

## **Release of report on conditional fees**

The Law Reform Commission (LRC) today (July 9) released a report on conditional fees which advises that conditions at this time are not appropriate for the introduction of conditional fees – a form of “no-win, no-fee” arrangement.

Professor Edward K Y Chen, chairman of the LRC’s Conditional Fees sub-committee, explained that although conditional fees could enhance access to justice for a significant proportion of the community who are currently neither eligible for legal aid nor able to fund litigation themselves, a successful conditional fees regime requires the long term availability of affordable insurance (called “after-the-event” insurance) to cover the opponent’s legal costs if the legal action fails.

However, responses from the insurance industry to an earlier consultation paper issued by the sub-committee suggested that this was unlikely to be the case in Hong Kong, he noted.

“In the absence of “after-the-event” insurance, we do not recommend the introduction of conditional fees because those in the middle income group might not be able to absorb the other side’s costs, and might face financial ruin if required to pay those costs,” Professor Chen said.

Conditional fees are an arrangement in which if the case is unsuccessful, the lawyer will charge no fees, whereas 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 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.

On the other hand, given the widespread support for the consultation paper’s proposal to expand the existing Supplementary Legal Aid Scheme administered by the Legal Aid Department, the report 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.

As an alternative to the existing legal aid schemes, the report further recommends the setting up of a Conditional Legal Aid Fund (“CLAF”) 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.

CLAF would engage the private lawyers on a conditional fee basis while CLAF would charge clients on a contingency fee basis.

The report recommends that a feasibility study should be carried out into establishing CLAF as a statutory body under the governance of an independent board.

The report proposes that CLAF should have a generously set upper financial eligibility limit but should not have a minimum financial eligibility limit. To be eligible for CLAF, an applicant must also satisfy the merits test.

The report suggests that mediation should be incorporated into CLAF in view of its growing success and popularity, and the savings it could potentially achieve in legal costs. CLAF should encourage litigants to use mediation and where the aided party consents to mediation and CLAF considers mediation appropriate, CLAF should fund the aided party's mediation costs.

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The report can also be accessed on the Commission's website at <[www.hkreform.gov.hk](http://www.hkreform.gov.hk)>.

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