

立法會
Legislative Council

LC Paper No. CB(2)1145/01-02(04)

Ref : CB2/PL/AJLS

LegCo Panel on Administration of Justice and Legal Services

**Report of the Working Group on Legislation concerning
the Provision of Legal Aid Services**

Purpose

This paper reports on the work of the Working Group on Legislation concerning the Provision of Legal Aid Services (the Working Group).

Background

2. At the meeting on 7 December 2001, the Panel agreed to form a working group to examine issues relating to the provision of legal aid services.

3. Under the chairmanship of Hon Margaret NG, the Working Group met on 7 December 2001 and 15 January 2002 to discuss the relevant issues. The membership of the Working Group is detailed in **Appendix I**.

4. The Working Group has agreed that it should not involve itself in a detailed review of the legislation which is a matter for the Administration. The task of the Working Group is to identify potential issues for review by the Administration. On the basis of this understanding, the terms of reference endorsed by the Working Group are as follows -

"To examine the relevant ordinances and subsidiary legislation concerning the provision of legal aid services in order to identify issues for the purpose of review and to make recommendations where appropriate."

5. The Working Group has also agreed to adopt the following work plan -

- (a) the Working Group will draw up a preliminary list of issues for review for the purpose of consultation with interested persons and bodies. The Working Group recommends that the consultation exercise should be conducted by the Panel;

- (b) the Working Group will hold further meetings to discuss the views received by the Panel, with a view to putting forward a final list of issues for the endorsement of the Panel; and
 - (c) the final list of issues endorsed by the Panel will be referred to the Administration for consideration.
6. On the basis of suggestions made by individual members of the Working Group, a preliminary list of issues for review, as set out in **Appendix II**, has been prepared. The Working Group has not come to any firm views on the issues identified.

Advice sought

7. The Panel is invited to endorse -
- (a) the work plan of the Working Group as set out in paragraph 5 above; and
 - (b) the preliminary list of issues set out in **Appendix II** for the purpose of consultation.

Council Business Division 2
Legislative Council Secretariat
21 February 2002

**Legislative Council
Panel on Administration of Justice and Legal Services**

**Working Group on legislation concerning
the provision of legal aid services**

Membership List

Chairman	Hon Margaret NG
Deputy Chairman	Hon Jasper TSANG Yok-sing, JP
Members	Hon Cyd HO Sau-lan Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon Miriam LAU Kin-yee, JP Hon Emily LAU Wai-hing, JP Hon Andrew CHENG Kar-foo Hon Audrey EU Yuet-mee, SC, JP (Total : 9 Members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Jimmy MA
Date	7 December 2001

**Working Group on Legislation concerning
the Provision of Legal Aid Services**

Preliminary list of issues for review

Existing legal aid regime - time for review

Legal aid is provided by the Legal Aid Department under the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal aid Scheme (SLAS). The Legal Aid Ordinance (LAO) was originally enacted in 1967 "to make provision for the granting of legal aid in civil actions to persons of limited means." SLAS, a self-financing scheme, was established in 1984 to provide civil legal aid for certain proceedings for the "sandwich class" whose financial resources exceed the ceiling set for the OLAS.

2. Since then, social conditions and expectations in Hong Kong have advanced. The Hong Kong Bill of Rights Ordinance came into force in 1992 and the Basic Law enshrining fundamental rights came into effect in 1997. The procedure and costs of litigation have developed to put access to the courts beyond not only "persons of limited means" but most ordinary citizens. Furthermore, consideration should be given to restructuring the legal aid scheme to tie in with the civil justice reform which is underway. Piecemeal up-date of LAO is no longer adequate. Time is ripe for an overall review.

3. *The Administration should* conduct a comprehensive review on the objective, adequacy and effectiveness of the existing legal aid regime with a view to enhancing the accessibility of legal services to persons who may otherwise have no means of enforcing their legal rights.

4. In conducting the review, *the Administration should* also address the specific issues raised by Members in the following areas -

- (a) the scope of legal aid;
- (b) the financial eligibility limits for legal aid schemes;
- (c) Discretion of the Director of Legal Aid (DLA) to waive the means test;
- (d) Assessment of financial resources;
- (e) Costs and contributions;
- (f) Legal aid for alternative means of dispute resolution;

- (g) Appeal from decision of DLA; and
- (h) Fees and costs payable to counsel and solicitors.

Scope of legal aid

Defamation actions

5. *The Administration should* consider whether legal aid should be granted for defamation actions, particularly those involving freedom of speech as an issue. Consideration should also be given to grant legal aid, without means testing, in deserving cases. Members note that many defamation actions in Hong Kong do not involve corporations, but individuals such as columnists or journalists who may have limited means to pursue litigation privately.

Other proceedings

6. *The Administration should* consider whether the scope of legal aid should be expanded to include the following excepted proceedings -

- (a) disputes between limited companies and their shareholders;
- (b) disputes over partnerships;
- (c) money claims in derivatives of securities, currency futures or other futures contracts;
- (d) election petitions arising from the Legislative Council and District Council elections; and
- (e) uncontested cases such as those relating to bankruptcies and liquidations.

The Administration should examine the possibility of expanding the SLAS or establishing other self-financing legal aid schemes to deal with some of these proceedings. Members note that the SLAS, a self-financing scheme, is operating with a surplus.

Financial eligibility limits for legal aid schemes

Civil cases

7. Legal aid for civil proceedings is provided under LAO through the OLAS and the SLAS. The upper financial eligibility limit under the OLAS is \$169,700. For cases involving personal injuries and professional negligence, an applicant

whose financial resources exceed \$169,700, but do not exceed \$471,600 may apply for legal aid under the SLAS. The upper limits for both schemes are considered to be too low.

8. Having regard to the objective of legal aid, in particular the objective of the SLAS, *the Administration should* conduct a comprehensive review of the basis and criteria adopted for assessing the financial resources of applicants and the upper financial eligibility limits under the OLAS and the SLAS.

Criminal cases

9. *The Administration should* review the upper financial eligibility limit for legal aid in criminal cases with a view to adjusting it upward. To adopt the same financial resources criteria for both criminal and civil cases may be inappropriate, having regard to the differences between criminal and civil offences.

Discretion of DLA to waive means test

10. DLA may, under section 5AA of LAO, waive the upper limit of means test in respect of proceedings in which a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue. *The Administration should* consider whether DLA should be empowered to exercise the same discretion in respect of the following proceedings -

- (a) Employees in appeals brought by employers against judgments of the Labour Tribunal (LT)

These types of actions involve employees applying for legal aid to defend appeals brought by employers to the Court of First Instance against judgments of the LT. Employees who received a LT judgment in favour of them might be deterred from further pursuing their claims for fear that they cannot afford the costs of the appeal proceedings, if the appeal is allowed.

- (b) Actions involving the Basic Law, the Personal Data (Privacy) Ordinance and anti-discrimination legislation

Cases where contravention of the Basic Law, the Personal Data (Privacy) Ordinance or anti-discrimination legislation is an issue are often of great general or public importance and have wide implications.

(c) Employees in insolvency cases

It may be justified to grant legal aid without means testing for cases of employees applying for legal aid to recover compensation due to them in employers' insolvency cases. The issue could be reviewed in conjunction with the relief mechanism under the Protection of Wages on Insolvency Ordinance such as the provisions relating to application for winding up of employers by the employees.

Assessment of financial resources

Calculation of disposable income

11. The existing method of calculation (i.e. by multiplying the applicant's monthly disposable income by 12 and adding his disposable capital to that sum) is unreasonable, as it assumes that the person will have a fixed income over the next 12 months. ***The Administration should*** review the formula so that any loss or reduction of future income can be taken into account in calculating the disposable income of an applicant.

12. ***The Administration should*** consider the proposal of using the median monthly household expenditure, rather than the "35-percentile household expenditure", as the index of personal allowance deductible for calculating the disposable income of applicants under the OLAS. The Administration's advice that the percentage of households financially eligible for legal aid has been increased from 48% to 58%, following the introduction of the latter benchmark since July 2001, is not considered a sufficient reason for not pursuing the proposal.

Requirements under Legal Aid (Assessment of Resources and Contributions) Regulations

13. ***The Administration should*** review the following provisions of the Legal Aid (Assessment of Resources and Contributions) Regulations -

(a) Regulation 6 - Application in representative or fiduciary capacity

The provision that the financial resources of any persons who might benefit from the outcome of the proceedings should be taken into account in determining the financial capacity of an applicant in a representative or fiduciary capacity may be unfair and should be reviewed.

(b) Regulation 7 (1) - Resources of a spouse

The provision that the resources of a spouse of a legal aid applicant should be treated as the resources of the applicant in assessing the applicant's financial eligibility should be reviewed. According to general rules of litigation, "husband" and "wife" are treated as separate and independent entities.

(c) Regulation 8 - Resources of an applicant who is an infant

It is noted that Report No. 37 of the Director of Audit's Report on Provision of Legal Aid Services has made reference to a case involving an infant applicant. The case illustrates an anomaly that public money is spent in providing legal aid to the infants of financially well-off parents who are willing and can afford to conduct litigation on a private basis. The method of assessing the means of an infant applicant should be reviewed with a view to removing the anomaly.

Costs and contributions

Contribution in cases involving human rights issues

14. Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations sets out, inter alia, the contribution of an aided person in proceedings involving a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights. ***The Administration should*** consider -

- (a) reviewing the maximum rate of contribution from a successful litigant in such proceedings (i.e. over 60% of the person's financial resources); or
- (b) exempting aided persons from making contributions. The use of public money to provide legal aid for cases involving matters of principle and significant public interest may be justified.

Contribution under the OLAS

15. An aided person whose financial resources exceed \$144,000, but do not exceed \$169,700, is required to pay the maximum contribution rate of 25%. As the upper financial eligibility limit under the OLAS is comparatively low, a large number of aided persons would be required to pay the maximum contribution. ***The Administration should*** review the maximum contribution rate.

Contribution under the SLAS

16. The contribution rate under the SLAS was reduced from 15% to 12% since July 2000. The use of a sliding scale of contribution, instead of at the rate of 12% across the board, is considered to have the advantage of being more flexible. ***The Administration should*** conduct a review on the impact of the new contribution rate on the SLAS Fund, for determining whether a sliding scale should be adopted, when more data from new cases handled are available.

17. Under Part III of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations, the rate of contribution is 12% when a claim proceeds to judgment. The rate shall be reduced to 6% when a claim is settled prior to delivery of a brief to Counsel. ***The Administration should*** consider whether appropriate steps should be taken to ensure that the relevant provisions are fully explained to an applicant in advance of the delivery of the Counsel's brief, so as to facilitate the applicant to make a decision in his best interests.

Interest accrued on DLA's first charge

18. Section 18A(3B)(b) of LAO provides that interest at the rate of 10% per annum or at a prescribed rate shall accrue on DLA's first charge on property recovered or preserved. Although section 18A(3B)(c) provides that DLA has the discretion to waive, either in whole or in part, the payment of all or any of the interest so accrued, it is reported that DLA has seldom exercised such discretion.

19. ***The Administration should*** review the situation in order to lessen the burden of the aided persons with genuine hardship, in particular those who cannot sell the property for valid reasons.

Interest accrued on monies due to aided persons

20. Section 19A of LAO requires that all sums which may become payable to an aided person are paid to DLA before payment is made to the aided person. ***The Administration should*** consider whether the interest accrued on any such sums held by DLA should be payable to the aided persons.

Payment of costs by DLA on behalf of an aided defendant or respondent

21. A Justice of Appeal of the Court of Appeal, in ruling on a recent case, has expressed the view that the present statutory requirement (section 16C(1)(b)(ii) of LAO) that neither DLA nor an aided person should be liable for costs may cause injustice to the winning party not in receipt of legal aid. ***The Administration should*** review the relevant provisions.

Legal aid for alternative schemes

"Unbundled legal assistance"

22. The concept of "unbundled legal assistance", i.e. with private lawyers providing (and charging for) advice and assistance at key points in the proceedings, designed to help the litigant represent himself, is highlighted in the Interim Report and Consultative Paper on Civil Justice Reform released on 29 November 2001. The Working Party on Civil Justice Reform hopes that in ongoing reviews of the scope of legal aid, notice should be taken of the growing phenomenon of unrepresented litigants, prompting consideration of broader public funding of meritorious claims by such litigants. Legal aid should also be considered as a funding source for "unbundled legal assistance".

23. Members consider that "unbundled legal assistance" may be a useful scheme to help litigants represent themselves, if it is not possible to provide full representation for all aspects of the proceedings through publicly funded legal aid. It is of particular importance to litigants that they are provided with professional legal advice at the very early stages of the proceedings to enable them to make a well-informed decision as to whether it is in their best interests to proceed further with the litigation. *The Administration should* consider whether the legal aid regime should be restructured in such a way as to provide for "unbundled legal assistance".

Alternative dispute resolution (ADR) schemes

24. As mentioned in the Interim Report and Consultative Paper on Civil Justice Reform, ADR can be used in appropriate cases as an alternative or adjunct to civil proceedings. The Consultative Paper has examined the different approaches adopted in overseas jurisdictions as to whether and to what extent the parties should be compelled by the court to resort to ADR, and made a number of proposals for consultation. One of the proposals is the desirability of legislation giving the DLA power to make resort to ADR a condition of granting legal aid in appropriate cases. The power could be a power to limit legal aid in the first place to the mediation, or a power to make participation in mediation a condition of any subsequent legal aid funding of the proceedings.

25. Under Part I of Schedule 2 to LAO, legal aid is available for civil proceedings such as negotiations prior to the issue of legal proceedings including mediation. As this suggests that legal aid can only be granted for mediation in the course of litigation, *the Administration should* consider whether LAO should be amended to the effect that legal aid can be granted for mediation.

Appeal from decision of DLA

26. Measures to further improve transparency in the mechanism for handling appeals against DLA's decision to refuse legal aid are considered necessary. For instance, the Administration should consider the need to draw up and make public a code of practice setting out the detailed procedures for appeal. In cases where information is sought by the Registrar of the High Court arising from an appeal against DLA's decision, or where the Registrar has requested DLA to reconsider an application, the code of practice should indicate the timeframe within which DLA should respond.

27. It has been reported that at present, most applications for legal aid to appeal in criminal cases are refused by DLA, hence rendering it extremely difficult for the applicants to seek further legal recourse. While Rule 12(3) of the Legal Aid in Criminal Cases Rules provides that the judge or Court of Appeal may grant an appeal aid certificate notwithstanding DLA's refusal, it is unlikely for an applicant to incur costs to further pursue the appeal in the absence of legal aid.

28. *The Administration should* examine the above issues with a view to putting in place a more effective appeal mechanism.

Fees and costs payable to counsel and solicitors

29. It has been reported that in some instances, counsel has failed to receive fees for work undertaken in relation to a case referred from a solicitor instructed by DLA where the item has been disallowed on taxation. Under Regulation 4 of the Legal Aid (Scale of Fees) Regulation, the fees payable to counsel acting for an aided person shall be such as may be allowed on taxation or, in default of taxation, as may be fixed by DLA, not exceeding such amount as in the opinion of DLA would have been allowed if there had been taxation.

30. *The Administration should* review the relevant provisions with a view to improving the clarity.