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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 19 March 2008**

Recovery agents

Purpose

This paper provides information on the past discussions of Members of the Legislative Council on recovery agents (RAs), i.e. organisations which assist victims in the recovery of damages, usually arising from personal injury cases, in return for a fee as a percentage of the damages recovered.

Background

2. In the 2001-2002 session, the Panel on Administration of Justice and Legal Services (AJLS 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 victims of personal injuries were not eligible for legal aid under the financial eligibility limits at the time, they had resorted to entering into contracts with RAs which claimed to be able to help them in their claims for compensation. RAs operated for profits under the pledge of "no win, no pay" 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 pointed out that the prevalence of RAs indicated that they were meeting an unsatisfied demand for legal services and raised the question whether existing financial eligibility limits under the legal aid schemes were unrealistic. A review of the legal aid system was therefore necessary. The legal professional bodies pointed out that as RAs operated for profits, they would not act conscientiously to protect the rights and interests of their clients as qualified lawyers would.

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 identified in detail the problems resulted from the activities of RAs, and recommended public education, criminal enforcement against RAs, and disciplinary proceedings against the solicitors involved to rectify such problems.

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 civil court in Hong Kong. Lawyers who knowingly assisted in the performance of champertous agreements would be liable to be prosecuted as accessories to the criminal offence; lawyers who agreed to contingency fees 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 legality of RAs

6. According to the Administration, the following laws and rules of professional conduct would help determine the legality of RAs -

- (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 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. Maintenance and champerty remain as common law offences in Hong Kong, even though both offences were abolished in English law. 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.

Discussion of the AJLS Panel

7. The Panel discussed the issue of RAs at a number of meetings since November 2005. 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 Panel received the last progress report from the Administration on the measures taken against the illegal activities of RAs at its meeting on 23 April 2007.

8. At the meeting in April 2007, the Administration updated the Panel on the steps taken as follows -

- (a) Public education - 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 (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. The Administration had made arrangements for a radio Announcement of Public Interest (API) to be broadcast shortly and was exploring the feasibility of the production of television APIs.
- (b) Prosecution - Seven cases of RAs suspected of engaging in illegal activities were under investigation by the Police. Four of these cases had been referred to the Police for more than one year and had been singled out for active investigation. However, the Police had encountered difficulties in gathering documentary evidence during investigations. In some cases, victims declined to assist in the investigation. The involvement of overseas insurance companies had also complicated the investigation as the information on such companies was difficult to obtain. In this connection, the Interpol and the Commissioner for Insurance had been requested to assist.
- (c) Legislation - The preliminary thinking was to legislate to the effect that the contracts entered into by RAs and accident victims were illegal and unenforceable. In view of the implications on other types of contracts, the proposed legislative amendments would only apply to cases of personal injuries.

9. The legal professional bodies have expressed disappointment about the lack of progress in tackling the issue of RAs since it was discussed by the Panel in November 2005. As RAs typically charge 20% to 30% of the compensation recovered and

encroach on the interests of victims who are unaware of their rights and entitlements in personal injury claims, they consider that the Administration should step up enforcement action against RAs whose activities clearly amounted to maintenance and champerty which are criminal offences in Hong Kong, given that prosecution would be a very effective means to educate the public about the illegal activities of RAs.

10. The Law Society also pointed out that RAs had continued to place advertisements on television and websites and the Administration had not intervened. They considered that the Administration should issue guidelines to the media about the handling of advertisements relating to RAs.

11. Members agreed that to safeguard public interest, the Administration should impart a clear message to the public that the activities of RAs were illegal and persons engaging in such activities would be criminally liable. The Administration should also take prosecution action against RAs and, in the event that the Police encountered difficulties in enforcement under the existing law, introduce legislation.

Consultation conducted by the Law Reform Commission on conditional fees

12. The Administration advised the Panel that the developments of the statutory framework to regulate claims intermediaries (also known as RAs) in England and the consultation on conditional fees conducted by the Law Reform Commission (LRC) were relevant to the issue of RAs.

13. The LRC's Subcommittee released its Consultation Paper on Conditional Fees for public consultation in September 2005. "Conditional fees" means fee arrangements whereby, in the event of success, the lawyer charges his usual fees plus an agreed flat amount or percentage "uplift" on the usual fees.

14. The Subcommittee recommended, inter alia, that -

- (a) 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; 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, consideration should be given to expanding the SLAS on a gradual and incremental basis, by raising the financial eligibility limits and by increasing the types of cases which could be taken up by the SLAS.

15. The LRC published its Report on Conditional Fees in July 2007. It recommended, inter alia, the following -

- (a) the SLAS should be expanded on a gradual and incremental basis and the types of cases covered by the SLAS should be increased; and
- (b) a new fund, the Conditional Legal Aid Fund (CLAF), should be set up together with a new body to administer the fund and to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, etc. The CLAF should cover personal injury cases as well as a range of other cases.

16. The Consultation Paper on Conditional Fees had made reference to the problems and the regulation of claims intermediaries in England and the situation in Hong Kong. It was considered that conditional fees might appeal to litigants who would have otherwise patronised RAs. The Report on Conditional Fees had made reference to the recent developments in the regulation of claims intermediaries in England. Consideration had also been given to the impact on RAs if legal practitioners in Hong Kong were allowed to charge conditional fees. However, the Report concluded that there was very little material on the basis of which an impact assessment could be made.

17. While the legal professional bodies were against the introduction of conditional fees in civil litigation, they supported the expansion of the SLAS. They also considered that in addressing the issue of RAs, the development in England was not relevant to the situation in Hong Kong.

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 maintained that the scope of the SLAS should be expanded to cover cases which had a high success rate and a reasonably good chance of recovering damages, such as personal injury cases.

LegCo questions

19. Apart from the discussions of the AJLS Panel, Members had raised issues relating to RAs at various Council meetings -

- (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 concern 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 developments

20. The Administration will brief the Panel on the outcome of the cases under investigation and other related issues at the coming meeting on 19 March 2008.

Relevant papers

21. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
14 March 2008

Recovery agents

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/ 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/ 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>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/ Question</u>
	23 April 2007	Background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)1631/06-07(04)] Administration's paper on "Recovery agents" [LC Paper No. CB(2)1631/06-07(05)] Minutes of meeting [LC Paper No. CB(2)2219/06-07]