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Panel on Administration of Justice and Legal Services

Background brief for the meeting on 23 April 2007

Recovery agents

Purpose

This paper gives an account of the past discussions of Members of the Legislative Council on issues relating to recovery agents (RAs), i.e. 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.

Background

2. 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 Panel was advised that as many accident victims were not eligible for legal aid under the then 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.

3. 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.

4. In November 2004, the Law Society of Hong Kong 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 submission to the Panel in 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.

5. In January 2005, the Bar Council of the Hong Kong Bar Association 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 (Cap. 159) and their professional codes of conduct.

The 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 (Cap. 159) 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.

Discussions of the Panel

7. On 28 November 2005, the Panel held its first meeting to discuss the issue of RAs. The Panel requested the Administration to tackle the problem of RAs which had affected the interests of the public and the operation of the legal profession. The Administration provided progress reports on the steps it had taken to prevent illegal activities of RAs to the Panel in February and March 2006. The Panel followed up the issue at its meeting on 22 January 2007.

Actions taken by the Administration

8. The Administration advised the Panel that it would adopt a three-pronged approach to tackle the issue of RAs, involving public education, possible prosecution, and consideration of the need for legislation. The Administration updated the Panel on the steps taken at the meeting in January 2007-

- (a) 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 Administration was investigating some 10 cases of RAs suspected of engaging in illegal activities. Pending the investigation, the Administration was not in a position to say whether these activities amounted to maintenance and champerty. The Administration would consider bringing prosecution against the concerned parties if there was sufficient evidence to substantiate charges. The offences involved could be maintenance, champerty, or fraud, depending on the facts of individual cases. The Administration would provide a progress report on these cases to the Panel;
- (c) it would be more appropriate to assess the effectiveness of prosecution on illegal RAs before any legislative amendments were considered. For the time being, the Administration considered it unnecessary to introduce legislation to regulate the activities of RAs as maintenance and champerty were still offences in Hong Kong; and
- (d) since June 2005, no further complaints had been lodged with the Consumer Council regarding RAs. The Consumer Council had commented that this could signify a demand for RA service by the general public. The Administration therefore had to strike a balance between the demand of the general public and the interest of the legal professional bodies in deciding the way forward.

9. The Working Party on Recovery Agents of the Law Society advised the Panel that according to a research that it had conducted on the problem of RAs, there were about 8 600 claims for personal injuries filed in the High Court and the District Court in 2004 and 2005, and firms suspected to work for RAs handled about 30% of these claims. Given the prevalence of the RAs, the legal profession was disappointed with the Administration's ambivalent position on the legality of RAs. They expressed concern that the Administration had not conducted proper investigation into the activities of RAs and taken enforcement action against them since the matter was discussed by the Panel in November 2005.

10. Members' major views were -

- (a) the measures taken by the Administration on public education were inadequate. The Administration should consider using other more effective means, such as Announcements of Public Interest and the television programme "Hong Kong Connection" to warn the public of the risks of using RAs;
- (b) the Administration should take the initiative to investigate suspected cases involving illegal RA activities and take effective measures to tackle the problem of RAs. Regardless of the number of complaints received, the Administration had the responsibility to safeguard the interests and legal right of the general public; and
- (c) the Administration should conduct an analysis of the RA cases under investigation, including the amount of compensation that should be received by the victims and the amount of compensation that they had actually received. This would throw light on the amount of fees that had been charged by RAs.

Related developments

11. The Administration advised the Panel that the developments of the statutory framework to regulate RA activities in the United Kingdom (UK) and the consultation on conditional fees conducted by the Law Reform Commission (LRC) were relevant to the issue of RAs.

Regulation of claims management companies in the UK

12. In the UK, the common law offences and torts of maintenance and champerty were abolished by section 13 of the Criminal Law Act 1967. Since then, serious and widespread problems emerged from the proliferation of claims management companies. The Administration updated the Panel on the recent developments of the statutory framework to regulate claims management companies in the UK at its meeting in January 2007. The Panel noted that pursuant to the enactment of the Compensation Act in 2006, the UK Secretary of State for Constitutional Affairs was empowered to authorise persons to provide regulated claims management services and

to regulate the conduct of authorised persons. The "Code of Practice for the Provision of Regulated Claims Management Services by Trade Unions" was issued in November 2006. The Claims Management Services Tribunal would be established in early 2007 and the offence of providing unauthorised regulated claims management services would come into force in April 2007.

13. The legal profession considered that the developments in the UK were irrelevant to the situation in Hong Kong. They pointed out that unlike the UK, maintenance and champerty were still offences in Hong Kong. The Administration should step up enforcement action against RAs.

14. Hon Miriam LAU stressed that any attempt by the Administration to legalise RA activities in Hong Kong was unacceptable, bearing in mind that RAs in Hong Kong, unlike the claims management companies in the UK, took a percentage of the damages awarded to accident victims as service fees.

Consultation Paper on Conditional Fees

15. The Administration advised that a Sub-committee of the Law Reform Commission (LRC) released its Consultation Paper on Conditional Fees for public consultation on 14 September 2005. Two of its recommendations were -

- (a) the Sub-committee recommended 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 had made reference to the problems and regulation of claims management companies in England and the situation in Hong Kong, and considered that conditional fees might appeal to litigants who would have otherwise patronised RAs, which might or might not be qualified or suitably supervised; and
- (b) given the success of the Supplementary Legal Aid Scheme (SLAS) in widening access to justice by using event-triggered fees on a self-financing basis, the Sub-committee recommended that consideration should be given to expanding the SLAS on a gradual incremental basis, by raising the financial eligibility limits and by increasing the types of cases which could be taken up by the SLAS.

16. The Panel noted that the two legal professional bodies did not support the recommendation of the LRC Sub-committee that the prohibitions against the use of conditional fees by legal practitioners should be lifted.

17. The Law Society advised the Panel that its Working Party on Recovery Agents and Working Party on Conditional Fees had discussed the issue of RAs and considered that one of the possible ways to address the problem was to expand the scope of the SLAS to cover personal injury cases.

18. Members pointed out that the clientele of RAs were those who were neither eligible for legal aid nor had the means to afford the legal costs. While members noted the previous advice of the Administration that it had reservations on the expansion of the SLAS, they considered that the scope of the SLAS should be expanded to cover cases of personal injuries which had a high success rate and a reasonably good chance of recovering damages.

LegCo questions

19. Apart from the discussions of the Panel, 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.

Latest position

20. The Administration will brief the Panel on the outcome of the cases under investigation and other related issues at the coming meeting on 23 April 2007.

Relevant papers

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

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>Administration's paper 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 [LC Paper No. CB(2)453/05-06(02)]</p> <p>Working Party on Recovery Agents of the Law Society's submission on "Recovery Agents" [LC Paper No. CB(2)517/05-06(01)] (English version only)</p> <p>Mr Francis CHAN's submission on "Recovery agents" [LC Paper No. CB(2)545/05-06(01)] (Chinese version only)</p> <p>Minutes of meeting [LC Paper No. CB(2)897/05-06]</p>
	--	<p>Administration's paper 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)] (English version only)</p> <p>Administration's paper on "Recovery agents" [LC Paper No. CB(2)1560/05-06(01)]</p>
	22 January 2007	<p>Background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)891/06-07(04)]</p> <p>Administration's paper on "Recovery agents" [LC Paper No. CB(2)891/06-07(05)]</p> <p>Minutes of meeting [LC Paper No. CB(2)1125/06-07]</p>