

For discussion on  
25 January 2010

**Legislative Council Panel on  
Administration of Justice and Legal Services  
Research Report on “Legal Aid Systems in Selected Places”**

**Purpose**

This paper sets out the Administration’s response to the research report on “Legal Aid Systems in Selected Places” conducted by the Research and Library Services Division of the Legislative Council (LegCo) Secretariat, and major concerns raised by the legal professional bodies and concern group/organization on the report.

**The Administration’s Response**

***A. Authority responsible for providing legal aid***

2. We note that in all the three selected places covered in the research, the authorities responsible for providing legal aid are statutory bodies instead of government departments, and that –

(a) the legal aid authorities’ annual budgets are subject to the control of the executive branch before being approved by the legislature; and

(b) the legal aid authorities are also directly accountable to the executive branch.

3. In Hong Kong, although the Legal Aid Department (“the LAD”) is a government department, decisions at the operational level are made by professional officers. In particular, the existing appeal procedure does not allow the policy bureau to exert any undue influence upon the department in deciding whether to grant or refuse legal aid to individual applicant<sup>1</sup>.

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<sup>1</sup> Anyone aggrieved by any decision to refuse legal aid application is entitled to appeal under Section 26 of the Legal Aid Ordinance (Cap. 91) and Rule 12 & 13 of Legal Aid in Criminal Cases Rules (Cap 221), and the ultimate decision in a civil or criminal case is made by a member of the Judiciary.

4. We note the views of the Law Society of Hong Kong (“the Law Society”), the Hong Kong Bar Association (“the Bar Association”), and the Society for Community Organization (“the SOCO”) on the establishment of an independent legal aid authority. We also note that the Legal Aid Services Council (LASC) has recently completed a study on the matter and concluded that in view of the very satisfactory service currently provided by the Legal Aid Department (“the LAD”), the views of the LAD staff on the matter, and having considered the present financial position of the government, it does not see a pressing need to disestablish LAD and substitute it by an independent authority.

5. We concur with the LASC that the current services delivered by the LAD are impartial, effective and satisfactory. We hold the view that legal aid services should continue to be operated in the present manner under the current institutional setup.

### ***B. Scope of legal aid services***

#### **(i) Legal Advice and Mediation**

6. We note that in all the three selected places, the publicly-funded legal aid services encompass not only legal representation but also legal advice and mediation. The report states that in Hong Kong, the current scope of legal aid does not cover legal advice and mediation.

7. The report has not, as pointed out in the submission of LASC, addressed the following –

(a) free legal advice is available from the Duty Lawyer Service which operates a Free Legal Advice Scheme under government subvention. Free legal advice are being provided in nine legal advice centres across the districts; and

(b) with the implementation of the Civil Justice Reform on 2 April 2009, the scope of legal aid covers mediation in all civil proceedings including matrimonial proceedings.

(ii) Financial Eligibility Limits (FELs)

8. We would like to point out that amongst the jurisdictions studied, Hong Kong is the only jurisdiction which adopts a “**financial capacity**” approach to assess the means of legal aid applicants. The financial capacity of the individual refers to the aggregate of his/her yearly disposable income and his/her disposable capital. This approach avoids the anomalies of having separate income and capital tests, which may work to the disadvantage of persons having only income or capital and in favor of those having both. The computation of disposable income and disposable capital also has a direct bearing on applicants’ eligibility. For instance, Hong Kong disregards the value of main dwelling of legal aid applicants in calculating their disposable capital, this arrangement does not appear to be common amongst the jurisdictions studied. Furthermore, many overseas jurisdictions are still pegging the deductible standard personal allowance of their legal aid applicants to their social security assistance rates. We have moved on and adopted the “35-percentile household expenditure” as our standard since the year 2000. Comparison of the various FELs applied in Hong Kong vis-à-vis other jurisdictions should be seen in this light.

9. We agree with the LASC that a one-line FEL is straightforward to apply. We do not consider it appropriate to introduce different eligibility limits for different types of cases for Hong Kong. We note that SOCO proposed to extend the discretion exercised by the Director of Legal Aid (DLA) to waive the upper financial limit of legal aid applicants. The fundamental legal aid policy is that legal aid should only be granted to those who lack the means to take or defend legal action. In this light, DLA’s exemption power should be restrictive. DLA has the discretion to grant legal aid to an applicant even if the applicant’s financial resources exceed the financial eligibility limit only in the following cases –

- (a) in a criminal case if DLA is satisfied that it is desirable in the interests of justice to do so; or
- (b) in cases where a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue.

We consider the above arrangement appropriate.

10. As regards the types of cases covered by legal aid, we note that Hong Kong is comparable to the three jurisdictions in respect of the range of cases covered under the Ordinary Legal Aid Scheme (OLAS), and that we are the only jurisdiction operating a Supplementary Legal Aid Scheme (SLAS) to enable those people whose financial resources exceed the financial eligibility limit (FEL) for OLAS to receive legal aid services in certain types of cases. We have taken note of the views of the Law Society and the Bar Association concerning the relaxation of FELs for OLAS and SLAS to enable more people to be eligible for legal aid. In particular, we note that the Bar Association has urged that the means assessment mechanism should take into account the circumstances for elderly applicants. There are also suggestions for extending the coverage of SLAS to more types of cases. We are examining these proposals in the course of conducting the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants, and will revert to the Panel in March 2010.

(iii) Legal aid services at the community level

11. We have taken note of the views of stakeholders on the provision of legal aid services at the community level. In particular, we note that the LASC would investigate into ways and means to enhance legal aid services at the community level. We will consider LASC's views in examining proposals to provide legal aid services at the community level.

***C. Legal Aid Service Fees***

12. Since 2006, the Administration has been consulting the legal professional bodies on the review of the criminal legal aid fees system. A broad consensus has already been reached on the changes to be made to the fee structure, which will provide proper recognition for preparation or pre-trial work, rationalize fee items and enhance transparency for the fee setting and re-determination basis. At the request of the Law Society, the Administration has also agreed to increase the fee rates for solicitors undertaking criminal legal aid cases. The Administration's offer will increase the criminal legal aid expenditure by about \$100 million, and provide further improvement to the remuneration of solicitors by an increase ranged between 120% and 400%, depending on individual cases. Negotiation with the Law Society on the issue of rates is in progress. In the meantime, the Administration has taken on board LASC's suggestion and is making preparation for the legislative process to put in place the revised criminal legal aid fee structure.

13. The Government is committed to providing reasonable and effective remuneration for legal aid lawyers within the remits of public affordability. We will continue to ensure that public funds are spent in a prudent manner to ensure sustainability in the provision of legal aid services.

#### *D. Legal Aid Expenditure*

14. We note the Law Society and the Bar Association have commented on the level of legal aid expenditure based on the comparison of legal aid spending per capita of Hong Kong vis-à-vis the other jurisdictions in the report. We share the view of the LASC that a direct comparison per se may not be meaningful.

15. We consider that the adequacy of resources deployed in the provision of legal aid services should not be assessed solely on the comparison of per capita spending on legal aid services with other jurisdictions. Such a comparison fails to recognize that other aspects of the economy including the household income, standard of living, etc also have a bearing on the costs of legal aid services in each jurisdiction. Furthermore, key elements of the legal aid system such as the capping or otherwise of legal aid budget, the mechanism for assessing the eligibility of legal aid applicants, client contributions, etc also have an important role to play in assessing the provision of legal aid services. For instance, Hong Kong has been stated as having the lowest expenditure per capita in the selected places in the research report, but Hong Kong has the highest level of expenditure per granted application. We cannot agree to the suggestion for increasing legal aid funding solely on the ground that other jurisdictions have a higher per capita spending on legal aid than we do.

Home Affairs Bureau  
Legal Aid Department  
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