

立法會
Legislative Council

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 25 April 2002 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, JP

Member Attending : Hon Cyd HO Sau-lan

Public Officers Attending : Miss Eliza LEE
Deputy Director of Administration

Mr James CHAN
Assistant Director of Administration

Mrs Fanny YU
Deputy Director of Legal Aid

Mr William CHAN
Assistant Director of Legal Aid

By Invitation : Hong Kong Bar Association

Mr Michael Lunn, SC
Mr Ruy Barretto, SC

Hong Kong Family Welfare Society

Mrs Cecilia KWAN
Assistant Director

Ms Amarantha YIP
Principal Social Worker

Hong Kong Press Council

Mr CHOI Chi-sum
Mr David WONG

The Hong Kong Council of Social Service

Ms Jane TSUEI
Business Director (Service Development)

1st Step Association

Mr WONG Kwok-ho
Mr CHEUNG Wai-ming
Mr WONG Yuk-lam

Law Society of Hong Kong

Mr Amirali Nasir
Mr Robin Egerton
Mr Patrick Moss

Hong Kong Journalists Association

Mr Jesse WONG
Executive Committee Member

Association of the Rights of Industrial Accident
Victims

Mr CHAN Kam-hong

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

The Chairman welcomed representatives of the Administration and deputations to the meeting. The Chairman said that the purpose of the meeting was to receive views on the preliminary list of issues for review in Appendix II to the Report of the Working Group on Legislation concerning the Provision of Legal Aid Services (the Working Group). The Working Group was formed by the Panel on 7 December 2001 to examine issues relating to the provision of legal aid services. The Working Group agreed that it should not involve itself in a detailed review of the legislation which was a matter for the Administration. On the basis of this understanding, the Working Group agreed that it would only draw up a preliminary list of issues for review for the purpose of consultation with interested parties and bodies. Following consultation by the Panel, the Working Group might hold further meetings to discuss the views received, with a view to putting forward a final list of issues for the endorsement of the Panel. The final list of issues for review would be sent to the Administration for consideration.

I. Meeting with deputations

1st Step Association
(LC Paper No. CB(2)1741/01-02)

2. Representatives of 1st Step Association were of the view that any insurance monies received by a legal aid applicant involving in a personal injury claim as a result of accident at work should not be regarded as the disposable capital in assessing his financial resources. The applicant had to rely on the insurance monies received to meet his and/or his dependants' living

expenses. They pointed out that the financial resources would exceed the upper financial eligibility limit under the Supplementary Legal Aid Scheme (SLAS) which stood at \$471,600, if insurance monies were regarded as disposable capital.

3. Deputy Director of Legal Aid (DDLA) responded that employees' compensation received was disregarded in computing an applicant's financial resources. In reply to Ms Cyd HO's enquiry, DDLA said that apart from employees' compensation, the Director of Legal Aid (DLA) was not empowered to exclude other types of insurance monies received by an applicant from the calculation of his financial resources. At the request of the Chairman, DDLA agreed to provide a written response.

(Post-meeting note : The Administration's written response was circulated to the Panel vide LC Paper No. CB(2)2100/01-02(02) on 29 May 2002.)

The Hong Kong Bar Association
(LC Paper No. CB(2) 1692/01-02(01))

4. Representatives of the Hong Kong Bar Association highlighted the following points -

Reform of legal aid in criminal proceedings

- (a) There had been a haphazard division of labour between LAD and the court in administration of legal aid services and time was ripe for a review. At present, the granting of legal aid in civil cases was under the Legal Aid Ordinance (LAO) (Cap. 91), whereas that for criminal cases was under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance (Cap. 221);
- (b) LAD should instruct leading counsel to represent the applicants in criminal cases, as the Department of Justice (DOJ) representing the opposite party often assigned Senior Counsel or briefed Senior Counsel at the Bar in such cases;
- (c) Under the Legal Aid in Criminal Cases Rules, where an applicant was involved in murder, treason or piracy with violence and was refused legal aid on ground of means by DLA, he might apply to a judge for granting of legal aid and exemption from means test and from payment of contribution. Such powers of the judge should be extended to cover cases involving very lengthy sentences of imprisonment, such as those charged with drug

trafficking in large quantities of dangerous drugs or armed robbery;

- (d) Under Rule 21(2) of the Legal Aid in Criminal Cases Rules, the trial judge might certify the fee payable to a solicitor or counsel assigned under a legal aid certificate be increased, if in his opinion that the case was of exceptional length or complexity. It was not appropriate for the Judiciary to have a role in assessment of fees. The existing system had created many problems and a fundamental change to the system was necessary. The Bar Association suggested that fees should be agreed in advance. This approach was also adopted by the DOJ;

Reform of legal aid in civil proceedings

- (e) The Bar Association was in support of the Administration's position that the financial resources of the parents or guardians of an infant applicant should be disregarded, and only the financial resources of the infant would be taken into account. The right of an infant to such protection in his status as a minor was stipulated in Article 24 of the International Covenant on Civil and Political Right and enshrined in Article 20 of the Hong Kong Bill of Rights Ordinance;
- (f) Section 9(d) of LAO empowered DLA to refer an application for legal aid to counsel to investigate the facts and to make a report thereon or to give an opinion thereon or on any question of law arising out of the application. DLA should make full use of the provision, not just for difficult cases and cases where independent legal advice were required;
- (g) The upper financial eligibility limit for OLAS had increased by 11.3 times since 1984 from \$15,000 to the present level of \$169,700. If the same ratio was applied to SLAS, its upper financial eligibility limit would have gone up to \$ 1.1 million. The upper financial eligibility limit for SLAS should be adjusted upward to at least \$1 million; and
- (h) The scope of SLAS should be expanded to cover other types of cases such as -
 - (i) cases where the individual damages might not be high but the damages to many could be considerable e.g. consumer and product liability and environmental damage cases;

- (ii) class or group litigation which involved monetary claims and which had a reasonably good chance of success e.g. disasters, insolvency of a corporate employer and Building Management Ordinance type cases; and
- (iii) cases with reasonable prospects of recovering damages and the costs so that there was relatively little risk to SLAS of an unsatisfied judgment or orders for costs e.g. claims by flat buyers against property developers in relation to defective workmanship in premises and claims against insurance companies.

Hong Kong Family Welfare Society (HKFWS)
(LC Paper No. CB(2)1692/01-02(02))

5. Representatives of HKFWS highlighted the following points -

- (a) A comprehensive review of the provision of legal aid services was supported;
- (b) The scope of legal aid should be expanded to cover defamation cases, and cases involving bankruptcies;
- (c) Resources of a spouse should not be taken into account in calculating the financial resources of the applicant;
- (d) The practice of disregarding the resources of an infant's parents or guardians in assessing the financial resources of the infant applicant should continue;
- (e) Legal aid should be granted for "unbundled legal assistance" and mediation, so that disputes could be settled without having to resort to court;
- (f) The procedures for legal aid services should be more transparent and user-friendly. A leaflet/booklet should be produced by LAD, containing information such as eligibility for legal aid services, application procedure, costs and contributions, system for choosing and changing a lawyer, appeal system, Service Charter, other relevant services such as mediation and counselling, and Q&A to answer some common questions;
- (g) The effectiveness of the existing mechanism to monitor services provided by LAD's in-house lawyers and private legal practitioners assigned should be improved, such as by collecting

feedback from aided persons; and

- (h) There should be measures to ensure easy access to advice, guidance and counselling to supplement legal aid services. The recent proposal of setting up community legal service centres was a move in the right direction.

Hong Kong Council of Social Service (HKCSS)
(LC Paper No. CB(2) 1692/01-02(04))

6. Ms Jane TSUEI made the following points -

- (a) A comprehensive review of provision of legal aid services was supported;
- (b) Provision of legal aid services should be client-based. For example, applicants should be well apprised of the services available to them and their contribution towards the cost of legal aid cases; measure should be taken to safeguard applicants' right to privacy and confidentiality; subject to the agreement of the applicants, social worker and/or their family members should be allowed to accompany them to meet with LAD staff; and LAD should strengthen liaison with agencies providing social services so that other types of support services could be provided by the latter to aided persons in need;
- (c) The existing upper financial limits for OLAS and SLAS were too low and should be adjusted upward to suit present day circumstances;
- (d) The existing method (i.e. by multiplying an applicant's monthly disposable income by 12 plus his disposable capital) in assessing an applicant's financial eligibility for legal aid should be reviewed, as it was unreasonable to assume that an applicant's income would remain unchanged in the coming 12 months; and
- (e) Notwithstanding the advantages of mediation in resolving disputes, aided persons should not be forced to resort to mediation as an alternative or adjunct to civil proceedings.

Law Society of Hong Kong
(LC Paper No. CB(2) 1692/01-02(06))

7. Mr Patrick Moss highlighted the following points -
- (a) It might not be a wise use of limited public funds to grant legal aid for defamation actions and to extend the scope of SLAS to cover proceedings relating to disputes between limited companies and their shareholders; disputes over partnerships; money claims in derivatives of securities, currency futures or other future contracts; election petitions arising from the Legislative Council and District Council elections; and uncontested cases such as those relating to bankruptcies and liquidations;
 - (b) The upper financial eligibility limits for OLAS and SLAS were grossly out of step with present day circumstances and should be reviewed;
 - (c) There was little justification for counsel engaging in criminal legal aid work to receive less remuneration than their counterparts engaging in civil legal aid work. Such anomaly should be narrowed if not removed;
 - (d) There might be grounds for empowering DLA to waive means test in respect of applications for legal aid to bring proceedings under the Basic Law, the Personal Data (Privacy) Ordinance and anti-discrimination legislation. However, it was still debatable whether the proposal should be taken forward, given these were not the type of proceedings for which legal aid should be granted at a time when funds were in short supply and other members of the community were denied the chance to bring proceedings for actions more essential to their benefit;
 - (e) The proposal that interest should be paid to the aided person in respect of sums held by DLA on his behalf pending conclusion of the proceedings warranted further examination, as to do so would involve DLA in additional administrative work disproportionate to the value of interest accruing. Moreover, as the aided person had been heavily subsidised throughout the proceedings, the loss of interest was a small price to pay;
 - (f) Where proceedings including an appeal were instituted by an aided person and were unsuccessful, DLA should be responsible for the payment of the costs of the winning party not in receipt of legal aid;

- (g) The proposal of extending legal aid to "unbundled legal assistance" was worthy of support on the condition that there was consistency in the assistance given;
- (h) Legal aid should be granted for mediation provided that the mediation was undertaken by qualified lawyers;
- (i) While measures should be introduced to further improve transparency in the mechanism for handling for appeals against DLA's decision to refuse legal aid, any major change to the procedure for appeals against the refusal of legal aid in criminal cases should be considered with caution; and
- (j) The review of the provision of legal aid services should also look at ways to provide legal advice to the public in a continuous and consistent manner so that their problems did not have to be resolved in the courts.

Hong Kong Journalists Association (HKJA)
(LC Paper No. CB(2) 1692/01-02(07))

8. Mr Jesse WONG said that HKJA supported the granting of legal aid for defamation actions and that legal aid should be available to all individuals passing the means test. As to the concern that LAD would be inundated with applications for defamation actions, Mr WONG said that this could be addressed by formulating a set of screening criteria to facilitate LAD to process applications.

Association of the Rights of Industrial Accident Victims
(LC Paper No. CB(2)1741/01-02)

9. Mr CHAN Kam-hong made the following points -
- (a) DLA should exercise discretion to grant legal aid without means testing to victims of industrial accidents and family members of workers who died from industrial accidents to enable them to pursue their claims for employees' compensation;
 - (b) Legal aid applicants in (a) above should be exempted from making a contribution of 6% or 12%, as appropriate, under SLAS;
 - (c) The upper financial eligibility limits for legal aid schemes should be raised to enable persons in (a) above to obtain legal aid;

- (d) The provision of legal aid services should be made more transparent and user-friendly; and
- (e) LAD should improve its mechanism to monitor the service provided by assigned legal practitioners.

Hong Kong Press Council (HKPC)
(LC Paper No. CB(2) 1692/01-02(03))

10. Representatives of HKPC said that HKPC had reservations about the proposal to extend legal aid to cover defamation cases. HKPC, as a self-regulatory body of the newspaper industry, preferred a non-litigation approach in dealing with public complaints against the press. HKPC was of the opinion that the proposal of extending legal aid to defamation cases would encourage people to use public funds to sue media organisations for personal gain. This would in turn give rise to proliferation in suits being filed against the press, thereby resulting in curbing press freedom. HKPC considered that a better approach was for newspapers to exercise self-discipline in striving for accuracy and avoiding sensationalism in their reporting. Should the proposal to extend legal aid to cover defamation cases be implemented, HKPC hoped that legal aid should only be limited to those cases where public interest was served, and that DLA should be empowered to exercise his discretion in favour of the applicants sparingly so as to prevent abuse of the system.

Response from the Administration

11. Deputy Director of Administration (DD of Adm) said that the Administration would carefully consider the deputations' views as set out in their written submissions. She, however, pointed out that there was a need to prioritize legal actions for grant of legal aid since legal aid was funded by public coffer. DD of Adm further said that the suggestions made by some deputations at the meeting about expanding the scope of legal aid schemes and raising the upper financial eligibility limits of legal aid were not new, and improvements in this regard had been made following previous reviews on legal aid services. DD of Adm added that legal aid services in Hong Kong compared favourably with international standards, for instance legal aid was not only provided to criminal proceedings, but also covered civil proceedings relating to major areas of the livelihood of the community at large. Moreover, there was no cap on the cost of legal aid, which was the exception, rather than the rule, according to international practices.

12. DDLA gave a preliminary response to some of the suggestions made by HKFWS, HKCSS and the Bar Association. On information leaflets/booklets, DDLA said that LAD had produced booklets on guide to legal aid services, calculation of financial resources and contributions and DLA's first charge. A

leaflet on Customer Service Standards setting out the targets for the time in processing legal aid applications and payment to clients and service providers in respect of legal aid cases was also produced.

13. Regarding HKCSS's suggestions that LAD staff should receive applicants and aided persons in private and that social workers or family members should be allowed to accompany them, DDLA said that meetings with applicants and aided persons were held in private and it was permissible for social workers or family members to attend these meetings. DDLA, however, pointed out that social workers or family members would be advised against speaking on behalf of the applicants and aided person. The fact that the evidence did not come from the mouth of the applicant might prevent LAD from assessing accurately whether the applicant would come up to proof when his case went before the court. As to HKCSS's suggestion that LAD should strengthen liaison with agencies providing social services, DDLA said that LAD had paid visits to these agencies to brief them on legal aid services and to exchange views on how best to provide a more integrated service to applicants and aided persons. For instance, LAD would refer unsuccessful applicants to agencies providing social services, such as HKFSW for follow-up.

14. As to the suggestion made by the Bar Association that judges should be given the discretionary power to waive the means test in all cases coming before the Court of First Instance, DDLA said that only 2% of the legal aid applications on the three major categories of criminal cases received in 2001 (namely: trials in the Court of First Instance and District Court respectively and appeals against convictions or sentence) were refused due to failure to pass the means test.

Discussion

15. Ms Cyd HO asked representatives of HKFSW and HKCSS whether they considered that the assistance provided by LAD to unsuccessful applicants was adequate. Representatives of HKFSW and HKCSS responded that LAD should play a more proactive role in helping unsuccessful applicants. The Chairman said that the scope for enhanced cooperation between LAD and the social welfare sector should be explored so that a one-stop service could be provided to clients in need of legal aid and other services.

16. In view of the Bar Association's comment that LAD rarely instructed leading counsel in criminal cases whereas DOJ often assigned Senior Council or briefed Senior Council in private practice in these cases, the Chairman suggested and members agreed to request LAD and DOJ to provide information on the number of criminal cases which they had assigned to Senior Council to cases tried in the Court of First Instance and above in the past three years.

(*Post-meeting note* : The Administration's responses were circulated to the Panel vide LC Paper No. CB(2)2100/01-02(01) & (02) on 29 May 2002.)

17. Responding to Mr Albert HO's enquiry about the reason for a judge to be given the discretion to waive means test in criminal cases coming before the Court of First Instance, Mr LUNN of the Bar Association said that the Rule to empower a judge to waive means test in cases involving murder, treason, or piracy with violence was introduced probably because of the capital punishment. The logic had now fallen away. The Chairman said that it could well be the Administration's view that it should be for DLA to exercise discretion to waive means test, not judges, although an exception had been made for capital offences. However, with the abolition of the capital punishment, the Rule should be removed altogether. Mr LUNN said that if the purpose of having the Rule was to safeguard the taxpayers' money, unrepresented defendants embroiled in a complex case would cost more to the taxpayers. In addition, the presence of unrepresented litigants would increase costs for all court users. The Chairman said that similar concerns had been raised in the Interim Report and Consultation Paper on Civil Justice Reform.

18. Ms Emily LAU asked Mr CHAN of the Association of the Rights of Industrial Accident Victims to elaborate on his views that the upper financial limits for legal aid schemes should be raised and aided persons who were victims of industrial accidents should be exempted from making contribution under SLAS.

19. Mr CHAN of the Association of the Rights of Industrial Accident Victims responded that the very low upper financial limits under that for OLAS and SLAS had rendered many victims of industrial accidents ineligible for legal aid. Although the upper financial limit for SLAS was much higher than that for OLAS, aided persons under SLAS were required to make a contribution of 12%, in addition to other administration and legal fees. Under the circumstances, many industrial accident victims had increasingly resorted to entering into contracts with agents which claimed to be able to help them in their claims for accident compensation. Mr CHAN pointed out that these agents operated on the pledge of "no win, no charge" and would take 18% to 30% of the compensation received as their service fees if the claims were successful. As these agents were unheard of by members and the Administration, the Chairman requested Mr CHAN to provide further details on these agents, such as advertisements to promote their services, terms of contracts signed with their clients, and other information on such cases. Mr CHAN agreed.

(*Post-meeting note* : Hon Margaret NG, the Chairman, raised an oral question for reply on the matter at the Council meeting on 12 June 2002.)

20. Mr Jasper TSANG expressed support for extending legal aid for defamation actions. Mr TSANG said that the concern of the Press Council about proliferation of defamation actions against the media was exaggerated as applicants for legal aid had to pass both the merits and means tests. Moreover, most people did not wish to go through a legal process to seek redress. Mr Albert HO shared Mr TSANG's views and said that extending legal aid to cover defamation actions could also help journalists who sometimes were sued for their reporting.

21. In summing up, the Chairman said that the final list of issues for review by the Administration would be prepared for endorsement of the Panel. Subject to the views of the Panel, the final list would be forward to the Administration for consideration. Organisations which had given views on the matter would also be given a copy of the final list.

22. There being no other business, the meeting ended at 6:40 pm.

Council Business Division 2
Legislative Council Secretariat
19 July 2002