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Panel on Administration of Justice and Legal Services
Background brief for the meeting on 24 November 2008
Review of the provision of legal aid services

Purpose

This paper aims to provide a basis to facilitate members' discussion on the review of the provision of legal aid services.

Background

Government's legal aid policy and framework

2. According to Article 35 of the Basic Law, Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. 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 rights and obligations). 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." The Hong Kong Bill of Rights Ordinance (Cap. 383) (HKBORO) incorporates into Hong Kong law the provisions of ICCPR as applied to Hong Kong.

3. 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.

4. The Legal Aid Ordinance (Cap. 91) (LAO), enacted in 1967, sets out the legal framework for the administration of legal aid. Legal aid is provided by the Legal Aid Department (LAD) 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.

5. The Legal Aid Services Council (LASC) was set up on 1 September 1996 under the Legal Aid Services Council Ordinance (Cap. 489) to oversee the administration of the legal aid services provided by LAD which is accountable to the

Council for the provision of such services. According to section 4(5)(b) of the Ordinance, LASC is the Chief Executive's advisory body on the policy of the Government concerning publicly-funded legal aid services and shall advise on "the feasibility and desirability of the establishment of an independent legal aid authority".

Legal aid for civil cases

6. To qualify for legal aid for civil proceedings under OLAS, an applicant's financial resources must not exceed \$165,700. 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 HKBORO or an inconsistency with ICCPR.

7. SLAS is a self-financing scheme introduced in 1984. The scheme was limited initially to cover claims for damages for personal and fatal injuries. It was subsequently extended to cover employees' compensation claims in 1992 and medical, dental as well as legal professional negligence in 1995. Its current scope covers cases of personal injury or death, medical, dental and legal professional negligence where the claim is likely to exceed \$60,000. It also covers claims under the Employees' Compensation Ordinance (Cap. 282) irrespective of the amount of claim. The scheme is available to those whose financial resources exceed \$165,700 but do not exceed \$460,300. The costs of the scheme are met from the Supplementary Legal Aid Fund, which is financed by the applicants' contributions and damages or compensation recovered.

Legal aid for criminal cases

8. To qualify for legal aid in criminal cases, an applicant's financial resources should not exceed \$165,700. 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 \$165,700 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**).

Legal Aid Policy Review 1997

9. In early 1997, the Government appointed an inter-departmental Working Group to conduct a comprehensive review of the criteria used to assess financial eligibility of applicants for legal aid services provided by LAD. In addition, the Working Group had reviewed the scope of legal aid and the operation of LAO. The Administration issued a consultation paper entitled "Legal Aid Policy Review 1997" in December 1997. The original and final recommendations of the Review as provided by the Administration are in **Appendix II**. Legislative amendments arising from the Review were implemented in July 2000.

Review conducted by the Panel in 2001

10. In 2001, the Panel on Administration of Justice and Legal Services (the Panel) put to the Administration that time was ripe for another major review of legal aid services. The Administration, however, took the view that there was no immediate need to conduct another comprehensive review. The Panel had subsequently reviewed the provision of legal services and identified a number of issues for the Administration's consideration. In the course of its deliberation, the Panel had received views from deputations including the legal professional bodies and social services sectors. After having considered the views received, the Panel had compiled a "List of Issues for Review on Provision of Legal Aid Services".

11. The Panel was of the view that the procedure and costs of litigation had developed to put access to the courts beyond not only "persons of limited means" but most ordinary citizens. The Panel reiterated its request that the Administration should conduct another comprehensive review on the objective, adequacy and effectiveness of the existing legal aid system with a view to enhancing the accessibility of legal aid services for those in need and address the specific issues in the review.

12. The Administration had not conducted any major review of the legal aid system but had provided responses to the "List of Issues for Review on Provision of Legal Aid Services" in June 2003. A summary setting out the issues identified by the Panel and the Administration's responses at that time is in **Appendix III**.

Recent discussions of the Panel and related developments

13. Since then, the Panel has continued to follow up the relevant issues with the Administration. The Panel has also received further views from LASC and the two legal professional bodies. The Panel has all along held the view that there is an urgent need for the Administration to conduct an overall review of the legal aid system in the light of the implementation of the Civil Justice Reform, instead of making merely piece-meal adjustments to the system. The major issues discussed and related developments are highlighted in the following paragraphs.

Scope of the provision of legal aid

Defamation proceedings

14. The Panel had requested the Administration to consider expanding the scope of legal aid to cover defamation proceedings in its review conducted in 2001. The Administration's response was that excluding defamation proceedings from the provision of legal aid was reasonable because international human rights jurisprudence confirmed that the exclusion did not deprive a person of access to court nor interfere with freedom of expression. *Members, however, expressed the view that a large part of defamation cases involved the issue of freedom of expression, and*

most actions for libel in Hong Kong were instituted against the author, not the publisher. Without legal aid, a defendant would face great difficulty in defending himself in court.

Building management cases

15. LASC suggested that the relevant legislation should be amended so that legal aid could be made available to office-bearers of owners' corporations (OCs) to enable them to commence legal action in their personal capacity for the effective enforcement of the Building Management Ordinance (Cap. 344) (BMO) or Deed of Mutual Covenant (DMC) on maintenance and repair of buildings. In the longer time, LAO should be amended to enable eligible OCs to enforce BMO or DMC on maintenance and repair of buildings. The Administration, however, did not consider that the LASC's suggestion should be pursued given the measures being in place to assist owners to upkeep their property and the possible enhancement measures for the effective implementation of BMO and DMC underway.

Mediation

16. *LASC and the Hong Kong Bar Association had suggested that legal aid should be extended to mediation. The Administration advised the Panel that it was positive towards the suggestion.* In the Final Report issued by the CJ's Working Party on Civil Justice Reform in March 2004, it recommended that LAD should have power in suitable cases to limit its funding of persons who qualified for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation was inappropriate or had failed.

17. In order for the Administration to consider the Working Party's recommendation, LAD launched a one-year pilot scheme on 15 March 2005 to assess the cost-effectiveness and implications of providing legal aid to cover mediation of legally aided matrimonial cases.

18. After having received the evaluation and finding of the pilot scheme, the Panel supported the Administration's proposal to provide funding for mediation in legally-aided matrimonial cases on a permanent basis. In response to members on the main features of the permanent arrangement, the Administration advised that mediation would not be a mandatory pre-condition for the granting of legal aid for legal representation, as it was intended to be an adjunct to litigation and an alternative channel to dispute resolution between the parties. In line with the current legal aid policy which required that only persons who passed the means and merits tests would be eligible for legal aid, LAD would only finance the legally-aided persons' share of the mediator's fees, and mediators' fees and legal costs incidental to mediation should be subject to DLA's first charge on any property recovered or preserved for the aided persons. The Administration plans to introduce the legislative proposal to amend LAO in mid 2009.

19. *The Administration is scheduled to brief the Panel on the legislative proposal*

to provide funding for mediation in legally-aided matrimonial cases in March 2009 (item 9 on the list of outstanding items for discussion by the Panel).

Legal advice

20. *Members considered that consideration should also be given to extending the scope of legal aid from litigation to legal advice. Members may wish to note that the Panel will consider the review of the Free Legal Advice Scheme in the context of the demand for and supply of legal and related services in Hong Kong in June 2009 (item 5 on the list of outstanding items for discussion by the Panel).*

21. Noting the Administration's response to the Panel's suggestion of restructuring the legal aid system to provide for "unbundled legal assistance" that it would take into account development in respect of the Civil Justice Reform concerning measures to help unrepresented litigants in further consideration of the issue, *members expressed the view that "unbundled legal assistance" would assist unrepresented litigants and 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.*

Supplementary Legal Aid Scheme

Scope of the scheme

22. 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, its scope had to be 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.

23. The Administration's views are summarized below -

- (a) it was not justified to use contributions recovered from SLAS cases to subsidize other types of cases that did not justify the principle mentioned in paragraph 22 above;
- (b) 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; and

- (c) in order to maintain the financial viability of SLAS, the Administration did not consider it justified to extend its scope to other types of cases.

24. *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.

Report on Conditional Fees published by the Law Reform Commission

25. The Law Reform Commission published the Report on Conditional Fees (the Report) in July 2007. The Report has concluded that notwithstanding that conditional fees can enhance access to justice to a significant proportion of the community who are currently neither eligible for legal aid nor able to fund litigation themselves, conditions at this time are not appropriate for the introduction of conditional fees because -

- (a) a successful conditional fees regime requires the long term availability of affordable insurance to cover the opponent's legal costs if the legal action fails; but
- (b) responses from the insurance industry have suggested that such insurance is not likely to be available in Hong Kong; and
- (c) those in the middle income group may not be able to absorb the other side's costs.

26. The Report has recommended that the Government should increase the financial eligibility limits of SLAS, as well as expand the types of cases covered by the scheme.

27. The Report has further recommended the setting up of a Conditional Legal Aid Fund (the proposed Fund) to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful. According to the recommendation, the proposed Fund should have a generously set upper financial eligibility limit but no minimum financial eligibility limit should be set. The proposed Fund would engage the private lawyers on a conditional fee basis while the clients would be charged on a contingency fee basis. A feasibility study should be carried out into establishing the proposed Fund as a statutory body under the governance of an independent board.

28. Members may wish to note that the Administration has previously reiterated its reservations on the expansion of SLAS as proposed in the relevant consultation paper published in September 2005. *The Panel is scheduled to discuss issues relating to the Report in the beginning of the 2009-2010 legislative session (item 14 on the list of outstanding items for discussion by the Panel).*

Financial eligibility limits for legal aid services

Need for a fundamental review

29. Members expressed concern that under the existing financial eligibility limits, many applicants who had been refused legal aid on ground of means had a meritorious case to pursue and they were unable to do so due to the high costs of private litigation. They questioned whether the present financial eligibility limits for legal aid had been realistically set. *Members expressed the view that the Administration should review its existing broad-brush approach of setting a financial eligibility limit for applications across the board, and undertake a fundamental review on the criteria used for determining eligibility for legal aid, taking into account all relevant factors including the nature of the case and the seriousness of the offence.* Members were also 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.

30. The Administration's view was that a comprehensive mechanism was already put in place 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 so as to maintain the real value of the limits;
- (b) a biennial review to reflect other relevant factors, including the changes in litigation costs; and
- (c) a review once every five years of the criteria used to assess financial eligibility of legal aid applicants.

31. The Administration also explained that it did not have, as a matter of policy, a target coverage of legal aid services, in terms of percentage of eligible households. The existing review mechanism to take account of inflation and changes in litigation costs was to ensure that the real value of the limits would be maintained.

Computing of disposable capital

32. The Law Society and LASC considered that compensation or insurance payment arising from an incident not relating to the legal aid application should be disregarded, if the payment/compensation was meant to compensate for the loss of future earning capacity of the applicant. The Law Society, however, disagreed with

LASC that Mandatory Provident Fund (MPF) retirement benefits should be disregarded in computing disposable capital as they represented capital in the hands of the applicants.

33. The Administration took the view that if the insurance monies an applicant received were not related to his claim, these monies should be no different from his other financial resources that the applicant had at his disposal to pursue litigation in private. The monies should therefore be included as disposable capital. Similarly, if MPF benefits were free for the disposal of an individual to pursue private litigation, they should be included in assessing financial capability.

Discretion of DLA

34. LASC suggested that DLA should consider whether there were areas where his discretion could be introduced to deal with potential hardship or injustice created by existing rules. The Administration agreed to consider LASC's suggestion but commented that as legal aid was funded by public coffers, it was desirable to set out the assessment criteria clearly in statute.

Consistency with HKBORO

35. The Panel queried whether refusal to grant legal aid to a person who was charged with a serious criminal offence and unable to meet the costs of litigation would contravene HKBORO. The Administration advised that in view of the fact that there was a built-in mechanism to enable DLA to exercise his discretion under Rule 15(2) of the Legal Aid in Criminal Cases Rules where it was in the "interests of justice" to do so, and given the guidance provided by the court, the current legal aid system did not contravene HKBORO.

36. The Panel noted the view of the Bar Association that Article 11 of HKBORO required that if an applicant for legal aid did not have sufficient means to pay for legal assistance, the legal assistance should be provided to him if it was in the interest of justice to do so. The Bar Association suggested that an absolute financial eligibility limit in respect of legal aid for criminal cases should be removed and a gradation of eligibility restriction could be introduced to enable DLA to require contributions from the aided persons towards the cost of higher court representation if that was reasonable in all the circumstances of the case.

37. The Administration stressed that DLA had exercised his discretion on previous occasions to grant legal aid to applications which passed the merit test but failed the means test. Introducing different eligibility limits for different applicants/types of cases would give rise to uncertainty and confusion as well as concerns of subjectivity and arbitrariness in the assessment process of legal aid applications.

The 2007 Annual Review

38. The Administration informed the Panel that the change in the Consumer Price

Index (C) (CPI(C)) during July 2006 to July 2007 was +2.1%. The Secretary for Home Affairs moved a motion at the Council meeting held on 12 December 2007 to adjust upwards the limits from \$162,300 to \$165,700 for OLAS and criminal legal aid, and from \$450,800 to \$460,300 for SLAS in accordance with the cumulative increase in consumer prices. The motion was carried.

Biennial reviews from 2002 to 2006

39. Since 1992, the Administration has reviewed the fees payable to -

- (a) lawyers in private practice engaged by LAD to act as defence lawyers in criminal legal aid cases (criminal legal aid fees);
- (b) lawyers in private practice engaged by the Department of Justice (DoJ) to prosecute in criminal cases on behalf of the Government (prosecution fees); and
- (c) duty lawyers providing legal representation under the Duty Lawyer Scheme (DLS fees).

40. As regards the biennial reviews on litigation costs conducted in 2002, 2004 and 2006, the Administration considered that 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.

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

41. 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 pegged currently 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.

42. In conducting the five-yearly review of the criteria for assessing financial eligibility of legal aid applicants in May 2003, 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 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. The Administration had introduced in 2006 a number of deductible items in

computing the disposable income and disposable capital. Details of the improvement measures arising from the 2003 five-yearly review as provided by the Administration are in **Appendix IV**.

43. The Administration consulted the Panel on the proposed scope of the 2007 five-yearly review in March 2007 and May 2008. The Administration provided the following statistics of 2006-2007 to the Panel -

- (a) only 5% of the legal aid applicants did not pass the means test under OLAS and SLAS;
- (b) less than 1% of the applicants did not meet the means test for criminal legal aid; and
- (c) about 55% of the households in Hong Kong were eligible for OLAS and over 70% of the households were eligible for OLAS and SLAS under the current legal aid scheme.

The Panel, however, also noted from the statistics relating to legal aid applications from 2004-2005 to 2007-2008 provided by Hon Margaret NG's Office that the number of legal aid applications received only represented some 40% of the number of enquiries received.

44. The Panel received the following views from deputations on the 2007 five-yearly review -

- (a) the Government should review the appropriateness of relying solely on the movements in CPI(C) in reviewing the financial eligibility limits for legal aid applicants;
- (b) the financial eligibility limit for SLAS should be increased to \$1 million, so as to allow the middle class who could not afford the high litigation costs to be eligible for legal aid and to have access to justice;
- (c) the contribution rate payable by legally-aided persons and the financial eligibility limit under SLAS could be applied flexibly, e.g. legal aid could be granted to an applicant whose financial resources exceeded the statutory financial limit, on the condition that he agreed to make a higher contribution rate, say 15%;
- (d) the savings of legal aid applicants who were about to retire should be disregarded in computing their disposable capital;
- (e) the savings, the property and rental income arising therefrom of elderly legal aid applicants should be disregarded in computing their disposable capital and disposable income respectively;

- (f) the personal allowance deductible in calculating disposable income of applicants, which was currently equivalent to 35-percentile household expenditure, should be increased;
- (g) means test should be waived for (i) meritorious cases involving the fundamental rights of residents as stipulated in Chapter III of the Basic Law, and (ii) certain applicants, e.g. applicants making employees' compensation claims, applicants who had become totally incapacitated as a result of personal injury by accident in the course of the employment, or applicants who had reached retirement age; and
- (h) regarding the review cycle of financial eligibility limits, it was important for reviews to be conducted timely to reflect changes in litigation costs and to ensure that 70% of households which currently were financially eligible for OLAS and SLAS would not be adversely affected as a result of any delay in adjusting the limits.

45. Members also expressed the following views -

- (a) the existing financial eligibility limits under OLAS and SLAS were unrealistically set and should be reviewed, as they failed to adequately safeguard the public's right to access to justice;
- (b) the appropriateness of having a one-line financial eligibility limits for all types of cases should be reviewed, having regard to the policy objective that no one with reasonable grounds for taking or defending legal action in the Hong Kong court was prevented from doing so because of a lack of means; and
- (c) relevant factors such as age, health and earning power should be taken account of in assessing the financial eligibility of a legal aid applicant. For example, in computing disposable capital, consideration should be given to disregarding the savings of an applicant who had passed the merits test and was approaching retirement age or had become incapacitated, and to disregarding the asset which was the only means of livelihood of a legal aid applicant.

46. The Administration advised the Panel that it intended to examine the following issues in the 2007 five-yearly review-

- (a) whether there was any room for improvement to the current financial capacity approach in assessing the financial resources of legal aid applicants;
- (b) whether the deductible items for computing disposable income was adequate to ensure that they continued to be able to serve current needs;

- (c) whether there was room for improvement in the items to be disregarded in computing disposable capital;
- (d) the appropriateness of having a one-line financial eligibility limits;
- (e) whether there was any room for streamlining the review cycle of financial eligibility limits; and
- (f) whether there was scope of improving SLAS without undermining or jeopardizing the financial viability of the scheme.

47. *Members may wish to note that the Administration plans to revert to the Panel in March 2009 after consultation with stakeholders on the proposal for financial eligibility limits (item 2 on the list of outstanding items for discussion by the Panel).*

Costs and contributions payable by legal aid clients

48. 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. *Some members considered that the maximum contribution rate of 67% should be lowered.*

49. *The Bar Association suggested that the contribution rate under SLAS could be applied flexibly.* For instance, legal aid could be granted to an applicant whose financial resources exceeded the statutory financial limit, on the condition of the applicant making a higher contribution rate.

Operation of legal aid services - interest accrued on DLA's first charges

50. Under section 18A of LAO, DLA is entitled to a first charge on any property that is recovered or preserved for the aided person in the proceedings for which legal aid is given. However, interest only accrues on DLA's first charge where the property recovered or preserved in the proceedings is to be used as a home for the aided person or his dependents and DLA agrees to defer enforcing the first charge e.g. by sale of the property. In that case, simple interest payable by the aided person will be accrued at the rate of 10% per annum from the date on which the charge is first registered.

51. Some members considered that the interest which accrued at 10% per annum was unjustified as the rate was far above the market rate. The Administration agreed that it would be more appropriate to adopt an interest rate which was linked to movements in the market, rather than a fixed rate at 10% per annum. The Administration introduced the Legal Aid (Charge on Property) (Rate of Interest) Regulation in December 2005 to the effect that the average of the best lending rates of the note-issuing banks on 1 April in a year, less a discount factor, would be adopted as the rate for the interest accruing on DLA's first charge under section 18A(3B)(b) of LAO.

Criminal legal aid fee system

52. The request for a comprehensive review of the current remuneration system for lawyer engaging in criminal legal aid work was made by the two legal professional bodies in 2003. Such a review was supported by the Panel, LASC and the Chief Justice. The Panel noted that the Administration had reached broad consensus with the legal professional bodies on the proposed structure of the criminal legal aid system, and had proposed rates for the various items for various court levels for their consideration. While the Bar Association was content with the proposal, the Law Society of Hong Kong considered that the fee rates for the new system unreasonable. The Administration was requested to consider the Law Society's proposal that the hourly rate in criminal legal aid should be at a par with civil taxation rates on a party-to-party basis. There was a suggestion that legal aid should also be available to accused persons during the investigation stage and before the commencement of proceedings before the courts.

53. *Members may wish to note that the Administration plans to revert to the Panel on the criminal legal aid fee system in December 2008 (item 3 on the list of outstanding items for discussion by the Panel).*

Recovery agents

54. Some deputations, including the professional legal bodies, had expressed concern about the activities of recovery agents (RAs), which were organizations assisting 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 RAs were usually those who were not eligible for legal aid and had no means to conduct litigation on a private basis. The prevalence of RAs 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.

55. In November 2004, the Law Society established a working group to investigate the problems caused by RAs. In January 2005, the Bar Council of the Bar Association appointed the Special Committee on Recovery Agents to study issues arising from the phenomenon of non-legally qualified persons interfering in, or encouraging, litigation for reward.

56. The Panel shared the legal profession's concern about activities of RAs who were not professionally qualified or subject to any code of professional conduct. The Panel discussed the issue at a number of meetings since November 2005. The Administration briefed the Panel on its three-pronged approach and the measures taken to tackle the issue of RAs, involving public education, possible prosecution, and consideration of the need for legislation. *DoJ has undertaken to continue to work closely with the two legal professional bodies and would report to the Panel on the issue in February 2009 (item 8 on the list of outstanding items for discussion by the Panel).*

Independent statutory legal aid authority

57. LASC commissioned a consultancy in October 1997 to study all publicly funded legal services with reference to similar services offered in other common law jurisdictions. The study was completed in April 1998. LASC submitted its recommendations to the Chief Executive in September 1998. LASC recommended, among other things, the establishment of an independent statutory legal aid authority to advise the Government on legal aid policies and ultimately to be accountable for the delivery of all legal aid services in Hong Kong. This recommendation, however, was not accepted by the Administration.

58. In the context of discussing the transfer of the legal aid portfolio from the Administration Wing of the Chief Secretary for Administration's Office to the Home Affairs Bureau, LASC advised the Panel that while the majority of its members did not have strong views on the transfer, it would step up its supervisory role to ensure that the provision of legal aid services was undertaken professionally and objectively without interference. LASC also advised that although its recommendation of setting up an independent statutory legal aid authority was not accepted by the Administration, LASC considered it appropriate to seek a review of the issue.

59. *The Panel has decided to follow up the issue of setting up an independent statutory legal aid authority with the Administration and LASC. The Administration advised on 20 December 2007 that after consideration of the outcome of LASC's study which should be completed around the end of 2008. It would revert to the Panel on the issue (item 11 on the list of outstanding items for discussion by the Panel).*

Relevant papers

60. A list of the relevant papers which are available on the LegCo website is in **Appendix V**.

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.

Legal Aid Policy Review 1997

Item	Existing Arrangement	Original Recommendation	Final Recommendation
1.	Financial capacity of an applicant for legal aid is assessed on the basis of the aggregate of his disposable income and disposable capital.	The current method should be maintained.	No change.
2.	<p>Comprehensive Social Security Assistance (CSSA) rates are used as the personal allowances deductible from the gross income of legal aid applicants in the assessment of their financial capacity.</p> <p>The expenditure figures are revised when the CSSA rates are updated.</p>	<p>The average expenditure of the lowest 50% households in Hong Kong as revealed by the five-yearly Household Expenditure Survey (excluding rent payment) should be used as the amount of personal allowances deductible from an applicant's gross income in the assessment of his financial eligibility.</p> <p>The expenditure figure should be revised every year according to CPI(A) to account for inflation until the next survey has revealed a new expenditure figure.</p>	<p>The 35-percentile expenditure (excluding rent) should be adopted as the index of personal allowances.</p> <p>No change.</p>
3.	The financial eligibility limit for the standard legal aid scheme is \$169,700 while that for Supplementary Legal Aid Scheme (SLAS) is \$471,600.	The current financial eligibility limits should be maintained.	No change.
4.	The financial eligibility limits for the standard scheme and SLAS are reviewed once every two years to take account of inflation (measured in terms of Hang Seng CPI), change in litigation costs and other relevant factors.	The biennial review cycle should be maintained.	The review to take account of inflation should take place every year. Every two years, the review will also take account of any change in litigation costs.

Item	Existing Arrangement	Original Recommendation	Final Recommendation
5.	The financial resources of an infant applicant's parents or guardians will not be treated as the infant's financial resources.	The current method of calculating the financial eligibility of "infant" applicants for legal aid should be maintained.	No change.
6.	Legal aid is generally not available to proceedings before the Coroner's Court except in very limited circumstances. Aid may also be provided to the deceased's next of kin on an administrative basis.	The Duty Lawyer Service should provide legal assistance to persons who are likely to face a reasonable chance of criminal prosecution that would lead to a jail sentence or loss of livelihood as a result of giving evidence at coroner's inquests.	Legal aid will be provided to those whose behaviour is likely to be called in question and who are likely to face a reasonable chance of criminal prosecution that would lead to a jail sentence or loss of livelihood. In addition, in coroner's inquests involving great public concern, assistance will also be provided to the deceased's next of kin.
7.	Legal aid is generally not available to proceedings before the Coroner's Court except in very limited circumstances. Aid may also be provided to the deceased's next of kin on an administrative basis.	The Legal Aid Department should be empowered to provide legal aid to persons who have been issued legal aid certificates to cover proceedings in a coroner's inquest where it appears to be necessary to do so for the proper conduct of the proceedings for which legal aid has been granted.	No change.
8.	Persons who have satisfied the means test and the merit test will be eligible for legal aid, regardless of their residency status or years of residence in Hong Kong.	The LAD should continue to provide legal assistance to eligible persons regardless of their residency status or years of residency in Hong Kong.	No change.
9.	Employees involved in appeals to the Court of First Instance brought by employers against judgments of the Labour Tribunal are subject to means test.	The means test for employees should continue to apply.	No change.

Item	Existing Arrangement	Original Recommendation	Final Recommendation
10.	DLA has to discharge a legal aid certificate if the financial resources of an aided person have become greater than the statutory eligibility limit after legal aid has been granted.	DLA should be given the discretion not to discharge a legal aid certificate even under such circumstances.	No change.
11.	The rates of maximum contribution are determined on the basis of the amount of financial resources possessed by an aided person.	The current arrangement should maintain.	No change.
12.	Legally aided persons under the standard legal aid scheme and whose financial capacity exceeds \$86,000 are required to contribute to the legal costs to be incurred by DLA, regardless of the outcome of the cases.	Legally aided persons under the standard scheme should be required to pay contribution according to a revamped sliding scale of contribution, except those on CSSA who should be exempt from paying any contribution.	The contribution scale remains as proposed except that those with financial resources below \$20,000 will not need to contribute.
13.	Legally aided persons under SLAS are required to pay an application fee of \$1,000 and another \$1,000 when they accept legal aid. They are not required to contribute unless they succeed in the proceedings. Successful litigants are required to pay 15% of the damages recovered and the legal costs incurred on their behalf.	Legally aided persons under SLAS should be required to pay an application fee of \$1,000 and interim contribution irrespective of the outcome of the case, with the amount being set at the maximum amount under standard scheme. The payment of \$1,000 payable when legal aid is granted should be dropped.	No change except that the contribution percentage on property recovered should be reduced from 15% to 12%.
14.	In Bill of Rights cases, legally aided persons are required to contribute according to a sliding scale.	In Bill of Rights cases, legally aided persons with financial capacity falling under the standard scheme should contribute according to the contribution	No change.

Item	Existing Arrangement	Original Recommendation	Final Recommendation
		scale under the standard scheme. If their financial capacity exceeds the limit for the standard scheme, in according with a revamped sliding scale, with bandwidths of \$100,000.	
15.	An interest of 10% per annum will be charged on DLA's first charge over an aided person's property.	DLA should be given the discretion to reduce or not to seek interest on the DLA's charge on a preserved or recovered property. The requirement that an aided person must agree in writing to accruing interest and the DLA's first charge should be deleted.	No change.
16.	Assigned solicitor is required to remit all moneys received by him to DLA.	Amendments to the Legal Aid Ordinance should be made to better protect the Legal Aid Fund against omission or failure on the part of assigned solicitors to protect the DLA's first charge or to comply with the provisions in the Ordinance.	DLA should be empowered to withhold payment of profits cost to the assigned solicitor should he release moneys actually received by him to the aided client instead of remitting the moneys to DLA, resulting in a loss to the Legal Aid Fund.
17.		Measures to further enhance the cost-effectiveness of our legal services should be explored.	No change.

LegCo Panel on Administration of Justice and Legislative Services

Review of provision of legal aid services conducted in 2001

Summary of issues raised by the Panel and the Administration's responses

Issues raised by the Panel	Administration's responses
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>(i) International human rights jurisprudence confirmed 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>

Issues raised by the Panel	Administration's responses
<p>(v) election petitions arising from the Legislative Council and District Councils elections;</p> <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>(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>(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>

Issues raised by the Panel	Administration's responses
<p>(ix) cases with reasonable prospect of recovering damages and costs e.g. claims by flat buyers against property developers and claims against insurance companies.</p>	<p>(ix) The cases mentioned are not excepted proceedings under the Ordinary Legal Aid Scheme (OLAS).</p>
<p>II. Supplementary Legal Aid Scheme (SLAS)</p>	
<p>(a) The Administration to consider expanding SLAS or establishing self-financing legal aid schemes to deal with some of the above excepted proceedings.</p>	<p>(a) The fundamental principle is that SLAS should be self-financing. The scope of SLAS is confined to cases -</p> <ul style="list-style-type: none"> (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. <p>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.</p>
<p>III. Financial eligibility limits for legal aid schemes</p>	
<p>The Administration to -</p> <p>(a) conduct a comprehensive review of the basis and criteria for assessing the financial resources of applicants and the upper financial eligibility limits under OLAS and SLAS; and</p>	<p>(a) The financial eligibility limits for legal aid should be set to reflect the individual's affordability in taking up litigation on his own financial resources. Accordingly, the justification for adjusting the financial eligibility limits is to reflect the changes in litigation costs. Based on LAD cases in the past two years, there has only been a minor change to the median litigation costs, the Administration does not see any justification for an increase in the financial eligibility limits.</p>

Issues raised by the Panel	Administration's responses
<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.</p>	<p>(b) Under Rule 15(2) of the Legal Aid in Criminal Cases Rules, 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.</p>
<p>IV. Discretion of DLA to waive upper limit of means test</p>	
<p>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>(a) employees in appeals brought by employers against judgments of the Labour Tribunal and employees in insolvency cases.</p> <p>(b) actions involving the Basic Law, the Personal Data (Privacy) Ordinance and anti-discrimination legislation;</p>	<p>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 Hong Kong Bill of Rights Ordinance (HKBORO) or an inconsistency with (the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong is at issue. 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 proceedings.</p> <p>(a) Only very few cases regarding appeals against the judgments of the Labour Tribunal had been refused on grounds of means. For employer's insolvency cases, if any individual employee presents a winding-up or bankruptcy petition against the employer, the other employees involved in the case, irrespective of whether they are granted legal aid, may apply for ex-gratia payment from the Protection of Wages on Insolvency Fund Board and upon making of a winding up/bankruptcy order, file a proof of debt to the Official Receiver.</p> <p>(b) Upon a breach of enforcement notice issued by the Privacy Commissioner for Personal Data, the Commissioner may refer the case to the Director of Public Prosecutions for consideration of commencement of criminal proceedings. In cases in relation to the anti-discrimination legislation, the Equal Opportunities Commission, where</p>

Issues raised by the Panel	Administration's responses
(c) cases involving victims of industrial accidents.	<p>conciliation does not succeed, may assist the aggrieved persons in bringing proceedings where the case raises a question of principle and the Commission considers it in the interest of justice to do so. For Basic Law cases, DLA is already empowered to exercise his discretion to waive the financial eligibility limit if the intended proceedings involve a breach of HKBORO or an inconsistency with ICCPR as applied to Hong Kong is in issue.</p> <p>(c) Of the 1708 legal aid applications regarding employees compensation cases under OLAS in 2002, only 7% were refused on means. An applicant who is found over on means under OLAS but is otherwise financially eligible under SLAS would be advised to apply under SLAS.</p>
V. Assessment criteria for financial eligibility	
(a) The Administration to review the criteria for calculating financial resources of legal aid applicants.	<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><u>Method of computing disposable income</u></p> <p>(i) 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>Reductions in computing disposable income</u></p> <p>(ii) There is a case 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>(iii) There is a case for deducting maintenance payment made by an applicant to support his ex-spouse and children from the applicant's disposable income.</p>

Issues raised by the Panel	Administration's responses
<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.</p> <p>(c) The Administration to review the following provisions of the Legal Aid (Assessment of Resources and Contributions) Regulations -</p> <p>(i) Regulation 6 - Application in representative or fiduciary capacity.</p>	<p><u>Deductible items in calculating disposable capital</u></p> <p>(iv) 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 debt and negative value of capital assets in assessing financial resources.</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.</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>

Issues raised by the Panel	Administration's responses
<p>(ii) Regulation 7(1) - Resources of a spouse.</p> <p>(iii) Regulation 8 - Resources of an application who is an infant.</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>
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; and</p> <p>(ii) exempt aided persons from making contribution.</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 contributions.</p> <p>(ii) The Administration does not agree to exempt aided persons in proceedings involving human rights issues from making contribution. The policy is to require the aided persons in civil legal aid cases to pay a portion of their resources for the public-funded services they are receiving.</p>
<p><u>Contribution under OLAS</u></p> <p>(b) The Administration to review the maximum contribution rate of 25% under OLAS.</p>	<p>(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.</p>

Issues raised by the Panel	Administration's responses
<p><u>Contribution under SLAS</u></p> <p>(c) The Administration to consider -</p> <ul style="list-style-type: none"> (i) reviewing the contribution rate which is 12%; (ii) the possibility of adopting a sliding scale of contribution; and (iii) exempting certain aided persons (e.g. victims of industrial accidents or dependants of deceased workers) from making contribution. 	<ul style="list-style-type: none"> (i) At present, for a successful claim under SLAS, 12% of the compensation recovered will be paid to the Supplementary Legal Aid 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%. (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. (iii) The Administration does not agree to exempt certain persons from making contribution under the existing legal aid policy on the policy consideration that aided persons in civil legal aid cases should be required to pay a portion of their resources for the public-funded services they are receiving.
<p>VII. Operation of legal aid services</p>	
<p><u>Interest accrued on DLA's first charges</u></p> <p>(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.</p>	<p>(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.</p>

Issues raised by the Panel	Administration's responses
<p><u>Interest accrued on monies due to aided persons</u></p> <p>(b) The Administration to consider whether the interest accrued on monies due to aided persons should be paid to the aided persons.</p>	<p>(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 amounts 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.</p>
<p><u>Payment of costs by DLA on behalf of an aided defendant or respondent</u></p> <p>(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 the Legal Aid Ordinance (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.</p>	<p>(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.</p> <p>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) of LAO.</p>
<p><u>Application for legal aid</u></p> <p>(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.</p>	<p>(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.</p>

Issues raised by the Panel	Administration's responses
<p><u>Appeal against decision of DLA to refuse to grant legal aid</u></p> <p>(e) The Administration to consider putting in place a more effective and transparent appeal mechanism.</p> <p><u>Fees and costs payable to counsel and solicitors</u></p> <p>(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.</p>	<p>(e) LAD had reviewed the procedure for handling appeals under section 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 that DLA has refused the application.</p> <p>(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.</p> <p>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.</p>
<p>VIII. Legal aid in criminal proceedings</p>	
<p>(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 such division of labour between LAD and the court in the administration of legal aid services.</p>	<p>(a) The Administration is not aware of any practical problem with the existing arrangement.</p>

Issues raised by the Panel	Administration's responses
<p>(b) LAD should instruct leading counsel to represent aided persons in criminal cases.</p> <p>(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.</p> <p>(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.</p>	<p>(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.</p> <p>(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.</p> <p>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.</p> <p>(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.</p> <p>LAD sees no merits at all in changing the present rules to allow fees to be agreed with individual assigned lawyers in advance.</p>
IX. Legal aid for alternative schemes	
<p>(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.</p>	<p>(a) The Administration will keep in view further development in respect of the Civil Justice Reform as regards measures to help unrepresented litigants.</p>

Issues raised by the Panel	Administration's responses
<p>(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 LAO.</p>	<p>(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.</p>
<p>X. Other issues</p>	
<p>(a) The Administration to consider the following suggestions to improve the operation of legal aid services -</p> <ul style="list-style-type: none"> (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. 	<ul style="list-style-type: none"> (i) LAD has published a number of pamphlets and newsletters on various aspects of legal aid services; (ii) LAD has put in place a performance evaluation system whereby reports of unsatisfactory performance or conduct of assigned lawyers are referred to its Departmental Monitoring Committee for advice on appropriate action to be taken. LAD has also put in place a mechanism to collect feedback from legal aid applicants and aided persons at various service stages; (iii) LAD have implemented various measures with a view to making LAD's services more customer-oriented including setting a Customer Service Unit in each section and introducing a One-Stop Service; (iv) Classroom training and job-related self-learning package on Putonghua have been provided to frontline staff of LAD.

Improvement Measures

Five-Yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants in 2003

- (a) in calculating a legal aid applicant's income, the loss or reduction of future income, subject to satisfactory proof to DLA, would 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 was at work if considered reasonable, provided that they were living with the applicant, and were 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 was 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 agreed to defer enforcing the first charge on property recovered should be one that had regard to the movements in the market, instead of a fixed rate as at present. The rate would on one hand be lower than the commercial best lending rate and on the other hand, not incur a loss to the Government.

Review of the provision of legal aid services

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
Legislative Council	7 November 2001	Official Record of Proceedings of the Council on the motion moved by Hon Audrey EU on "Upholding the Rule of Law"
	9 January 2002	Official Record of Proceedings of the Council on a written question raised by Hon Audrey EU on "Unrepresented litigants in civil cases"
	30 January 2002	Official Record of Proceedings of the Council on a written question raised by Hon Abraham SHEK on "Statistics of legal aid cases"
Panel on Administration of Justice and Legal Services	25 April 2002	<p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)1692/01-02(01)] (English version only)</p> <p>Submission from Hong Kong Family Welfare Society [LC Paper No. CB(2)1692/01-02(02)] (English version only)</p> <p>Submission from Hong Kong Press Council [LC Paper No. CB(2)1692/01-02(03)] (English version only)</p> <p>Submission from Hong Kong Council of Social Service [LC Paper No. CB(2)1692/01-02(04)] (Chinese version only)</p> <p>Submissions from 1st Step Association [LC Paper No. CB(2)1692/01-02(05) LC Paper No. CB(2)1741/01-02(01)] (Chinese version only)</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Submission from the Law Society of Hong Kong [LC Paper No. CB(2)1692/01-02(06)] <i>(English version only)</i></p> <p>Submission from Hong Kong Journalists Association [LC Paper No. CB(2)1692/01-02(07)] <i>(English version only)</i></p> <p>Submission from Mr YEUNG Wai-sing, Eastern District Council [LC Paper No. CB(2)1726/01-02(01)] <i>(Chinese version only)</i></p> <p>Submission from Association of the Rights of Industrial Accident Victims [LC Paper No. CB(2)1741/01-02(02)] <i>(Chinese version only)</i></p> <p>Submission from Hong Kong Confederation of Trade Unions [LC Paper No. CB(2)1741/01-02(03)] <i>(Chinese version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2615/01-02]]</p>
Legislative Council	9 April 2003	<p>Official Record of Proceedings of the Council on a written question raised by Hon Cyd HO on "Legal aid applications in respect of litigations concerning human rights"</p> <hr/> <p>Official Record of Proceedings of the Council on a written question raised by Hon Cyd HO on "Legal aid applications in respect of litigations concerning anti-discrimination legislation"</p>
Panel on Administration of Justice and Legal Services	23 June 2003	<p>List of Issues for Review prepared by the Panel in July 2002 [LC Paper No. CB(2)2646/01-02(01)]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Letter dated 11 September 2002 from the Bar Association responding to the List of Issues for Review [LC Paper No. CB(2)2784/01-02(01)] <i>(English version only)</i></p> <p>Judgment in Shem Yiu Fun, HCAL183/2002 [LC Paper No. CB(2)1542/02-03(01)]</p> <p>Paper provided by the Administration on "Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants" [LC Paper No. CB(2)2581/02-03(01)]</p> <p>Paper provided by the Administration on "Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants" [LC Paper No. CB(2)2581/02-03(02)]</p> <p>Response of the Administration on the List of Issues for Review [LC Paper No. CB(2)2581/02-03(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)3051/02-03]</p>
	29 July 2003	<p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)2639/02-03(01)] <i>(English version only)</i></p> <p>Extract of letter dated 16 July 2003 from the Director of Administration to the Clerk to Panel concerning the submission from the Hong Kong Bar Association [LC Paper No. CB(2)2888/02-03(01)]</p> <p>Submission from the Law Society of Hong Kong on "Review of the Legal Aid in Criminal Case Rules" [LC Paper No. CB(2)2908/02-03(01)]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Minutes of meeting [LC Paper No. CB(2)37/03-04]</p>
	<p>27 October 2003</p>	<p>Letter dated 20 October 2003 from the Director of Administration responding to the issues raised by the Panel at the meetings on 23 June and 29 July 2003 [LC Paper No. CB(2)159/03-04(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)387/03-04]</p>
	<p>29 January 2004</p>	<p>Reply dated 14 November 2003 from the Administration on "Court of Appeal Case CACC 365 of 2000" [LC Paper No. CB(2)370/03-04(01)]</p> <p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)644/03-04(01)] <i>(English version only)</i></p> <p>Letter dated 15 January 2004 from the Administration responding to the Hong Kong Bar Association's submission of 28 November 2003 [LC Paper No. CB(2)1094/03-04(01)]</p> <p>Submission from the Law Society of Hong Kong [LC Paper No. CB(2)1094/03-04(02)] <i>(English version only)</i></p> <p>Submission dated 12 December 2003 from the Legal Aid Services Council (LASC) on "Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants" [LC Paper No. CB(2)1094/03-04(03)] <i>(English version only)</i></p> <p>Response from the LASC on the Court of Appeal's judgment in a criminal appeal cases [LC Paper No. CB(2)3166/03-04(01)] <i>(English version only)</i></p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		Minutes of meeting [LC Paper No. CB(2)1741/03-04]
Legislative Council	5 May 2004	Official Record of Proceedings of the Council on a written question raised by Dr Hon LO Wing-lok on "Legal aid applications relating to claims of medical negligence"
Panel on Administration of Justice and Legal Services	14 December 2004	Paper provided by the Administration on "Annual and biennial review of financial eligibility limits of legal aid applicants" [LC Paper No. CB(2)367/04-05(01)] Minutes of meeting [LC Paper No. CB(2)710/04-05]
Legislative Council	11 May 2005	Official Record of Proceedings of the Council on an oral question raised by Hon Margaret NG on "Payment of fee to the defence counsel in criminal legal aid cases in respect of preparation work"
Panel on Administration of Justice and Legal Services	--	Responses of the Administration to the submissions from LASC and the Law Society of Hong Kong [LC Paper No. CB(2)58/04-05(01)] [LC Paper No. CB(2)58/04-05(02)] Paper provided by the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)507/04-05(01)] Letter dated 4 April 2005 from the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)1212/04-05(01)] Letter dated 8 July 2005 from the Administration to the Law Society of Hong Kong on "2004 Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees"

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>[LC Paper No. CB(2)2268/04-05(02)] <i>(English version only)</i></p> <p>Letter dated 11 July 2005 from the Administration on "Criminal Legal Aid Fees and Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants" [LC Paper No. CB(2)2319/04-05(01)]</p>
	23 January 2006	<p>Background brief prepared by the LegCo Secretariat on "Provision of legal aid services" [LC Paper No. CB(2)904/05-06(01)]</p> <p>Paper provided by the Administration on "Annual review of financial eligibility limits of legal aid applicants" [LC Paper No. CB(2)904/05-06(02)]</p> <p>Submission from Mr Valentine S T YIM on "Annual review of financial eligibility limits of legal aid applicants" [LC Paper No. CB(2)963/05-06(01)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)1491/05-06]</p>
	--	<p>Letter dated 17 March 2006 from the Administration on "2005 annual review of financial limits of legal aid applicants" [LC Paper No. CB(2)1471/05-06(01)]</p>
Legislative Council	3 May 2006	<p>Official Record of Proceedings of the Council on the motion moved by the Chief Secretary for Administration on "Proposed resolution under the Legal Aid Ordinance"</p>
Panel on Administration of Justice and Legal Services	27 November 2006	<p>Paper provided by the Administration on "Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants" [LC Paper No. CB(2)431/06-07(04)]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Minutes of meeting [LC Paper No. CB(2)887/06-07]</p> <hr/> <p>26 March 2007</p> <p>Background brief prepared by the LegCo Secretariat on "Provision of legal aid services" [LC Paper No. CB(2)1395/06-07(01)]</p> <p>Paper provided by the Administration on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)1395/06-07(02)]</p> <p>Submission from the Legal Aid Services Council [LC Paper No. CB(2)1472/06-07(01)] <i>(Chinese version only)</i></p> <p>Submission from the 1st Step Association [LC Paper No. CB(2)1472/06-07(02)]</p> <p>Information note from the LegCo Office of Hon Margaret NG [LC Paper No. CB(2)1472/06-07(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)1966/06-07]</p>
Legislative Council	2 May 2007	<p>Official Record of Proceedings of the Council on the motion moved by the Chief Secretary for Administration on "Proposed resolution under the Legal Aid Ordinance"</p>
Panel on Administration of Justice and Legal Services	28 May 2007	<p>Paper provided by the Administration on "Re-organisation of the Government Secretariat : Proposed transfer of the legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)1968/06-07(04)]</p> <p>Supplementary information provided by the Administration [LC Paper No. CB(2)1968/06-07(05)]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		Minutes of meeting [LC Paper No. CB(2)2540/06-07]
	--	<p>Position paper from the Hong Kong Bar Association on "Proposed Reorganisation Concerning the Legal Aid Department" [LC Paper No. CB(2)1989/06-07(01)] <i>(English version only)</i></p> <p>Submission from the Hong Kong Human Rights Monitor on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)1989/06-07(02)] <i>(Chinese version only)</i></p> <p>Submission from the Law Society of Hong Kong on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2058/06-07(01)] <i>(English version only)</i></p> <p>Letter dated 4 June 2007 from the Legal Aid Services Council on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2058/06-07(02)] <i>(English version only)</i></p> <p>Letter dated 6 June 2007 from the Panel Clerk to Legal Aid Services Council on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2058/06-07(03)]</p> <p>Paper provided by the Administration on "Re-organisation of the Government Secretariat : Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2117/06-07(01)]</p> <p>2nd Position Paper from the Hong Kong Bar Association on "Re-organisation of the Government Secretariat : Proposed</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2123/06-07(01)] <i>(English version only)</i>
	25 June 2007	Background brief prepared by the LegCo Secretariat on "Pilot Scheme on mediation of legally aided matrimonial cases" [LC Paper No. CB(2)2228/06-07(01)] Paper provided by the Administration on "Pilot Scheme on mediation in legally-aided matrimonial cases" [LC Paper No. CB(2)2221/06-07(04)] Paper provided by the Administration on "Review of criminal legal aid fee system" [LC Paper No. CB(2)2221/06-07(05)] Extract from minutes of meeting on 26 February 2007 [LC Paper No. CB(2)2221/06-07(06)] Paper provided by the Administration on "Review of criminal legal fees system" for the Panel meeting on 26 February 2007 [LC Paper No. CB(2)1127/06-07(02)] Submission from the Law Society of Hong Kong on "Criminal legal aid fees system" [LC Paper No. CB(2)2264/06-07(01)] <i>(English version only)</i> Minutes of meeting [LC Paper No. CB(2)2654/06-07]
	--	Legal Aid Services Council's reply dated 21 June 2007 on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2251/06-07(01)] <i>(English version only)</i>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		<p>Submission from the Law Society of Hong Kong on "The Pilot Scheme on Legal Aid for Mediation in Matrimonial Cases" [LC Paper No. CB(2)2294/06-07(01)] <i>(English version only)</i></p> <p>Table of Contents and Executive Summary of the report entitled "Twisting arms : court referred and court linked mediation under judicial pressure" [LC Paper No. CB(2)2312/06-07(01)] <i>(English version only)</i></p>
Legislative Council	12 December 2007	<p>Official Record of Proceedings of the Council on the motion moved by the Secretary for Home Affairs on "Proposed resolution under the Legal Aid Ordinance"</p>
Panel on Administration of Justice and Legal Services	25 February 2008	<p>Background Brief prepared by the LegCo Secretariat on "Criminal legal aid fees system" [LC Paper No. CB(2)1143/07-08(01)]</p> <p>Paper provided by the Administration on "Criminal legal aid fees system" [LC Paper No. CB(2)1143/07-08(02)]</p> <p>Submission from Society for Community Organization [LC Paper No. CB(2)1143/07-08(03)] <i>(Chinese version only)</i></p> <p>Submission from the Law Society of Hong Kong [LC Paper No. CB(2)1176/07-08(02)] <i>(English version only)</i></p> <p>Submission from Hong Kong Human Rights Monitor [LC Paper No. CB(2)1245/07-08(01)] <i>(English version only)</i></p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
		Minutes of meeting [LC Paper No. CB(2)1697/07-08]
	--	Survey Report of members of the Law Society of Hong Kong on criminal legal aid fees system [LC Paper No. CB(2)1203/07-08(03)] Letter dated 22 February 2008 from the Law Society of Hong Kong enclosing a letter from its President to the Secretary for Home Affairs concerning the criminal legal aid fees system [LC Paper No. CB(2)1247/07-08(01)]
	26 May 2008	Background Brief prepared by the LegCo Secretariat on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)2010/07-08(01)] Paper provided by the Administration on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)2011/07-08(04)] Interim report prepared by the Research and Library Services Division of the LegCo Secretariat on "The legal aid systems in selected places" [IN18/07-08] <i>(English version only)</i> Minutes of meeting [LC Paper No. CB(2)2818/07-08]
	--	Letter dated 26 May 2008 from the Law Society of Hong Kong on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)2090/07-08(01)]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Motion/Question</u>
	23 June 2008	<p>Background Brief prepared by the LegCo Secretariat on "Pilot Scheme on Mediation in Legally-aided Matrimonial Cases" [LC Paper No. CB(2)2327/07-08(01)]</p> <p>Paper provided by the Administration on "Proposal on the Permanent Arrangements for Mediation in Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2327/07-08(02)]</p> <p>Letter dated 3 June 2008 from the Law Society of Hong Kong on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2327/07-08(03)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2826/07-08]</p>
Legislative Council	2 July 2008	<p>Official Record of Proceedings of the Council on a written question raised by Hon James TO on "Inclusion of cash values of insurance policies in the calculation of capital assets in assets tests"</p>

Council Business Division 2
Legislative Council Secretariat
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