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Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 25 March 2014**

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. organizations 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 legislative 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.

5. In January 2005, the Bar Council of the Hong Kong Bar Association ("the 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 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, 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 Association's Code of Conduct prohibits barristers from accepting any brief or instructions on a contingency fee basis.

Discussions of the Panel

7. The Panel held two meetings on 19 March 2008 and 23 February 2009 to discuss ways to address the problems caused by RAs. Major views and concerns expressed are set out in the ensuing paragraphs.

The Administration's policy on RAs

8. Members noted that the Administration had adopted a three-pronged approach to address the problems caused by RAs as follows -

- (a) Public education - In order to increase public awareness of the risks of the activities of RAs, arrangements had been made for the broadcast of Announcements of Public Interest ("APIs") on television and radio commencing on 9 July 2008 to coincide with the enforcement actions taken by the Police. Furthermore, Offices of Government departments and the HA hospitals visited by accident victims had also taken steps to warn the public of the risk of engaging RAs, such as producing and putting up posters to warn against RAs, broadcasting of APIs in the waiting area, reminding staff to be vigilant against persons distributing touting leaflets and reporting such persons to the Police;
- (b) Prosecution – Apart from taking prosecution actions against RAs the Police had also stepped up patrol at spots where RAs had conducted extensive touting activities. On 3 July 2008, the Police mounted an operation to combat the illegal activities of RAs. A total of 21 persons were arrested and 22 premises were searched. Of the 21 persons arrested, two were charged with offences including (i) conspiracy to commit maintenance; (ii) champerty; (iii) theft; (iv) perjury; and (v) conspiracy to commit champerty. The trial of the two charged persons would take place at the District

Court from 11 to 15 May 2009; and

- (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 against the aforesaid two charged persons. If introduction of legislation was deemed desirable, the Panel, the two legal professional bodies as well as other stakeholders would be consulted.

Advertisements on services of RAs

9. 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 organizations aware that the activities of RAs were illegal so as to help curb the proliferation of such advertisements.

10. 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.

11. Members urged the 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

12. 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. Other members were however concerned that legislating the operation of

RAs was tantamount to legalizing RAs.

13. 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. The DoJ further advised that the current approach was to define more clearly the elements of the common law offences of maintenance and champerty with reference to the relevant case law, including the important judgment given by CFA in February 2007 (*FACV9&10/2006*) and the upcoming trial in May 2009 against the two persons arrested for engaging in the activities of RAs, with a view to reviewing whether the elements of the common law offences had posed any difficulties to the Police/DoJ in their investigation/prosecution work.

14. Whilst it was plainly in the public interest to combat against the misleading and fraudulent practices of RAs, members were of the view that the Administration should also examine the reasons for the prevalence of RAs which indicated that RAs were meeting an unsatisfied demand for legal services. A member pointed out that in recent years, there was a marked increase in the sums claimed for damages involving work injuries and traffic accidents particularly in cases where the services of RAs were engaged. However, RAs often abet the injured to exaggerate the degree of injuries sustained so as to claim for a higher amount of compensation. Such act would not only bring losses to insurance companies, but would also harm the interests of insurance policyholders in the end because of increase in insurance premium. The Administration was urged to expedite the legislative work against RAs and step up public education to warn the public, in particular the grass-roots, against RAs.

15. A member opined that the present system of prohibiting lawyers to enter into a conditional or contingency fee arrangement to act in legal proceedings in Hong Kong had to some extent impeded the public's right to access to justice, in particular for those who could not afford the high legal costs and had no recourse to legal aid. Like the expansion of Supplementary Legal Aid Scheme ("SLAS"), allowing some form of conditional fee arrangement might go in some way towards reducing the demand for the services of RAs.

Report of the Law Reform Commission on Conditional Fees

16. The Panel was advised that the outcome of the consultation on conditional fees conducted by the Law Reform Commission ("LRC")¹ might have a bearing on the policy regarding RAs. The LRC's Subcommittee released its Consultation Paper on Conditional Fees for public consultation in September 2005. "Conditional fees" meant fee arrangements whereby, in the event of success, the lawyer charged 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 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.

17. 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 patronized 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.

18. Whilst 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. Whilst members noted the previous advice of the Administration that it had

¹ The Panel was advised at its meeting held on 25 June 2013 that the Report on Conditional Fees recommended, inter alia, the expansion of the SLAS by raising the financial eligibility limits, and increasing the types of cases covered by the Scheme. The financial eligibility limits were raised in May 2011, and the types of cases were expanded in November 2012. Other recommendations of the Report were rejected by the Administration in October 2010.

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 position

19. The Panel received a letter dated 9 August 2013 from TANG Wing-chun, Kwun Tong District Councillor, requesting to discuss the issue of abolition of the common law offence of champerty. At its meeting held on 25 February 2014, the Panel agreed to discuss the matter at its next regular meeting scheduled for 25 March 2014.

20. Hon Frankie YICK will raise an oral question at the Council meeting of 26 March 2014 on legal aid, including the issue as to whether allowing legally aid persons to choose their own lawyers would give rise to champerty; and if so, what measures would be taken by the Administration to address the problem.

Council Business Division 4
Legislative Council Secretariat
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