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20 October 2003

Mrs Percy Ma
Clerk to the Panel on Administration
of Justice and Legal Services
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mrs Ma,

LegCo Panel on Administration of Justice and Legal Services ("the AJLS Panel")

Provision of Legal Aid Services :

The Administration's Response to Issues Raised by the AJLS Panel at its meetings on 23 June and 29 July 2003

Thank you for your letter of 10 October, requesting the Administration to respond to the issues raised by Members at the AJLS Panel meetings on 23 June and 29 July 2003. Our response is as follows.

Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants

To clarify the policy intention and give an undertaking to the effect that the purpose of conducting the reviews is not to reduce the number of eligible legal aid applicants (para. 35 of the minutes of meeting held on 23 June 2003)

Our legal aid policy is to provide publicly funded legal aid to those who cannot afford the costs of pursuing litigation on a private basis. The financial eligibility limit for legal aid services should be pitched at such a level, above which a person should be able to afford the costs of conducting litigation on a private basis without suffering undue hardship.

Accordingly, the policy intention of revising the financial eligibility limits is to ensure that the real value of the limits is maintained. It is against this background that the Administration has in place the existing mechanism to review the financial eligibility limits annually to take account of inflation, and biennially to take account also of changes in litigation costs.

The rationale behind the annual review is to ensure that, in inflationary time, the same sections of the community as have hitherto come within the scope of legal aid would continue to be so eligible. Following the same logic, in deflationary time, the sections of the community who have de-facto been caught within the net of the legal aid for no reason other than the reduction in prices should through the downward adjustment to the financial eligibility limits be kept outside the target group of publicly assisted legal aid service.

The Administration does not have, as a matter of policy, a target coverage of legal aid services, in terms of percentage of eligible households. Neither is it our intention to reduce the coverage of legal aid through a downward adjustment to the financial eligibility limits in accordance with CPI movements.

Scope of Supplementary Legal Aid Scheme ("SLAS")

To provide more detailed reasons to substantiate its concern that using the contributions paid to the SLAS Fund to subsidize other types of cases would affect the financial viability of SLAS (para. 20 of the minutes of meeting held on 29 July)

In considering any expansion to the scope of SLAS, we would like to reiterate that the fundamental principle of SLAS is that it should be self-financing. To enable the SLAS to remain self-financing, the scope of SLAS is confined to cases which :-

(a) deserve priority for public funding in the sense that significant injury or injustice to the individual is involved; and

(b) involve monetary claims and have a reasonably good chance of recovering damages.

As the Director of Legal Aid ("DLA") has explained at the Panel meeting on 29 July, the current 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. The contributions to the SLAS Fund have mainly come from aided persons in these personal injury cases. They are used to assist other applicants in similar cases, and other proceedings, including those involving professional negligence, under the same Scheme.

The Bar Association has proposed several types of proceedings for inclusion in the SLAS. In this regard, the LAD has conducted a quick search among the cases closed during the period from 2000/01 to 2002/03 to identify those proceedings that fall within the Bar Association's proposal. As the LAD's record system is not specifically designed to capture these types of proceedings, the findings may not be exhaustive. Nonetheless, on the basis of the available information, the LAD managed to identify 28 cases that involved money claims against property developers, insurance companies, employers (not listed companies) and banking institution. A net loss of about $14.9M was recorded in these cases. In particular, the 3 claims against property developers had incurred a net loss of about $2.9M, and the only one claim against a bank that we could identify had incurred a net loss of about $11.7M whilst the case was on legal aid (the overall legal cost of the case was more than $22M). The LAD is concerned that, should these figures be representing, including the proposed proceedings into the SLAS may jeopardize the financial well being of the SLAS fund.

Besides, on possible room for expansion for the SLAS, while the financial capability of the prospective defendants to pay up the claims in the event of successful litigation against them is a relevant factor, more importantly, we need to consider if the nature of the injury or injustice is such that it deserves priority for assistance under the Scheme. It is not justifiable to use contributions from aided persons whose lives are generally affected and in many cases devastated by the negligent acts of others, to subsidize other types of cases that do not satisfy, or just partially satisfy, the aforesaid two guiding principles. In addition, apart from the personal injury cases which generally have high success rate and where awards are generally high, the LAD is not aware of any other types of cases which, if included in the SLAS, would generate sufficient income to subsidize the other litigants assisted under the Scheme and to ensure that the Scheme will remain self-financing.

Against the above considerations, the Administration has yet to identify other types of proceedings which satisfy both of the two guiding principles mentioned above for inclusion in the scope of SLAS without affecting the financial viability of the Scheme.

Discretion of the DLA to waive the upper limit of means test

To provide information on past criminal cases where DLA had granted legal aid to the applicants whose financial resources exceeded the upper financial eligibility limit (para. 24 of the minutes of meeting held on 29 July)

Under Rule 15(2) of the Legal Aid in Criminal Cases Rules ("LACCR"), the DLA may, if he is satisfied that it is desirable in the interests of justice to do so, grant legal aid to an applicant notwithstanding that the applicant's financial resources exceed the financial eligibility limit. According to the LAD's record, in 2002, there were 57 applications for legal aid in criminal cases which failed the means test but passed the merits test. The DLA, having assessed "interests of justice" against the Widgery Criteria (see Appendix), has exercised his discretion under Rule 15(2) in 34 cases, and waived the upper financial eligibility limit of legal aid applicants.

To explain whether DLA's refusal to grant legal aid on grounds of means to a person charged with a serious criminal offence and who was unable to meet the costs of litigation would contravene the HKBOR (para. 25 of the minutes of meeting held on 29 July)

As mentioned earlier, in exercising his discretion on whether to waive the financial eligibility limit of a legal aid applicant under Rule 15(2) of the LACCR, the DLA would assess "interests of justice" against the Widgery Criteria, which has a long history in the English practice.

It has long been recognized by the Court that on full consideration of Article 11 of the HKBOR, there is no absolute right to free legal assistance in criminal proceedings (*R v Fu Yan* Criminal appeal No. 490 of 1991). This view was confirmed by Fuad V-P in a later judgment in *R v Mirchandani* (Criminal Appeal No. 350 of 1990). As observed by Fuad V-P, two conditions must be satisfied – "the interests of justice" must require that legal aid be provided but only if the person concerned "does not have sufficient means to pay for it." The judge further commented that since the cost of providing legal aid and assistance to those who cannot afford it is necessarily a charge on the public purse, there must surely be inbuilt mechanisms to regulate and limit the cost. In his judgment he found nothing in the law in force relating to legal aid in criminal cases which violated the Bill of Rights.

In view of the fact that there is an in-built mechanism to enable the DLA to exercise his discretion under Rule 15(2) where it is in the "interests of justice" to do so, and given the guidance provided by the Court, we consider that the current regime does not contravene the relevant provisions of the HKBOR.

Interest accrued on the DLA's first charge

To consider reducing the interest rate of 10% per annum which accrues on DLA's first charge on property recovered as prescribed under section 18A(3B)(b) of the Legal Aid Ordinance (para. 30 of the minutes of the Panel meeting held on 29 July)

As Members may recall, following the enactment of the Legal Aid (Amendment) Bill 1999 in July 2000, the DLA is given the discretion to waive or reduce the interest accrued on DLA's first charge on property recovered, 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.

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

Notwithstanding the DLA's discretionary power to waive all or part of the interest payable by the aided person, upon the Panel's request, we have reviewed the level of the interest rate as specified in section 18A(3B)(b). We consider that it would be more appropriate to adopt an interest rate which is linked to movements in the market, rather than a fixed rate at 10% per annum as specified in the law. In this connection, we note that the current average best lending rate of the three note-issuing banks, which is a broad commercial rate linked to movements in market, is 5% per annum. Since the publicly-funded legal aid services are provided to those people who cannot afford to take legal action on their own because of a lack of means, following internal consultation, the Administration accepts that there is a case to adopt, for the purpose of section 18A(3B)(b), an interest rate lower than the commercial rate (i.e. the best lending rate), one under which, on the other hand, the Government will not incur a loss.

We accordingly propose to adopt the Government's no-gain-no-loss interest rate, which is currently 2.826% per annum (set at 2.174% below the average best lending rate at present), as the rate for the interest accruing on DLA's first charge under section 18A(3B)(b) of the Legal Aid Ordinance.

Subject to Members' view, we would consider prescribing under section 28 of the Legal Aid Ordinance the no-gain-no-loss interest rate by means of subsidiary legislation.

Legal Aid Fees in Criminal Cases

To explain the difference between the Department of Justice ("DoJ") and the LAD in relation to the procedure and authority for increasing the fees payable to counsel/solicitors engaged for litigation work in criminal cases (para. 36 of the minutes of meeting held on 29 July)

The differences between the DoJ and the LAD in relation to the procedure and authority for increasing the fees payable to counsel/solicitors engaged for litigation work in criminal cases are set out as follows:

(a) the briefs of the DoJ are "marked brief", i.e. fees are marked before the work is done.

    For legal aid cases, the LAD could only assess the fees "having regard to the work actually and reasonably done" as required by Rule 21(1) of the Legal Aid in Criminal Cases Rules in accordance with the scale of fees prescribed therein. The LAD considers that if fees are to be agreed with individual lawyers beforehand for all legal aid cases, not only will it involve more administrative work, the assignment exercise would be relegated to a fee bargaining exercise 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 difficulties or unpredicted events encountered in the course of the trial or appeal. The LAD therefore will continue to adhere to the current approach of agreeing with individual assigned lawyers the fees level after the conclusion of the cases.

(b) The DoJ uses broadly similar rates as those prescribed in the above rules for their standard briefing out work in accordance with the complexity and length of each case. The DoJ may pay an additional fee called "reading in refresher" calculated at daily refresher fee if the pre-trial preparation work required as assessed by counsel is substantially over and above that required for normal cases.

On the other hand, the LAD could increase the brief fee and refresher fee payable to assigned lawyer beyond the maximum rates if assigned solicitor or counsel obtains from the Court a certificate of exceptional complexity/length. In the past, the LAD has encountered few disputes on its fees assessment based on work actually and reasonably done. The LAD has also experienced little difficulty in engaging competent and experienced lawyers in undertaking criminal legal aid work under the present system.

(Note: A brief fee covers pre-trial preparation and the appearance in court on the first day. The existing refresher rate is normally equivalent to 1/2 of the brief fee.)

(c) For non-standard briefing out work involving more complex and lengthy cases, the DoJ adopts a "tender" system whereby quotations (including quotation for preparation work) are sought from practitioners and critically examined by a Selection Board.

For legal aid cases of exceptional complexity and/or length, assigned counsel or solicitor may apply to a judge for a certificate of exceptional complexity and/or length which, if obtained, would provide authority to the LAD to increase the brief fee and refresher fee beyond the maximum rates permitted under the above-mentioned rules.

The LAD cannot adopt a tender system partly because the fees have to be assessed on "work actually and reasonably done" basis as explained in (a) above, and partly because of the time constraint. The LAD has no control over when a legal aid applicant may come forward for assistance. He may lodge his application for legal aid shortly before hearing and the urgency simply precludes the possibility of selecting counsel through a tender process. Where senior counsel are assigned nonetheless, their fees are subject to negotiation and are paid at non-standard rates.

2003 Annual Review of Financial Eligibility Limits of Legal Aid Applicants to Take Account of Inflation

Apart from responding to the above issues, we would also like to report on the Administration's findings following the 2003 annual review of the financial limits of legal aid applicants to take account of inflation during the reference period.

As Members have noted from our paper on "Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants" of June 2003, we have proposed that the financial eligibility limits for the Ordinary Legal Aid Scheme ("OLAS") and the SLAS should be revised from $169,700 to $163,080, and from $471,600 to $453,200 respectively, to take into account the cumulative decreases in CPI(C) of 3.9% during the two-year period July 2000 to July 2002.

In accordance with the review timetable, we have recently completed the 2003 annual review of the financial eligibility limits. The change in CPI(C) for the period July 2002 to July 2003 is –4.5%. In light of this significant decrease in consumer prices, there is a case to further adjust the limits downward to maintain the real value of the limits. We therefore propose that the financial limits for the OLAS and SLAS should be revised from $169,700 to ***$155,800***, and from $471,600 to ***$432,900*** respectively, to take into account the cumulative reduction in consumer prices of –8.2% recorded during July 2000 to July 2003.

Yours sincerely,

(Chan Yum-min, James)
for Director of Administration

cc Director of Legal Aid

Appendix

The Widgery Criteria

(a) whether the charge is a grave one, in the sense that the accused is in real jeopardy of losing his liberty or livelihood, or suffering serious damage to his reputation; or

(b) whether the charges raise a substantial question of law; or

(c) whether the accused is unable to follow the proceedings and state his own case, because of mental illness or other mental or physical disability; or

(d) whether the nature of the defence involves the tracing and interviewing of witnesses, or expert cross-examination of a witness for the prosecution; or

(e) whether legal representation is desirable in the interests of someone other than the accused, for example, in the case of sexual offences against young children, when it is not desirable that the accused should cross-examine the witness in person.