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Panel on Administration of Justice and Legal Services

**Background paper prepared by the Legislative Council Secretariat
for the meeting on 23 January 2006**

Provision of legal aid services

Purpose

This paper summarises the past discussions by Members on the provision of legal aid services.

The legal aid regime

Government's policy objective and international obligations

2. The Government's policy objective on legal aid is to ensure that no one with reasonable grounds for taking legal action in the Hong Kong courts is prevented from doing so because of a lack of means.

3. As far as the Government's international obligations in regard to legal aid services is concerned, 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. The Legal Aid Ordinance (LAO), enacted in 1967, sets out the legal framework for the administration of legal aid. Legal aid is provided by the Legal Aid Department under the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS). Legal aid will be granted to applicants who satisfy the means test and the merits test.

Civil cases

5. To qualify for legal aid for civil proceedings under OLAS, an applicant's

financial resources must not exceed \$155,800. An aided person may be required to make a contribution towards the cost of legal representation if, on a determination of his financial resources, he should be able to do so. The Director of Legal Aid (DLA) may waive the limit in meritorious cases involving a possible breach of the Hong Kong Bills of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights.

6. SLAS is a self-financing scheme introduced in 1984. It is available to those whose financial resources exceed \$155,800 but do not exceed \$432,900. The costs of the scheme are met from the Supplementary Legal Aid Fund, which is financed by applicant's contributions and damages or compensation recovered. The scheme covers cases, including personal injury or death, medical, dental or legal professional negligence, where the claim is likely to exceed \$60,000. It also covers claims under the Employees' Compensation Ordinance irrespective of the amount of claim.

Criminal cases

7. To qualify for legal aid in criminal cases, an applicant's financial resources should not exceed \$155,800. An applicant charged with murder, treason or piracy with violence may apply to a judge for exemption of means test and of payment of contribution. DLA has the discretion to grant legal aid in criminal cases to an applicant whose financial resources exceed \$155,800 if he is satisfied that it is desirable in the interests of justice to do so subject to payment of a contribution, if required. In determining whether it is in the interests of justice, the Widgery Criteria apply (**Appendix I**).

Issues identified by the Panel for review

8. In October 2001, the Panel on Administration of Justice and Legal Services set up a Working Group to review the current legislative framework of legal aid services. In the course of its deliberation, the Working Group received views from deputations including the legal professional bodies and social services sectors. Having considered the report of the Working Group and taken into account further views from the deputations, the Panel requested the Administration to 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 aid services for those in need, and in conducting the review, address specific issues raised by members in the following areas –

- (a) scope of legal aid;
- (b) financial eligibility limits for legal aid schemes;
- (c) discretion of 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.

The specific issues raised by members are in the first column of Appendix II. They were sent to the Administration on 1 August 2002.

Deliberations of the Panel

9. Since June 2003, the Panel held a number of meetings to discuss the relevant issues with the Administration. The Panel also received views from the Legal Aid Services Council and the two legal professional bodies. The Administration's response to the issues identified by the Panel for review, comments made by the Panel, the legal professional bodies and LASC on the Administration's response, as well as further response of the Administration, is summarised in **Appendix II**. Some of the major issues discussed and related developments are highlighted below.

Scope of legal aid

10. On the Panel's suggestion that the scope of legal aid should be extended to cover a number of proceedings, the Administration explained that it had yet to find justifications to do so.

11. The Administration's view was that the scope of the legal aid services was already very wide and went beyond international obligations. Compared with overseas experiences, Hong Kong was the exception, rather than the rule, in not having a cap on legal aid spending. As legal aid was funded by the public coffer which was not unlimited, and in light of its tight fiscal position as a result of the general economic downturn, it was necessary to prioritise legal actions for grant of assistance. In the longer term, the Administration might have to revisit the question of imposing a financial cap on legal aid spending.

Scope of SLAS

12. On the Panel's suggestion to enlarge the scope of SLAS, the Administration pointed out that the fundamental principle of SLAS was that it should be self-financing. To enable SLAS to remain self-financing, the scope of SLAS was confined to cases –

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

13. The Administration did not consider it justified using contributions recovered from SLAS cases to subsidise other types of cases that did not justify the aforesaid principle. The Administration also pointed out that the current satisfactory rate of recovery of compensation or damages for successful SLAS cases was primarily attributable to the fact that most SLAS applications related to claims for damages for personal injuries or death arising from road traffic accidents and work-related accidents were covered by insurance as required by law. Claims for legal professional negligence could also be covered by a professional indemnity scheme as required by law. As regards medical and dental negligence, the majority of medical practitioners took out insurance cover with the Medical Protection Society. In order to maintain the financial viability of SLAS, the Administration did not consider it justified to extend the scope of SLAS to other types of cases.

14. Members are invited to note that one of the recommendations in the Consultation Paper published by the Conditional Fees Sub-committee of the Law Reform Commission on 14 September 2005 is that “[given] the success of SLAS in widening access to justice by using event-triggered fees on a self-financing basis, consideration should be given to expanding SLAS on a gradual incremental basis, by raising the financial eligibility limits and by increasing the types of cases which can be taken up by SLAS”.

Financial eligibility limits for legal aid services

15. The Administration advised the Panel that it had put in place a mechanism to review the financial eligibility limits for legal aid services. It comprised three levels of reviews –

- (a) an annual review to take account of inflation;
- (b) a biennial review to reflect other relevant factors, including the changes in litigation costs; and

- (c) a review every five years of the criteria used to assess financial eligibility of legal aid applicants.

Annual and biennial reviews of financial eligibility limits for legal aid applicants

16. The Administration reported the findings of its annual (2002, 2003 and 2004) and biennial (2002 and 2004) reviews on the financial eligibility limits for legal aid applicants to the Panel.

17. In light of the findings of the 2002 and 2003 annual reviews, the financial eligibility limits for OLAS and SLAS were revised from \$169,700 to \$155,800; and from \$471,600 to \$432,900 respectively in July 2004. As there was only a minor increase of 0.4% in CPI(C) in the 2004 annual review during the reference period, the Administration proposed to withhold an adjustment to the financial eligibility limits of the two legal aid schemes. The Administration will brief the Panel on the outcome of the 2005 annual review at its meeting on 23 January 2006.

18. As regards the biennial review on litigation costs conducted in 2002 and 2004 respectively, the Administration considered that based on the findings there was little basis to propose any change to the eligibility limits because of the inconclusive data to reflect any substantive change in litigation costs during the reference period.

19. The Panel had received suggestions that the financial eligibility limit for SLAS should be raised. The Administration explained that the financial eligibility limits of legal aid applicants had been reviewed in 2002, 2003 and 2004 to take account of inflation and litigation costs during the reference period. The financial eligibility limits for legal aid scheme should be set to reflect the individual's affordability in taking up litigation on his own financial resources. As the legal professional bodies could not provide information on the actual fees/costs charged by the profession, and there had only been a minor change to the median litigation cost which remained within the current limit for SLAS, the Administration failed to see any justification for an increase in the financial eligibility limit for SLAS. However, the Administration was prepared to re-examine the financial limits, as and when it received concrete data from the two legal professional bodies that could support changes in litigation costs.

Five-yearly review of the criteria for assessing financial eligibility of legal aid applicants

20. At present, LAD adopts a "financial capacity" approach in assessing the means of legal aid applicants. Under this approach, an applicant's financial capacity is determined by reference to the aggregate of his yearly disposable income and disposable capital. Generally speaking, an applicant's disposable income is his gross income minus his standard personal allowances (the level of

which is currently pegged to the 35-percentile household expenditure), rent or mortgage payments and salaries tax payment. An applicant's disposable capital is defined as the sum of his credit balance, the market value of non-money resources (e.g shares) and the value of business or share in a company. The values of any interest in the only or main dwelling in which the applicant resides is however, disregarded in computing the amount of his disposable capital.

21. The Administration completed the five-yearly review of the criteria for assessing financial eligibility of legal aid applicants in May 2003. In conducting the review, the Administration had revisited the rationale for the existing approach for assessing financial capacity and compared its approach with practices of some overseas legal aid regimes. The Administration had also borne in mind the need to carefully assess the financial implications of any proposed changes to the overall approach, to establish the priority, and the affordability of possible adjustments in light of the extreme financial stringency the Administration was facing. It stressed that its policy intention was not to review the overall approach in such a way as to make legal aid commonly available to even the better-off litigants in Hong Kong.

22. The scope of the review was broadly categorised as follows –

- (a) approach for assessing financial capacity;
- (b) method of computing disposable income and the deductibles;
- (c) method of computing disposable capital and the deductibles;
- (d) resources of a spouse in means assessment;
- (e) resources of an applicant who is an infant in means assessment; and
- (f) applications in representative or fiduciary capacity.

23. Arising from the review, the Administration has put forward a number of proposals to improve the criteria for assessing the financial eligibility of legal aid applicants. The Administration intends to introduce legislative amendments to implement the proposals upon the commencement of the 2005-06 legislative session. The proposed improvement measures are set out below –

- (a) in calculating a legal aid applicant's income, the loss or reduction of future income, subject to satisfactory proof to DLA, will be taken into account;
- (b) in calculating a legal aid applicant's disposable income, the following items should be included as deductible –

- (i) provision for care of all dependants (other than just dependant children) during the time that the legal aid applicant is at work if considered reasonable, provided that they are living with the applicant, and are unable to take care of themselves by reasons of mental or physical disabilities or infirmity;
 - (ii) extension of the above deductible to also self-employed applicants; and
 - (iii) maintenance payment for ex-spouse and children, either ordered by the court and actually paid, or in case of voluntary payment, the amount actually paid which is considered reasonable and which should not exceed the statutory allowances as if the ex-spouse and children were the applicant's dependants;
- (c) in assessing disposable capital of an applicant to pursue an accident-related personal injury claim, DLA should be able to disregard an amount of the insurance monies received by the applicant in respect of the injuries to which the claim relates, to cover such future expenses on treatment, equipment and care in the following three years, as considered by DLA to be reasonable;
- (d) the contribution rate for the SLAS should be reduced from the present 12% to 10%; and
- (e) the interest rate to be accrued and payable by the aided person if DLA agrees to defer enforcing the first charge on property recovered should be one that have regard to the movements in the market, instead of a fixed rate as at present. The rate will on one hand be lower than the commercial best lending rate and on the other hand, not incur a loss to the Government.

24. The Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005 and the Legal Aid (Charge on Property) (Rate of Interest) Regulation, which seek to give effect to the above proposals, were gazetted on 16 December 2005. The House Committee decided at its meeting on 6 January 2006 that it was not necessary to set up a subcommittee to study the Regulations. The two Regulations will come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

Legal aid for mediation

25. One of the issues identified by the Panel was that the Administration should consider whether LAO should be amended to the effect that legal aid could be granted for mediation.

26. The Final Report on Civil Justice Reform issued in March 2004 recommended, inter alia, that “[the] Legal Aid Department should have power in suitable case, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of the scheme, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed.”

27. In February 2005, the Administration briefed the Panel on its decision to launch a Pilot Scheme on Mediation of Legally Aided Matrimonial Cases, in light of the recommendation in the Final Report on Civil Justice Reform. The Panel noted that the Pilot Scheme, to be launched on 15 March 2005, would last for 12 months with a view to assessing the cost-effectiveness and the implications of extending legal aid to mediation in matrimonial cases. The Administration aimed at completing the evaluation of about 120 cases covered under the Pilot Scheme by the first quarter of 2007.

The Panel’s views

28. Members considered that a fundamental review of the legal aid system was necessary in order to improve access to legal aid for those in deserving cases. The existing financial eligibility limits under the legal aid schemes were unrealistically set and failed to adequately safeguard the public’s right to access to justice, as many people with a meritorious case had been refused legal aid on means and were unable to take legal action on a private basis.

29. Some members pointed out that the ICCPR prescribed, among other things, that no one should be deprived of a fair trial because of a lack of means. The Hong Kong Bill of Rights Ordinance was enacted to give effect in local law to the provisions of ICCPR as applied to Hong Kong. Moreover, Article 39 of the Basic Law provided that the relevant provisions of international covenants and conventions on human rights as applied to Hong Kong should remain in force. While a financial eligibility limit should be set for legal services, the means test should not be administered by a rigid application of the financial limit, and the setting of the limit should have regard to the policy objective that “no one with reasonable grounds for taking legal action is prevented from doing so because of a lack of means”, and international obligations under human rights covenant.

30. Some members remained of the view that there was a strong case for expanding the scope of SLAS which was a profit-making scheme. They pointed out that SLAS started off as a small self-financing scheme with limited funding, and hence legal assistance could only be provided for restricted types of proceedings in order to maintain its financial viability. With the successful operation of SLAS over the years, it was time for the Administration to consider

expanding the scope of SLAS. The risk of incurring loss existed in every legal aid funded case and this was not a valid reason for not expanding SLAS. There was also a suggestion that the Administration should look into the nature of cases taken up by private legal practitioners under a conditional fee arrangement in considering the issue of expanding the scope of SLAS.

Recovery agents

31. Some deputations, including the professional legal bodies, had also expressed concerns about the activities of recovery agents, which were organisations that assisted victims of personal injuries to claim compensation on the basis that they would only charge a fee if the victim succeeded in his claim. The deputations pointed out that the target customers of recovery agents were usually those who were not eligible for legal aid and had no means to conduct litigation on a private basis. The prevalence of recovery agents indicated that they were meeting an unsatisfied demand for legal services and raised the question whether the existing financial eligibility limits under the legal aid schemes were unrealistic. Members had raised LegCo questions concerning, inter alia, the legality and regulation of recovery agents and the need for a review of the legal aid policy in 2002 and 2005.

32. The subject of recovery agents is being followed up by the Panel as a separate agenda item. The Panel had a discussion with the Administration and the two legal professional bodies at its meeting on 28 November 2005. The Administration would revert to the Panel in due course.

Criminal legal aid fees system

33. The issue of improvement of the existing criminal legal aid fees system was raised by the two legal professional bodies during the Panel's discussion on the provision of legal aid services. The Chief Justice suggested that the Administration should undertake a review on the subject with an appropriate representation. The Hong Kong Bar Association, the Law Society of Hong Kong and the Legal Aid Services Council provided separate submissions on the matter in April, June and October 2005 respectively.

34. The subject of criminal legal aid fees system is being followed up by the Panel as a separate item. The Panel discussed the matter at its meeting on 15 December 2005. The Administration advised members that it would invite representatives from the two legal professional bodies, the Judiciary, the Department of Justice and the Legal Aid Department sometime before Christmas for joint discussions. The Panel agreed to discuss the matter again in six months' time.

Questions and motion debates in Council

35. A list of the relevant questions raised and motions moved for debate in Council is in **Appendix III** for members' reference.

Relevant papers

36. A list of the relevant papers is in **Appendix IV**. These papers are available on the LegCo website (<http://www.legco.gov.hk>)

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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.

LegCo Panel on Administration of Justice and Legislative Services

Provision of legal aid services

Summary of issues raised and the Administration's responses

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
I. Scope of legal aid			
<p>(a) The Administration to consider expanding the scope of legal aid to cover -</p> <p>(i) defamation actions;</p> <p>(ii) disputes between limited companies and their shareholders;</p> <p>(iii) disputes over partnership;</p> <p>(iv) money claims in derivatives of securities, currency futures or other futures contracts;</p> <p>(v) election petitions arising from the Legislative Council and District Councils elections;</p>	<p>(i) International human rights jurisprudence confirms that exclusion of defamation proceedings from legal aid does not deprive a person of access to court nor interfere with freedom of expression. It is reasonable to establish priorities for legal assistance excluding defamation litigation.</p> <p>(ii) Protection of shareholders of listed companies should be tackled from the corporate governance perspective. The Consultation Paper on Corporate Governance issued by the Standing Commission on Company Law Reform (SCCLR) in July 2001 recommended that statutory derivative actions be introduced to enhance shareholders' rights. The Financial Services and the Treasury Bureau and the Security and Futures Commission have jointly published a consultation paper in May 2003 to seek public views on whether, and if so, how the proposal of SCCLR should be pursued.</p> <p>(iii) The Administration considers that it is not justified for taxpayers to bear the costs for resolving partnership disputes, which quite often arise from an amateurish agreement or lack of a written agreement or improperly kept books of account.</p> <p>(iv) The Administration considers that it is not justified to fund legal expenses of a person who chooses to engage in this kind of high risk (or, for some, speculative) activities with public money.</p> <p>(v) Election petitions based on human rights grounds are within the scope of legal aid. Those not based on human rights grounds are excluded so as not to encourage frivolous and vexatious petitions.</p>	<p>(i) A member of the Panel expresses the view that a large part of defamation cases involve the issue of freedom of expression, and most actions for libel in Hong Kong are instituted against the author, not the publisher. Without legal aid, a defendant will face great difficulty in defending in court.</p>	

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
<p>(vi) uncontested cases such as those relating to bankruptcies and liquidations;</p> <p>(vii) 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;</p> <p>(viii) 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; and</p>	<p>(vi) Proceedings whereby a person or persons seeking to make another person bankrupt or to liquidate a company are not excepted proceedings.</p> <p>However, legal aid does not cover proceedings initiated by a limited company for voluntary winding-up or for liquidation. It is not justified to use taxpayers' money to pay for the fees and charges relating to voluntary bankruptcy procedures.</p> <p>(vii) These cases are not excepted proceedings unless they fall within the jurisdiction of the Small Claims Tribunal. Potential claimants may also seek help from the Consumer Legal Action Fund administered by the Consumer Council.</p> <p>(viii) These cases are not excepted proceedings.</p> <p>Class action in the form of representative proceedings is already covered by legal aid. However, Hong Kong's civil justice system does not have rules designed to deal specifically with group litigation.</p> <p>The Judiciary's Interim Report and Consultative Paper on the Civil Justice Reform (December 2001) notes certain limitations of the representative proceedings set out in Order 15 rule 12 of the Rules of the High Court. The public's views are being sought on whether a group litigation scheme should be adopted in principle, subject to further investigation of schemes in other jurisdictions which may be suitable in Hong Kong. The issue of legal aid for class action proceedings has to be studied further in the light of further development of the court's rules and procedures in dealing with class litigation.</p> <p>[<u>Note by the LegCo Secretariat</u>: In its Final Report on Civil Justice Reform issued in March 2004, the Working Party appointed by the Chief Justice supports the recommendation that in principle, a scheme for multi-party litigation should be adopted. Schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong. (Recommendation 70 in the Final Report)]</p>		

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
(ix) cases with reasonable prospect of recovering damages and costs to be covered by the Supplementary Legal Aid Scheme (SLAS), e.g. claims by flat buyers against property developers and claims against insurance companies (paras. 5 - 6).	(ix) The cases mentioned are not excepted proceedings under the Ordinary Legal Aid Scheme (OLAS). As regards whether these proceeding could be covered by SLAS, please refer to the Administration's response in (II)(a) below. (paras. 8-33 of LC Paper No. CB(2)2581/02-03(03))	(x) LASC proposes that the relevant legislation be amended so that legal aid may be available to office-bearers of owners' corporations to enable them to commence legal action in their personal capacity for the effective enforcement of the Building Management Ordinance or Deed of Mutual Covenant on maintenance and repair of buildings. In the long term, the Legal Aid Ordinance (LAO) should be amended to enable eligible owners' corporations to enforce the Building Management Ordinance or Deed of Mutual Covenant on maintenance and repair of buildings.	(x) On LASC's proposal, the Administration considers that in view of the measures in place to assist owners to upkeep their property and the possible enhancement measures underway, it does not propose to amend the legislation and expand the scope of legal aid to cover owners' corporations for the time being (LC Paper No. CB(2)58/04-05(01) – Administration's response to LASC dated 16 September 2004).
II. Supplementary Legal Aid Scheme (SLAS)			
(a) The Administration to consider expanding SLAS or establishing self-financing legal aid schemes to deal with some of the existing excepted proceedings (para. 6).	(a) The fundamental principle is that SLAS should be self-financing. The scope of SLAS is confined to cases - (i) which deserve priority for public funding in the sense that significant injury or injustice to the individual is involved; and (ii) which involve monetary claims and have a reasonably good chance of recovering damages. It is not justified to use contributions recovered from the existing SLAS cases to subsidize other types of case that do not satisfy the aforesaid principle. In order to maintain the financial viability of SLAS, there should be no extension to the scope of SLAS (paras. 63 - 67 of LC Paper No. CB(2)2581/02-03(02)).	(a) The Administration has been requested to provide detailed reasons to substantiate its concern that using the contributions paid to the SLAS Fund to subsidize other types of cases as suggested by members of the Panel would affect the financial viability of SLAS. (b) A member suggests that the Administration should look into the nature of cases taken up by private legal practitioners under a conditional fee arrangement in considering whether the scope of SLAS should be expanded.	(a) On the basis of available information on cases closed during 2000/01 to 2002/03, the Legal Aid Department (LAD) has identified 28 cases that involved money claims against property developers, insurance companies, employers (not listed companies) and banking institutions. A net loss of about \$14.9M was recorded. LAD is concerned that including these proceedings into the SLAS may jeopardize the financial well-being of the SLAS Fund. In addition, apart from personal injury cases which generally have high success rate and where awards are generally high, LAD is not aware of any other types of cases which, if included in SLAS, would generate sufficient income to subsidise the other litigants assisted under the Scheme and to ensure that the Scheme will remain self-financing (LC Paper No. CB(2)159/03-04(03)).

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
		<p>(c) The Law Society considers that legal aid policy should be to expand the scope of both OLAS and SLAS to enable more people to benefit from the provision of legal aid and that this should take priority over the expansion of legal aid to cover other new areas of dispute.</p> <p>(d) LASC advises that its Working Party on the Scope of Legal Aid will continue to search for areas suitable to be included in SLAS. It will advise the Administration once suitable proposals are identified.</p>	
III. Financial eligibility limits for legal aid schemes			
<p>The Administration to -</p> <p>(a) conduct a comprehensive review of the upper financial eligibility limits under OLAS and SLAS (para. 7-8).</p>	<p>(a) The Administration does not see any justification for an increase in the financial eligibility limit for SLAS (paras. 53-56 of LC Paper No. CB(2)2581/02-03(02)).</p> <p>As a result of the 2002 and 2003 annual review of the financial eligibility limits to take account of inflation and the 2002 biennial review to take account of changes in litigation costs -</p> <p>(i) the financial eligibility limits for OLAS and SLAS were proposed to 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 so as to preserve the real value of the limits (LC Paper No. CB(2)159/03-04(03));</p> <p>[Note by the LegCo Secretariat: The revisions came into effect since July 2004.]</p> <p>(ii) no change to the financial eligibility limits should be made on account of changes in the litigation costs because of absence of concrete data on changes in litigation costs from July 2000 to July 2002 (LC Paper No. CB(2)2581/02-03(01)).</p> <p>[Note by the LegCo Secretariat: Having taken into account the result of the annual and biennial review conducted in 2004, the Administration concludes that there is a case to withhold adjusting the eligibility limits of the two legal aid schemes in view of the minor increase (+0.4%) in CPI(C) during July 2003 to July 2004, and the absence of data to reflect the trend of private litigation costs from July 2002 to July 2004 (LC Paper No. CB(2)367/04-05(01)).]</p>	<p>(a) LASC considers that the financial eligibility limit for SLAS should be increased from \$471,600 to \$672,000, to reflect price changes between 1984 when the Scheme was first introduced, and 1992 when the "financial capacity approach" was adopted.</p>	<p>(a) The Administration explains that when the financial eligibility limit for SLAS was revised in July 1995, it had taken into account the accumulated inflation since 1984, and the impact of the adoption in 1992 of the "financial capacity approach".</p>

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
		<p>The Panel is of the view that any review of financial eligibility limits of legal aid applicants should not be conducted with the objective of reducing the number of eligible applicants.</p>	<p>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 the intention to reduce the coverage of legal aid through a downward adjustment to the financial eligibility in accordance with consumer price movements. The existing mechanism to review the eligibility limits to take account of inflation and changes in litigation costs is to ensure that the real value of the limits is maintained (LC Paper No. CB(2)159/03-04(03)).</p> <p>At present, more than 55% of the total households in Hong Kong may be financially eligible for legal aid under OLAS, and some 70% under SLAS.</p>
		<p>LASC and the Law Society propose that CPI(A), instead of CPI(C), should be used to reflect price changes in respect of the financial eligibility of OLAS.</p>	<p>The Administration explains that CPI(C) reflects the pattern of high household expenditure which covers approximately the top 10% of total households. In this context, the change in the cost of legal services, which is generally regarded as high level expenditure item, would be appropriately represented by CPI(C), as compared with the other consumer price indices. Also, CPI(C) is also adopted by the Administration as the indicator in adjusting criminal legal aid fees.</p>
		<p>The Law Society proposes that the provision of legal aid should be substantially expanded with a sliding scale of contributions which would render more persons eligible for legal aid provided they make substantial contributions towards the costs. Increased contributions by legal aid recipients would also bring in more revenue to the legal aid fund.</p>	<p>The Administration considers that the Law Society's suggestion is tantamount to removing an absolute financial eligibility limit in respect of legal aid. This would imply that those who have sufficient means to pursue litigation in private would also get publicly assisted legal aid services. The Administration does not accept the proposal on legal aid policy ground.</p> <p>(LC Paper Nos. CB(2)58/04-05(01) and (02)) – Administration's responses to LASC and Law Society.)</p>
		<p>The Bar Association suggests a number of principles which should be adopted in considering the issue of financial eligibility limit for legal aid services, and how the limit should be set to give effect to the right of access to justice (LC Paper No. CB(2)644/03-04(01)).</p>	<p>The Administration responded that it had taken into account relevant factors including fundamental rights, seriousness of the offence and complexity of the case, proportionality and prioritization etc. The Administration's comments on the Bar Association's views are detailed in LC Paper No. CB(2)1094/03-04(01).</p>

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
<p>(b) consider adjusting upward the upper financial eligibility limit for legal aid in criminal cases, as adopting the same financial eligibility limit for both criminal and civil cases may be inappropriate (para. 9).</p>	<p>(b) Under Rule 15(2) of the Legal Aid in Criminal Cases Rules (LACCR), the Director of Legal Aid (DLA) may grant legal aid in criminal cases despite that the applicant's financial resources exceed the financial eligibility limit. Under Rule 13(2), for cases involving murder, treason or piracy with violence, the judge has power to exempt an accused person or appellant from means assessment and payment of contribution.</p> <p>The Administration does not see justifications for adjusting the financial limit upward particularly for criminal cases (paras. 36-38 of LC Paper No. CB(2)2581/02-03(03)).</p>	<p>(b) The Panel has requested the Administration to -</p> <p>(i) provide information on past criminal cases where DLA had granted legal aid to applicants with financial resources exceeding the financial eligibility limit; and</p> <p>(ii) explain whether refusal to grant legal aid to a person who is charged with a serious criminal offence and unable to meet the costs of litigation would contravene the Hong Kong Bill of Rights Ordinance (HKBOR).</p>	<p>(b) The Administration advises that –</p> <p>(i) in 2002, there were 57 cases applications for legal aid in criminal cases which failed the means test but passed the merits test. DLA, having assessed “interest of justice” against the Widgery Criteria, had exercised his discretion under Rule 15(2) in 34 cases, and waived the upper financial eligibility limit of legal aid applicants; and</p> <p>(ii) in view of the fact that there is an in-built mechanism to enable 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, the current legal aid regime does not contravene the relevant provisions of HKBOR (LC Paper No. CB(2)159/03-04(03)).</p>
		<p>The Bar Association suggests that -</p> <p>(i) Rule 15(2) of LACCR should be amended to ensure that legal assistance <u>shall</u> (not may) be provided to an applicant who does not have sufficient means to pay for it where the interest of justice requires so; and</p> <p>(ii) an absolute financial eligibility limit in respect of legal aid for criminal cases could be replaced by a gradation of eligibility restriction to enable DLA to require contributions by the applicants towards the cost of higher court criminal representation in appropriate circumstances (LC Paper No. CB(2)644/03-04(01)).</p>	<p>(i) Rule 15(2) of LACCR provides for the discretion of DLA to grant legal aid to an applicant if he is satisfied that it is desirable in the interests of justice to do so, notwithstanding that the applicant's financial resources exceed the financial eligibility limit. DLA has indeed exercised his discretion under Rule 15(2) to waive the financial eligibility limit of legal aid applicants.</p> <p>(ii) Introducing different eligibility limits for different applicants/cases would give rise to uncertainty and confusion, and may even give rise to concerns of subjectivity and arbitrariness in the assessment process of the legal aid applications (LC Paper No. CB(2)1094/03-04(01)).</p>
IV. Discretion of DLA to waive upper limit of means test			
<p>(a) The Administration to consider whether DLA should be given the discretion to waive the upper limit of means test in respect of the following proceedings -</p> <p>(i) employees in appeals brought by employers against judgments of the Labour Tribunal;</p>	<p>(a) The only exception in civil cases where DLA has a discretion to waive the financial eligibility limit of means test is when human rights issues are involved, i.e. in which a breach of HKBOR or an inconsistency with ICCPR as applied to Hong Kong is at issue.</p> <p>The exercise of DLA's exemption power should be very restrictive, and it would be undesirable to extend the exception to other cases solely on the basis of the nature and complexity of the</p>	<p>(a) The legal aid policy in Hong Kong is to ensure that no one with reasonable grounds for taking legal action is prevented from doing so because of a lack of means. There are many applicants with financial resources exceeding the upper limit of means test who are unable to conduct litigation on a private basis. DLA should exercise discretion to waive upper limit of means test in deserving cases.</p>	

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<p>(ii) actions involving the Basic Law, the Personal Data (Privacy) Ordinance and anti-discrimination legislation;</p> <p>(iii) employees in insolvency cases; and</p> <p>(iv) cases involving victims of industrial accidents (para. 10)</p>	<p>proceedings (paras. 40 - 43 of LC Paper No. CB(2)2581/02-03(03)).</p> <p>(The Administration has provided case statistics and remedies available to persons involved in these proceedings at Annex I to LC Paper No. CB(2)2581/02-03(03)).</p>	<p>(b) LASC has asked DLA to consider whether there are areas where discretion by the DLA can be introduced to deal with potential hardship or injustice created by existing rules.</p>	<p>(b) The Administration agrees to consider LASC's suggestion but comments that as legal aid is funded by public coffers, it is desirable to set out the assessment criteria clearly in statute.</p>
V. Criteria for assessing financial eligibility			
<p>(a) The Administration to review the criteria for calculating financial resources of legal aid applicants (paras. 11 and 13).</p>	<p>(a) The Administration will maintain the current approach of aggregating an applicant's yearly disposable income and his disposable capital in conducting the means test.</p> <p>The Administration's responses to the issues raised by the Panel are as follows (paras. 13 - 50 of LC Paper No. CB(2)2581/02-03(02)) –</p> <p><u>Method of computing disposable income</u></p> <p>(i) The Administration proposes that subject to proof of loss or reduction of future income to the satisfaction of DLA, such loss or reduction would be taken into account in calculating an applicant's disposable income.</p> <p><u>Deductions in computing disposable income</u></p> <p>(ii) The Administration proposes to extend deductible allowances from disposable income to cover the amount incurred by an applicant to provide for the care of his other dependants, in addition to his infant dependants, who are unable to take care of themselves. Self-employed applicants would also benefit from this proposed change.</p>	<p>(a) The Law Society and LASC agree that the current "financial capacity" approach in conducting the means test should be maintained.</p> <p>(i) The Law Society agrees that loss or reduction of future income should be taken into account in calculating disposable income.</p> <p>(ii) The Law Society considers that the deduction should be allowed irrespective of whether or not the dependant(s) are living with the applicant.</p> <p>LASC considers that the condition for the dependant(s) to live with the applicant be relaxed.</p>	<p>(ii) The proposed extension is designed to cater for the specific circumstances where the dependant(s) are living with the applicant and his/her spouse, and are unable to take care of themselves and thus require care and attention whilst the applicant and his/her spouse are at work. Given this premise and the possible difficulties in verifying claims of non-live in dependants, particularly if they may not reside in Hong Kong, the Administration is of the view that the extension of the existing infant care allowance should be confined to the dependant(s) who live with the applicant.</p>

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
	<p>(iii) The Administration proposes to deduct maintenance payment made by an applicant to support his ex-spouse and children from the applicant's disposable income.</p> <p><u>Deductible items in calculating disposable capital</u></p> <p>(iv) The Administration proposes that in assessing disposable capital of an applicant to pursue an accident-related personal injury claim, DLA may disregard an amount of the insurance monies paid to the applicant in respect of the injuries, which DLA considers reasonable to cover such future expenses on treatment, equipment and care and attention, as may be certified to be necessary by a registered medical practitioner, subject to proof to the satisfaction of DLA.</p> <p>(v) There is no strong justification for excluding borrowed money and cash in bank in assessing financial resources.</p> <p>(vi) There is no strong justification for excluding negative value of capital assets in assessing financial resources.</p>	<p>(iii) The Law Society and LASC agree that the proposed deduction of maintenance payment in calculating disposable income should be further extended to cover other types of periodical payments ordered by the court.</p> <p>(iv) The Law Society and LASC consider that compensation or insurance payment arising from an incident not relating to the legal aid application should also be disregarded, if the payment/compensation is meant to compensate for the loss of future earning capacity of the applicant.</p> <p>The Law Society, however, disagrees with LASC that Mandatory Provident Fund (MPF) retirement benefits should be disregarded in computing disposable capital as they represent capital in the hands of the applicant.</p> <p>(v) LASC considers that the rule should be relaxed so that debts to an authorized or licensed financial institution can be taken into account, subject to the applicant making a declaration to disclose details of the debt to LAD.</p> <p>The Law Society considers that properly documented loans should be excluded.</p>	<p>(iii) The Administration is of the view that other types of periodical payments do not necessarily relate to supporting the livelihood of the applicant's dependants. It is not the policy intention to make all payments ordered by the court deductible items, without regard to the nature of a particular obligation. The Administration is also not aware that other overseas jurisdictions include periodical payments ordered by the court as deductible items.</p> <p>(iv) The Administration is of the view that if the insurance monies an applicant receives are not related to his claim, these monies should be no different from his other financial resources, such as personal savings, that the applicant has at his disposal to pursue litigation in private. The monies should therefore be included as disposable capital. Similarly, as MPF benefits are free for the disposal of an individual to pursue private litigation, they should be included in assessing financial capability.</p> <p>(v) The Administration considers that if a legal aid applicant has an outstanding loan and disposable capital, he can always use his financial resources to repay the loan before applying for legal aid. In this way, the need for an outstanding loan to count as a deductible item would not arise. This treatment is in line with practices adopted in many overseas jurisdictions.</p>
<p>(b) The Administration to consider using the median monthly household expenditure, rather than "35 percentile household expenditure", as the index of personal allowance deductible for calculating the disposable income of applicants under OLAS (para. 12).</p>	<p>(b) The objective of adopting the "35-percentile household expenditure" is to reflect more realistically the expenditure level of the target group, i.e. households in the lower middle class and below for legal aid. Using the median household expenditure as the basis for calculating the deductible income will not be representative of that of the target group. (The Administration's responses are detailed in paras. 22 - 23 of LC Paper No. CB(2)2581/02-03(02)).</p>	<p>(b) The Law Society and LASC agree that the median household expenditure should be adopted as the personal allowance deductible for OLAS, and that median household income should be used for identifying the target group of legal aid.</p> <p>LASC also proposes to use the "75-percentile household expenditure" as personal allowance deductible for SLAS.</p>	<p>(b) The "35-percentile household expenditure" as the standard personal allowance deductible reflects realistically the basic expenditure need of the target group of legal aid. Following the adoption of the threshold since 2000, there has been significant increases in the absolute level of the deductible ranging from 60% to 140%, depending on the size of the household to which a particular applicant belong. Further raising the personal allowance deductible would have very significant financial implications on the public purse.</p> <p>A higher personal allowance deductible for</p>

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			<p>applicants under SLAS is tantamount to accepting the notion that SLAS applicants should enjoy a higher standard of basic needs for the purpose of financial eligibility assessment for legal aid. The Administration considers that the same level of personal allowance deductible should apply to legal aid applicants, irrespective of the different legal aid schemes they may be pursuing.</p> <p>(LC Paper Nos. CB(2)58/04-05(01) & (02) – Administration's responses to Law Society and LASC dated 16.9.04.)</p>
<p>(c) The Administration to review the following provisions of the Legal Aid (Assessment of Resources and Contributions) Regulations (para. 13) -</p> <p>(i) Regulation 6 - Application in representative or fiduciary capacity.</p> <p>(ii) Regulation 7(1) - Resources of a spouse.</p> <p>(iii) Regulation 8 - Resources of an application who is an infant.</p>	<p>(i) The effect of Regulation 6 is that for application made by a person acting in representative or fiduciary capacity, that person's means would not be taken into account for financial resources assessment unless he himself also stands to benefit from the aided proceedings. This accords with the objective that legal aid serves to assist only persons of limited means.</p> <p>(ii) The current policy of aggregating the financial resources of an applicant and his/her spouse should be maintained.</p> <p>(iii) The existing policy of not aggregating the financial resources of an infant and his parents/guardians in determining the financial resources of the infant should be maintained.</p> <p>(paras. 34 - 50 of LC Paper No. CB(2)2581/02-03(02))</p>	<p>(ii) The Law Society and LASC agree to the existing policy.</p> <p>(iii) The Law Society and LASC agree to the existing policy.</p>	
VI. Costs and contributions payable by legal aid clients			
<p><u>Contribution in cases involving human rights issues</u></p> <p>(a) The Administration to-</p> <p>(i) review the maximum rate of contribution which ranges up to 67% of the person's financial resources (para. 14(a)); and</p>	<p>(i) Different rates of contribution are specified in the Legal Aid (Assessment of Resources and Contributions) Regulations for different brackets of financial resources. The maximum rate of 67% only applies to financial resources exceeding \$1,200,000. Operational experience does not indicate a need for adjusting the scale of contribution.</p>	<p>(i) Some members consider that the maximum contribution rate of 67% should be lowered.</p>	

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(ii) exempt aided persons from making contribution (para. 14(b)).	(ii) The Administration does not agree to exempt aided persons in proceedings involving human rights issues from making contribution (paras. 48-50 of LC Paper No. CB(2)2581/02-03(03)).		
<u>Contribution under OLAS</u> (b) The Administration to review the maximum contribution rate of 25% under OLAS (para. 15)	(b) In 2002, only 1% of the aided persons (96 out of 12,747) under OLAS paid the maximum contribution rate, whereas around 82% did not need to pay any contribution. The Administration will keep in view the proportion of aided persons paying the maximum contribution rate in considering whether there is a need for a future revision (paras. 51-52 of LC Paper No. CB(2)2581/02-03(03)).		
<u>Contribution under SLAS</u> (c) The Administration to consider - (i) reviewing the contribution rate which is 12% (paras. 16 and 18); (ii) the possibility of adopting a sliding scale of contribution (para. 16); and (iii) exempting certain aided persons (e.g. victims of industrial accidents or dependants of deceased workers) from making contribution (para. 17).	(i) At present, for a successful claim under SLAS, 12% of the compensation recovered will be paid to the SLAS Fund, unless the claim is settled before trial and delivery of brief to counsel, in which case the rate of contribution will be 6%. Having examined the likely financial impact, the Administration proposes that the contribution rate be reduced from 12%/6% to 10%/6% (paras. 57-60 of LC Paper No. CB(2)2581/02-03(02)). (ii) The Administration does not see strong justifications for those who have suffered more and therefore receive more compensation to contribute at a higher rate under a sliding scale of contribution. A flat rate is more reasonable and fair, and easier to administer (para. 61 of LC Paper No. CB(2)2581/02-03(02)). (iii) The Administration does not agree to exempting certain persons from making contribution under the existing legal aid policy (paras. 46 and 55 of LC Paper No. CB(2)2581/02-03(03)).	(i) LASC agrees to the proposed reduction in contribution rate if there is no expansion in the scope of SLAS. If SLAS takes on more cases, the existing contribution rate should be retained so as to benefit more people. The Law Society considers that the present contribution rate should be maintained so as to enable the scope of SLAS to be expanded. (ii) LASC agrees to the retention of a flat contribution rate. The Law Society agrees to the retention of a flat contribution rate, subject to its proposal to expand the scope of SLAS by raising the eligibility limit.	

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VII. Operation of legal aid services			
<u>Interest accrued on DLA's first charges</u> (a) The Administration to review the exercise of DLA's discretion to waive the interest accrued on DLA's first charges on property recovered or preserved to lessen the burden of the aided person (paras. 19 - 20).	(a) Following enactment of the Legal Aid (Amendment) Bill in July 2000, DLA is given the discretion to waive or reduce the interest accrued in circumstances where he considers just and equitable to do so (paras. 2-3 of Annex II to LC Paper No. CB(2)2581/02-03(03)).	(a) Some members consider that the interest which accrues at 10% per annum is unjustified as the rate is far above the market rate.	(a) The Administration has reviewed the level of the interest rate specified in section 18A(3B)(b) of LAO, and considers 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. Accordingly, the Administration proposes to adopt the Government's no-gain-no-loss interest rate as the rate for the interest accruing on DLA's first charge under section 18A(3B)(b). Subject to the Panel's view, the Administration would consider prescribing under section 28 of LAO the no-gain-no-loss interest rate by means of subsidiary legislation (LC Paper No. CB(2)159/03-04(03)).
<u>Interest accrued on monies due to aided persons</u> (b) The Administration to consider whether the interest accrued on monies due to aided persons should be paid to the aided persons (para. 21).	(b) The Administration has yet to see sufficient justifications for implementing the proposal because an aided person who has recovered damages has received the benefit of subsidized litigation. The substantial disbursement paid by the Government on behalf of the aided person amount to an interest free loan for him. Under the circumstances, it would not be unreasonable for the small amount of interest being credited to the Government (paras. 4-10 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
<u>Payment of costs by DLA on behalf of an aided defendant or respondent</u> (c) In the light of an observation made by a Justice of Appeal of the Court of Appeal in a case, the Administration to review whether the statutory provision in section 16C(1)(b)(ii) of LAO that neither DLA nor an aided defendant should be liable for costs may cause injustice to the successful plaintiff not in receipt of legal aid (para. 22).	(c) The statutory provision is intended to protect a legally aided defendant and the legal aid fund against costs in excess of the amount of his contribution. It is up to a plaintiff to decide if he wants to commence proceedings against someone who is not good for costs because of impecunious financial position. If a plaintiff chooses to do so, there is a real possibility that he will not be able to recoup costs from the defendant. Notwithstanding the concern expressed by the Justice of Appeal, both the Court of Appeal and the Court of Final Appeal uphold the rationale for section 16C(1)(b)(ii) (paras. 11-16 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		

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<u>Application for legal aid</u> (d) The Administration to consider making full use of section 9(d) of LAO, which empowers DLA to refer an application for legal aid to counsel to investigate and advise on any question of law arising out of the application (para. 27).	(d) DLA has extensively invoked the statutory provision in obtaining advice from legal practitioners and other experts including medical practitioners where such advice is required to facilitate the processing of legal aid applications (paras. 17-18 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
<u>Appeal against decision of DLA to refuse to grant legal aid</u> (e) The Administration to consider putting in place a more effective and transparent appeal mechanism (paras. 29 - 31).	(e) LAD had reviewed the procedure for handling appeals under 26 of LAO in consultation with the Legal Aid Services Council and the Judiciary in 2000. Moreover, under Rule 12(3) of the Legal Aid in Criminal Cases Rules, the court which handles the appeal may exercise discretion to grant legal aid on its own initiative, notwithstanding DLA has refused the application (paras. 19-25 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
<u>Fees and costs payable to counsel and solicitors</u> (f) The Administration to review the relevant provisions of the Legal Aid (Scale of Fees) Regulation in relation to situations where fees payable to counsel acting for an aided person are disallowed on taxation (paras. 32 - 33).	(f) 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. Cases where counsel's fees are totally disallowed because the solicitor instructing him should have done the work of the counsel should be rare. For work undertaken by counsel which should have been done by the solicitor, it is not unusual for the taxing master to allow the counsel's fees to be paid 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 (paras. 26-28 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
VIII. Legal aid in criminal proceedings			
(a) 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 (para. 34).	(a) The Administration is not aware of any practical problem with the existing arrangement (para. 59 - 60 of LC Paper No. CB(2)2581/02-03(03)).		

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(b) LAD should instruct leading counsel to represent aided persons in criminal cases (para. 35(a)).	(b) LAD usually only 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 an aided person in any case (para. 30 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
(c) The Administration to consider extending the power of judges to grant legal aid and exemption from means test and payment of contribution to cover criminal cases involving lengthy sentences of imprisonment (para. 35(b)).	(c) Judges 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 three categories of offences. Since means assessment is one of the two cardinal criteria for granting legal aid, the exception of waiving means test should be very restrictive and continue to be confined to the above types of offences (paras. 61-63 of LC Paper No. CB(2)2581/02-03(03)).		
(d) 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 to be one of exceptional length or complexity. The Administration should consider the possibility to allow fees to be agreed in advance with the assigned lawyers (para. 35(c)).	(d) All fees payable to counsel and solicitors are assessed by LAD and not by the Judiciary. Fees are determined by DLA having regard to the work actually and reasonably done. It is 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. LAD sees no merits at all in changing the present rules to allow fees to be agreed with individual assigned lawyers in advance (paras. 31-32 of Annex II to LC Paper No. CB(2)2581/02-03(03)).		
IX. Legal aid for alternative schemes			
(a) The Administration should consider restructuring the legal aid regime to provide "unbundled legal assistance", i.e. with private lawyers providing advice and assistance at key points in the proceedings, to help unrepresented litigants (paras. 23 - 24).	(a) The Administration will keep in view further development in respect of the Civil Justice Reform as regards measures to help unrepresented litigants (paras. 65 of LC Paper No. CB(2)2581/02-03(03)).	(a) The Panel is of the view that unbundled legal assistance would assist unrepresented litigants. It would also assist LAD in assessing the merits of a case at different stages of the proceedings and accordingly decide whether legal aid should continue to be granted.	

Issues raised by the Panel for review (LC Paper No. CB(2)2646/01-02(01))	Administration's responses to the issues for review (LC Paper Nos. CB(2)2581/02-03(01), (02) & (03))	Comments made by the Panel, the legal professional bodies and the Legal Aid Services Council (LASC) at meetings on 23 June, 29 July and 27 October 2003, 29 January and 14 December 2004	Administration's responses to comments made by the Panel, the legal professional bodies and LASC (LC Paper Nos. CB(2)159/03-04(03), 1094/03-04(01), 58/04-05(01) & (02))
(b) One of the proposals arising from the Civil Justice Reform consultation exercise is to empower DLA to resort to alternative dispute resolution (ADR) as a condition of granting legal aid. The Administration should consider whether legal aid can be granted for mediation, instead of mediation in the course of litigation under Part I of schedule 2 to LAD) (paras. 25 - 26).	(b) The Administration shall consider the best way forward once the Working Party on Civil Justice Reform has finalized the report and its recommendation regarding ADR schemes in the light of the public views received. The Administration shall also study the findings and the final evaluation on the three-year Pilot Scheme on Family Mediation in considering its implications on the provision of legal aid services (paras. 66-68 of LC Paper No. CB(2)2581/02-03(03)). [Note by the LegCo Secretariat: Recommendations 138 – 143 on “Alternative Dispute Resolution” in the Final Report on Civil Justice Reform issued in March 2004 are relevant.]		
X. Other issues			
(a) The Administration to consider the following suggestions to improve the operation of legal services (para. 36) - (i) more transparent and user-friendly legal aid services; (ii) mechanism to monitor services provided by LAD's in-house lawyers and private legal practitioners; (iii) client-based legal aid services; and (iv) putonghua training for LAD staff.	(a) The Administration's response is detailed in paras. 33 - 42 of Annex II to LC Paper No. CB(2)2581/02-03(03).		

Relevant papers**Paper prepared by the Secretariat**

LC Paper No.

CB(2)2646/01-02(01) -- List of Issues for Review on Provision of Legal Aid Services

Papers provided by the Administration

CB(2)2581/02-03(01) -- Paper dated June 2003 on “Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants”

CB(2)2581/02-03(02) -- Paper dated June 2003 on “Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants”

CB(2)2581/02-03(03) -- Paper dated June 2003 on “Provision of Legal Aid Service : Administration’s Response on the List of Issues for Review”

CB(2)159/03-04(03) -- Administration’s letter dated 20 October 2003 responding to the issues raised by the Panel at the meetings on 23 June and 29 July 2003

CB(2)1094/03-04(01) -- Administration’s letter dated 15 January 2004 responding to the Bar Association’s submission dated 28 November 2003

CB(2)58/04-05(01) -- Administration’s letter dated 16 September 2004 to LASC responding to LASC’s submission on “Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants”

CB(2)58/04-05(02) -- Paper submitted in September 2004 responding to the Law Society’s submission on the Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants

CB(2)367/04-05(01) -- Paper dated December 2004 on “Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants”

CB(2)2319/04-05(01) -- Letter dated 11 July 2005 on the updated position on “Criminal Legal Aid Fees and Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants”

Papers provided by the legal professional bodies and LASC

CB(2)644/03-04(01) -- Bar Association’s paper dated 28 November 2003 on “Provision of Legal Aid Services”

CB(2)1094/03-04(02) -- Law Society’s paper submitted in January 2004 on “Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants”

CB(2)1094/03-04(03) -- LASC’s submission dated 12 December 2003 on “Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants”

Minutes of Panel meetings

CB(2)3051/02-03 -- Minutes of meeting on 23 June 2003

CB(2)37/03-04 -- Minutes of meeting on 29 July 2003

CB(2)387/03-04 -- Minutes of meeting on 27 October 2003

CB(2)1741/03-04 -- Minutes of meeting on 29 January 2004

CB(2)/03-04 -- Minutes of meeting on 14 December 2004

Appendix III

Relevant questions raised and motions moved for debate in Council

<u>Date of Council meeting</u>	<u>Question</u>
9 January 2002	Hon Audrey EU raised a written question on "Unrepresented litigants in civil cases"
30 January 2002	Hon Abraham SHEK raised a written question on "Statistics on legal aid cases"
9 April 2003	Hon Cyd HO raised a written question on "Legal aid applications in respect of litigations concerning human rights"
9 April 2003	Hon Cyd HO raised a written question on "Legal aid applications in respect of litigations concerning anti-discrimination legislation"
5 May 2004	Dr Hon LO Wing-lok raised a written question on "Legal aid applications relating to claims of medical negligence"
11 May 2005	Hon Margaret NG raised an oral question on "Payment of fee to the defence counsel in criminal legal aid cases in respect of preparation work"
<u>Date of Council meeting</u>	<u>Motion</u>
7 November 2001	Hon Audrey EU moved a motion on "Upholding the Rule of Law"
8 May 2002	Hon Margaret NG moved a motion on "Civil Justice Reform"

Provision of legal aid services

Relevant papers/documents

LC Paper No.

Papers/Documents

Submissions received by the Panel

- | | |
|--|---|
| CB(2)1692/01-02(01)
CB(2)2639/02-03(01)
CB(2)644/03-04(01)
CB(2)1094/03-04(01)
(<i>English version only</i>) | -- Submissions from the Hong Kong Bar Association |
| CB(2)1692/01-02(02)
(<i>English version only</i>) | -- Submission from Hong Kong Family Welfare Society |
| CB(2)1692/01-02(03)
(<i>English version only</i>) | -- Submission from Hong Kong Press Council |
| CB(2)1692/01-02(04)
(<i>Chinese version only</i>) | -- Submission from Hong Kong Council of Social Service |
| CB(2)1692/01-02(05)
CB(2)1741/01-02(01)
(<i>Chinese version only</i>) | -- Submissions from 1st Step Association |
| CB(2)1692/01-02(06)
CB(2)1094/03-04(02)
(<i>English version only</i>) | -- Submissions from the Law Society of Hong Kong |
| CB(2)1692/01-02(07)
(<i>English version only</i>) | -- Submission from Hong Kong Journalists Association |
| CB(2)1726/01-02(01)
(<i>Chinese version only</i>) | -- Submission from Mr YEUNG Wai-sing, Eastern District Council |
| CB(2)1741/01-02(02)
(<i>Chinese version only</i>) | -- Submission from Association of the Rights of Industrial Accident Victims |
| CB(2)1741/01-02(03)
(<i>Chinese version only</i>) | -- Submission from Hong Kong Confederation of Trade Unions |

CB(2)1094/03-04(03) -- Legal Aid Services Council (LASC)'s submission
(English version only) dated 12 December 2003 on "Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants"

CB(2)3166/03-04(01) -- Written response from the Legal Aid Services
(English version only) Council on the Court of Appeal's judgment in a criminal appeal cases

Paper prepared by the LegCo Secretariat

CB(2)2646/01-02(01) -- List of Issues for Review prepared by the Panel in
July 2002

Papers provided by the Administration

CB(2)1542/02-03(01) -- Judgment in Shem Yiu Fun, HCAL183/2002 (The
Administration has been requested to take into account the case in reviewing the method of assessing the financial resources of an applicant under the legal aid scheme)

CB(2)2581/02-03(01) -- Paper provided by the Administration on "Annual
and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants"

CB(2)2581/02-03(02) -- Paper provided by the Administration on
"Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants"

CB(2)2581/02-03(03) -- Administration's response to the remaining issues
raised by the Panel

CB(2)159/03-04(03) -- Director of Administration's letter dated
20 October 2003 responding to the issues raised by the Panel at the meetings on 23 June and 29 July 2003

CB(2)370/03-04(01) -- The Administration's reply dated 14 November
2003 on "Court of Appeal Case CACC 365 of 2000"

CB(2)1094/03-04(01) -- Letter dated 15 January 2004 from the
Administration responding to the Hong Kong Bar Association's submission of 28 November 2003

- CB(2)58/04-05(01)
CB(2)58/04-05(02) -- Administration's written responses to the submissions from LASC and the Law Society of Hong Kong
- CB(2)367/04-05(01) -- Paper provided by the Administration on "Annual and biennial review of financial eligibility limits of legal aid applicants"
- CB(2)507/04-05(01) -- Paper provided by the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases"
- CB(2)1212/04-05(01) -- Administration's letter dated 4 April 2005 on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases"
- CB(2)2268/04-05(01)
(*English version only*) -- Administration's letters dated 8 July 2005 to the Hong Kong Bar Association on 2004 Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees
- CB(2)2268/04-05(02)
(*English version only*) -- Administration's letters dated 8 July 2005 to the Law Society of Hong Kong on 2004 Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees
- CB(2)2319/04-05(01) -- Administration's letter dated 11 July 2005 on the updated position on "Criminal Legal Aid Fees and Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants"
- -- Legislative Council Brief on Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005 and Legal Aid (Charge on Property) (Rate of Interest) Regulation issued by the Administration Wing, Chief Secretary for Administration's Office on 14 December 2005

Minutes of meetings of Panel on Administration of Justice and Legal Services

- CB(2)3051/02-03 -- Minutes of meeting on 23 June 2003
- CB(2)37/03-04 -- Minutes of meeting on 29 July 2003

- [CB\(2\)387/03-04](#) -- Minutes of meeting on 27 October 2003
- [CB\(2\)1741/03-04](#) -- Minutes of meeting on 29 January 2004
- [CB\(2\)710/04-05](#) -- Minutes of meeting on 14 December 2004