

立法會
Legislative Council

LC Paper No. CB(2)899/08-09(05)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 23 February 2009**

Recovery agents

Purpose

This paper provides information on the past discussions of the Panel on Administration of Justice and Legal Services (the Panel) 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 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, they had resorted to entering into contracts with RAs which claimed to be able to help them in their claims for compensation. These RAs operated for profits under 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 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. The legal professional bodies also pointed out that as RAs operated for profits (typically charging 20% to 30% of the compensation recovered), 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 (the Law Society) established a working party to investigate into the problems caused by RAs in relation to personal injuries claims. 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 recommended public education, criminal enforcement against RAs, and disciplinary proceedings against the solicitors involved as means 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) (LPO) and their professional codes of conduct.

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

- (a) under LPO, 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 LPO 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 will 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

The Administration's policy on RAs

7. The Panel has discussed the issue of RAs at a number of meetings since November 2005. The Administration advised the Panel that it had adopted a three-pronged approach to tackle the issue of RAs, involving public education, possible prosecution, and consideration of the need for legislation. At the meeting on 19 March 2008, the Administration updated the Panel on the steps taken as follows -

- (a) Public education - Measures had been put in place 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. A radio Announcement of Public Interest (API) to inform the public about the risks of the activities of RAs was ready to be launched, and a television API would be launched after completion of its production. The timing for broadcasting these APIs would be worked out with the Police to maximise their impact.
- (b) Prosecution - Nine cases relating to RAs were being investigated by the Police, seven of which were being actively pursued. Three arrests had been made and one case might result in prosecution. The Police had also stepped up patrol at spots where RAs had conducted extensive touting activities.
- (c) Legislation - The Administration did not rule out the possibility of introducing legislation against the activities of RAs in order to protect the public interest. Champerty and maintenance were common law offences in Hong Kong and offenders could be liable to prosecution. The Administration would review the need for legislation pending the outcome of prosecution actions.

Issues raised

Advertisements on services of RAs

8. Members and the legal professional bodies had expressed disappointment about the lack of progress in tackling the issue of RAs over the years. The Panel noted the concern of the Law Society that RAs had continued to place advertisements on television and websites, but the Administration had not intervened. Representatives of the Law Society considered that the Administration should make media organisations aware that the activities of RAs were illegal so as to help curb the

proliferation of such advertisements. The Administration advised that it was mindful that any actions to be taken should not be perceived as interfering with the freedom of expression of the media. It also advised that the advertisements per se might not be unlawful. Nevertheless, the Department of Justice (DoJ) had referred to the Police information pertaining to such advertisements to facilitate their investigation/prosecution. Members urged DoJ and the Law Society to examine the legality of such advertisements so that pre-emptive action could be taken before any champertous contracts were entered into between RAs and accident victims. Members were of the view that it would be in the public interest for the Administration to impart a clear-cut message to the public on the legality of RAs. They also considered that the Administration should step up enforcement actions against RAs given that prosecution would be a very effective means to educate the public about the illegal activities of RAs.

Legislating against activities of RAs

9. Some members took the view that legislation regulating the activities of RAs should be introduced as soon as possible to remove any uncertainties in the law. The Administration assured members that as confirmed by the judgment of the Court of Final Appeal in February 2007 (FACV9&10/2006), the common law rules making maintenance and champerty criminal offences were part of Hong Kong law prior to 1997 and remained applicable by virtue of Article 8 of the Basic Law. In the light of the judgment, it would be prudent for the Administration to consider whether statutory law was required, and if so, whether the law should regulate the activities of RAs or the contracts of RAs. As enacting legislation against the activities of RAs would have wide implications, especially on business activities, the public would need to be consulted on the legislative proposal.

Report of the Law Reform Commission on Conditional Fees

10. During the course of discussions on the subject of RAs, the Administration had advised the Panel that the outcome of the consultation on conditional fees conducted by the Law Reform Commission (LRC) might have a bearing on the policy regarding RAs.

11. 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. The LRC published its Report on Conditional Fees in July 2007 recommending, inter alia, that -

- (a) given the success of the Supplementary Legal Aid Scheme (SLAS) in widening access to justice through the payment of a portion of the damages recovered by the successful applicants, SLAS should be expanded on a gradual and incremental basis by raising the financial eligibility limits and by increasing the types of cases covered by SLAS; 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. CLAF should cover personal injury cases as well as a range of other cases.

12. 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.

13. While the legal professional bodies were against the introduction of conditional fees in civil litigation, they supported the expansion of SLAS. 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 SLAS, they maintained that the scope of 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.

Latest developments

14. The Administration advised the Panel that the broadcast of APIs had commenced on 9 July 2008. The Police mounted an operation to combat illegal activities of recovery agents on 3 July 2008. A total of 21 persons were arrested and 22 premises were searched in various places. Of the 21 persons arrested, two were charged with offences including (a) conspiracy to commit maintenance; (b) champerty; (c) theft; (d) perjury; and (e) conspiracy to commit champerty. The Administration expected that further arrests/charges would be made in due course. The Administration also received documents from the Law Society regarding a legal practitioner possibly involved in an "arrangement" for legal fees and had referred the matter to the Police for investigation.

Questions and debates in Council

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

- (a) Dr Hon Margaret NG raised an oral question on "Agents handling claims for accident compensation" at the Council meeting on 12 June 2002;
- (b) Dr 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.

16. Members may also wish to note that Hon CHAN Kin-por will raise a written question on "Regulation of RAs" at the Council meeting on 18 February 2009.

Relevant papers

17. 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
17 February 2009

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]
	19 March 2008	Background Brief prepared by the Legislative Council Secretariat [LC Paper No. CB(2)1357/07-08(05)] Administration's paper on "Recovery agents" [LC Paper No. CB(2)1357/07-08(06)] Minutes of meeting [LC Paper No. CB(2)2007/07-08]
	--	Administration's paper dated 9 July 2008 providing an update of the recent developments on the subject of recovery agents [LC Paper No. CB(2)2575/07-08(01)]

Council Business Division 2
Legislative Council Secretariat
17 February 2009