

**For information**

**LegCo Panel on Administration of Justice and Legal Services**

**Provision of Legal Aid Services**

**Administration's Response on the List of Issues for Review**

**Introduction**

The LegCo Panel on Administration of Justice and Legal Services (“the Panel”) has identified, for the consideration of the Administration, a list of issues concerning the provision of legal aid services for review. We have reported separately to the Panel our findings following (a) the annual and biennial review of financial eligibility limits of legal aid applicants; and (b) the five-yearly review of criteria for assessing financial eligibility limits of legal aid applicants. This paper sets out the Administration's response to the remaining issues raised by the Panel.

**I. Scope of legal aid**

(Paragraphs 5 and 6 of the Panel's Paper)

2. The Administration is asked to consider whether the scope of legal aid should be extended to cover proceedings set out in paragraphs 5 and 6 of the Panel's Paper.

3. We shall start off by explaining our policy position on legal aid services, by highlighting inter-alia our international obligations in this regard. Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) guarantees all individuals the right to a fair hearing in both criminal and civil proceedings (which involves the determination of an individual's civil right and obligation). Article 14(3) further provides that a person charged with criminal offence shall be entitled to “have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it”.

4. Set against the above background, the scope of our legal aid services is already very wide and goes way beyond our international obligations. To recap, in Hong Kong, legal aid is not only provided to criminal proceedings, but is also available in civil proceedings relating to

major areas of the livelihood of the community at large. They include family and matrimonial disputes, personal injury claims, employment disputes, tenancy disputes, contractual disputes, immigration matters, professional negligence claims, and coroner's inquests.

5. If we go by overseas experiences, Hong Kong is the exception, rather than the rule, in not having a cap on legal aid spending. Other jurisdictions subject their legal costs to a financial limit, and some even impose spending cap on each individual case.

6. Legal aid is nevertheless funded by the public coffer which is not unlimited, and we have to prioritize legal actions for grant of assistance so that resources are targeted at those with the greatest need for help. The need for prioritization in the grant of legal aid is all the more pressing, in light of our tight fiscal position as a result of the general economic downturn. In the longer term, we may have to revisit the question of imposing a financial cap on legal aid spending.

7. Against the above background, the Administration has yet to find sufficient justifications to accord priority to the following areas for the grant of legal aid: -

(a) Defamation actions

(Paragraph 5 of the Panel's Paper)

8. We have submitted a paper setting out our policy on this matter to the Panel in November 2000. Our position has remained unchanged.

9. The exclusion of defamation proceedings from the legal aid scheme is consistent with international human rights jurisprudence, which has confirmed that a lack of legal aid for defamation proceedings does not deprive a person of access to court nor interfere with the freedom of expression and that it is reasonable to establish priorities for legal assistance excluding defamation litigation. According to information to hand, legal aid is not available for defamation in many foreign jurisdictions including England and Wales, Scotland, Ireland, New South Wales of Australia, Ontario of Canada, and Singapore.

(b) Disputes between limited companies and their shareholders

(Paragraph 6(a) of the Panel's Paper)

10. These proceedings become part of the excepted proceedings from the grant of legal aid following the passage of the Legal Aid (Amendment)

Bill 1995. When this Bill was first introduced, it was proposed that the excepted proceedings should cover “partnership disputes”. At a meeting of the Bills Committee studying the Bill held on 23 February 1995, the Committee suggested that as partnership disputes were excluded from the scope of legal aid, disputes between limited companies and their shareholders should be excluded as well.

11. If the Panel’s concern is about the question of protection for shareholders of listed companies, we feel that it should be tackled from the corporate governance perspective. In this regard, we note that, in a Consultation Paper on Corporate Governance issued by the Standing Committee on Company Law Reform (“SCCLR”) in July 2001, the Committee proposed that statutory derivative action be introduced to enhance shareholders’ rights, whereby the Securities and Futures Commission will be empowered to bring derivative actions against wrongdoers in relation to listed companies, subject to the provision that the Securities and Futures Commission shall exercise its power in the public interest as well as in the interest of the company. On this, we note that the Financial Services and the Treasury Bureau and the Securities and Futures Commission have jointly published a consultation paper in May 2003 to seek public views on whether, and if so, how the proposal recommended by the SCCLR should be pursued.

12. According to information to hand, legal aid is not provided for this type of cases in England and Wales because they are not considered to have sufficient priority to justify public funding. Similarly, legal aid is not provided for in New South Wales and Victoria of Australia and Ontario of Canada.

(c) *Disputes over partnership*

(Paragraph 6(b) of the Panel’s Paper)

13. These proceedings become part of the excepted proceedings following the passage of the Legal Aid (Amendment) Bill 1995. According to the Legal Aid Department (LAD)’s previous experience, partnership dispute cases are usually concerned with sharing of profits or liability for losses. Quite often such disputes arise from an amateurish agreement or lack of a written agreement or improperly kept books of account. It is not justified for the taxpayers to bear the costs for resolving this type of disputes. Even if the court orders that the partnership be dissolved, the accounts be taken and a receiver be appointed, no money or very little money could be recovered in the majority of cases. It is therefore considered inappropriate to accord

these cases with priority for granting legal aid.

14. According to information to hand, legal aid is not provided for this type of cases in England and Wales because they are not considered to have sufficient priority to demand a share of the available resources. Similarly, legal aid is not provided for such cases in New South Wales of Australia and Ontario of Canada.

(d) Money claims in derivatives of securities, currency futures or other futures contracts

(Paragraph 6(c) of the Panel's Paper)

15. These proceedings become part of the excepted proceedings following the passage of the Legal Aid (Amendment) Bill 1995. The Administration's view is that while a person chooses to engage in this kind of high risk (or, for some, speculative) activities, it is not justified to fund his legal expenses with public money. Moreover, these lawsuits are usually very complex. The disproportionate amount of resources required in processing these applications is considered not justified, bearing in mind the scarcity of resources and the tight budget situation the government is facing.

(e) Election petitions arising from the Legislative Council and District Council elections

(Paragraph 6(d) of the Panel's Paper)

16. Election petitions based on human rights grounds are within the scope of legal aid. Election petitions not based on human rights grounds are excluded from the scope of legal aid since the enactment of the Legal Aid Ordinance, so as not to encourage frivolous and vexatious petitions.

17. In recent years, only a very small number of election petitions have been raised. There was one election petition each for the 1998 Legislative Council election and 1999 District Council election, and no petition for the 2000 Legislative Council election.

18. Apart from the above, the following proceedings proposed by the Panel are already either wholly or partly covered by the existing scheme:

(a) Uncontested cases such as those relating to bankruptcies and liquidations

(Paragraph 6(e) of the Panel's Paper)

19. Proceeding whereby a person or persons seeking to make another person bankrupt or to liquidate a company are not excepted proceedings. Legal aid is available to, for example, an employee who wishes to take bankruptcy or winding-up proceedings against his employer for arrears of wages. Legal aid is not available to proceedings initiated by a limited company for voluntary winding-up or for liquidation, following our long established policy that legal aid should only be provided to natural persons, but not companies. This is consistent with our objective to target public funds for the grant of legal aid to priority areas relating to individual's livelihood.

20. According to information to hand, in overseas jurisdictions such as England and Wales, Scotland, Ireland, New South Wales of Australia, Ontario of Canada and Singapore, legal aid is provided to individuals only.

21. Uncontested bankruptcy proceedings as such are not excluded from the scope of legal aid at present, though, in assessing the merits of individual cases, it may be hard to predict whether the proceedings will be contested. As for self-bankruptcy, the petitioner is not seeking to enforce a right or defend a claim. He is seeking to free himself, by as expeditious and inexpensive means as possible, from his debts and liabilities before his creditors take action to bankrupt him so that he can have a fresh start in life. The procedural requirements for obtaining the relief are such that one could effectively represent himself. We do not consider it justified to use taxpayers' money to pay for the fees and charges relating to the voluntary bankruptcy procedures (at \$8,650 to the Official Receiver's Office and \$1,045 to the Court when presenting the petition). And, according to the Official Receiver's Office, there were over 25,138 voluntary bankruptcy petitions for 2002. The merits of the proceedings aside, there will be substantial financial implications on the Government if public fund is used to cover the fees and charges involved in bankruptcy proceedings.

*(b) cases where the individual damage might not be high but the damage to many could be considerable, e.g. consumer and product liability and environmental damage cases*

(Paragraph 6(f) of the Panel's Paper)

22. These types of cases are not excepted proceedings unless they fall within the jurisdiction of the Small Claims Tribunal. Legal aid will be granted to an applicant subject to the means and merits tests as usual. Potential claimants may also seek help from the Consumer Legal Action Fund administered by the Consumer Council. The Fund aims to assist individuals or large groups of consumers with similar grievances to gain legal remedies by providing financial support and legal assistance.

*(c) Class or group litigation which involves monetary claims and which has a reasonable good chance of success, e.g. disasters, insolvency of a corporate employer and Building Management Ordinance type cases*

(Paragraph 6(g) of the Panel's Paper)

23. The types of cases mentioned, i.e. disasters, insolvency of a corporate employer and Building Management Ordinance type cases, are not excepted proceedings. Legal aid will be granted to an individual who passes the means and merits tests.

24. Class action in the form of representative proceedings already exist and is covered by legal aid. However, the present civil justice system in Hong Kong does not cater for other forms of "class action" as in the case of the United States and does not have rules designed to deal specifically with group litigation. The Judiciary's Interim Report and Consultative Paper of the Civil Justice Reform issued in December 2001 notes certain limitations of the representative proceedings as set out in Order 15 rule 12 of the Rules of the High Court for dealing with multi-party litigation. These limitations include the availability of representation orders being narrowly defined and individuals affected by a representation order still being free to re-open the proceedings on the basis that facts and matters peculiar to his case exist. The Interim Report and Consultative Paper seeks the public's views on whether a group litigation scheme should be adopted in principle, subject to further investigation of schemes implemented in other jurisdictions which may be suitable in Hong Kong.

25. We note from the Interim Report and Consultative Paper that the United Kingdom now has the Civil Procedure Rules which seek to address multi-party litigation by creation of procedures where the court makes a Group Litigation Order (“GLO”). The GLO is to provide for the case management of claims which give rise to common or related issues of fact or law. We also note that legal aid is provided for GLO-related actions to eligible individuals involved in the actions.

26. Subject to further development in respect of class litigation in the context of the Hong Kong Civil Justice Reform, we do not see, at this stage, in-principle objection to provision of legal aid to cover class action proceedings. We would however have to consider how the merits and means testing, i.e. the two cardinal criteria for determining whether legal aid should be granted, should be conducted for this kind of proceedings. The matter has to be studied further in the light of any further development of the court’s rules and procedures in dealing with class litigation.

*(d) Cases with reasonable prospects of recovering damages and the costs so that there is 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*  
(Paragraph 6(h) of the Panel’s Paper)

27. While the types of cases mentioned, i.e. claims by flat buyers against property developers and claims against insurance companies, are not excepted proceedings under the OLAS, we note that the Panel would like us to consider whether these proceedings could be covered by the SLAS.

28. We would like to start off by recapitulating on the history and nature of the SLAS. One major distinction between the SLAS and the OLAS is that the SLAS is self-financing in nature.

29. The fundamental principle that the SLAS should be self-financing has been laid down since its establishment in 1984. To enable the SLAS to remain self-financing, the scope of SLAS is confined to cases: -

- (a) which deserve priority for public funding in the sense that significant injury or injustice to the individual is involved; and
- (b) which involve monetary claims and have a reasonably good chance of recovering damages.

30. Based on the above principle, the SLAS was limited initially to cover claim for damages for personal and fatal injuries. It was subsequently extended to cover employees' compensation claims in 1992 and medical, dental as well as legal professional negligence in 1995. Its current scope covers cases of personal injury & death, medical, dental and legal professional negligence where the claim for damages is likely to exceed HK\$60,000 and claims under the Employees' Compensation Ordinance irrespective of the amount of claim. The need to limit the scope of the SLAS is to ensure that the SLAS Fund is able to build up a healthy balance collected from damages awarded to compensate aided persons whose lives were generally affected and in many cases devastated by the negligence acts of others.

31. A point worthy noting is, that we currently have a satisfactory rate of recovery of compensation or damages for successful SLAS cases is primarily attributable to the fact that most SLAS applications relate to claims for damages for personal injuries or death arising from road traffic accidents and work-related accidents which are covered by insurance as required by law. Additional safeguard against non-recovery of damages is provided through the Motor Insurers' Bureau and the Employees Compensation Assistance Fund Board respectively. Claims for legal professional negligence can also be covered by a professional indemnity scheme as required by law. As regards medical and dental negligence, it is known that majority, if not all medical practitioners takes out insurance cover with the Medical Protection Society.

32. With the above background, as a matter of principle, we do not consider it justified using contributions recovered from the existing SLAS cases to subsidize other types of cases that do not satisfy the aforesaid principle, or do not provide certainty in the prospect of recovery to ensure that the overall financial viability of the SLAS will not be jeopardized.

33. In sum, in order to maintain the financial viability of the SLAS, there should be no extension to the scope of the SLAS.

## **II. Financial eligibility limits for legal aid schemes**

(Paragraphs 7 to 9 of the Panel's Paper)

34. The Panel suggests the Administration to conduct a comprehensive review of the financial eligibility limits for legal aid applicants.



35. On this, the Panel may wish to note that the Administration has concluded the annual, biennial and the five-yearly reviews of the financial eligibility limits. The outcome of the reviews are reported in separate papers to the Panel.

36. The Administration notes that the Panel has raised in paragraph 9 of the Panel's Paper that adopting the same financial eligibility limit for both criminal and civil legal aid cases may be inappropriate and that the upper financial eligibility limit for legal aid in criminal cases should be adjusted further upward. On this, we have the following views.

37. Under Rule 15(2) of the Legal Aid in Criminal Cases Rules, if the DLA is satisfied that it is desirable in the interests of justice to do so, he may grant legal aid in criminal cases despite that the applicant's financial resources exceed the financial eligibility limit. This is to ensure that people charged with criminal offences are not prevented from pursuing his defence or criminal appeal by a lack of means.

38. In recent years, only a small number (37 out of 4,673 applications in 2002) of criminal legal aid applicants cannot pass the means test. In view of the small number, and given that for cases involving murder, treason or piracy with violence, the judge has power, under Rule 13(2), to exempt an accused person or appellant from means assessment and payment of contribution, we do not see justification for adjusting the financial limit upward particularly for criminal cases.

### **III. Discretion of DLA to waive upper limit of means test** (Paragraph 10 of the Panel's Paper)

39. Paragraph 10 of the Panel's Paper invites the Administration to consider whether the DLA should be given the discretion to waive the upper limit of means test for a number of proceedings.

40. At present, the only exception in civil cases where the DLA has a discretion under section 5AA of the Legal Aid Ordinance (Cap. 91) to waive the financial eligibility limit of means test is when human rights issues are involved, i.e. in which a breach of Hong Kong Bill of Rights Ordinance ("BORO") or an inconsistency with ICCPR as applied to Hong Kong is at issue. Such an exception is given as a matter of human rights policy consideration.

41. In considering whether the DLA's power to waive the means test should be further expanded, it is important to note that our legal aid policy is to ensure that no one with reasonable grounds for taking legal action in a Hong Kong court is prevented from doing so because of a lack of means. One should bear in mind that legal aid is funded by the public coffer which is not unlimited. Public money has to be targeted to those who cannot afford the costs of conducting litigation on a private basis and therefore need publicly funded legal aid services. Determining the means of a legal aid applicant is accordingly one of the two cardinal criteria for the grant of legal aid. Extending the power of the DLA to waive the financial eligibility limit for granting of legal aid could mean that public money will be diverted to support the legal actions of those who have the financial capacity to pursue litigation in private, from actions by persons who are more in need of legal aid services, purely on the basis of the types of legal actions they respectively are instituting. From our basic policy principle of providing legal aid to person of limited means and proper prioritization of limited resources, we do not see the need to expand DLA's power to waive the upper limit of means test in respect of proceedings not involving human right issues.

42. Against this policy premise, in relation to the types of cases referred to in paragraph 10(a) to (d) of the Panel's paper, we do not see overriding justifications for exception to be made to waive the upper financial eligibility limits of means testing for the concerned applicants. According to information to hand, we understand that means test is not exempted for all of these cases in England and Wales, Ontario of Canada or New South Wales of Australia.

43. We have nonetheless set out at Annex I relevant case statistics and remedies currently available to persons involved in the proceedings highlighted in the Panel's Paper.

#### **IV. Assessment of financial resources**

(Paragraphs 11 to 13 of the Panel's Paper)

44. The Panel suggests the Administration to review various basis in calculating a legal aid applicant's financial resources. The Administration has completed the five-yearly review of the criteria for assessing financial eligibility. The scope of the review covers methods of computing disposable income and disposable capital as well as the assessment of financial resources of third parties. The outcome of the review is reported in a separate paper to the Panel.

**V. Costs and contributions payable by legal aid clients**  
(Paragraphs 14 to 18 of the Panel's Paper)

45. Paragraphs 14 to 18 of the Panel's Paper invite the Administration to consider reviewing the contribution rates under legal aid schemes for civil cases and exempting legally aided persons in certain civil cases from making contribution.

46. It is our policy to require the aided persons in civil legal aid cases to pay a portion of their resources for the publicly-funded services they are receiving. It would not be a proper use of public money if relatively well-off persons are allowed to enjoy Government-subsidized legal aid at no cost simply because of the nature of the cases they are pursuing.

47. Against this premise, the Administration's responses to the Panel's specific suggestions regarding the contribution rates are set out below.

Contribution in cases involving human rights issues  
(Paragraph 14 of the Panel's Paper)

48. The Panel suggests that the Administration should review the maximum rate of contribution (over 60% of the person's financial resources) from a successful litigant in proceedings involving human rights issues.

49. The amount of contribution payable is determined by reference to the amount of financial resources as assessed by the LAD and the rate of contribution applicable. Different rates of contribution are specified in the Legal Aid (Assessment of Resources and Contributions) Regulations for different brackets of financial resources. For financial resources below the upper financial eligibility limit under OLAS i.e. \$169,700, the rate of contribution payable ranges from a nominal sum of \$1,000 to 25% of the financial resources as assessed. For financial resources exceeding this financial limit and where DLA's discretion to waive the limit is exercised as described in paragraph 40 above, the rate of contribution ranges from 30% to 67%. The maximum rate of contribution of 67% only applies to financial resources exceeding \$1,200,000. It should also be noted that an applicant may be asked to pay a lesser sum than the maximum amount of contribution having regard to the probable costs of the proceedings. Furthermore, if the costs of the proceedings turned out to be less than the amount of any contribution paid, the excess would be refunded to the aided person at the conclusion of the case.

50. The actual operational experience does not point to a need for adjusting the existing scale of contributions from successful applicants in cases involving human rights issues. As a matter of fact, there was only one successful application in respect of which the DLA had exercised waiver of the financial eligibility limit in the past five years (i.e. from 1998 to 2002). As regards the Panel's suggestion to exempt the aided persons in proceedings involving human rights issues from making contribution, we cannot agree to it for the reason set out in paragraph 46 above.

Contribution under the OLAS  
(Paragraph 15 of the Panel's Paper)

51. The Panel suggests that the Administration should review the maximum contribution rate of 25% under the OLAS. Members may wish to note the fact that, in 2002, only 1% of the aided persons (96 out of 12,747 aid persons) paid the maximum contribution rate of 25% of financial resources; whereas around 82% of the aided persons did not need to pay any contribution. It therefore does not appear to us there is any strong case for adjusting the maximum contribution rate of 25%.

52. Indeed, the current maximum contribution rate of 25% of an applicant's financial resources represents a big reduction from the previous maximum contribution rate of 43% following the passage of the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation in 2000. The Administration will nonetheless keep in view the proportion of aided persons paying the maximum contribution rate so as to consider whether there is a case to revise it in a later date.

Contribution under the SLAS  
(Paragraphs 16 to 18 of the Panel's Paper)

53. The contribution rate under the SLAS was reduced from 15% to 12% in July 2000. The Panel suggests the possibility of adopting a sliding scale in contribution under SLAS.

54. The Administration has taken the opportunity to review the contribution rates under SLAS in the context of the five-yearly review. Our findings are reported in a separate paper to the Panel.

55. As regards the Panel's suggestion of exempting certain persons, such as victims of industrial accidents or dependants of deceased workers, from contribution, we cannot agree to it for the reason set out in paragraph 46 above.

56. The Panel also suggests that the LAD should fully explain Part III of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations to a legal aid applicant in advance of the delivery of the Counsel's brief.

57. According to Regulation 14 and Part III of Schedule 3 of the Legal Aid (Assessment of Resources and Contributions) Regulations, if an applicant succeeds in his case, he should contribute 12% of the damages recovered to the SLAS Fund. If the case is settled before a counsel is briefed to attend trials, the contribution rate will be reduced to 6% of the damages recovered. The reasons for setting a lower contribution rate for a case settled prior to trial are:

- (a) where a claim is settled at an early stage, it would be inequitable to deduct the same percentage from damages recovered as in a case proceeding right through to trial and judgment; and
- (b) legally aided plaintiffs would be discouraged from settling cases, even where the offers are in all respects reasonable, if they remain liable for the full deduction.

58. We agree with the Panel that the attention of the applicants under the SLAS should be drawn fully to the contribution rate they are subject to vis-à-vis the damages received following successful litigations. Indeed, as a matter of standard procedure, the above Regulation is well explained to the applicants by the LAD staff when handling legal aid applications under the SLAS. Reference to this regulation is again made in the offer letter delivered to each successful SLAS applicant. By virtue of paragraph 10.2 of the LAD's Guidance Notes to the lawyers handling civil cases, the lawyer conducting the case is also required to remind the aided person of the contribution rate applicable when advising him on any settlement.

### **Legal Aid in Criminal Proceedings** (Paragraph 34 of the Panel's Paper)

59. The Panel observes that there is a haphazard division of labour between LAD and the court in the administration of legal aid

services, i.e. the granting of legal aid in civil cases is provided for under the Legal Aid Ordinance, whereas that for criminal cases is stipulated under the Legal Aid in Criminal Cases Rules.

60. The Administration notes the Panel's observation. We are not aware of any practical problem with the existing arrangement.

**Extending the power of judges to grant legal aid and exemption from means test and payment of contribution to cover criminal cases involving very lengthy sentences of imprisonment**

(Paragraph 35(b) of the Panel's Paper)

61. The Panel suggests that the power of judges to grant legal aid and exempt means test and payment of contribution should be extended to criminal cases involving very lengthy sentences of imprisonment.

62. A judge has power to grant legal aid under Rules 8(3) and 12(3) of the Legal Aid in Criminal Cases Rules, notwithstanding LAD has refused legal aid. However, the judge cannot grant legal aid if LAD has refused legal aid on means, except in respect of murder, treason or piracy with violence cases. Under Rule 13 of the Legal Aid in Criminal Cases Rules, a judge has power to grant legal aid and exemption from means test and payment of contribution in cases involving these 3 categories of offences. Until the Crimes (Amendment) Bill 1992, which replaced capital punishment with life imprisonment, these offences were punishable by death. Notwithstanding the abolition of capital punishment, the power of judges to grant legal aid and exemption from means test and payment of contribution to defendants of these types of cases is not affected and remains exercisable.

63. Since means assessment of legal aid applicants is one of the two cardinal criteria for granting legal aid, we are of the view that the exception of waiving means test should be very restrictive and should continue to be confined to the above types of offences.

**Legal aid for alternative schemes**

(Paragraphs 23 to 26 of the Panel's Paper)

64. The Administration notes that the Panel has made a few suggestions arising from the Judiciary's Interim Report and Consultative Paper on Civil Justice Reform as suggested in paragraph 23 to 26 of the Panel's Paper. We shall keep in view the final recommendations of the Working Party on Civil Justice Reform, and assess their implications on

the legal aid services. Meanwhile, our initial comments on the matters raised by the Panel are set out in paragraphs 65 to 68 below.

“Unbundled legal assistance”

(Paragraphs 23 and 24 of the Panel’s Paper)

65. The Panel suggests that the concept of “unbundled legal assistance”, i.e. with private lawyers providing advice and assistance at key points in proceedings, may be a useful scheme to help litigants to represent themselves. The Administration shall continue to keep in view further development in respect of the Civil Justice Reform as regards measures to help unrepresented litigants. Meanwhile, it should be noted that the Duty Lawyer Service is already receiving government subvention to run the Legal Advice Scheme providing free legal advice without means testing to members of the public, and the Tel-Law Scheme providing basic information on the legal aspects of everyday problems through a free telephone advice service.

Alternative dispute resolution (ADR) schemes

(Paragraphs 25 and 26 of the Panel’s Paper)

66. The Panel notes that one of the proposals arising from the Civil Justice Reform consultation exercise is to empower the DLA to make resort to ADR a condition of granting legal aid in appropriate cases. It suggests that the Administration should consider whether legal aid should be granted for mediation.

67. Once the Working Party on Civil Justice Reform has finalized the report and its recommendation regarding ADR schemes in light of public views received, the Administration shall consider the best way forward.

68. The Judiciary has separately launched a 3-year Pilot Scheme on Family Mediation. A final evaluation report on the Scheme is expected to complete in August 2003. We shall also study the findings and the final evaluation on the Pilot Scheme in considering its implication on the provision of legal aid services. We would not rule out at this stage our need to run a trial scheme in respect of legal aid cases.

**Other Issues Relating to Operation of Legal Aid Services**

69. The Administration notes that the Panel has raised other matters related to the detailed operation of legal aid services. They

include the DLA exercising his power to waive interest accrued on his first charge on property recovered; the question of payment of interest accrued on monies due to aided persons; payment of costs by the DLA on behalf of an aided defendant or respondent; appeal against decision of the DLA; fees and costs payable to counsel and solicitors by the DLA; and LAD's customer services. The DLA's response to these matters is set out at Annex II.

Administration Wing  
Chief Secretary for Administration's Office

June 2003



**Case Statistics and Remedies Currently available  
to Persons involved in the proceedings highlighted  
Paragraph 10 of the Panel Paper**

**(a) Appeals against Judgments of the Labour Tribunal by Employees;  
and Employees in Insolvency Cases**

(Paragraphs 10(a) and (c) of the Panel's Paper)

Regarding appeals against judgments of the Labour Tribunal, among the 97 applications for legal aid made in 2002, only 13 cases were refused on grounds of means.

2. For employer's insolvency cases, if any individual employee presents a winding-up or bankruptcy petition against the employer, the other employees involved in the case, irrespective of whether they are granted legal aid, may apply for ex-gratia payment from the Protection of Wages on Insolvency Fund Board and upon making of a winding up/bankruptcy order, file a proof of debt to the Official Receiver. From January to December 2002, of the 1,414 legal aid applications to institute winding-up or bankruptcy proceedings to recover arrears of wages and related employment benefits due to employers' insolvency, only 37 applicants were over on means.

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

(Paragraph 10(b) of the Panel's Paper)

3. As regards cases in relation to the Personal Data (Privacy) Ordinance, the aggrieved persons (i.e. the data subject) may lodge their complaints with the Privacy Commissioner for Personal Data. The Privacy Commissioner will investigate into the complaints and issue an enforcement notice if there is a breach of PDPO provisions. In the event of breach of enforcement notice, the Privacy Commissioner may refer the case to the Director of Public Prosecution for consideration of commencement of criminal proceedings. In 2001-02, 888 complaints were received by the Office of the Privacy Commissioner for Personal Data and 8 enforcement notices were issued.

4. As regards cases in relation to the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance and the Disability Discrimination Ordinance, the Equal Opportunities Commission may

facilitate conciliation between the parties in dispute. Where conciliation does not succeed, the Commission may assist the aggrieved persons in bringing proceedings where the case raises a question of principle and the Commission considers it in the interest of justice to do so. Members may also wish to note that in 2002, there were only two legal aid applications in relation to the Sex Discrimination Ordinance, six in relation to the Disability Discrimination Ordinance and none in relation to the Family Status Discrimination Ordinance. None of the applications was refused on means.

5. For Basic Law cases, as with the PDPO proceedings and proceedings brought under the above-mentioned anti-discrimination ordinances, the DLA is already empowered to exercise his discretion to waive the financial eligibility limit if the intended proceedings under the Basic Law involve 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 in issue.

**(c) Cases involving victims of industrial accidents**

(Paragraph 10(d) of the Panel's Paper)

6. Regarding employees compensation cases, of the 1,708 legal aid applications under OLAS in 2002, 123 [7%] were refused on means. An applicant who is found over on means under OLAS but is otherwise financially eligible under SLAS would be advised to apply under SLAS. In 2002, there were 60 SLAS applications, of which 56 were converted from OLAS. None of the SLAS applications was refused on means.

**Annex II**

**Response concerning  
Matters related to the Operation of Legal Aid Services**

**Matters Relating to the operation of the LAD**

*Interest accrued on DLA'S first charge*  
(Paragraphs 19 and 20 of the Panel's Paper)

The Panel suggests that the Administration should review the exercise of the DLA's discretion to waive the interest accrued on DLA's first charge on property recovered.

2. Under section 18A of the Legal Aid Ordinance, the DLA is entitled to a first charge on any property that is recovered or preserved for the aided person in the proceedings for which legal aid is given. However, interest only accrues on DLA's first charge where the property recovered or preserved in the proceedings is to be used as a home for the aided person or his dependents and the DLA agrees to defer enforcing the first charge e.g. by sale of the property. In that case simple interest payable by the aided person will be accrued at the rate of 10% per annum from the date on which the charge is first registered. Following the enactment of Legal Aid (Amendment) Bill in July 2000, the DLA is given the discretion to waive or reduce the interest accrued if he is satisfied that it would cause serious hardship to the aided person, or that in the circumstances it is just and equitable to do so.

3. From July 2000 to 15 April 2003, among the 117 cases where DLA has deferred enforcement of the first charge registered against property recovered or preserved, DLA has exercised discretion to waive part of the interest payable in 104 cases and waive all interest payable in 3 cases. These statistics should serve well to demonstrate that DLA has indeed exercised his discretion where justified.

*Interest accrued on monies due to aided persons*  
(Paragraph 21 of the Panel's Paper)

4. Paragraph 21 of the Panel Paper invites the Administration to consider whether the interest accrued on monies to aided persons shall be paid to the aided person. According to section 19C of the Legal Aid Ordinance, any interest on the moneys paid to the DLA on behalf of the

aided persons shall be paid to the general revenue of the Government. The arrangement was introduced in 1991 for the following reasons:

- (a) the aided person has received the benefit of subsidized litigation and the interest credited to Government is but a small return for the service provided;
- (b) the substantial disbursements often paid by the Government on behalf of the aided person during the course of litigation amount to an interest free loan for him. There is no reason why interest should have to be paid on monies held by the DLA on behalf of the aided person;
- (c) The LAD has to manage more than 30,000 accounts (the figure for 1991 was 15,000 accounts) of aided persons every year. The task of calculating and paying relatively small sums of interest would be disproportionate to their value and cannot be absorbed by the existing resources of the LAD.

5. In reviewing the provision, we would like to put the situation in its proper perspective first. The DLA releases moneys received on behalf of aided persons as much as possible and as soon as they are received. The DLA only retains an amount of moneys which is considered necessary to cover the estimated costs liable to be reimbursed by the aided persons pursuant to DLA's first charge. Once the amount of such costs has been ascertained, the balance of the moneys retained, if any, will be released to the aided persons.

6. On the basis of the statistics on 1,732 cases closed in 2002-03 involving damages and payment to aided persons, in around 90% (1,064 cases) of the cases that involve interim payments (1,224 in total), the LAD released to the aided persons 60% of the damages in around 25 days on average. The remaining damages held by the LAD were those required to cover the legal costs incurred by the LAD, pending negotiation between parties and/or taxation by court on costs, and receipt of the agreed or taxed costs from the opposite party. Upon receipt of costs from the opposite party, in 96% of the 1,732 cases (i.e. 1,660 cases), the LAD paid the balance to the aided persons within 1.5 month on average (which is around 4.5 months from the receipt of damages).

7. In order to consider whether an arrangement should be implemented to pay any interest to the aided person on the moneys paid to the DLA on behalf of the aided persons, we have to study the implications of putting in place the necessary arrangements by the LAD, the additional resources required and the cost-efficiency relating to the

implementation of the arrangements.

8. An aided person who has recovered damages has received the benefit of subsidized litigation under the legal aid scheme. And the substantial disbursements paid by the Government on behalf of the aided person during the course of the litigation amount to an interest free loan for him. Under the circumstances, it would not be unreasonable for the small amount of interests being credited to the Government.

9. On the other hand, in order to calculate interest payable and effect the corresponding interest payment to aided persons, the additional work will have to be absorbed by the LAD within its existing manpower resources. In addition, a computer system would need to be set up to capture information to facilitate calculation of interest payable. The non-recurrent and recurrent costs arising from the setting up and operation of this system are yet to be determined.

10. We have to balance the additional costs to be incurred by the Government and the benefits to be afforded to the aided person in considering whether it is worthwhile to implement the proposal to pay interest to aided persons. We have yet to see sufficient justifications for implementing the proposal under the present circumstances.

*Payment of costs by DLA on behalf of an aided defendant or respondent*  
(Paragraph 22 of the Panel's Paper)

11. Paragraph 22 of the Panel's Paper refers to an observation made by a Justice of Appeal of the Court of Appeal in the case of *Common Luck Investment Ltd v. the DLA* CACV 375/2001 that injustice may be caused to a successful plaintiff who is not in receipt of legal aid and is not able to recover costs from either the DLA or a legally aided defendant because of section 16C(1)(b)(ii) of the Legal Aid Ordinance.

12. It must be pointed out that section 16(C)(1)(b)(ii) applies only where the aided person is a defendant or respondent in the proceedings and is intended to protect a legally aided defendant as well as the legal aid fund against costs in excess of the amount of his contribution.

13. The rationale, which was accepted by both the Court of Appeal and Court of Final Appeal, is that it is up to a plaintiff to decide if he wants to commence proceedings against someone who is not good for costs because of his impecunious financial position. If he chooses to do so, there is a real possibility that he will not be able to recoup costs from

the defendant even if he is successful. There is therefore no reason why he should be put in a better position than he would have been but for the fact that the defendant is legally aided and why resort should be made to the public funds for payment of his costs.

14. The Justice of Appeal considered that injustice could arise in a situation where a plaintiff was compelled to sue to rid himself of unjustifiable claims against his right or interest. However, in the particular case mentioned above, it cannot be said that the defendant's claim was unjustifiable in the first place as the defendant was successful in his claim in both the Court of First Instance and the Court of Appeal. As all legal aid applications are merit-tested, the fact that the defendant was granted legal aid is indicative that he had reasonable grounds to defend the plaintiff's claim.

15. Secondly, the facts of this particular case are rather peculiar and the situation whereby a plaintiff is compelled to sue, even though the defendant is not good for costs, should be rare. In this case, both the plaintiff and defendant had competing claims against each other. The plaintiff in this case could have chosen to be the defendant in the proceedings had submission been made to the court on that party's behalf.

16. In conclusion the so-called injustice is more imaginary than real. It should be noted that notwithstanding the concern expressed by the Justice of Appeal, both the Court of Appeal and Court of Final Appeal upheld the provision in section 16C(1)(b)(ii).

Application for legal aid

(Paragraph 27 of the Panel's Paper)

17. Paragraph 27 of the Panel Paper asks the Administration to consider a full use of the provision of Section 9(d) of the Legal Aid Ordinance. Processing of legal aid applications is the core function of the LAD. Section 9(d) of the Legal Aid Ordinance has been extensively invoked by the DLA to obtain advice from legal practitioners and other experts including medical practitioners where such advice is required to facilitate the processing of the application. Legal advice is sought under section 9(d) in respect of:

- (a) claims arising from an assault by law enforcement agents, and judicial review proceedings against public authorities, unless there is already a decided precedent case or counsel's opinion obtained on similar issues; and

(b) a legal aid application involving complex issues of facts and law.

18. For 2002-03, there were 91 occasions where the LAD made payments to counsel for advices obtained under section 9(d) of the Legal Aid Ordinance.

Appeal against decision of DLA

(Paragraphs 29 to 31 of the Panel's Paper)

19. Paragraph 29 invites the Administration to further improve transparency in the mechanism for handling appeals against DLA's decision to refuse legal aid. The LAD had reviewed the procedure for handling legal aid appeals under section 26 of the Legal Aid Ordinance (Cap. 91) in consultation with the Legal Aid Services Council and the Judiciary back in 2000. Expanded reasons for refusing legal aid have been added to the Notice of Refusal issued to the legal aid applicants when the applicants are informed of the decision of the DLA and their rights of, as well as the procedure for, appeal. On appeal, a written Reasons for Refusal will be submitted to the Registrar and provided to the legal aid appellant before the legal aid appeal hearing.

20. In practice, the LAD will, in addition to explaining to the unsuccessful applicants about the procedures for appealing against DLA's decision, also assist those who have decided to appeal in completing and filing the Notice of Appeal with the Registrar. This information is set out in various pamphlets widely distributed by the LAD.

21. The Registrar hearing the appeal may make such directions as he deems fit, including seeking further information from the DLA, or requiring the DLA to reconsider certain issues. In so doing, the Registrar may fix a date for the next hearing, or require the appeal to be restored before a certain date, or simply adjourn it sine die (i.e. without fixing a date). The appeal would be restored by the DLA as soon as the information requested is to hand or the application has been reconsidered, as the case may be, and in any event within the deadline specified by the Registrar.

22. The LAD has in place a bring-up system to ensure that the appeals would be restored in good time to avoid prejudicing the interest of the legal aid appellants, for example, where the legal aid applicant's claim is about to be statute-barred or where a court date has been fixed for a hearing in the proceedings to which his application for legal aid relates.

23. Paragraph 30 of the Panel's Paper suggests that it may be difficult for an appellant in a criminal case to pursue the appeal if his application for legal aid has been refused. Under Rule 12(3) of the Legal Aid in Criminal Cases Rules, the court which handles the appeal may exercise the discretion to grant legal aid on its own initiative or upon application from the appellant either in person or in writing if it appears to the court that the appellant should be granted legal aid notwithstanding that the DLA has refused his legal aid application.

24. To initiate an appeal against a criminal conviction, an appellant needs only to fill in a simple form of notice of appeal and files it in court. If the appellant is in custody, the staff of the Correctional Services Department will help him fill in the Notice of Appeal and file it in court.

25. Upon receipt of a Notice of Appeal against conviction/sentence, and in those cases where the appellant is unrepresented (as in the case where legal aid is refused) or in doubtful cases, the court may as a matter of practice fix a date for mention to see the appellant so as to ascertain the situation as well as to make directions on the future course of action. At the mention hearing, the court may exercise its discretion and grant an appeal aid certificate in accordance with Rule 12(3).

*Fees and costs payable to counsel and solicitors*  
(Paragraphs 32 to 33 of the Panel's Paper)

26. Paragraphs 32 to 33 of the Panel Paper set out a situation where counsel's fees are disallowed on taxation under the Legal Aid (Scale of Fees) Regulations, and ask the Administration to review the relevant provisions with a view to improving the clarity. Regulation 4 of the Legal Aid (Scale of Fees) Regulations provides clearly that fees payable to counsel by the DLA for representing legally aided persons are subject to taxation. There are provisions requiring an assigned solicitor to inform counsel forthwith of any disallowance or reduction of counsel's fees on taxation and provisions for review of a taxation if Counsel is dissatisfied with the decision of a taxing master.

27. We do not see any ambiguity in these provisions. The revised Guidance Notes issued by the LAD have reminded assigned solicitors of their obligations under the Regulations. The guidance Notes also remind the assigned solicitors to use their best endeavours to ensure that a proper fee for the work done by Counsel on behalf of an aided person is allowed on taxation since, as solicitors having conduct of the cases, they



are better placed than the DLA to justify counsel's fees in the face of any objections or queries raised by the paying party or the Taxing Master.

28. According to the LAD, the occasions where Counsel's fees are totally disallowed because the solicitor instructing him should have done the work undertaken by Counsel should be rare. In LAD staff's experience, for item of work which should have been done by the solicitor, it is not unusual for the Taxing Master to allow the Counsel to be paid for that item and tax off the costs charged by the solicitor in respect of the same item of work or to allow the Counsel's fees to be transferred, in whole or in part, to the common fund costs which may then fall to be borne either by the aided person concerned or the legal aid fund.

### **Legal Aid in Criminal Proceedings**

(Paragraph 35 of the Panel's Paper)

29. Paragraph 35 of the Panel Paper sets out several issues in criminal legal aid for the Administration to consider.

#### *Instructing leading Counsel to represent aided persons*

(Paragraph 35(a) of the Panel's Paper)

30. The Panel suggests that the LAD should instruct leading counsel to represent aided persons in criminal cases. The LAD usually assigns counsel with over 10 years experience to represent aided persons in appeals and trials at the High Court. The LAD usually only considers and assigns senior counsel to represent aided persons in appeal cases and occasionally in trials where the cases are of exceptional difficulty or complexity. Whether counsel appearing for the prosecution is a senior counsel is one of the factors but not the decisive factor in LAD's consideration whether senior counsel should be assigned to act for a legally aided person in any cases.

#### *Agreement of fees in advance*

(Paragraph 35(c) of the Panel's Paper)

31. The Panel suggests that it is not appropriate for the Judiciary to have a role in assessment of fees payable to assigned lawyers under Rule 21(2) of the Legal Aid in Criminal Cases Rules if a case is certified by a judge at the end of a trial or hearing of an appeal to be one of exceptional

length or complexity. It has to be pointed out that all fees payable to counsel and solicitors are assessed by the LAD and not by the Judiciary in accordance with the fees or rates prescribed by Rule 21 of the Legal Aid in Criminal Cases Rules (Cap. 221) at the conclusion of a trial or appeal hearing. Where a judge certifies upon application made by an assigned lawyer upon conclusion of a trial or appeal, that in his opinion a trial or appeal conducted or heard before him was of exceptional length or exceptional complexity or both, the fees payable to the assigned lawyer will be increased proportionately as determined by the LAD in accordance with the provisions in Rules 21(2), (3) and 5.

32. The present rules provide fees to be determined by the DLA having regard to the work actually and reasonably done. It is therefore not possible or practicable for the fees to be agreed before the work is actually done and its complexity properly assessed. It is also not possible to know before a trial is conducted or an appeal heard whether the judge would certify the case to be of exceptional length or complexity. In the past, the LAD has encountered few disputes on its fees assessment; and cases of exceptional length or complexity as certified by the judge account for approximately 3% of the total criminal legal aid cases per annum. If fees are to be agreed with individual lawyers beforehand, not only will more administrative work be involved but the assignment exercise would be relegated to a fee bargaining exercise or a shopping spree and seen to be putting the interests of lawyers before the aided persons'. Besides, there is no telling whether a lawyer would not seek a higher fee afterwards on grounds of unforeseen difficulty or unpredicted events encountered in the course of the trial or appeal. The LAD therefore sees no merit at all in changing the present rules to allow fees to be agreed with individual assigned lawyers in advance.

### **Other Issues**

33. Paragraph 36 of the Panel paper sets out some suggestions by various organization on the operation of legal aid service. Our responses towards the suggestions are as follows:

(a) More transparent and user-friendly legal aid services  
(Paragraph 36(a) of the Panel's Paper)

34. The LAD attaches importance to enhancing the transparency of the legal aid procedures and has published a number of pamphlets and newsletters providing information on eligibility of legal aid services, application procedures, costs and contributions, nomination and change

of a lawyer, appeal system, customer services standards incorporating LAD's performance pledges on processing time for applications and payments, Q & As relating to legal aid services. The information is also available on LAD's hotline and website.

(b) Effectiveness of existing mechanism to monitor services provided by LAD's in-house lawyers and private legal practitioners  
(Paragraph 36(b) of the Panel's Paper)

35. The LAD set up an inter-departmental working group in 1998 to review the monitoring of assigned out cases and put forward a number of recommendations to tighten monitoring of assigned out cases. Having consulted the Legal Aid Services Council, the LAD has implemented all the short-term and some of the medium-term measures. The LAD will continue to study further measures to enhance monitoring of assigned-out cases. The LAD has put in place a performance evaluation system whereby reports of unsatisfactory performance or conduct of assigned lawyers are referred to the LAD's Departmental Monitoring Committee for advice on appropriate action to be taken including placing such lawyers' names on the Record of Unsatisfactory Performance or removing them from the Legal Aid Panels. Chaired by the DLA, the Committee comprises relevant Section Heads and a representative from the Corruption Prevention Department of the Independent Commission Against Corruption.

36. The LAD has also in place a mechanism to collect feedback from legal aid applicants and aided persons at various service stages. The mechanism of collecting clients' feedback and the questionnaires has recently been reviewed and revised with the assistance of Government's Efficiency Unit and a management consultant.

37. The new mechanism and questionnaires will provide the LAD with a more comprehensive picture of the opinions of our applicants and aided persons on the standard and quality of the services rendered by the LAD and the assigned solicitors.

(c) Client-based legal aid services  
(Paragraph 36(c) of the Panel's Paper)

38. With a view to making LAD's services more customer-oriented, the LAD set up a Customer Service Unit in each section in March 2000 and appointed Customer Service Managers and Officers to strengthen LAD's customer service. Regular meetings were held between the

frontline staff and the management to identify areas for improvement. Training has been provided to all the frontline staff through workshops, talks, seminars to enhance their skills in handling customers. In 2002, a customer service handbook was prepared for the guidance of LAD's staff and a pamphlet setting out LAD's customer services standards was issued to all users of the legal aid services to enhance their understanding of LAD's operation. Case study sessions on complaints were conducted regularly among customer service managers and officers.

39. Since 1997, the LAD has introduced a One-Stop Service whereby applicant is given an appointment to attend LAD's office for the means and the merits tests to be conducted at the same time. The LAD has an established procedure to ensure that legal aid applications that require urgent action such as cases with imminent bar date and cases involving injunction will be processed immediately upon receipt of application.

40. Subject to the agreement of the legal aid applicant and the undertaking from those attending the interview not to breach confidentiality, family members or social workers are allowed to accompany the applicants to meet with LAD's staff provided they do not interfere with the proper discharge of functions of the LAD's staff in obtaining statement and information from the applicant.

41. The LAD has established effective network with the Duty Lawyer Service, the Bar Association's Free Legal Service, and other NGOs to ensure that clients who are in need of help will receive proper and relevant assistance.

(d) Putonghua training for LAD staff  
(Paragraph 36(d) of the Panel's Paper)

42. As at the end of April 2003, of the 460 frontline staff in the LAD, 244 were provided with classroom training on Putonghua, 178 of them were provided with training material in the form of job-related self-learning package. As from February 2003, a specially designed training package on Putonghua that combines self-learning booklets, cassette tapes with lunch time tutorial sessions were provided to all frontline staff and in particular to those handling legal aid applications to enhance their communication with Putonghua speaking applicants. 38 frontline staff have been attending the lunch time Putonghua Tutorial sessions since March 2003.