

Release of consultation paper on conditional fees

A Law Reform Commission (LRC) sub-committee today (September 14) released a consultation paper on conditional fees.

Amongst other proposals, the sub-committee recommends that existing prohibitions against the use of conditional fees should be lifted for certain types of civil litigation, so that lawyers may choose to charge conditional fees in appropriate cases.

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.

At present, conditional fees, like other forms of “no win, no fee” arrangements, are unlawful for civil legal proceedings involving the institution of legal proceedings. The restriction has its origins in the ancient common law crime and tort of champerty and maintenance.

Professor Edward K Y Chen, chairman of the LRC’s Conditional Fees sub-committee, said there were good reasons to relax the restriction.

“Given the high cost of litigation in Hong Kong, those in the middle-income group whose means are above the limits set down by the Legal Aid Scheme and the Supplementary Legal Aid Schemes would have difficulty financing litigation.

“Financial considerations mean the middle-income group either have to abandon their claim or bring civil proceedings without legal representation,” he said.

The consultation paper recommends that lawyers should be allowed to use conditional fees in certain types of civil litigation, including personal injury cases, family cases not involving the welfare of children, insolvency cases, employees’ compensation cases, professional negligence cases, some commercial cases, product liability cases and probate cases involving an estate.

Conditional fee agreements should not be extended, at least initially, to defamation cases, criminal cases, and cases in which an award of damages is not the primary remedy sought.

“To maintain a healthy balance between the rights of claimants and defendants, there should be some mechanism to safeguard defendants against nuisance claims.

“We are therefore recommending that a claimant utilising conditional fees should be required by law to notify the defendant of this fact,

and that the court should have discretionary power to require security for costs in appropriate cases,” Professor Chen said.

The consultation paper points out that conditional fee arrangements cannot function properly without the availability of “After-the-Event” insurance (“ATE insurance”).

It is normal litigation practice that a claimant who loses his case would be required to pay a reasonable portion of the other side’s legal costs. ATE insurance provides cover for this potential liability.

However, the indications are that it is possible that ATE insurance may not be available at an affordable level and on a long-term basis in Hong Kong.

To cater for the possibility that conditional fees cannot be successfully launched without ATE insurance, the sub-committee recommends that the Government should increase the financial eligibility limits of the Supplementary Legal Aid Scheme , as well as expanding the types of cases covered by the scheme.

The sub-committee has further recommended the setting up of a “non-government contingency legal aid fund” (“CLAF”).

The sub-committee envisages that CLAF would probably be run by an independent body, and that applicants would have to satisfy a “merits” test in respect of their proposed litigation, but would not be subject to any means test. The scheme would take a share of any compensation recovered, so that it would be self-financing.

Lawyers working for the scheme would be paid on a conditional fee basis. The scheme would also pay the defendants’ legal costs in unsuccessful cases; and so would, in effect, take over the role of ATE insurance.

“We realise that this is a novel approach and we would like to get as much feedback as possible. The consultation process is very important and we hope to be able to fine tune our recommendations in the light of the public’s response,” Professor Chen said.

Professor Chen stressed that the recommendations in the consultation paper were put forward for discussion and did not represent the sub-committee’s final conclusions. The sub-committee invites and would welcome views, comments and suggestions on any issues discussed in the consultation paper.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The consultation paper can also be accessed on the Commission’s website at <www.info.gov.hk/hkreform>.