



**CONSULTATION PAPER ON THE PROPOSED
ESTABLISHMENT OF AN INDEPENDENT INSURANCE
AUTHORITY (IIA) (“the Paper”)**

SUBMISSIONS

OVERVIEW

- (a) The Law Society supports the establishment of an IIA in principle, subject to clarification on the issues set out below.
- (b) We raise queries on the regulatory functions of the IIA, the definition of various terms, the intentions behind those various terms, as well as the principles underlining these proposals.
- (c) The Administration is proposing new regulatory powers for the IIA:
 - (i) these powers appear to be comparable to those of the Securities and Futures Commission (SFC) but no justification has been provided why such powers are required for the insurance industry;
 - (ii) introduction of “dual regulation” by the IIA and the Hong Kong Monetary Authority (HKMA) on banks’ insurance intermediary activities. The Law Society notes this proposal might be contrary to the policy objective of enhancing regulatory consistency, as this approach could introduce discrepancy and unpredictability in enforcement.

COMMENTS ON THE PAPER

CHAPTER 3 – FUNCTIONS AND GOVERNANCE STRUCTURE

3.1 Functions of the IIA

1. **Para (3.1.1 (b))**

The Administration proposes the IIA to assume a duty “... *to organize public education programmes.*”

We query whether the IIA should assume the responsibility to provide an education programme, although we note the SFC has such a responsibility and it appears to be the trend for the Administration to impose such tasks on regulatory bodies.

2. **Para 3.1.2(b)**

The IIA shall “*promote understanding by ... policyholders of insurance products and the insurance industry in Hong Kong*”.

The Paper does not contain any proposals which could assist or facilitate implementation of this objective.

3.3 Set-up of the IIA

3. **Para 3.3.2(c)**

The IIA shall have a *chairman and a chief executive officer (CEO)* appointed by the Chief Executive. The appointments of a chairman and a CEO within the IIA are new concepts, vis-a-vis the existing hierarchy structure of the Office of the Commissioner of Insurance which has a Commissioner, assisted by various Assistant Commissioners of Insurance.

The respective roles of the proposed chairman and of the CEO should be clearly defined.

Delegation

4. **Para 3.3.3**

The Administration proposes to empower the IIA to *delegate* its functions, other than those specified to be *non-delegable*, to its members, committees and employees.

We have reservations on this as too much delegation does not sit comfortably with the policy of establishing the IIA. We suggest that before the issue of delegation is considered, the question of whether and to what extent the IIA would still be responsible for its function, after delegation, should be examined. Moreover, the persons or committees to whom the functions of the IIA are to be delegated, or sub-delegated, have to be looked at closely.

Para 3.3.3 non-delegable functions of IIA

5. Para 3.3.3(c)

The proposal that “*a delegation or sub-delegation does not prevent the IIA or its delegate from concurrently performing the function so delegated or sub-delegated*” muddles both the function of the IIA and the responsibility for carrying out those functions. This suggestion could potentially introduce ambiguity as to who or which one would ultimately be responsible for carrying out those functions.

We recommend the Administration to re-consider this proposal and whether such delegation should be removed.

6. Para 3.3.3(e)

There is reference to a schedule which would set out those non-delegable functions, but no details have been provided. At this stage, it is considered that apart from those functions proposed in the Paper, the following should also be included as non-delegable functions, *i.e. the power to sanction insurance companies and the decision to prosecute.*

CHAPTER 4 – LICENSING REGIME FOR INSURANCE INTERMEDIARIES

4.2 *Definition of Regulated Activities*

7. The meaning of “regulated activities” is unclear and the definition of “proposed exemptions” is very broad. We consider the definition to be cumbersome, and may give rise to difficulty with interpretation.

We recommend the proposed definition be reconsidered and redrafted.

8. **Para 4.2.2 (b):** *Introduction of two broad categories of licensed insurance intermediaries viz. licensed insurance agents and licensed insurance brokers.*

We note distinctions among different insurance intermediaries are already difficult under the existing regime; the Paper fails to clarify or improve it. We consider this matter requires further discussion.

9. **Para 4.2.2(d):** *Introduction of the general principle on regulation and licensing, being that “a person commits an offence if he carries on ‘regulated activities’ without a licence, unless he was exempted”*

The following is noted:

10. **Para 4.2.3. (2)(a)(iii) and Para 4.2.3. (2)(b):** *“Regulated Activities” and “Regulated Advice”*

The Administration relies, inter alia, on the making of a “material decision” to define “regulated activities” and “regulated advice”.

We note that a person carries on regulated activities if he invites or induces (or attempts to invite or induce) another person to make a material decision. On the other hand, he would be giving regulated advice if he gives an opinion on matters pertinent to the making of such “material decision”.

The Administration appears to equate the making of a decision to the carrying on of regulated activities; this is not always the case. There is also a conceptual gap between making a decision and the carrying on of the activities thereafter.

The Administration also appears to equate the giving of an opinion to the giving of an advice. The rendering of an opinion or a remark might or might not be equivalent to the rendering of an advice; it depends on the manner and the way the opinion is to be delivered. The equating of the two is arbitrary.

The Administration should re-consider whether it is appropriate to equate these concepts.

11. Para 4.2.3. (2)(d)(i) and (ii) and para 4.2.3(2) (c)

The proposal has not addressed the stage or phase when the insurance intermediary *advises on the insurance contract itself or the proposed insurance contract which takes place before* providing advice on making the application, issuing, continuation or renewal of the policy.

Under the current proposal, an insurance intermediary who *advises on the insurance contract itself* would not be giving “regulated advice”, or that he would not be inviting the other person to make a “material decision”, hence he would not be carrying on “regulated activities”.

The proposal as drafted should be reviewed.

12. Para 4.2.3 (3)(a) and Para 4.2.3 (3)(b): Licensing requirement

An insurance agent must not carry on regulated activities without a licence, *in the course of that person’s business, or employment, or for reward*. The same applies *mutatis mutandis* to an insurance broker.

We query the rationale for omitting sub-agents from the proposal. The Administration seemingly has presumed that the sub-agent is included in the proposal – see footnote (10) underneath para 4.2.2, but that has not been explicitly defined or canvassed in the paper.

This requires clarification.

We also note an insurance agent or an insurance broker needs a licence only when he or it is carrying on regulated activities *in the course of that person’s business, or employment, or **for reward***. (emphasis added)

The situation involving the provision of gratuitous advice by insurance agents or brokers has not been covered. Gratuitous advice (which might or might not be free advice) could be rendered by insurance intermediaries and that could or might lead to subsequent procurement of insurance contracts.

We invite the Administration to re-consider this proposal.

Exemption from licensing

13. **Para 4.2.2 (e), and Para 4.2.3 (3)(d):**

The Administration proposes that (a) certain professionals giving regulated advice wholly incidental to their professional practice, and (b) trust companies giving regulated advice wholly incidental to the discharge of their duties, will be exempted from the licensing requirement. The following queries in respect of the exemption are raised:

- (i) the exemption requires that the giving of the regulated advice is “wholly incidental” to the practice.

What factors will underline this requirement?

- (ii) **Para 4.2.3 (3)(d)(i):** the exemption will apply to a solicitor in a Hong Kong firm or foreign firm.

(a) What is the rationale for this exemption?

Foreign law firms are prohibited from practising local law and such firms cannot employ local solicitors. See section 50B(4) of Legal Practitioners Ordinance (Cap 159) (“LPO”).

(b) What about employees who are not solicitors in a law firm but who provide regulated advice?

This proposal fails to take into account the practical operations of a law firm. We recommend this matter be re-considered to include the law firm’s business, otherwise support staff such as Trainee Solicitors and para-legals will be caught by this proposal.

- (iii) **Para 4.2.3(3)(d)(ii):** Counsel will also be exempted, if the giving of the regulated advice is wholly incidental to his practice as a counsel.

Why has reference been made to the LPO in the case of solicitors but not for counsel?

- (iv) **Para 4.2.3(3)(d)(iii):** in the case of certified public accountants, the Administration uses gender specific reference in the exemption clauses but not in the case of counsel or solicitors.

Has there been an oversight in the drafting?

- (v) **Para 4.2.3(3)(d)(iv) :** A trust company holding itself out as so giving regulated advice wholly incidental to the discharge of its duty as a trust company is exempted.

Will the individual giving the advice be similarly exempted?

- (vi) **Para 4.2.3(3)(d)(vi)**: the current draft suggests that the giving of regulated advice through the media will be exempted.

While it could be agreed that the media should not be prohibited from publishing regulated advice, why will the person giving such regulated advice be exempted? Is it the Administration's intention to exempt such persons?

Will the act of reporting on "regulated advice" be exempted?

- (vii) **Para 4.2.3(d)(vii)** : It appears the current draft of this exemption only contemplates claims on policies that have been accepted.

As drafted it is unclear whether the exemption also applies to circumstances where the person concerned is involved in disputed claims, or claims rejected by an authorised insurer.

- (viii) **Para 4.2.3(3)(d)(viii)**: the exemption was extended to persons solely providing back office administration.
The term "back office administration" has not been defined and the scope of the exemption is thus unclear.

In our view, a distinction should be made between the discussing or giving of an opinion within the office, in the course of *internal* administration of and handling of insurance proposals and claims, etc, as opposed to the provision of advice on insurance matters to the general public in the course of *external* insurance activities. The former should be exempted but not the latter.

We also note the proposal in **Para 4.2.3 (3)(d)(vii)** appears to exempt some but not all the necessary internal discussion on the handling of insurance contracts and claims.

Under the proposal, it is likely that staff working in an insurance company discussing proposals themselves in the course of a proper discharge of their job duties would unintentionally be caught into the regulatory regime.

This exemption, as drafted, requires clarification.

14. **Para 4.2.2(f)** *Regulated activities outside Hong Kong:*

The proposal attempts to bring insurance intermediaries outside HK who target clients in HK into the licensing regime. We note the following. :

- (i) the issue of enforceability - it will be unsatisfactory if the law, as enacted, could not be enforced.
- (ii) the principle of deeming or regarding such activities outside Hong Kong to be regulated activities provided in Hong Kong – under this deeming proposal, would such policies sold to Hong Kong residents be voidable?

This proposal requires clarification.

4.3 *Operation of the Licensing System*

15. **Para 4.3.2:** The categorization of different licensees could cause confusion.

We note that *insurance agents* are individuals, *insurance agencies* are business entities and *technical representatives* (TRs) are also individuals engaged by insurance agencies. The situation where an individual could be both an insurance agent and an insurance agency (by e.g. operating as a sole proprietor) is not addressed. Should the individual in this situation be separately licenced? The fact that both an insurance agent and an insurance agency could employ TRs further confuses the concept. The picture could be even more complicated where an agent and/or agencies work in partnership.

The position of a TR is also not clear. Should a TR be qualified in his own right? Can a company be a TR?

The Administration should take this opportunity to improve and streamline the current licensing system, in order to avoid more confusion, by considering the following classification of licences:

- (i) **Insurance agent** – *includes both individuals, companies and other business entities (such as a partnership).*
- (ii) **Insurance broker** – *includes both individuals, companies and other business entities*
- (iii) **Technical representatives** – *can be either technical representatives of an insurance agent provided that the representative is himself an insurance agent or an insurance broker.*

16. **Para 4.3.2.10 and para 4.3.3(2)(g)** *Deeming provision:*

If a licensee ceases to be appointed by at least one authorized insurer, the licence would be deemed to be suspended, and if no appointment is made within a period

of time, the licence would be deemed to be revoked. It appears the licences of those insurance agents who become self-employed would be deemed to be revoked.

We consider this proposal is unfair and requires re-consideration.

17. **Para 4.3.2.10 and note (24) on p.40** *Notification and the notice period :*

A licensee will be required to notify the IIA of the cessation of his appointment by at least one authorized insurer within 7 business days after the said cessation. The proposed notice period is too short.

We recommend a period of 14 days instead of 7 days.

18. **Para 4.3.3(1)(d)** *Conditions on the grant of licence :*

A licence may be granted subject to *any reasonable conditions* as the IIA may impose, but the Paper does not provide details of such conditions.

A set of guidelines, or even subsidiary legislation, should be published or promulgated.

19. **Para 4.3.3(1) (f), para 4.3.3(4)(f)** *Use of trade names:*

The Administration proposes that (a) a licenced insurance agency and (b) a licenced insurance broker, must not carry on a regulated activity in a name other than the name specified in the licence.

We note it is a common Hong Kong practice for businesses to trade under separate names registered with the Business Registration Office. The proposal is at variance with common commercial practice, unless it is intended that a licence is granted for each such business name. The proposal should be reconsidered.

20. **4.3.3 (1)(g), 4.3.3(4)(d) and 4.3.3(5)(e)** *Validity of licence:*

We note the licence of an insurance agent will be valid for 3 years, or other period, while the licence for an insurance broker has no such time limit. **This reflects existing practice but the Administration should explain the rationale for maintaining such an arbitrary distinction between the licensing of insurance agents and insurance brokers.**

21. “*other periods*”

If the IIA decides on a period other than 3 years then clear guidelines should be provided.

22. **Para 4.3.3(2)(c), 4.3.3(3)(c), 4.3.3(4)(c), 4.3.3(5)(c) and 4.3.3(6)(a)(ii) & (iii)**

“*Fit and Proper*” person:

(i) It is unclear whether prior regulatory breaches can be used to impute the character of the applicant. **This requires clarification.**

(ii) The other factor in determining “fit and proper” is whether the person failed to comply with requirement under the ICO or *any relevant regulations*.

The Administration should clearly identify the “*relevant regulations*”.

23. **Note 27 on P.46** *Definition of the “person” for grant of licence :*

The “*person*” will include a “*controller of the corporation*”.

Will the term controller of such a corporation have the same meaning as a “*controller*” of an insurer in section 9 of the ICO or will there be a separate definition?

24. **Para 4.3.3(6)(a)(vii)** *Determination by other organizations:*

We note decisions made by HKMA, SFC, Mandatory Provident Fund Schemes Authority (MPFA) *or any other authority or regulatory organization*, will also be considered.

The Administration should clearly identify the identity of “*.....any other authority or regulatory organisation, whether in Hong Kong or elsewhere*”.

25. **Para 4.3.3 (6)(a)(v) and para 4.3.3(6)(b)** *Shadow directors:*

We note that if a person has ever been a shadow director of an insolvent company, that will be taken into consideration as to whether that person is ‘fit and proper’. Under the proposed definition, a person “*must not*” be regarded as a shadow director by reason only of the fact that the director acts on advice given by that person in a professional capacity. It is noted that certain professionals could be highly influential, and could give advice to that director and thus that professional causing the director to act on such advice *should be* regarded as a shadow director for the purpose of this definition.

We recommend the proposed definition of “shadow director” should be reviewed and redrafted.

26. *“Member of senior management*

In determining whether a person is fit and proper, the IIA would also consider whether the person has ever been a member of senior management of a corporation.

We recommend a definition of “Member of senior management” should be provided.

27. **Para 4.3.3 (6)(b)** *No discretion*

Use of the words “*must not*” indicate the IIA will not have any discretion in defining shadow director.

The question of whether this is desirable requires further examination.

28. **Para 4.3.3 (8)(c)**

The words “*must not*” are likewise used in the section on the renewal of a licence under certain circumstances. **We query whether this is appropriate and recommend reviewing the use of words “*must not*” in the above proposals.**

29. **Para 4.3.3 (8)(d)** *Conditions upon renewal of licence*

When a licence is to be renewed, the IIA will have discretion to amend or remove any conditions or impose new condition on the licensee.

Any conditions imposed should be reasonable and guidelines should be circulated for comment before publication.

30. **Para. 4.3.3(8)(h)** *Period of renewed licence:*

It is noted that the IIA may renew a licence for 3 years or a shorter period. However, a licence granted under Para 4.3.3(1)(g) may be “*valid for 3 years or ... any other period*”.

The rationale for the distinction is unclear - a licence may not be renewed for a period longer than 3 years, even though a licence may originally be granted for a period longer than 3 years.

4.4 Register of Licensed Insurance Intermediaries

31. **Para. 4.4.3(1)(a)(vii) and (viii)** *Record of disciplinary actions*

The IIA will have a statutory duty to maintain and keep a register of licensees, to include information on specified suspensions within the last 5 years.

There appears to be no policy in relation to *spent* disciplinary actions e.g. will licencees be required to disclose *spent* disciplinary actions?

32. **Para 4.4.3(1)(d)** *Request for a copy of register:*

The register can be inspected on 2 specified grounds.

The Administration should explain the rationale for this restriction.

33. **Para. 4.4.3(1)(f)** *Internet access:*

It seems surprising that the IIA shall be required by law to make the register available to the public through the internet.

The Administration may wish to consider whether such an obligation is appropriate and the implications if the IIA fails to comply for some reasons.

34. **Para 4.4.3 (2)** *The IIA may request information*

The IIA may request a licensee to submit such information as it may reasonably require to maintain the register, but the Paper does not explain what information the IIA will require.

Details of the scope of information required should be provided.

4.5 Appointment of Responsible Officers (RO)

35. **Para 4.5.1** *Appointment of RO*

The Administration proposes that every corporate licensee and authorized insurance company should appoint an RO who is *its senior executive*.

We recommend a definition of “*senior executive*” be provided.

36. **Para 4.5.5(1)** *Deeming provision*

The Administration proposes that the Chief Executive Officer of an authorized insurer shall be deemed to be its RO. This deeming provision is unsatisfactory, because

- (i) an RO needs to pass the relevant qualifying professional examinations, while the CEO usually is an employee of the insurer and might not need to pass any such examination; but
- (ii) the CEO (who is deemed to be the RO) could be answerable to complaints and be subject to sanctions.

The Administration is requested to re-consider the proposal.

It is also noted that: (a) only the Hong Kong chief executive of an authorised international insurer is responsible for the insurer's Hong Kong insurance business in its entirety; and (b) the Hong Kong chief executive of an authorised international insurer must be "*employed by*" the insurer.

Is it the intention that the global chief executive or only the Hong Kong chief executive of an authorised international insurer or both should be deemed to be the insurer's RO?

Will it be a requirement for the global chief executive and/or the Hong Kong chief executive of such an insurer to be employed by the insurer?

37. **Para 4.5.2** *Subject to approval*

We note the appointment of an RO requires IIA's approval, but not its *prior* approval.

Will the IIA have any power to revoke the appointment of an RO?

38. **Para. 4.5.5** *Responsible Officers:*

The Administration should clarify whether an RO must be employed by the company for which he is responsible, or whether it is sufficient for the RO only to be engaged by that company.

CHAPTER 5 – REGULATORY POWERS OF THE IIA

5.1. *Conduct Requirement*

39. **Para 5.1.2 (i), (iv) (v) (vi) and (vii):** *Conduct requirement of insurance intermediaries*

The Administration proposes that, when carrying on regulated activity, a licensed insurance intermediary must, inter alia, (a) act in the best interests of the policyholder or potential policyholder and (b) have such regard to the particular circumstances of the policyholder or potential policyholder.

In our view, this proposal is conceptually wrong.

An insurance agent owes his duties to his principal, not towards the policyholder or potential policyholder. As proposed, if and when an insurance agent carries out the regulated activities, he will be conflicted.

This proposal should be re-considered.

5.2. *Enforcement of conduct requirement*

40. **Para 5.2.1 (a) and (e)** *Search and seizure of business records;*

The IIA will have power to initiate inspection or enter into business premises of regulated entities to conduct an inspection or investigation. It will have the power to inspect or copy “business records” in the course of such inspection or investigation.

41. **Para 5.2.5(a)** Definition of “business records”

The definition is too general and broad, and would easily result in abuses such as unauthorized “fishing expedition”.

We recommend the scope of "business records" be redrafted to cover only those records related to the insurance business of the insurance intermediary, and specifically to those related to the subject matter under investigation.

42. **Para 5.2.2** *Specified Suspension Power*

We consider the power of suspending the licensed insurance intermediaries from carrying on any regulated activities for a period of time to be severe.

The power should be exercised with caution.

We request clarification of the phrase "pending a proportionate disciplinary decision which may not be readily available in a serious or complicated case".

Given the significance of this power, it may be appropriate that it be exercised only by the IIA and should not be delegated to the HKMA.

43. **Para. 5.2.5(2)(d) *Power to conduct investigation:***

The IIA must consult the HKMA before it may appoint someone to investigate a bank's insurance intermediary activities.

Is this constraint on the exercise of the powers by the IIA appropriate?

Will there be delay in the conduct of the investigation because of the requirement to consult?

44. **Para 5.2.5 (7): *Prosecution***

The Administration proposes that employees of IIA, who are not qualified under the LPO, could prosecute offences under the ICO. The Law Society expresses concerns over the quality of the decision to prosecute.

The IIA should be invited to consider briefing out its prosecutions to independent advocates which provides an independent assessment over each decision to prosecute.

5.3. *Disciplinary Sanctions*

45. **Para 5.3.1 *Proportionate Disciplinary actions***

It is proposed that the IIA will have the power to impose a range of “*proportionate*” disciplinary actions, but no details have been provided on the measures and so it is not possible to comment on whether such disciplinary actions will be appropriate or proportionate.

We note the Market Misconduct Tribunal is an independent body established under the SFC, but the IIA will have its own Disciplinary Committee and Expert Panel to support its disciplinary proceedings. We consider it appropriate to appoint an independent tribunal.

The Administration should re-examine the proposed regulatory arrangement.

46. **Para 5.3.3 (1) *Misconduct***

We consider the “Misconduct” for the purpose of disciplinary sanctions has been defined too broadly **and recommend the definition be redrafted.**

47. **Para. 5.4.2(f) and 5.4.3(7) Prosecution by IIA:**

It is proposed that the IIA may prosecute offences in its own name.

The Administration should review whether the IIA, being a regulator, should also be the prosecutor. The question as to whether the Secretary of Justice should be responsible for determining whether to prosecute and in what manner should be thoroughly and further considered (cf para 5.2.5 (7)).

48. **Para 5.4.3(a) "business record":**

It is proposed that a business record should be any record or document relating to the business conducted by the insurer.

This requires clarification. Will such records be limited to those relating to the insurance business of the insurer concerned?

49. **Para 5.4.3(8)(b)(i) Revocation of authorisation of an insurer:**

The power to revoke the authorisation of an insurer while it still carries on insurance business is a new power. Given the ongoing and sometimes long-term nature of insurance business, it is considered inappropriate for an insurer to continue to carry on its insurance business while unauthorised and with the consequent withdrawal of the relevant statutory obligations applicable to an authorised insurer. (cf **para 5.4.3(15)(a)(i).**) The current regime where an insurer remains authorised but may be subject to various requirements and restrictions with regard to its existing and any new business is more appropriate in such circumstances.

The Administration is invited to reconsider whether such a proposed power is appropriate, and generally whether the extensive range of powers proposed to be given to the IIA is unnecessarily wide and complex and with only minimal checks and balances.

CHAPTER 6 – REGULATORY ARRANGEMENTS FOR BANKS’ INSURANCE INTERMEDIARY ACTIVITIES

50. The Administration is proposing a model of dual regulation of the banks’ insurance intermediary activities, by the IIA and the HKMA and that IIA would be the primary and lead regulator for all insurance intermediaries.

In our view this model is unsatisfactory, as there would be inconsistency and/or confusion in enforcement of the regulations. We do not support this proposal.

51. **Para 6.1 and Para 6.4** *Delegation of investigative functions*

We note the IIA could delegate its investigative functions to HKMA, but that delegation, and the withdrawal of any such delegation, would be subject to the CE’s approval.

In our views, this is too inflexible and might not be responsive should circumstances require.

52. **Para 6.1(c)** *Role of the IIA with banks:*

The proposal for the IIA and HKMA to carry out joint inspections of banks’ insurance intermediary activities and the ability of the IIA to take over an investigation from the HKMA or participate in an HKMA investigation appears certain to cause confusion, duplication of roles and inconsistency of investigations.

The proposal should be reconsidered.

53. **Para 6.2 (d)** *Keeping HKMA posted*

The Administration proposes to enhance regulatory consistency and co-operation by arranging the IIA and the HKMA to exchange certain information at regular intervals and to keep each other posted on regulatory matters. There is no evidence to suggest the proposed exchange of information would enhance regulatory consistency.

We recommend removal of this proposal.

54. **Para 8.1.2(d)** *Levy on insurance premiums:*

It is proposed that a levy of 0.1% of insurance premiums be collected, without consideration of the different nature and scale of premiums on reinsurance treaties, captive insurance arrangements and single premium investment policies.

The Administration should consider whether such a levy on such policies is appropriate.

**Law Society of Hong Kong
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