

立法會
Legislative Council

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LegCo Panel on Administration of Justice and Legal Services

Provision of Legal Aid Services

List of Issues for Review

Existing legal aid regime - time for review

1. 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 The Legal Aid Ordinance (LAO) was originally enacted in 1967 "to make provision for the granting of legal aid in civil actions to persons of limited means."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 schemes;
- (g) Application for legal aid;
- (h) Appeal from decision of DLA;
- (i) Fees and costs payable to counsel and solicitors;
- (j) Legal aid in criminal proceedings; and
- (k) Other issues.

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;
- (e) uncontested cases such as those relating to bankruptcies and liquidations;

- (f) 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;
- (g) class or group litigation which involves monetary claims and which has a reasonably good chance of success e.g. disasters, insolvency of a corporate employer and Building Management Ordinance type cases, and
- (h) 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.

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 grossly out of step with present day circumstances.

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.

- (d) Cases involving victims of industrial accidents

It may be justified to grant legal aid without means testing for cases involving victims of industrial accidents or family members of deceased workers in their pursuit for employees' compensation.

Assessment of financial resources

11. Financial resources are taken as an applicant's monthly disposable income multiplied by 12, plus his disposable capital. *The Administration should* review the basis for calculation of financial resources, in particular the following -

- (a) any loss or reduction of future income should be taken into account in calculating the disposable income of an applicant. It is unreasonable to assume that the applicant will have a fixed income over the next 12 months;
- (b) borrowed money and cash in bank should not be taken into account in calculating disposable income and disposable capital; and
- (c) insurance monies for accidents received by an applicant should not be regarded as the capital in assessing his financial resources.

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. *The Administration should* consider whether certain categories of aided persons should be exempted from making contributions under SLAS, e.g. victims of industrial accidents or dependants of deceased workers.

18. 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

19. 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.

20. *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

21. 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

22. 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"

23. 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".

24. 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

25. 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.

26. 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.

Application for legal aid

27. Section 9(d) of LAO empowers 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. *The Administration should* consider whether DLA should make full use of the provision, not just for difficult cases and cases where independent legal advice are required.

28. *The Administration should* review whether LAD should take a more robust line with some legally aided persons to prevent the system from being abused.

Appeal from decision of DLA

29. 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.

30. 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.

31. *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

32. 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.

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

Legal aid in criminal proceedings

34. There has been a haphazard division of labour between LAD and the court in administration of legal aid services. At present, the granting of legal aid in civil cases is under LAO, whereas that for criminal cases is under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance (Cap. 221). *The Administration should* review the present arrangement.

35. ***The Administration should*** consider the following suggestions -

- (a) LAD should instruct leading counsel to represent aided persons in criminal cases, as the Department of Justice (DOJ) representing the opposite party often assigns Senior Counsel or briefs Senior Counsel at the Bar in such cases;
- (b) under Rule 13 of the Legal Aid in Criminal Cases Rules, where an applicant is involved in murder, treason or piracy with violence and is refused legal aid 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; and
- (c) 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 is of exceptional length or complexity. It is not appropriate for the Judiciary to have a role in assessment of fees. The existing system has created many problems and a fundamental change to the system is necessary. It is proposed that fees should be agreed in advance. This approach is adopted by bodies dispensing public funds such as the DOJ.

Other issues

36. ***The Administration should*** consider the following suggestions made by various organisations received by the Panel -

- (a) 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;
- (b) 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;

- (c) 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; measures 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; and
- (d) LAD staff should receive training on Putonghua in order to better communicate with Mainland clients.

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