

Submission from the Law Society of Hong Kong

## **REVIEW OF LEGAL AID**

The Legal Aid Committee of the Law Society has discussed the list of preliminary issues prepared by the Legislative Council Panel ("the list") on the Administration of Justice & Legal Services and has the following comments:

### Existing legal aid regime

1. The Law Society is fully In support of an overall review of the provision of legal aid under the ordinary Legal Aid Scheme ("OLAS") and the Supplementary Legal Aid Scheme ("SLAS").
2. The purpose of such a review should be to achieve a balance between enhancement of the accessibility of legal aid services to those persons who do not otherwise have any means of enforcing their legal rights and the effective and efficient use of public funds.
3. Whilst there may well be isolated instances of those who may have an inability to enforce their legal rights it is the Law Society's view that the two schemes should be reviewed in order to expand the proportion of the population eligible for legal aid rather than to extend the types of proceedings for which legal aid should be available with or without a means test.

### Defamation actions

4. It has always been the Law Society's view that legal aid should be available for what are generally regarded as "essential" proceedings i.e. those in respect of which a person of limited means may obtain legal redress to enforce rights essential to his well-being. Now is not the time when public funds are more limited than they have been in the past to embark upon a course which will extend the scope of legal aid to cases which are not "essential". In this context we refer to paragraph 5 of the list in which it is suggested that legal aid should be granted for defamation actions. We are firmly of the view that this would not be a wise use of public funds. It is likely that the Legal Aid Department would be inundated with applications from persons who considered that they had been "defamed" during the course of domestic arguments and otherwise. The costs incurred in defamation proceedings are notoriously high and it is the Law Society's opinion that the funds which would be spent on such actions would be better used in expanding the means test to enable more people to qualify for proceedings which have greater benefit for both them and the community.

### Other proceedings

5. Similarly on the same basis as above the Law Society does not consider that there are valid arguments for extending the scope of legal aid in respect of the excepted proceedings listed in paragraph 6 of the list. The fact that SLAS is operating with a surplus does not, of itself, justify extending legal aid to proceedings which have hitherto been excepted from its scope. There were good reasons why legal aid did not cover the category of proceedings listed such as partnership disputes and disputes between companies and shareholders and the Law Society is not aware of convincing arguments for removing the restrictions. The "surplus" from SLAS is a fragile one which could easily be lost as a result of losing significant cases and whilst the concept of the SLAS is sound it would not be prudent to extend the scheme merely because a "surplus" has been carefully built up over the years with the existing categories of action.

### Financial eligibility

6. The Law Society strongly favours any upward revision of the means test limits but is concerned at the "veiled" suggestion that the criteria for civil and criminal cases should be different. Data should be made available to show to what extent the means test has unreasonably excluded applicants in criminal cases before any proposal is made to increase or decrease it in isolation from the civil means test.
7. We would wish to have further information before commenting on paragraph 10 of the list and in particular would like to know whether the means test is currently acting unfairly in respect of employees who are respondents to an appeal from a decision in their favour by the Labour Tribunal. Similarly in relation to employees in insolvency cases where we have reservations over the need for the Director to waive the means test bearing in mind that the majority of applicants are unemployed.

### Director's discretion to waive means test

8. We accept that there may be grounds for considering whether the Director should have a discretion to waive the means test in respect of applications for legal aid to bring proceedings under the Basic Law, Personal Data (Privacy) Ordinance and anti-discrimination legislation but we repeat our concerns that these are not the type of proceedings for which we envisage legal aid should be granted at a

time when funds are in short supply and other members of the community are denied the chance to bring proceedings for actions more "essential" to their benefit.

#### Assessment of financial resources

9. The Law Society supports the proposal to review the assessment of financial resources and contribution rates set out in paragraphs 11 to 19.

#### Payment of interest

10. Paragraph 20 of the list suggest that interest should be paid to the aided person in respect of sums held by the Director on his behalf pending conclusion of the proceedings. The Law Society has reservations that this proposal will involve the Director in additional administrative work disproportionate to the value of the interest accruing and that since the aided person has been "subsidised" throughout the proceedings the loss of the Interest is "a small price" to pay.

#### Payment of costs by DLA

11. The Law Society considers that the position should be restored to what it was considered to be prior to the Court of Appeal decision, namely that where proceedings including an appeal were instituted by an aided person and were unsuccessful the DLA should be responsible for the payment of the costs of the successful non legally aided litigant.

#### Unbundled legal assistance

12. The Law Society initially does not favour "unbundled" legal assistance as suggested in paragraphs 22 and 23 of the list unless there is consistency in the assistance given. However at this time prior to the Law Society's response to the Civil Justice Review the position on this proposal is reserved.
13. The proposal in paragraphs 24 and 25 that legal aid should be available for mediation is supported provided the mediation is undertaken by appropriately qualified lawyers.
14. There is some concern at the appeals procedure referred to in paragraphs 26 and 27. We agree that there should be made available to all whose applications are refused clear guidelines as to the procedures on appeal. Any submissions made by the Director to the

Registrar must be provided also to the appellant and time limits should be adhered to if this is not currently occurring. On the subject of criminal appeals it is understood that the majority of those refused are in relation to appeals from the magistracies. It is not clear from the list whether there are proposals to change the method or procedures for appeals against the refusal of legal aid in criminal cases but we would caution against major change.

15. Paragraph 29 refers to an issue which has long been debated by both the Law Society and the Bar Association. However the statutory rules are quite clear that both solicitor and counsel are entitled to be paid whatever amounts are allowed on taxation. If sums are taxed off the bills of either solicitor or counsel then there is no redress in a legal aid case. The court has decided that the sum claimed is not reasonable and neither solicitor nor counsel can claim that amount. The problem that has arisen is because the taxing master has decided that work for which counsel has claimed payment should, in the taxing master's view, have been done by the solicitor. Accordingly the amount is taxed off the counsel's fee note but no virement takes place to enable the solicitor to claim an amount which might be reimbursed to counsel. Accordingly the work is done free of charge for the aided person and this is unreasonable in the circumstances.
16. The Law Society considers that a flaw in the present system of legal aid is the ability for those clearly shown to be abusing the system to continue to be granted legal aid. It was Lord Denning who said

"One has to remember that legal aid can be used most oppressively against innocent people".

Whilst we are not suggesting that this is a frequent occurrence nevertheless there is a sentiment that the Legal Aid Department should take a more robust line with some legally aided persons.

17. As a major stakeholder in the system the Law Society is keen to participate in any review that may take place.

23 April 2002

DOC. 58122