative framework of legal aid services and received views from deputations. The Association of the Rights of Industrial Accident Victims informed the Panel that as many accident victims were not eligible for legal aid under the existing financial eligibility limits of the legal aid schemes, they had resorted to entering into contracts with RAs which claimed to be able to help them in their claims for compensation. RAs operated on the pledge of "no win, no charge" and would take a percentage of the damages recovered as their service fees.

4. When the Panel was briefed on the outcome of the 2004 annual review of the financial eligibility limits for legal aid applicants in December 2004, the legal professional bodies suggested that a fundamental review of the legal aid system was necessary as many persons not eligible for legal aid had turned to RAs to pursue their claims for compensation. The legal professional bodies pointed out that as RAs operated for profits, they would not act in a conscientious manner to protect the rights and interests of their clients as qualified lawyers would do. The Panel noted that the Law Society of Hong Kong had set up a working group to look into the issues relating to RAs and would provide information on its deliberations for the consideration of members in due course.

5. On 28 November 2005, the Panel held its first meeting to discuss the issue of RAs with the Administration and the legal profession. The Administration reported further developments to the Panel in February and March 2006. Concerns were also raised by Members at the Council meetings on 12 June 2002, 26 January 2005 and 15 June 2006.

Legal position

6. According to the Administration, a number of laws and rules of professional conduct are relevant to the legality of RAs as far as the legal position is concerned -

- (a) under the Legal Practitioners Ordinance (Cap. 159), it is an offence for a person to practise as a barrister or to act as a solicitor if he is not qualified to do so;
- (b) at common law, it is both a civil wrong and a criminal offence to assist or encourage a party to litigation in circumstances that amount to "maintenance" or "champerty". Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognized by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. Maintenance and champerty remain as common law offences in Hong Kong. The maximum penalty for an indictable offence under section 101I of the Criminal Procedure Ordinance (Cap. 221) is imprisonment for seven years and a fine; and
- (c) under the Legal Practitioners Ordinance and the Law Society's Guide to Professional Conduct, a solicitor may not act in contentious proceedings on the basis of a contingency fee arrangement, i.e. on the basis that the solicitor would only receive payment if the case is successful. The Bar's Code of Conduct prohibits barristers from accepting any brief or instructions on a contingency fee basis.

Views of the legal profession

7. In November 2004, the Law Society established a working group to investigate the problems caused by RAs. The Law Society had sought advice from leading counsel on the legality of a number of contracts entered into by RAs with accident victims. The advice obtained was that the contracts were champertous and unenforceable. The Law Society issued a circular to its members on 17 May 2005, advising them that the practice of RAs was a criminal offence in Hong Kong and lawyers risked committing professional misconduct if they worked on cases financed

by RAs. In its written submission to the Panel meeting on 28 November 2005, the Law Society had set out in detail the problems identified in the activities of RAs, and concluded that the possible solutions to the problem of RAs were public education, criminal enforcement against RAs, and disciplinary proceedings against the solicitors involved.

8. In January 2005, the Bar Council appointed the Special Committee on Recovery Agents to study issues arising from the phenomenon of non-legally qualified persons interfering in, or encouraging, litigation for reward. The Special Committee produced a report in April 2005 which concluded that the contracts between RAs and accident victims were champertous and could not be enforced in a court of Hong Kong. Lawyers who knowingly assisted in the performance of the contracts or entered into a contingency fee arrangement in the context of litigation might have committed the crime of champerty, and might be in breach of the Legal Practitioners Ordinance and their professional codes of conduct.

The Administration's position

9. The Department of Justice (DoJ) advised the Panel at its meeting on 28 November 2005 that it had adopted a three-pronged approach to the issue of RAs, involving public education, possible prosecution, and consideration of the need for legislation. Apart from one complaint which had been referred to the Police for investigation, the Consumer Council had not received any further complaints from consumers. DoJ would consider bringing prosecution against a RA if there was sufficient evidence that it had committed any offence.

10. DoJ also advised that the following developments were relevant to the issue of RAs -

- (a) Regulation of claims management companies in UK - the Compensation Bill to provide a statutory framework for the regulation of claims management companies was introduced in the UK House of Lords on 2 November 2005. Details of the regulatory regime would be set out in regulations to be made under the new legislation; and
- (b) Consultation on conditional fees - a Sub-committee of the Law Reform Commission (LRC) released its Consultation Paper on Conditional Fees for public consultation on 14 September 2005. The Sub-committee had made reference to the problems and regulation of RAs (referred to as "claims intermediaries" in the Consultation Paper) in England, and the situation in Hong Kong. One of the recommendations made by the Sub-committee was that prohibitions against the use of conditional fees in certain types of civil litigation by legal practitioners should be lifted, so that legal practitioners might choose to charge conditional fees in appropriate cases. The Sub-committee considered that conditional fees might appeal to litigants who would have otherwise patronised RAs,

which might or might not be qualified or suitably supervised. A relevant extract from the Consultation Paper on Conditional Fees is in **Appendix I**.

Members' views and concerns

11. Apart from the discussion of the Panel at its meeting on 28 November 2005, Members had raised issues relating to RAs in the Council on the following occasions -

- (a) Hon Margaret NG raised an oral question on "Agents handling claims for accident compensation" at the Council meeting on 12 June 2002;
- (b) Hon Margaret NG and Hon LI Kwok-ying expressed concerns about the problems relating to RAs during the debate on the 2005 Policy Address at the Council meeting on 26 January 2005; and
- (c) Hon LI Kwok-ying raised a written question on the "Operation of claims companies" at the Council meeting on 15 June 2005.

12. Members expressed concern about the prevalence of RAs and requested the Administration to look into the propriety, desirability and legality of the operation of RAs from both the public's and the profession's point of view, and consider deterrent measures, including taking prosecution and introducing legislation to regulate RAs. Some Members considered that the emergence of RAs was mainly attributable to the fact that many accident victims were neither eligible for legal aid nor able to afford the high legal cost, and asked the Administration to consider reviewing the legal aid policy. Some Members pointed out that the LRC's study on conditional fees was very controversial and might not be able to solve the problem of RAs.

13. For details of Members' concerns and the Administration's responses, members are requested to refer to the following papers -

- (a) extracts from the Official Records of Proceedings of the Council meetings on 12 June 2002, 26 January 2005 and 15 June 2005 in **Appendices II to IV**; and
- (b) an extract from the minutes of the Panel meeting on 28 November 2005 in **Appendix V**.

Subsequent developments

14. In response to the request of the Panel, the Administration had, in March 2006, set out its position regarding RAs and the developments subsequent to the Panel meeting in November 2005 in a paper which was circulated to the Panel for information on 28 March 2006 (LC Paper No.CB(2)1560/05-06 in **Appendix VI**). The gist of the paper is as follows -

- (a) following a meeting between DoJ and the legal professional bodies in January 2006, measures had been introduced to prevent illegal activities of RAs, such as putting up of posters or notices and making available leaflets at the offices of the Labour Department, the Traffic Accident Victims Assistance Section of the Social Welfare Department, Legal Aid Department and Hospital Authority hospitals where serious touting activities had been carried out by RAs, and requesting relevant Government departments to stop any touting activities of RAs on their premises;
- (b) the Law Society had supplied DoJ with information concerning advertisements on the Internet and the local media relating to a number of RAs. The Police were conducting investigations of certain suspected cases involving illegal activities of RAs (including the High Court case [HCMP2878/2004] which was brought to the attention of DoJ by Hon Margaret NG, Panel Chairman). If evidence of criminal acts was uncovered, DoJ would consider bringing prosecution proceedings; and
- (c) it would be more appropriate to see whether the practice of illegal RAs could be stopped by prosecution before considering any legislative amendments. For the time being, a case for legislation had not been made out.

15. In view of the on-going investigation by the Police of certain suspected cases, the on-going consultation regarding conditional fees which might have a bearing on the policy regarding RAs, and the current developments of the statutory framework to regulate RA activities in the UK, the Administration proposed to continue to monitor the situation in Hong Kong and the UK before deciding the way forward.

Latest position

16. DoJ will brief the Panel on the latest developments of the issue at the coming meeting on 22 January 2007.

Relevant papers

17. A list of relevant papers available on the LegCo website is in **Appendix VII**.

Extract from Chapter 6 of Consultation Paper on Conditional Fees

~~deletion of the requirement may convince counsel to take on the case.~~

- (iv) *Counsel's fees as disbursements* – A small number of ATE insurance providers are able to treat counsel's fees as disbursements and so counsel will be paid, win or lose.

6.37 These points should be borne in mind in devising any scheme of event-triggered fees in Hong Kong. It falls to be considered whether barristers should be subject to a higher maximum uplift than solicitors, to mitigate the difficulty of finding a competent barrister to represent clients who have a worthy cause but require conditional fee financing. An alternative would be to explore the possibility of ATE insurers including counsel's fees as disbursements as a normal practice.

Insurance

6.38 It is apparent that the availability of insurance is a key factor in making the conditional fee system work. Whether the market in Hong Kong is large enough to allow a number of insurance companies to compete and survive should be investigated and considered.

6.39 It may be useful to note that in England, when conditional fee agreements first became lawful in 1995, only the Law Society-approved "Accident Line Protect" was available, offering a low fixed premium of £85 per case regardless of the type or value to members of the Personal Injury Panel.⁴³ Within three years, the scheme was in difficulties, primarily through adverse selection of cases by solicitors.

6.40 Since 1995, providers of ATE insurance have grown to around a dozen. In reality, the majority are brokers and the number of underwriters operating in the market is around five.⁴⁴ However, underwriters have suffered greater losses than they had anticipated, and there is a danger that in the near future the demand for ATE insurance may not be fully met.⁴⁵

6.41 An issue which needs to be considered is whether the recoverability of ATE premiums and success fees has any impact on the level of insurance premiums and the availability of ATE insurance.

Intermediaries

6.42 Since the abolition of criminal and civil liability for champerty and maintenance, claims intermediaries sometimes referred to as compensation claims agents, claims management companies or claim farmers, have proliferated in England, typically by maintaining a high profile through

⁴³ Contrast the premium of £367.50 (tax inclusive) in *Callery v Gray* in 2000.

⁴⁴ M Harvey "Guide to Conditional Fee Agreements" Jordans 2002 at 115.

⁴⁵ As above.

aggressive TV marketing campaigns. Concern over the activities of claims intermediaries has been a constant theme over the last few years. The collapse of Claims Direct, the Accident Group and others has focused attention on the business models of claims intermediaries. Allegations of high-pressure sales, exaggerated or low-quality claims, expensive and opaque insurance products covering items that are irrecoverable between the parties, and high-interest loans to clients with no credit checks have served to paint a poor picture of this sector. Clients often have not fully understood the liabilities they were undertaking when signing up for insurance and loans offered to them by the sales agents to facilitate the claim. Many respondents to the consultation expressed concern at the way in which some intermediaries obtained their business, and the suitability of ATE insurance and loan products sold to claimants. In some instances, it is questionable whether claims intermediaries add value or simply an extra costly tier to the claims process.

6.43 According to the views collected by the UK Department for Constitutional Affairs from its consultation exercise in 2003,⁴⁶ a number of problems have emerged in the claims intermediaries sector, which are summarised as follows:

"Many respondents expressed grave concerns over the behaviour and conduct of claims intermediaries in marketing and selling their products. Unlike solicitors, who are bound by a professional code of conduct, claims intermediaries are unregulated. However, the respondents also recognised the important role that intermediaries have in informing consumers of their legal rights. The respondents suggested that regulations should be considered to control the activities of these intermediaries.

The Law Society believed that it was crucial that the claims management industry be subject to regulation if they were to be involved in the provision of advice under CFAs. Citizens Advice suggested that primary legislation be introduced to bring claims intermediaries within the scope of legal services regulation. The Federation of Small Business (FSB) stated that CFAs had encouraged the emergence of claims farmers who derive their income from persuading clients to make a claim without any real investment in the merits of the action. The FSB also felt that claims were now more complex, with each claim being broken down so that every small detail is priced. This has increased the costs of claims. The FSB would like to see a simpler system for making claims, and proposed that some restrictions should be placed on the various types of claim made under CFAs."

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DCA, *Consultation Paper on Simplifying CFAs*, June 2003.

Regulation of claims intermediaries in England

6.44 There is some existing regulation of aspects of the legal and financial package services that claims intermediaries offer to the public. For example, the Law Society and the Bar Council regulate the conduct of solicitors and barristers respectively who work with, or take work from, these companies. Their activities may be covered by trading standards legislation, including the supply of goods and services, unfair contract terms and trade descriptions. Their advertisements are under the purview of the Advertising Standards Authority and the Office for Communications. There is, however, no sector-specific regulation.

6.45 In 2003 and 2004, the sudden collapse of several claims intermediaries gave rise to concerns from consumers and solicitors. At present, claims intermediaries in England may join the Claims Standards Council on a voluntary basis. Only a small proportion of claims intermediaries have opted to join the Claims Standards Council. In November 2004, the UK Government proposed that the Claims Standards Council should work vigorously towards approval of its code of practice by the Office of Fair Trading, with the hope that the code of practice would raise the standards of claims intermediaries.

6.46 In December 2004, the Final Report by Sir David Clementi on the Review of the Regulatory Framework for Legal Services in England and Wales was published and claims intermediaries were identified as one of the regulatory gaps.⁴⁷ The UK Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer announced on 21 March 2005 that a White Paper would be released later in 2005 followed by legislation to reform the market for legal services. That legislation will include new provisions specifically to bring the claims intermediaries within the regulatory net.

Mode of operation of claims intermediaries in Hong Kong

6.47 There is anecdotal evidence that compensation claims agents are becoming more active in Hong Kong. While the fact that unregulated and unqualified persons are providing legal services to the public may be a cause for concern, there have been no serious complaints about the operation of Hong Kong compensation claims agents. The Consumer Council, for example, has no record over the past two years of any complaint against such organisations, although the Consumer Council has acknowledged that this does not necessarily indicate that there have been no unfair practices.

6.48 According to an article in the Consumer Council's "Choice" magazine, claims intermediaries operate under the pledge of "no win, no fees". They employ lawyers on behalf of the client and will pay the necessary disbursements up front. If no recovery is made, the claimant need not pay anything. If the claim results in recovery, the intermediary will usually take

⁴⁷ For an earlier review, see The Blackwell Report published in April 2000.

20% - 30% of the compensation received as a service charge. Claims intermediaries therefore select their clients and accept those cases which are more likely to win.⁴⁸

6.49 There are unsubstantiated reports that some claims intermediaries are run by solicitors using a limited company as the business vehicle. Salesmen are employed to solicit business, sometimes by approaching accident victims in hospitals. There is also anecdotal evidence that some claims intermediaries have approached legally-aided clients and attempted to persuade them to abandon legal aid.

6.50 Preliminary research by the Consumer Council indicates that advertisements for these services do not appear to be widespread in the mainstream media, though some claims intermediaries advertise on websites, through telephone listings, or in publications that are distributed free of charge. However, in August 2002, a claims intermediary advertised its services on a local Chinese TV channel. This may be a sign that claims intermediaries have become more widespread and are employing more aggressive marketing tactics.

6.51 Given that legal practitioners are not allowed to charge any form of event-triggered fees, the services offered by claims intermediaries are unique, as they operate on a contingency fee basis similar to that adopted in the United States.

Relevant regulations and rules

6.52 We noted earlier in this paper⁴⁹ that a solicitor may not enter into a conditional or contingency fee arrangement to act in contentious business. That restriction stems from legislation, conduct rules and the common law offences of champerty and maintenance. Therefore, if a legal practitioner uses a claims intermediaries company as a facade to charge contingency fees, he may be guilty of the common law offence and may have contravened relevant legislation and professional conduct rules.

6.53 If a solicitor or barrister accepts referrals from claims intermediaries, and in return offers kickbacks or shares profits with the intermediary, that may amount to a breach of rule 4 of the Solicitors' Practice Rules (which prohibits the sharing of fees with non-qualified persons) or paragraph 92 of the Bar Code (which prohibits a barrister from giving a commission or present to any person who introduces work to him).

6.54 Persons other than solicitors and barristers, depending on the facts of the case, may be caught under the Legal Practitioners Ordinance (Cap 159), which makes it an offence for a person to practise as a barrister or

⁴⁸ November 2002. There are, however, anecdotal evidence showing that sometimes compensation claims agents will take on even weak or wholly unmeritorious cases for their nuisance value, if they believe that the defendant can be forced into settlement.

⁴⁹ Chapter 1.

notary public, or to act as a solicitor, if he is not qualified to do so. There are also offences in respect of unqualified persons who prepare certain documents relating to the commencement and conduct of proceedings.⁵⁰

6.55 Unqualified persons may, depending on the facts of the case, be guilty of the common law offence of maintenance and champerty. Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.

6.56 There have been cases where organisations have been prosecuted for, and convicted of, being unqualified persons who act as solicitors. However, these cases were not specifically related to accident compensation assistance. The Bar Association recently issued a report on recovery agents. The Law Society issued a circular on 17 May 2005 to its members, advising them that the practice of recovery agents is a criminal offence in Hong Kong, and lawyers risked committing professional misconduct if they worked on cases financed by recovery agents.

Pros and cons

6.57 The Consumer Council is of the view that if services offered by claims intermediaries are widely accepted by the public, this may reflect the fact that the existing legal sector has not fully met the needs of the general public. The Consumer Council also noted that the major clientele of claims intermediaries are those who are not eligible for legal aid but do not have the means to afford the normal litigation costs. It could be argued that these intermediaries provide a service to those whose needs would otherwise remain unmet by conventionally funded legal services.

6.58 The “no win, no fee” arrangements provided by claims intermediaries could be said to provide the client with a clear delineation of the extent of his costs liability, in contrast to the conventional time-cost basis on which lawyers charge. It could be argued that the time-cost approach to charging presents the lawyer with an interest in procrastination and delay, in marked contrast to the claims intermediary’s interest in speedy settlement and maximising the amount of compensation.

6.59 On the other hand, some are sceptical of the operation of claims intermediaries for reasons which include:

- (i) The background, training or knowledge of claims intermediaries is unknown.

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Also in respect of some documents on conveyancing and the administration of a deceased person’s property.

- (ii) The level of supervision is unknown.
- (iii) There is a serious risk of conflict of interest in that disbursements such as medical fees or other experts' fees are kept to a minimum (because the claims intermediary pays for these fees himself) in the hope of a settlement, with the result that cases are not properly advised, assessed or prepared for trial.
- (iv) There is a risk that settlements are reached on commercial considerations, and not according to the best interests of the claimants. For example, substantial claims may be settled for relatively modest sums to the detriment of the claimant.
- (v) For clients who have a strong claim which is likely to result in a substantial award, the client may end up paying more than he would under a conventional time-cost arrangement.
- (vi) If the case is lost and the compensation claims agent is unable or unwilling to pay the opponents' legal costs, the client has virtually no protection, given that it is likely that the claims intermediary is uninsured and has limited liability.

The impact of allowing legal practitioners to charge event-triggered fees on claims intermediaries

6.60 If legal practitioners in Hong Kong are allowed to charge event-triggered fees, and if the common law offences of maintenance and champerty are abolished, those changes are likely to impact on claims intermediaries. On the one hand, legal practitioners will become more price-competitive, which may take away business from the claims intermediaries. On the other hand, claims intermediaries may employ aggressive marketing techniques to enhance their share of the litigation market, as in the case of England.

6.61 There is no evidence to suggest that if claims intermediaries were not available their clients would avail themselves of conventional legal services provided by the legal profession. Indeed, as we pointed out above, the Consumer Council believed that the majority of claims intermediaries' clients were persons who fell outside the legal aid net, and who could not afford to engage a lawyer on their own account.

~~The Hong Kong situation~~

~~Access to the courts~~

~~6.62 Access to the courts is one of the fundamental rights~~

**Extract from the Official Record of
Proceedings of the Council meeting on 12 June 2002**

PRESIDENT (in Cantonese): Fifth question.

Agents Handling Claims for Accident Compensation

5. **MISS MARGARET NG** (in Cantonese): *Madam President, it has been reported that a number of agents that help clients handle their claims for accident compensation have been established one after another. Operating under the pledge of "no win, no charge", such agents enter into contracts with their clients for employing lawyers and paying the necessary fees on the clients' behalf. If the civil case is subsequently lost, the claimant concerned need not pay anything; if the claim is successful, then the agent will take 20% to 30% of the compensation received as its service charge. It is noted that the major clientele of these agents are those who are neither eligible to apply for legal aid nor able to afford the high legal costs. In this connection, will the Government inform this Council:*

- (a) *whether it has taken note of the increase in the number of such agents and taken action to find out how they operate, including the legality of the way they operate;*
- (b) *of the measures it has to remind claimants of the points to note before signing a contract to engage such agents to make compensation claims; and;*
- (c) *whether it has assessed if the increase in the number of such agents reflects inadequacies in the existing legal aid schemes and, in particular, whether the eligibility criteria for the Supplementary Legal Aid Scheme are so demanding that most people are not qualified and have to engage the service of such agents even though they know that such agents reap a higher share of the compensation than that under the Scheme; and whether it will thus review its legal aid policy?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President,

- (a) The Administration is aware that, in the past few years, a number of organizations have advertised services of the kind referred to in this

question. The Department of Justice has looked into the legality of such services. There are certain offences under the Legal Practitioners Ordinance and at common law, and certain rules of legal professional conduct, that are relevant to these organizations. However, non-lawyers can provide certain types of assistance in the recovery of accident compensation, even on a contingency basis, without breaching these provisions. In respect of some advertised services, action has been taken by the Bar Association, Law Society, the Consumer Council or the Department of Justice to find out how they operate. In addition, the Law Society has recently established a working party to look more generally into the activities of such organizations, and the Consumer Council has conducted some preliminary research in respect of them.

- (b) The Administration is not aware of any special measures that are currently in place to remind claimant of points to note before signing the types of contract referred to in the question. However, both the Law Society's Working Party and the Consumer Council are considering whether there is a need for such measures. The Department of Justice will liaise with those two bodies on the way forward.
- (c) Our legal aid policy seeks to ensure that no one with reasonable grounds for taking legal action in Hong Kong is prevented from doing so because of a lack of means. To implement this policy, applicants must pass means and merits tests to qualify for legal aid.

Currently, an applicant with annual financial resources of not more than \$169,700 may apply for legal aid under the Ordinary Scheme. In July 2000, we adjusted the deductible allowances figures to make the Scheme more accessible. As a result, the percentage of households eligible for legal aid has increased from 48% to 58%, covering around 1 million lower and middle income group households.

On top of the Ordinary Scheme, the Legal Aid Department operates a "self-financing" Supplementary Scheme, to provide civil legal aid to an applicant whose financial resources exceed the limit for the Ordinary Scheme, but do not exceed \$471,600. The

Supplementary Scheme provides publicly-funded legal aid to cases which deserve priority for public funding, in the sense that significant injury or injustice to an individual, as distinct from that to a commercial concern, is involved. To ensure its financial viability, it is necessary to confine the Scheme to monetary claims that have a reasonably good chance of recovering damages.

Under the Supplementary Scheme, legal aid is available to cases of personal injury, death, medical, dental or legal professional negligence where the claim for damages is likely to exceed \$60,000. The Scheme also covers claims under the Employees' Compensation Ordinance irrespective of the amount of claim.

In 2001, about 13.2% of legal aid applications processed under the Supplementary Scheme were refused on grounds of merits, 3.3% on grounds of means. These figures do not suggest that the eligibility criteria for the Supplementary Scheme are too demanding. The Administration nonetheless has in place a comprehensive mechanism and timetable to review the financial eligible limits of legal aid applicants. It comprises an annual review to take account of inflation; a biennial review to also reflect changes in litigation costs; and a review every five years of the criteria used to assess financial eligibility of legal aid applicants. We trust that these regular reviews should be sufficient in ensuring that the limits keep pace with the economic realities.

MISS MARGARET NG (in Cantonese): *Madam President, the Secretary for Justice indicated in part (a) of the main reply that the Department of Justice had looked into the legality of such services. May I ask the Secretary for Justice if she knows clearly how these agents operate? The Secretary indicated in the main reply that non-lawyers could provide certain assistance. What assistance was she referring to? Has special attention been paid to the following circumstances? First, given that the agents will pay for the lawsuits lodged on behalf of the claimants, will the former ask the latter to accept unreasonable settlement so as to "recover" the money that has been invested, limit the latter in their choice of lawyers, or ask the latter to sign unreasonable agreements?*

Second, under the existing law, it is a violation of conduct if a lawyer touts business. What is the case if business is touted through certain agents? Has the Secretary studied and investigated if there is participation of lawyers behind such agents? The investigation carried out by the Law Society is not comprehensive enough since it is confined to law firms only.

SECRETARY FOR JUSTICE (in Cantonese): Madam President, during the period between 1999 and June 2002, a total of 25 cases were submitted to us by the Law Society. Four of them are currently under prosecution, and five under investigation. These cases are found to be in breach of either section 45 of the Legal Practitioners Ordinance with respect to unqualified person not to act as solicitor, or section 47 of the Ordinance with respect to unqualified person not to prepare certain instruments. Under the law, all these acts are illegal.

If judging from the evidence obtained, the Department of Justice considers it necessary to carry out investigation, the relevant cases will be referred to the police. Though prosecution action will be taken in some cases, we will notify the Law Society so that similar cases arising in future may be referred to the police direct for investigation. When I met with the President and council members of the Law Society on 24 May, I was told that the Working Party of the Law Society would study this matter in detail and discuss with us how similar matters could be handled after a preliminary conclusion had been drawn. I would like to point out here that the cases mentioned by me earlier are not merely confined to claims for accident compensation. Other cases in breach of the Legal Practitioners Ordinance are included as well.

MR LAU CHIN-SHEK (in Cantonese): *Madam President, the emergence of these agents is simply attributed to the fact that a lot of people are unable to afford the litigation fees or ineligible for legal aid. Will the Secretary inform this Council of the number or percentage of cases recorded in the past two years in which workers injured on duty or their family members were not granted legal aid for failure to pass the means test? Will the Government consider reviewing the scope of legal aid and exempting employees injured on duty from being means-tested if they file a lawsuit with respect to statutory compensation payable to employees?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, I have to defer to the Chief Secretary for Administration on the part concerning legal aid.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, the Secretary for Justice has already cited the relevant figures in the main reply.

MR LAU CHIN-SHEK (in Cantonese): *Madam President, my supplementary question asked about the number or percentage of cases recorded in which workers injured on duty or their family members were not granted legal aid for failure to pass the means test. Furthermore, will the Government consider reviewing the scope of legal aid and exempting employees injured on duty from being means-tested if they file a lawsuit with respect to statutory compensation payable to employees?*

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, it has been stated clearly in the main reply that about 13% of the relevant applications were refused on grounds of exceeding the income limit. I have at hand some general figures on work-related injuries. I am afraid no breakdown data has been provided to me. The number of cases rejected for exceeding the asset limits appears to be quite small.

PRESIDENT (in Cantonese): Chief Secretary for Administration, this supplementary question involves some statistical figures. If you are unable to immediately analyse the data you have on hand, you may consider giving a written reply.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, I do not have figures on individual items on hand. Nonetheless, I am pleased to provide the breakdown figures in detail in due course. (Annex IV)

MR LAU CHIN-SHEK (in Cantonese): *Madam President, the Chief Secretary for Administration has not answered the second part of my supplementary question, that is, the part concerning whether employees injured on duty can be exempted from the means test if they lodge a lawsuit with respect to statutory compensation for employees?*

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, the Director of Legal Aid is empowered to grant exemption. Actually, we will constantly review the financial eligible limits of legal aid applicants. It has also been mentioned in the main reply that an annual review will be carried out to take account of inflation, and a review every two or five years will be conducted to assess other matters such as methods of compensation. We will certainly review this.

MISS LI FUNG-YING (in Cantonese): *Madam President, the Secretary for Justice pointed out in part (c) of the main reply that 3.3% of legal aid applications were rejected on grounds of means. Has the Secretary considered that, though the figure represents only 3.3% of the applications, some of the applicants were refused on grounds of means because they had just received some burial money from their friends and relatives in mourning for their family member who had unfortunately died in the course work, or they had just received some money from the company of the dead to meet the funeral expenses? Will the Secretary consider exempting the burial money and funeral expenses from the means test when conducting another review in future?*

PRESIDENT (in Cantonese): This question is related to legal aid. Which Secretary will answer this question? Chief Secretary for Administration.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, I will be very pleased to include such specific items when conducting the next review.

MR ALBERT HO (in Cantonese): *Madam President, at present, legal practitioners are not allowed to sign agreements with respect to conditional*

payment with litigants, or make arrangement for sharing the amount of compensation with litigants. The original objective of making this regulation was mainly to prevent professionals from involving themselves in conflicts of interests. Nonetheless, it has now come to our notice that non-professionals are not governed by the professional code in this respect. This is because they can avoid being governed by professional conduct through such other means as acting in the name of a company. If they bully the injured or ask them to enter into settlement or sign unreasonable agreements, the injured or the signatory will have no way to air their grievances or lodge a complaint. For these reasons, will the Government consider enacting legislation or formulating policies to safeguard these people from being cheated by unfair or unreasonable agreements?

SECRETARY FOR JUSTICE (in Cantonese): Madam President, under sections 44 and 47 of the Legal Practitioners Ordinance, an unqualified person will be guilty of an offence if he acts as a barrister, a notary public, or a solicitor; an unqualified person will also be guilty of an offence if he prepares certain specified instruments for the purpose of initiating proceedings, property transactions or representations. Furthermore, under common law, assisting or encouraging a party to file a lawsuit may constitute such civil or criminal offences as maintenance or champerty.

"Champerty" can be interpreted as an act of instituting a lawsuit on behalf of a claimant in proceedings not related to one's personal interest, or assisting or encouraging a litigant to file a lawsuit in the absence of legally recognized justifications. The act of champerty performed for the purpose of sharing compensation is a special form of champerty. As the name suggests, it means that the party being encouraged to file a lawsuit undertakes to the party providing support that the latter may, if the lawsuit is won, share part of the benefit. This is in breach of the law. Therefore, if the sole objective of the agents which provide support or assistance to their clients to file a lawsuit is to share their compensation through such mode of operation as "no win, no charge", as pointed out by the Honourable Margaret NG in the main question, the agents will be in breach of the common law. Nevertheless, the crux of the question lies in whether we have received any complaints or obtained sufficient evidence to prove that a certain agent is performing such an act. If so, we will surely institute prosecution.

MR ALBERT HO (in Cantonese): *Madam President, I can absolutely not understand the reply given by the Secretary for Justice earlier. The Secretary remarked in part (a) of the main reply: "However, non-lawyers can provide certain types of assistance in the recovery of accident compensation, even on a contingency basis, without breaching these provisions". My question was actually referring to such circumstances. Can the Secretary explain once again the circumstances she was referring to? The Secretary has not given me a reply with respect to this point.*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, the constitution of an offence depends mainly on evidence. I believe Members are all aware, besides solicitors and barristers, voluntary agencies may also provide legal services for a litigant. As I pointed out just now, if the relevant legal services are not prohibited under the Legal Practitioners Ordinance, for instance, the provision of assistance to a litigant to collect information before a lawsuit, then it does not constitute an act of champerty. Therefore, action can only be taken dependent on the evidence we have obtained. It is not that the police and the Department of Justice are leaving these agents alone. Prosecution will be taken if there is sufficient evidence proving that the law has been infringed.

PRESIDENT (in Cantonese): This Council has spent more than 19 minutes on this question. I am afraid I have to disappoint a number of Members who are still waiting for their turn to raise their supplementary questions. We will now proceed to the sixth question.

~~Road Tunnel Linking up Shekou and Zhuhai~~

6. **MR HUI CHEUNG-CHING** (in Cantonese): *Madam President, it has been reported that the Guangdong authorities are currently studying a proposal to construct a road tunnel to link up Shekou of Shenzhen and Zhuhai. In this connection, will the Government inform this Council whether:*

- (a) *it knows the details of the proposal;*
- (b) *it has evaluated the impact of the infrastructure on the economic and trade development of Hong Kong; and*

**An extract from the speech of Hon Margaret NG
at the Council meeting on 26 January 2005**

~~modernized and the Government has the duty to facilitate this instead of obstructing the process. Let me name just a few issues.~~

~~First, Solicitors Corporation. The primary legislation enabling solicitors to practise in limited companies was passed in 1997. Yet today, it has not been implemented. Numerous drafts of the Rules have been submitted by The Law Society of Hong Kong, and was each time delayed because the Government demanded further changes.~~

~~Second, Solicitors Professional Indemnity Scheme. While the present scheme needs to be amended urgently so that solicitors do not have to be insurers for each other, the Government is taking the intransigent and unrealistic stance that it will not support the change chosen by members of The Law Society of Hong Kong unless it includes insurance against the insurance company becoming insolvent. No professional indemnity in the world carries such a condition.~~

~~Third, limited liability practice. This is now permitted in England, in the United States, in Australia and New Zealand among other places. But in Hong Kong, we have difficulty even pinning down which of the Policy Bureaux is responsible for considering it.~~

Second, development of legal services. There are developments undermining professional service. An increasing source of concern is claim assessors. While lawyers offer the better protection for the interests of members of the public, they are precluded by their code of conduct from soliciting business, or to offer contingency or conditional fees arrangements. By contrast, claim assessors are unregulated. They can canvass for business in the waiting rooms of physiotherapists or hospitals; they can offer to charge no fees but just take a percentage of the compensation they obtain from the potential defendants, usually insurance companies. The downside which is not always made known to the client is that he may not be advised of the true compensation he is entitled to. I urge the Government to look into the propriety and desirability of this from both the public's and the profession's point of view, and take steps to enhance public awareness.

~~I have spoken repeatedly on the use of lay prosecutors in Magistrates' Courts with the result that briefing out to lawyers in private practice is now a rarity. With the stable provision of an abundance of qualified lawyers, the Prosecution Authorities should upgrade prosecution work. Cost saving is no~~

An extract from the speech of Hon LI Kwok-ying
at the Council meeting on 26 January 2005

~~also unnecessary. The DAB considers that since their main business on the Mainland normally involves external legal services, it is therefore not really necessary to require Hong Kong lawyers to pass the relevant examination before they can be qualified for practice. Of course, external services also involve mainland affairs and Hong Kong lawyers cannot know nothing about mainland laws. Thus, we propose that if Hong Kong lawyers are involved mainly in providing external services, the requirement of passing the examination can be relaxed. For example, they can only be required to pass a "benchmark examination" on basic mainland legal knowledge, or they can be required to take certain relevant subjects of the mainland practice examination.~~

We also consider that the signing of CEPA only marks the beginning of the development of co-operation between the Hong Kong and mainland legal services industries, and there are still more areas under CEPA which merit continued enhancement and expansion. In order to develop Hong Kong's stable and sustainable legal services and realize the win-win situation of mutually benefitting Hong Kong and the Mainland and supplementing each other's strengths, the DAB hopes that the SAR Government can continue to discuss with the relevant Central Authorities and perfect the relevant provisions and mechanisms. Moreover, the Government also has to spare no efforts in assisting the industry in Hong Kong and on the Mainland to enhance co-operation ~~and promote the exchange of talents.~~

Madam President, I would like to talk about the recent emergence of compensation recovery companies and the problems they have caused, hoping that the Chief Executive and the relevant officials can pay attention. The compensation recovery companies focus on cases seeking compensation for bodily injuries. They will represent the injured party in looking for a lawyer to claim compensation. There is nothing wrong with the emergence of this type of service industry in Hong Kong which plays the role of a middleman, however, the development of compensation recovery companies seriously affect the development of solicitors' firms. More importantly, the reason for the development of this kind of companies originates from the loopholes in some Hong Kong laws. It can be said that these companies pose improper competition to solicitors' firms.

The problems caused by compensation recovery companies concern mainly three aspects. First, the compensation recovery companies provide legal advice to the injured claimants, including recommendations on whether or

not to initiate proceedings and the claims amount. This should be the work of lawyers but is now provided by staff of those companies who have not received professional legal training. This is simply irresponsible. When providing legal advice, Hong Kong lawyers are subject to different supervision in law, but those companies do not have legal authorization, nor are they subject to supervision. They are providing legal advice without the supervision of any professional bodies, and are at the same time avoiding the legal requirements. Moreover, at present, lawyers are strictly prohibited by regulations to make the so-called "no win no gain" service undertaking, but such regulations do not apply to the compensation recovery companies. Consequently, these companies are given the opportunity to take advantage of loopholes in law. Finally, since some compensation recovery companies are linked to solicitors' firms, the claimants are referred to the solicitors' firms by those companies for follow-up action. However, the compensation recovery companies very often "manipulate" the cases and the contact with claimants and play a leading role from suggesting the claims amount to giving advice on the cases. As a result, lawyers cannot have direct contact with their clients. Under the circumstances that lawyers do not have the opportunity of making the most direct contact with the claimants, their legal advice may thus not be the most beneficial to the claimants, thereby affecting their interests ultimately.

In face of the problems caused by these compensation recovery companies, the public cannot see the police or the authorities concerned tackling them seriously. Up to now, no effective deterrent measure has been taken, including making prosecutions, considering legislative amendment, and so on.

Madam President, we hope that the SAR Government can pay close attention to the problems, make efforts to solve the social problems one by one, and fulfil the title of the policy address: Working Together for Economic Development and Social Harmony.

Madam President, I so submit.

~~MR ALBERT HO (in Cantonese): Madam President, in the very lengthy policy address delivered by the Chief Executive, his declaration of self-confession of identifying inadequacies and self-conviction was the focus of attention. Actually, the numerous inadequacies identified by the Chief Executive himself, from his failure to implement "people-based" governance and "address people's~~

Extract from the Official Record of
Proceedings of the Council meeting on 15 June 2005

~~The Immigration Department (ImmD) will expeditiously process all visa applications. The ImmD's performance pledge is that all applications will be processed within four weeks upon receipt of all necessary documents. The ImmD will also expedite the processing of urgent cases.~~

~~We believe that the existing visa policy has struck an appropriate balance between providing travel convenience and promoting economic and trade activities on the one hand, and maintaining effective immigration control and safeguarding Hong Kong's security on the other. We will continue to make necessary change to our visa policy in the light of changes in circumstances.~~

Regularizing Operation of Claims Companies

18. **MR LI KWOK-YING** (in Chinese): *Madam President, in her speech during the debate on the 2005 policy address at the Legislative Council meeting on 27 January this year, the Secretary for Justice pointed out that The Law Society of Hong Kong (Law Society) and the Consumer Council had studied the operation of claims companies, but there was insufficient evidence to prove that these companies had caused harm to the community, or that control by way of legislation was necessary. However, it has been reported that Law Society has earlier said that financing accident victims in instituting legal proceedings by claims recovery agents constitutes an act of maintenance or champerty, which should be prosecuted by the Department of Justice. In this connection, will the Government inform this Council:*

- (a) *whether it has studied if Law Society has changed its position on whether these claims companies have caused harm to the community; if the study reveals such a change, whether the authorities have asked Law Society about the reasons for the change as well as the specific harm to the community; if the study reveals otherwise, the rationale for that;*
- (b) *whether it has assessed if claims companies have been involved in champerty and illegal promotional practice and whether the problem of excessive fee-charging is serious; if the assessment results reveal that such acts are illegal and the problem is serious, of the details and how the authorities will follow up; if the assessment results revealed otherwise, the details of that; and*

- (c) *as claims companies solicit business by claiming that they will charge on a "no win, no fee" basis, and the Law Reform Commission of Hong Kong is studying this form of fee-charging, whether the authorities know the latest progress of the study, and whether such matters as how to regularize the operation of claims companies will be covered by the study; if they will not be covered, the reasons for that?*

SECRETARY FOR JUSTICE (in Chinese): Madam President, this question relates to organizations that assist victims of personal injuries to claim compensation on the basis that they will only charge a fee if the victim succeeds in his claim. These organizations are referred to in the question as "claims companies". However, I will adopt the description used by Law Society and the Hong Kong Bar Association, namely "recovery agents".

There are three parts to this question and I will answer them in the same order.

- (a) In July 2002, Law Society established a working party to investigate the activities of unqualified persons. This included what was then a relatively unknown category of recovery agents involved particularly in the field of personal injuries. A circular was issued to members of Law Society advising them of the reservations held by Law Society if solicitors were to accept instructions from recovery agents. These included the impairment of the solicitor's independence and the client's freedom of choice of solicitor under such arrangements as were believed to be made by recovery agents, and concern that victims of accidents were not receiving the full level of compensation because of the contractual obligation to pay over a percentage frequently as high as 25% to the recovery agents.

In November 2004, Law Society established a second working party specifically to look at the activities of recovery agents in relation to personal injury claims. This was done because of an awareness of growth in the activities of recovery agents in personal injury claims and concerns at the social implications arising. Advice was obtained from leading counsel on the legality of a number of recovery agents' contracts with accident victims and a circular

issued to Law Society members. The circular emphasized the likelihood of misconduct if solicitors were to act for victims of accidents in claims financed by recovery agents.

I understand that this latest circular does reflect a more robust approach towards the policing of solicitors' actions in respect of recovery agents than in the past. According to Law Society this is because there is a growing awareness of the activities of recovery agents, concern at their lack of professional indemnity cover against their negligence, allegations of misconduct on the part of those working for them, and concern that there were instances of conflict of interest in the prosecution of claims resolved in favour of the recovery agents to the detriment of the accident victims. There have been allegations as yet unproven that claims had been settled for amounts less than was appropriate and that accident victims who were entitled to legal aid were diverted from such assistance so as to better serve the commercial interests of the recovery agents who would receive up to 25% of the compensation on recovery.

- (b) The Department of Justice has studied the activities of recovery agents. It has also received information on them from Law Society, the Hong Kong Bar Association and the Consumer Council. With regard to the possibility that some recovery agents have been involved in champerty or illegal promotional practices, I will deal with this in a moment when I discuss possible prosecutions.

So far as publicity methods are concerned, we understand that recovery agents canvass for business at various places to which accident victims go to seek assistance. They also distribute leaflets and advertise through the Internet, newspapers and television. Recovery agents may also employ "claims consultants" to canvass for business.

With regard to the fees payable to recovery agents if the claim is successful, we understand that these generally range from 20% to 25% of the compensation recovered.

The follow-up action in relation to these activities falls into three categories.

- (i) The first is public education of the possible risks involved in using the services of recovery agents, and of the availability of legal aid. The Consumer Council published an article on the former in *Choice* magazine and has encouraged the Legal Aid Department (LAD) to promote its services as an alternative to those of recovery agents.

As part of its annual programme of activities, the LAD through its professional staff has been paying regular visits, and delivering talks, to non-governmental organizations promoting the availability of legal aid. It has also published an article in the *LAD News*, the target readers of which are the general public, explaining the advantages of undertaking litigation with the assistance of legal aid while drawing the public's attention to the possible pitfalls of seeking help from recovering agents to pursue a claim in Court.

The Social Welfare Department continues to advise all applicants for Traffic Accident Victims Assistance of their right to claim compensation against any party at fault, through a solicitor or the LAD.

- (ii) The second possible action is to bring a prosecution against a recovery agent if there is sufficient evidence that it has committed any offence. The Department of Justice does not investigate possible offences and only considers bringing a prosecution if evidence is referred to it by law enforcement agencies or others. My Department has advised Law Society, the Hong Kong Bar Association and the Consumer Council that, if they discover any evidence of criminal conduct by recovery agents, this can be referred to the police. So far, there has been no case in which sufficient evidence of an offence by a recovery agent has been produced to my Department to warrant a prosecution. I understand that the Consumer Council is in the process of referring one recent complaint to the police. It remains to be seen whether there is sufficient evidence to bring a prosecution in that case.

- (iii) The third type of action has been to consider whether legislation should be introduced to regulate recovery agents. The Department of Justice was informed by the Consumer Council in February of this year that it had not received any complaints from members of the public about the activities of recovery agents. We have now been informed that there has been one recent complaint. However, I do not consider that there is sufficient justification for legislating at the present time. My Department will nonetheless continue to monitor the situation.

With regard to the position of Law Society, as the regulatory body for practising solicitors, it is entirely appropriate for it to issue advice to its members on their professional duties in relation to victims represented by recovery agents.

- (c) The Law Reform Commission study of conditional fees (or "no win, no fee arrangements") is progressing well. It is expected that a consultation paper on the subject will be published within the next few months. At this stage, I am not able to say whether or not the paper will discuss the possible regulation of claims companies.

~~Insufficient Motorcycle Parking Spaces~~

19. ~~MR ALBERT CHAN (in Chinese): Madam President, I have received complaints from members of the public that motorcycle parking spaces in many areas are insufficient, especially in Tsuen Wan, Tsing Yi and Tin Shui Wai. In this connection, will the Government inform this Council:~~

- ~~(a) of the demand and supply situation of day-time and night-time motorcycle parking spaces in various administrative districts and the districts in which motorcycle parking spaces are seriously in short supply; and~~
- ~~(b) whether it plans to provide additional motorcycle parking spaces in the next 12 months; if so, of the proposed locations and the number of such parking spaces?~~

**Extract from minutes of meeting of
Panel on Administration of Justice and Legal Services on 28 November 2005**

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V. Recovery agents

(LC Paper No. CB(2)453/05-06(01) – Paper provided by the Administration on "Recovery agents"

LC Paper No. CB(2)453/05-06(02) – Background brief prepared by the LegCo Secretariat on "Recovery agents"

LC Paper No. CB(2)1516/04-05(01) – A summary and a report on "Recovery Agents" from the Special Committee on Recovery Agents of the Hong Kong Bar Association

LC Paper No. CB(2)517/05-06(01) – Submission from the Working Party on Recovery Agents of the Law Society of Hong Kong

LC Paper No. CB(2)1609/04-05(01) – A circular on "Recovery Agents" issued by the Law Society of Hong Kong to its members on 17 May 2005)

Presentation of views by various parties

27. Mr Patrick BURKE, Member of the Law Society Working Party of Recovery Agents, highlighted the salient points in the submission of the Working Party as follows –

- (a) as recovery agents (RAs) provided their services on a “no win no fee” basis, they were desperate to settle claims as quickly as possible, and very often advised clients to accept low offers of settlement well below the true value of the claims;
- (b) claim cases brought by RAs were not properly prepared, and the solicitors and counsel used were not experienced in conducting claims;
- (c) litigants had to pay 20% to 30% of the damages recovered to RAs;
- (d) RAs provided incorrect advice on their clients’ eligibility for legal aid. Some RAs abused legal aid by arranging for their clients to apply for legal aid so that they could get their fee “for nothing” and were no longer liable for payment of legal costs;

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- (e) the agreements between litigants and RAs, which amounted to champerty and/or maintenance, were illegal and unenforceable;
- (f) the public should be educated on the proper way to pursue claims and the disadvantages and risks of using RAs in order to tackle the problem of RAs;
- (g) prosecution should be brought against RAs;
- (h) professional disciplinary action should be taken against solicitors who knowingly acted for a client being assisted by a RA; and
- (i) support from the Legislative Council was requested to tackle the problem of RAs which affected the proper administration of justice.

28. Mr Anthony CHAN of the Hong Kong Bar Association presented the views of the Associations as follows –

- (a) the propriety and desirability of RAs had been assessed by the Bar Association;
- (b) regarding the propriety of RAs, the activities of RA were illegal;
- (c) regarding the desirability of RAs, RAs did not serve public interest. Most of the clients of RAs were eligible for legal aid and could pursue their claims with legal aid. RAs had an interest in settling cases quickly with the minimal costs, and there were conflicts of interests between RAs and their clients that could not be mitigated. RAs also charged a disproportionate fee of about 25% of the recovered damages; and
- (d) the Bar Association was concerned that the Administration had not taken active steps to investigate into the activities of RAs and to uphold the law.

29. Mr Francis CHAN briefed members on his views as detailed in his submission (which was tabled at the meeting and issued to members vide LC Paper No. CB(2)545/05-06 after the meeting) –

- (a) litigants had to use a large portion of the damages recovered to pay for RAs;
- (b) RAs did not do their job properly resulting in the litigants getting less damages than they were entitled to;
- (c) RAs encouraged litigants to borrow loans at high rates of interest up to about 42%;

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- (d) RAs persuaded litigants not to apply for legal aid or Comprehensive Social Security Assistance by giving them incorrect information;
- (e) RAs tried to obtain business through inappropriate means such as misleading advertisements, but the Administration had not taken any action against those advertisements;
- (f) the Administration should provide clear guidelines on whether the agreements between RAs and their clients were legal and enforceable, and if these agreements were illegal, should explain this clearly to the public;
- (g) the Administration should raise the financial eligibility limit for the Supplementary Legal Aid Scheme (SLAS); and
- (h) the Administration should formulate policy to provide the necessary support and assistance to victims in pursuing their claims for damages and employee compensations.

Discussion

30. The Chairman said that the two legal professional bodies had been very concerned about the problems caused by RAs. The Chairman pointed out that not only would litigants suffer losses from hiring the services of RAs, RA activities would also adversely affect the development of the legal profession.

31. DSG thanked the legal professionals for their views on the activities of RAs. He said that the Administration had been cooperating with the two legal professional bodies in studying the matter. He added that the matter should be considered from the point of view of the public and the legal profession.

32. Referring to paragraph 10 of the Administration's paper on RAs, DSG said that the Consumer Council had commented that if the service of RAs was widely accepted by the public, this might signify that the existing legal services market could not meet the needs of the general public. The major clientele of RAs were those neither eligible to apply for legal aid nor able to afford the high legal cost.

33. DSG added that at common law, it was both a civil wrong and a criminal offence to assist or encourage a party to litigation in circumstances that amounted to maintenance or champerty. The Administration also noted that there might be abuse of the claim procedure or the legal aid scheme. However, only two complaints against RAs, one from the Consumer Council and another from the Law Society, had been received so far.

34. DSG explained that the Administration's approach to RA activities fell into the following three categories –

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- (a) the public should be educated on the possible risks involved in using the services of RAs, and the availability of legal aid;
- (b) DOJ would consider bringing a prosecution against a RA if there was sufficient evidence that it had committed any offence. So far, there had been no case in which sufficient evidence of an offence by a RA was produced to DOJ to warrant a prosecution. DOJ had advised the two legal professional bodies and the Consumer Council that, if they discovered any evidence of criminal conduct by RAs, the cases could be referred to the Police for investigation; and
- (c) DOJ would keep under consideration whether legislation should be introduced to regulate RAs. So far, there was insufficient justification for legislating on the subject.

35. DSG said that the Administration noted that in the United Kingdom (UK), the introduction of conditional fee arrangement and the increase in the number of RAs had created a lot of problems in recent years. The Administration also noted that conditional fee was allowed in UK. This had given rise to the vast increase in numbers in RAs. The problem with RAs in UK was much more serious than that in Hong Kong. In Hong Kong, the Conditional Fees Sub-committee of the Law Reform Commission (LRC) had released its Consultation Paper on “Conditional fees” in September 2005 which was still at the public consultation stage. In view of the current developments in UK and the on-going consultation regarding conditional fees in Hong Kong, DOJ proposed to continue to monitor the situation in Hong Kong and UK before deciding the way forward. The Administration hoped that with more evidence and time, it could be determined whether active steps would need to be taken.

36. Ms Miriam LAU pointed out that the problems relating to the activities of RAs had existed for a long time. The two legal professional bodies had conducted detailed research on RAs. They had both concluded that the activities of RAs were illegal, and they would monitor the conduct of the legal profession in this respect. Under the circumstances, it was unacceptable for the Administration to refuse to take action to regulate the activities of RAs on the excuse of insufficient justification.

37. Ms LAU added that LRC’s proposed conditional fee arrangement was very controversial and might not be able to solve the problem of RAs. Its implementation was yet to be decided. She further pointed out that many years ago, legislative amendments were introduced to criminalise acts of touting and commission-taking by “submarines” who were not legally trained persons and not employed by any lawyer firm, but they acted as go-between of a client and a barrister. Since the Administration had criminalised the activities of “submarines”, RAs which charged even much higher fees than those “submarines”, should also be regulated to protect the public interest. The Chairman concurred with Ms LAU.

38. DSG stressed that the Administration was not unwilling to tackle the problem

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of RAs. He pointed out that the interests of the public and the legal profession had to be safeguarded. DSG explained that as it was not within DOJ's terms of reference to investigate possible offences, it had requested the two legal professional bodies to refer cases to the Administration, and the Police would conduct investigation. So far, there had been no case with sufficient evidence to warrant a prosecution or justification for legislating on the subject. The Administration would enlist the assistance of the two legal professional bodies to continue monitoring the situation.

39. Referring to the comments of the Consumer Council quoted by DSG (paragraph 32 above), Mr Patrick BURKE expressed doubt that the clients of RAs were not eligible for legal aid. According to his 25 years of lawyer experience involved in personal injury cases, most of the victims concerned were eligible for legal aid, and hence could receive better legal service from more experienced lawyers appointed under the legal aid scheme. The middle class could also obtain legal aid through SLAS to pursue claims for compensation.

40. Mr BURKE pointed out that the activities of RAs had created widespread problems. However, as RAs might not refer cases to law firms, they were not operated within the legal system. It was therefore difficult for the Law Society to conduct investigation and obtain relevant statistics.

41. Mr LI Kwok-ying informed members that as indicated from his contact with victims of accidents and injuries, most of the victims concerned were not eligible for legal aid. He quoted the recent mini-bus accident in Sha Tau Kok as an example. As most of the victims were landowners, they were not eligible for legal aid, despite the fact that they could hardly afford the high legal cost of litigation. As a result, these victims had to rely on the service of RAs to pursue their claims, even though they were aware of the risks and costs in hiring the service of RAs. Mr LI therefore considered that public education might not be able to solve this problem.

42. Mr LI further pointed out that those victims would not lodge complaints against RAs which were the only means they could use to pursue their claims. He also noted from paragraph 18(iii) of the Administration's paper that the Administration considered that there was no evidence to show that RAs were causing a real problem in Hong Kong. Mr LI sought clarification on the definition of "real problem".

43. Mr James TO said that some of the RAs touted business for law firms of which they were employees or shareholders. Mr TO considered that the Administration and the Law Society should examine whether such activity was illegal under the laws of Hong Kong. He also expressed concern that the autonomy of the legal profession would be undermined if it was controlled by non-legal professionals to whom the professional code of conduct and rules would not apply. The standard of the legal profession was bound to be adversely affected.

44. DSG responded that the Law Society would monitor the conduct of solicitors in accordance with the Solicitor's Guide to Professional Conduct. He reiterated that as stated in the Administration's paper, a solicitor could not act in contentious

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proceedings on the basis of a contingency fee arrangement under the Guide and the Legal Practitioners Ordinance (Cap. 159). The Bar's Code of Conduct also prohibited barristers from accepting any brief or instructions on a contingency fee basis. DSG said that the Administration would discuss with the two legal professional bodies the enforcement of the relevant ordinance and code of conduct. DSG also requested the two legal professional bodies to refer cases concerning the activities of RAs, if any, to the Administration.

Way forward

45. The Chairman concluded that the Panel considered that the Administration should tackle the problem of RAs which had affected the interests of the public and the operation of the legal profession, and that the Panel should follow up this subject at its future meetings. In the light of the discussion, the Chairman requested DOJ to respond to the concerns and suggestions raised by members and the legal profession, and the legal professional bodies to examine their professional rules and code of conduct, with a view to discussing the item with the Panel in about two months' time.

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For information
on 27 March 2006

LegCo Panel on Administration of Justice and Legal Services

Recovery Agents

In a letter from the Administration of Justice and Legal Services Panel dated 13 March 2006, the Administration was requested to explain its policy on recovery agents in writing. This paper sets out the Administration's position regarding recovery agents and the recent progress of the matter.

2. As set out in the Administration's paper submitted to the Panel in November 2005, the Administration has adopted a three-pronged approach to this issue – involving public education, possible prosecution, and consideration of the need for legislation.

3. It was reported in the Administration's paper submitted to the Panel in February 2006 that a meeting was held between the Department of Justice and representatives of the legal professional bodies in January 2006. It was agreed between the legal professional bodies and the Department of Justice that there are certain follow-up actions to be done in order to prevent the illegal activities of recovery agents. While the Police would continue its investigation in relation to the activities of certain recovery agents, the Administration and the professional bodies would focus their efforts on increasing the public awareness of the inappropriate activities of the recovery agents. This included putting up of posters or notices in the relevant Government departments and hospitals to increase the public awareness of the matter.

4. Following the meeting, measures have been implemented by the Administration in accordance with what were agreed at the meeting.

(I) **Public education**

5. The Department of Justice has discussed the matter with the relevant departments and organizations. The measures they have taken or proposed to take to prevent the illegal activities of recovery agents are summarized as follows.

Labour Department

6. (i) The Labour Department has been distributing a new leaflet to injured employees through its Employees' Compensation Division (ECD) and the Occupational Medicine Division (OMD) offices, as well as public hospitals where the Employees' Compensation Assessment Boards meet to assess the permanent loss of earning capacity of injured employees. A copy of the leaflet is enclosed at **Annex A**.

(ii) The Labour Department has also uploaded cautionary messages in the digital display panel in the waiting area of its ECD offices for the information of injured employees. A poster on the same subject has also been produced and posted conspicuously in the waiting area of its offices.

(iii) The Labour Department is planning to enhance its public announcement system to broadcast cautionary messages in the waiting area of its offices.

(iv) In the course of handling disputed or unresolved employees' compensation claims, staff of the Labour Department will duly inform the injured employees of the availability of legal aid and other proper free legal advisory services. If the employees so wish, its staff will refer them to apply for legal aid or assist them in registering their claims direct at the District Court.

(v) The Labour Department has sought the help of the relevant property management to station security guards in the vicinity of the ECD/OMD offices to monitor and stop touting activities of recovery agents.

Department of Social Welfare (Traffic Accident Victims Assistance (TAVA) Section)

7. (i) It has been the practice of the Social Welfare Department since the inception of the TAVA Scheme in 1979 that its staff will explain to all TAVA applicants their rights to claim damages/compensation through a solicitor in private practice or with the assistance provided by Legal Aid Department (LAD) against any party at fault in respect of their traffic accidents. At the same time they will be given a notice entitled "Important notice to all applicants for financial assistance under the TAVA Scheme" (Copy of the notice is at **Annex B**), which provides, among other things, relevant information about their rights. The notice is also put up on the notice board at the reception area of the TAVA Section office.
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- (ii) In addition, copies of the LAD's pamphlet entitled "How to apply for legal aid in civil cases" are available for distribution to TAVA applicants and members of the public at the TAVA Section office.
- (iii) The Social Welfare Department has all along enlisted the assistance of the management of the building where the TAVA Section office is located in carrying out frequent patrols in order to stop any touting activities of recovery agents in the vicinity of the office of the TAVA Section.

Legal Aid Department

8. LAD has advised that it is not aware of any touting activities by recovery agents in the vicinity of its offices. Nevertheless, with the assistance of the Department of Justice, LAD will design poster for display in its offices with cautionary message against the use of recovery agent as a preventive measure.

Hospital Authority (HA)

9. (i) Posters about recovery agents issued by the Labour Department and notices have been posted up in some HA hospitals, including those HA hospitals where the Employees' Compensation Assessment Board assesses the injured employees.
- (ii) Leaflets issued by the Labour Department have been distributed to the public in some HA hospitals.
- (iii) Security guards have been instructed to evict recovery agents carrying on touting activities from hospital premises.
- (iv) In response to the request by the Department of Justice, the HA has reinforced the message to all HA hospitals that the touting activities of the recovery agents are contrary to the interest of the patients and are illegal and that security guards should be reminded to evict any recovery agents from hospital premises when they are conducting touting activities in hospital premises.
- (v) The HA also planned that all HA hospitals should post up posters issued by the Labour Department for the purpose of general public education.
- (vi) The HA has indicated support for all necessary measures for protecting the interest of the general public.

(II) Possible prosecution

10. The Law Society has supplied the Department of Justice with information concerning advertisements on the internet and the local media relating to a number of recovery agents. The Police are now conducting investigations of certain suspected cases involving illegal activities of the recovery agents. If evidence of criminal acts is uncovered, the Department of Justice will consider bringing prosecution proceedings.

(III) Possible legislation

11. There was a general understanding during the meeting with the professional bodies in January 2006 that before considering any legislative amendments, it would be more appropriate to see whether the practice of illegal recovery agents could be stopped by prosecution.

12. The Department of Justice takes the view that for the time being, a case for legislation is not made out.

(IV) The Administration's position

13. Maintenance and champerty are still offences in Hong Kong. Lawyers cannot work on a "no win, no fee arrangement". Our policy is that, if evidence of criminal acts by recovery agents is uncovered, the Department of Justice would consider prosecution proceedings against anyone who has committed such offences. The Administration will continue to monitor the situation in consultation with the legal profession and relevant authorities to ensure that the access to justice and interest of the public are adequately protected.

14. As regards the recent High Court case (HCMP 2878/2004), it is noted from the facts stated in the judgment that the case may involve acts of champerty and maintenance. The Administration is aware that the case has already been reported to the Police for investigation. If evidence of criminal acts is uncovered, the Department of Justice would consider any appropriate prosecution proceedings.

(V) Our Proposal

15. In view of on-going investigation by the Police of certain suspected cases, the current developments in the U.K. and the on-going consultation regarding conditional fees, we propose to continue to monitor the situation in Hong Kong and in the U.K. before deciding the way forward.

Department of Justice

March 2006

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Beware of Touting Activities of **Claims Recovery Agents**

Recently there are outsiders approaching injured employees near our offices and in the waiting area for work injury assessment in hospitals, peddling claims recovery business.

In your own interest, you are strongly advised of the following:

- (1) Don't respond to their approach and don't chat with them on your employees' compensation case. You should keep your personal particulars confidential to avoid being abused by others.
- (2) Don't sign any paper/document without careful thought. You may face unanticipated legal consequences and financial liabilities later on.
- (3) Don't take advertisement and lobbying at face value. Please be skeptical about propaganda such as "no win, no fee", "no charge", "risk-free guarantee" and "huge sum of compensation". Don't attempt to make a try. You may be held liable for huge damages and handling fees if you withdraw from their service half-way through.



Touting activities are prohibited by this department and hospitals. Such activities are totally unrelated to this department.

Please exercise vigilance when being tempted. If you feel harassed, notify our staff, security personnel or report to the police.



Labour Department

**Important Notice to All Applicants for Financial Assistance
under the Traffic Accident Victims Assistance Scheme**

The purpose of the Traffic Accident Victims Assistance Scheme is to provide financial assistance for traffic accident victims, and their dependants as quickly as possible after a traffic accident, though subsequently they would have to repay the amount of Traffic Accident Victims Assistance out of any common law damages or other forms of compensation that they may recover in respect of the same accident.

It is important, however, that applicants should understand that any sum of money that they may receive under the Traffic Accident Victims Assistance Scheme is not a substitute for any right that an accident victims or their dependants may have to claim:

- (a) damages against whoever may be to blame for the traffic accident (normally liability for payment of any damages awarded will be met by the motorist's insurance company or if he is not insured, by the Motor Insurers' Bureau.
- (b) Employees' Compensation against an employer where the traffic accident arose out of or in the course of the employment of the traffic accident victim (e.g. where the victim is a delivery worker and is injured/killed in a traffic accident when making a delivery or is a domestic servant who is injured/killed in a traffic accident when out on an errand for her employer).

Applicants should also understand that the amount of damages or Employees' Compensation that may be recovered will usually (but not always be) greater than the amount of the payment that they may receive under the Traffic Accident Victims Assistance Scheme. Even if the motorist cannot be located (e.g. in a 'hit and run' case) it may be possible to obtain an ex-gratia payment on their behalf from the Motor Insurers' Bureau. Therefore, if they have not already done so they should consult a solicitor or, if they cannot afford to do so, go to the Legal Aid Department at 66 Queensway, Queensway Government Offices, 24/F, H.K. (Tel. No. 2537 7661) or 3/F, Mong Kok Government Bldg., No. 30 Luen Wan Street, Kln at Mong Kok KCR Station (Tel. No. 2380 0117) to seek legal aid to claim damages or Employees' Compensation. The staff of the Legal Aid Department will be pleased to answer enquiries and to render assistance as far as they can.

Appendix VII

Recovery agents

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
Legislative Council	12 June 2002	Official Record of Proceedings of the Council on an oral question raised by Hon Margaret NG on "Agents handling claims for accident compensation"
Panel on Administration of Justice and Legal Services	25 April 2002	Minutes of meeting (LC Paper No. CB(2)2615/01-02))
	14 December 2004	Minutes of meeting (LC Paper No. CB(2)710/04-05))
Legislative Council	26 January 2005	Official Record of Proceedings of the Council on Debate on the 2005 Policy Address
	15 June 2005	Official Record of Proceedings of the Council on a written question raised by Hon LI Kwok-ying on "Operation of claims companies"
Panel on Administration of Justice and Legal Services	28 November 2005	<p>A summary and a report on "Recovery Agents" from the Special Committee on Recovery Agents of the Hong Kong Bar Association (LC Paper No. CB(2)1516/04-05(01)) (English version only)</p> <p>A circular on "Recovery Agents" issued by the Law Society of Hong Kong to its members on 17 May 2005 (LC Paper No. CB(2)1609/04-05(01)) (English version only)</p> <p>Paper provided by the Administration on "Recovery agents" (LC Paper No. CB(2)453/05-06(01))</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Background brief prepared by the LegCo Secretariat on "Recovery agents" (LC Paper No. CB(2)453/05-06(02))</p> <p>Submission from the Working Party on Recovery Agents of the Law Society on "Recovery Agents" (LC Paper No. CB(2)517/05-06(01)) <i>(English version only)</i></p> <p>Submission from Mr Francis CHAN on "Recovery agents" (LC Paper No. CB(2)545/05-06(01)) <i>(Chinese version only)</i></p> <p>Minutes of meeting (LC Paper No. CB(2)897/05-06)</p>
	--	<p>Paper provided by the Administration on "Recovery agents" (LC Paper No. CB(2)1201/05-06(01))</p> <p>Judgement of the High Court (HCMP 1878/2004) on 9 February 2006 (LC Paper No. CB(2)1380/05-06(01)) <i>(English version only)</i></p> <p>Paper provided by the Administration on "Recovery agents" (LC Paper No. CB(2)1560/05-06(01))</p>