

立法會
Legislative Council

LC Paper No. CB(2)1889/09-10(02)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 28 June 2010**

Law Reform Commission Report on Conditional Fees

Purpose

This paper provides relevant information to facilitate members' discussion on the Report on Conditional Fees published by the Law Reform Commission ("LRC") in July 2007.

Consultation Paper on Conditional Fees

2. Conditional fees are a form of "no win, no fee" arrangement. If the case is unsuccessful, the lawyer will charge no fees. In the event of success, the lawyer charges his normal fees plus a percentage "uplift" on the normal fees. Conditional fees are different from the American form of contingency fee, where the lawyer's fee is calculated as a percentage of the amount of damages awarded by the court.

3. At present, conditional fees, like other forms of "no win, no fee" arrangements, are unlawful in relation to a claim involving the institution of legal proceedings. The restriction has its origins in the ancient common law crime and tort of champerty and maintenance. The Legal Practitioners Ordinance (Cap. 159) provides that the power to make agreements as to remuneration and the provisions for the enforcement of these agreements do not give validity to "any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding."

4. In July 2003, LRC appointed the Subcommittee on Conditional Fees ("the Subcommittee") to consider whether conditional fee arrangements were feasible in the circumstances of Hong Kong and to make proposals for reform as appropriate. In September 2005, the Subcommittee released a Consultation Paper on Conditional Fees for public consultation. The Consultation Paper recommended the introduction of conditional fees for certain types of civil litigations. However, it was also pointed out in the Consultation Paper that the feasibility of a conditional fee regime depended on whether there was insurance available to cover the opponent's legal costs if the legal action was unsuccessful ("after-the-event insurance"). To cater for the possibility that

conditional fees could not be successfully launched without after-the-event insurance, the Subcommittee also recommended, inter alia, that the Administration should increase the financial eligibility limits of the Supplementary Legal Aid Scheme ("SLAS") and expand the types of cases covered by the scheme.

5. The Panel was briefed on the Consultation Paper at its meeting on 24 October 2005. Members had expressed various concerns about the proposed introduction of conditional fees arrangements. Hon Audrey EU was concerned that under such arrangements, as the lawyer had a direct interest in the outcome of the case, in the event of conflict of interests between the two parties, he might try to manipulate the client and the development of the case. She therefore considered that the proposed arrangements should not apply to matrimonial cases. Ms EU also expressed concern that disputes between lawyers and their clients would likely arise in the course of litigation, hence an increase in satellite litigations. She was of the view that the expanding SLAS would be a better option than introducing conditional fees arrangements. Hon Miriam LAU and Hon Emily LAU expressed concern that introducing the proposed arrangements would lead to an emergence of claims intermediaries and a reduction in legal aid funding. Dr Hon Margaret NG pointed out that the legal profession had also expressed concern that the introduction of the proposed conditional fee arrangements would result in a substantial cutback in the availability of legal aid. Legal practitioners were also worried that once some lawyers had accepted the conditional fees arrangements, other lawyers would be compelled to follow suit, even though there might be pitfalls in the proposed system.

6. Members may wish to note that the issue of conditional fees had also been raised in the context of the Panel's discussions on recovery agents. Some members considered that like the expansion of SLAS, allowing some form of conditional fee arrangements might go in some way towards reducing the demand for the services of recovery agents, as conditional fees might appeal to litigants who could not afford the high legal costs and had no recourse to legal aid and would have otherwise patronised the recovery agents.

Report on Conditional Fees

7. In July 2007, the Subcommittee published its report on Conditional Fees. The Report has concluded that notwithstanding that conditional fees can enhance access to justice to a significant proportion of the community who are currently neither eligible for legal aid nor able to fund litigation themselves, conditions are not appropriate for the introduction of conditional fees because responses from the insurance industry have suggested that after-the-event insurance is not likely to be available in Hong Kong. In the absence of such insurance, those in the middle income group may not be able to absorb the other side's costs.

8. Given the widespread support for the expansion of SLAS during the consultation exercise, the Report has recommended that SLAS should be expanded on a gradual and incremental basis by, firstly, raising the financial eligibility limits and secondly, increasing the types of cases covered by the scheme. The Report has further

recommended that 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, and pay the opponent's legal costs should the litigation prove unsuccessful. According to this recommendation -

- (a) applicants for CLAF should be subject to a means test which should have a generously set upper financial eligibility limit without minimum financial eligibility limit. Individuals, sole proprietors and partnerships falling within the definition of "small and medium-sized enterprises" should be eligible to apply. A review should be conducted in due course to consider expansion of eligibility to include limited companies which satisfy the "small and medium-sized enterprises" criteria;
- (b) an applicant must also satisfy the merits test in order to be eligible for CLAF;
- (c) CLAF would engage the private lawyers on a conditional fee basis while the clients would be charged on a contingency fee basis;
- (d) a feasibility study should be carried out on the establishment of CLAF as a statutory body under the governance of an independent board; and
- (e) CLAF should encourage litigants to use mediation, and where the aided party consents to mediation and CLAF considered mediation appropriate, CLAF should fund the aided party's mediation costs.

Recent developments

9. Regarding the recommendation in the Report for the expansion of SLAS, members may wish to note that the Home Affairs Bureau has discussed the issue with the Panel in the context of the recently completed five-yearly review of the criteria of assessing the financial eligibility of legal aid applicants at the meetings on 29 March and 24 May 2010. At the meeting on 29 March 2010, the Administration informed the Panel of its recommendation not to expand the scope of SLAS to cover other categories of cases. Members had expressed disappointment with the Administration's recommendation and urged the Administration to consider seriously expanding the scope of SLAS with a view to enhancing the middle class' access to justice. The Administration advised the Panel that any proposal for extending the scope of SLAS must not undermine or jeopardize its financial viability, given its self-financing nature. SLAS was by design aimed at cases which involved monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages. The Administration also advised that if the scope of SLAS was to be extended to cover cases which did not fulfil such criteria, the Administration would not be able to raise the financial eligibility limit of SLAS to \$1 million at the same time.

10. The Department of Justice will revert to the Panel on the remainder of the recommendations made in the Report at the forthcoming meeting on 28 June 2010.

Relevant papers

11. A list of the relevant papers which are available on the Legislative Council website (<http://www.legco.gov.hk>) is in **Appendix**.

Council Business Division 2
Legislative Council Secretariat
22 June 2010

Law Reform Commission Report on Conditional Fees

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Panel on Administration of Justice and Legal Services	24 October 2005	<p>Consultation Paper on Conditional Fees http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj1024cb2-conditional-e-scan.pdf</p> <p>Executive Summary of the Consultation Paper on Conditional Fees [LC Paper No. CB(2)122/05-06(05)] http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj1024cb2-122-5e.pdf</p> <p>Minutes of meeting [LC Paper No. CB(2)499/05-06] http://www.legco.gov.hk/yr05-06/english/panels/ajls/minutes/aj051024.pdf</p>
	29 March 2010	<p>Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)1148/09-10(01)] http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj0329cb2-1148-1-e.pdf</p> <p>Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)1156/09-10(06)] http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj0329cb2-1156-6-e.pdf</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		Minutes of meeting [LC Paper No. CB(2)1581/09-10] http://www.legco.gov.hk/yr09-10/english/panels/ajls/minutes/aj20100329.pdf
	24 May 2010	Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)1583/09-10(04)] http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj0524cb2-1583-4-e.pdf Minutes of meeting

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