

**Panel on Administration of Justice and Legal Services
Home Affairs Bureau's response to follow-up actions**

Item 1 Review of the provision of legal aid services

The Home Affairs Bureau ("HAB") to provide information on how Hong Kong compared to other jurisdictions in terms of accessibility of the middle class to legal aid.

Response

There are a number of features in our means assessment rules on the computation of an applicant's eligibility for legal aid that facilitate accessibility of the middle class to legal aid as compared with many other jurisdictions. For example, in computing the disposable capital of an applicant, the total value of an applicant's only or main dwelling is disregarded. We have also since 2000 adopted household expenditure using Consumer Price Index (A) as the benchmark for calculating personable allowances in lieu of the Comprehensive Social Security Assistance rate.

In addition, there is also the Supplementary Legal Aid Scheme (SLAS) set up especially to provide legal assistance to the middle class. The SLAS is a unique scheme not found anywhere else in the world. In Australian provinces such as South Australia and Victoria, they also run schemes similar to the Hong Kong SLAS. However, one major and significant difference is that unlike SLAS where the Scheme will be responsible for the costs of the lawyers acting for an aided person as well as the costs of the opponent if the case is unsuccessful, the aided persons have to meet any costs order made in favor of the opponents under the South Australia Scheme.

Moreover, the Administration has completed the five-yearly review on the criteria for assessing the financial eligibility (FEL) of legal aid applicants ("the five-yearly review"). The purpose of the five-yearly review is to examine the criteria used to assess the financial eligibility limits of legal aid applicants. In the process of review, the Administration has widely consulted the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel), the two legal professional bodies and the Legal Aid Services Council (LASC). Upon completion of the five-yearly review, the Administration proposes to

implement the following recommendations, including -

- (a) the median monthly household expenditure be used to replace the 35-percentile household expenditure as a deductible component in calculating disposable income; and
- (b) the FEL for OLAS be raised from the present \$175,800 by about 50% to \$260,000 and that for SLAS from \$488,400 by about 100% to \$1.3 million.

With the new measures in place, more middle-class will benefit and more cases will be covered.

Item 5 Research report on “Legal aid systems in selected places”

HAB to explain in writing how it arrived at the figure of HK\$110 per capita in legal aid spending in Hong Kong.

Response

The figure of \$110 per capita was arrived at upon taking into account the following: (a) expenditure on legal costs; (b) costs for processing legal aid applications and supporting services; (c) costs of the Official Solicitor's Office; (d) costs for Duty Lawyer Services; (e) costs of the LASC and (f) costs of community legal information. The total cost is then divided by the population in Hong Kong in the year of 2007-08.

Item 13 Law Reform Commission Report on Conditional Fees

HAB was requested to provide relevant information and the Administration's views on the following suggestions raised by members -

- (a) to explore in the context of enhancing access to justice the feasibility of capping the costs recoverable from opponents for litigations where there was significant imbalance in bargaining power between the parties, with a view to giving the litigants concerned certainty as to their exposure to litigation costs if unsuccessful; and
- (b) to explore whether there was room for saving legal costs incurred in legal aid cases so that more people could be assisted under the

limited legal aid funding

Response

For (a), we are of the view that the proposal is a departure from the normal costs rule that costs follow the event. While cost capping, developed in England, is available under the English Civil Practice Procedure, we are of the view that it is difficult to obtain in practice and has a restrictive nature. Cost capping is an effective means of enhancing access to justice for the parties with weaker bargaining power. We further note that the suggestion was made in view of the difficulties with the implementation of conditional fee arrangements and the demands for expansion of SLAS.

We note that the LASC is currently examining the possibilities for expansion of the scope of SLAS without undermining or jeopardizing the financial viability of the scheme. The study being conducted by the LASC is expected to conclude by late 2010. The Administration will further consider the feasibility of expanding the scope of SLAS having regard to the recommendations of the LASC.

For (b), we note that the Panel had suggested that Legal Aid Department (LAD) should exercise more flexibility and review critically the number of lawyers required and the need to engage senior counsel with a view to saving legal costs. Towards this end, Members may wish to note that when legal aid is granted, LAD is duty bound to assign a solicitor to represent the aided person for the purpose of instituting or defending legal proceedings. LAD adopts a flexible approach in determining the number of lawyers to be assigned in a legal aid case. Depending on the cases in question and bearing in mind the interest of the aided persons and the need to ensure that public funds are used in a cost effective manner, LAD may assign counsel taking into account, inter alia, the level of court that will deal with the aided person's case, and the complexity of issues and facts of the case. LAD may assign a counsel to represent the aided person in addition to the solicitor. In this regard, LAD has always adopted a prudent but flexible approach in the matter of the assigning of lawyers in legally aided cases.

LAD has submitted a detailed information paper to the LASC on the subject (attached at Annex). LASC noted that LAD was already

exercising flexibility and prudence in determining the number of lawyers required and circumstances under which a senior counsel would be assigned to handle legal aid cases. LASC considered that the present arrangements adopted by LAD in the assignment of lawyers for legal aid cases appropriate.

Home Affairs Bureau
October 2010

Submission to LASC by LAD

Assignment of solicitor, counsel and senior counsel in legal aid cases

Purpose

This paper sets out the current practice adopted by the Legal Aid Department (LAD) on the number of lawyers including senior counsel assigned in handling legal aid cases.

Background

2. During the discussion at the Administration of Justice and Legal Services Panel on the “Law Reform Commission Report on Conditional Fees” held on 28 June 2010, it was suggested that LAD “should exercise more flexibility and review critically the number of lawyers required and the need to engage senior counsel with a view to saving legal costs”.

Flexibility in engaging lawyers

3. When legal aid is granted, LAD is duty bound to assign a solicitor to represent the aided person for the purpose of instituting/defending legal proceedings. LAD adopts a flexible approach in determining the number of lawyers to be assigned in a legal aid case. Depending on the case in question and bearing in mind the interest of the aided person and the need to ensure that public funds are used in a cost effective manner, LAD may assign counsel taking into account the following matters:

- (a) The level of court that will deal with the aided person’s case:

If the case is brought or defended at the District Court level, e.g. matrimonial proceedings, then in general no counsel will be assigned.

For cases conducted in the High Court or above, a counsel will normally be assigned but counsel is not expected to engage in work which should be handled by solicitors such as drafting witness statements, attending interlocutory hearings etc. However, if the assigned solicitor who has conduct of the case wishes to engage counsel to prepare witness statements or attend interlocutory hearings etc, he can seek approval and LAD will grant authority if there are justifiable reasons for so doing.

- (b) For District Court cases, if the case involves, say, complex issues of law or complicated facts, LAD may assign a counsel to represent the aided person in addition to the solicitor.

In this regard, LAD has always adopted a prudent but flexible approach in the matter of the assigning of lawyers in legally aided cases.

Number of counsel assigned in a case

4. In general, a solicitor will be assigned in each and every legal aid case. For cases where assistance of counsel is required and as mentioned in paragraph 3 above, a junior counsel as opposed to a senior counsel would be assigned. In other words, in the majority of legal aid cases where a counsel's assistance is required, the number of lawyers involved is at most two.

Assignment of Senior Counsel

5. Assignment of senior counsel is governed by section 13(2) of the Legal Aid Ordinance which stipulates that "the Director may, if he is of the opinion that the proceedings are, or may become, of **exceptional difficulty or importance**" assign senior counsel to represent an aided person with the assistance of a junior counsel.

6. LAD will normally accede to the request of the assigned solicitor for senior counsel if the assigned solicitor can satisfy the Department that the conditions set out in section 13(2) are met in the case concerned.

7. However, in cases where senior counsel are assigned, LAD may discontinue the service of junior counsel following the abolition of the “Two-Counsel Rule” in January 1996. In deciding whether to retain the service of the junior counsel, consideration will be given to the matters such as whether the assistance of the junior is necessary for the proper preparation of the case because of its complexity or heavy documentation involved or for carrying out legal research on difficult or novel questions of law and referred to in paragraph 62/APP/48 of the Hong Kong Civil Procedure 2010 edition.

Legal Aid Department

Ref. : LA/ADM/10/9 (C) XXIII

Date : 29 July 2010