

INFORMATION NOTE

Scope of legal aid services in selected places

1. Background

1.1 In Hong Kong, under the Supplementary Legal Aid Scheme (SLAS), legal aid is currently available for cases involving personal injury or death, medical, dental or legal professional negligence where the claim for damages is likely to exceed HK\$60,000, as well as employees' compensation claims irrespective of the amount of the claim. There have been persistent calls by the two legal professional bodies to expand the scope of SLAS by increasing the types of cases covered.

1.2 The Chief Executive announced in his 2010-2011 Policy Address that the Government had earmarked HK\$100 million for injection into the SLAS Fund when necessary to expand the scope of the scheme. In the meantime, the Interest Group on Scope of Legal Aid of the Legal Aid Services Council (LASC) would report to the Panel on Administration of Justice and Legal Services (the Panel) on its study on expansion of SLAS in December 2010.

1.3 The Research Division of the Legislative Council Secretariat conducted a research on the legal aid systems in England and Wales of the United Kingdom, the Province of Ontario of Canada and the State of New South Wales of Australia in 2009. At the Panel's meeting held on 22 November 2010, it was agreed that the Research Division be requested to undertake more detailed study on the scope of legal aid services.

1.4 This information note focuses on the scope of legal aid services provided in the three selected places covered in the aforementioned research, namely, England and Wales, Ontario and New South Wales. To provide a quick reference, **Appendix I** compares the cases covered under the respective legal aid regime, whereas **Appendix II** presents the updated figures of legal aid expenditures relating to the legal aid regime in the selected places and Hong Kong.

2. England and Wales of the United Kingdom

2.1 In England and Wales, the Legal Services Commission, a non-departmental public body, provides legal aid services. It runs two schemes: the Community Legal Service (CLS) and the Criminal Defence Service (CDS). CLS provides free legal advice, legal help on civil matters including assistance with family mediation, and legal representation in court proceedings. CDS offers free legal advice on criminal matters, duty solicitor service, and legal representation for defence in criminal cases at all court levels.

2.2 Civil legal aid is means and merits tested. Financial means test looks at a client's income and capital, and the legal merits test looks at factors such as the case's likelihood of success. As regards criminal legal aid, in magistrates' courts, legal aid can be granted to defendants who could be imprisoned, but the defendants need to pass a financial means test. There is no financial means test for cases heard in the Crown and higher courts.

2.3 Legal aid is available for criminal and many types of civil legal problem, such as family, immigration, social welfare, mental health and other areas of civil law. However, legal representation is not available for cases heard in certain tribunals or courts, including the Employment Tribunal and the Lands Tribunal. People also cannot normally receive legal aid for the following types of cases:¹

- (a) personal injury;
- (b) negligently caused damage to property;
- (c) conveyancing (the legal transfer of property ownership when buying or selling a house or flat);
- (d) boundary disputes;
- (e) making a will;
- (f) trust law;

¹ Legal Services Commission (2010a) p.15.

- (g) defamation (libel and slander) or malicious falsehood (knowingly spreading lies about people);
- (h) company or partnership law;
- (i) matters arising out of carrying on a business; and
- (j) attending an interview for an asylum claim.

2.4 Apart from allegations relating to clinical negligence, services relating to allegations of negligently caused injury, death or damage to property are excluded from the scope of legal aid. It is because the great majority of these cases are suitable for funding under conditional fee agreements. Meanwhile, conveyancing, boundary disputes, the making of wills, matters of trust law, defamation or malicious falsehood, matters of company or partnership law, and other matters arising out of the carrying on of a business are excluded because they are not considered to have sufficient priority to justify public funding. In particular, the government does not consider it being justified to spend public money helping businessmen who fail to insure against the risk of facing legal costs.²

3. The Province of Ontario of Canada

3.1 In Ontario, legal aid services are provided by Legal Aid Ontario (LAO) which is an independent publicly-funded non-profit corporation. LAO provides free legal advice, duty counsel services and certificates for retaining private lawyers to represent clients in proceedings, and funds a network of independent community-based legal aid clinics.

² Legal Services Commission (2001) p.1.

3.2 To qualify for legal aid services, an applicant must be financially and legally eligible. This means that an applicant's net household income and assets corresponding to his or her household size must be at or below the specified limit, and the legal problem is one that is covered by LAO. Depending on the applicant's income and ownership of property, he or she may qualify for a certificate with a contribution agreement, i.e. the applicant will repay LAO some or all of the legal fees.

3.3 According to the *Legal Aid Services Act 1998*, LAO shall provide legal aid services in the areas of criminal law, family law, clinic law and mental health law. In addition, it may provide legal aid services in areas of civil law, except in:

- (a) proceedings wholly or partly in respect of a defamation;
- (b) relator actions;
- (c) proceedings for the recovery of a penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings;
- (d) proceedings relating to any election; and
- (e) prescribed areas of civil law, prescribed types of civil cases or prescribed types of civil proceedings.

3.4 LAO narrowed down its certificate coverage for civil litigation matters in April 2010. Cases that are no longer covered by legal aid certificates include but are not limited to the following:³

- (a) personal injury claims;
- (b) claims against disability insurers for reinstatement of long-term disability insurance;

³ Legal Aid Ontario (2010); Legal Aid Ontario (2010b); PSWLaw (2010); *Toronto Star*, 9 April 2010.

- (c) lawsuits for abuse in institutions;
- (d) malicious prosecution;
- (e) real estate or mortgage actions;
- (f) wrongful dismissal matters;
- (g) civil fraud;
- (h) medical malpractice matters;
- (i) actions for damages against a lawyer; and
- (j) actions against LAO.

3.5 In response to media enquiries on the reduction of civil legal aid coverage, LAO states that contingency fee arrangements are currently available, which means that there is a viable alternative to legal aid coverage for low-income persons who have a meritorious civil claim. This option has enabled LAO to concentrate civil certificate resources in areas where full representation is most often required.⁴

4. The State of New South Wales of Australia

4.1 In New South Wales, legal aid is provided by Legal Aid New South Wales (Legal Aid NSW) which is an independent statutory body. Legal aid services include free legal advice and minor assistance, duty solicitor services, legal representation, and alternative dispute resolution.

⁴ Legal Aid Ontario (2010a); Legal Aid Ontario (2010b).

4.2 To be eligible for civil or criminal legal aid, the legal problem of an applicant must be one that is covered by Legal Aid NSW. Except for some family, care and protection, mental health and drug matters, as well as cases involving children and disabled persons, the applicant must also pass a means test which looks at the applicant's income and assets, i.e. the applicant's net assessable income and net assets must be below prescribed limits. The applicant must also pass a merit test which considers whether it is reasonable in all the circumstances to grant legal aid.

4.3 Legal Aid NSW provides legal assistance in matters arising under both New South Wales law and the Commonwealth law. Legal aid is available in most areas of law, including:⁵

- (a) family law and de facto relationships;
- (b) child support;
- (c) criminal law;
- (d) children, criminal law;
- (e) consumer issues;
- (f) tenancy, caravan park and retirement village disputes;
- (g) domestic violence;
- (h) child welfare;
- (i) refugee applications;
- (j) disputes with government departments (such as social security);
- (k) discrimination and civil liberties;
- (l) protected estate matters;

⁵ Legal Aid New South Wales (2010).

- (m) mental health and guardianship matters;
- (n) veterans' pension appeals;
- (o) public interest environmental matters;
- (p) prisoners;
- (q) separate representatives for children in Family Court matters; and
- (r) public interest coronial inquests.

5. Hong Kong

5.1 In Hong Kong, legal aid is provided by the Legal Aid Department (LAD) under the Ordinary Legal Aid Scheme (OLAS) and SLAS. In addition, the Duty Lawyer Service offers four legal assistance schemes to complement the legal aid services provided by LAD, namely, the Duty Lawyer Scheme (legal representation in the Magistrates' Courts, Juvenile Courts and Coroners Courts), the Legal Advice Scheme, the Tel-Law Scheme, and the Convention Against Torture Scheme.

5.2 To qualify for legal aid, an applicant must pass both a merits test and a means test. The applicant will be eligible if his or her financial resources do not exceed the financial eligibility limits. For civil legal aid under OLAS and criminal legal aid, the current limit is HK\$175,800, while under SLAS an applicant is eligible if his or her financial resources are above HK\$175,800 but not exceeding HK\$488,400. As regards the merits test, in civil cases (both OLAS and SLAS), the applicant must have reasonable grounds for taking or defending proceedings, while in criminal cases, legal aid will be granted if it is desirable in the interests of justice to do so.

5.3 OLAS covers civil proceedings in the District Court, the Court of First Instance, the Court of Appeal, the Court of Final Appeal, certain coroner's inquests, as well as application to the Mental Health Review Tribunal. The major types of cases covered by OLAS are:

- (a) family and matrimonial disputes;
- (b) personal injury claims;
- (c) employment disputes;
- (d) contractual disputes;
- (e) immigration matters; and
- (f) professional negligence claims.

5.4 Legal aid is not available for certain proceedings, including:

- (a) defamation (other than defending a counter-claim alleging defamation);
- (b) Small Claims Tribunal matters;
- (c) Labour Tribunal matters;
- (d) money claims in derivatives of securities, currency futures or other futures contracts; and
- (e) election petitions except involving a possible 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.

5.5 Under SLAS, legal aid is available for cases involving personal injury or death, as well as medical, dental or legal professional negligence, where the claim for damages is likely to exceed HK\$60,000. The Scheme also covers claims under the Employees' Compensation Ordinance irrespective of the amount of the claim.

Appendix I

Cases covered under the legal aid regime in the selected places and Hong Kong⁽¹⁾

	Hong Kong OLAS	Hong Kong SLAS	England and Wales	Ontario	New South Wales
Family matters	✓	×	✓	✓	✓
Personal injury	✓	✓	normally not provided for such cases ⁽²⁾	×	available in limited circumstances for people at special disadvantage
Professional negligence	✓	medical, dental and legal professional negligence only	normally not provided for such cases, ⁽²⁾ but clinical negligence claims remaining within the scope of legal aid	medical malpractice and claims against lawyers excluded	available to people at special disadvantage
Consumer protection ⁽⁴⁾	not including disputes in relation to financial transactions, e.g. the purchase of financial products	×	not including disputes in relation to financial transactions ⁽⁵⁾	not including disputes in relation to financial transactions	available for consumer protection matters arising under a Commonwealth statute (not including disputes in relation to financial transactions)

Notes: (1) This is a rough categorization of cases for comparison only.

(2) Legal aid is normally not provided for personal injury and professional negligence claims because the great majority of these cases are suitable for funding under conditional fee agreements.

(3) Personal injury is now excluded because contingency fee arrangements are currently available, which means that there is a viable alternative to legal aid coverage for low-income persons who have a meritorious civil claim. This option has enabled Legal Aid Ontario to concentrate civil certificate resources in areas where full representation is most often required.

(4) Consumer protection mainly concerns product liabilities, unfair trade practices, privacy rights and consumer credit, but in a broader sense, it may include mis-selling of financial products.

(5) As the United Kingdom has a financial ombudsman, mis-selling cases usually go to the financial ombudsman, instead of seeking legal remedy.

Appendix I (cont'd)

Cases covered under the legal aid regime in the selected places and Hong Kong⁽¹⁾

	Hong Kong OLAS	Hong Kong SLAS	England and Wales	Ontario	New South Wales
Trust matters	×	×	normally not provided for such cases	×	only covering protected estate which are statutory trusts for persons with disabilities who could not manage their own affairs
Company disputes	×	×	×	×	×
Defamation	×	×	×	×	available in very limited circumstances
Employment disputes	✓	×	✓	wrongful dismissal matters excluded	available to people at special disadvantage only to take proceedings for the recovery of unpaid wages and other entitlements under a state award
Housing matters	✓	×	✓	real estate or mortgage actions excluded	✓
Immigration matters	✓	×	✓	✓	✓
Criminal matters	✓	×	✓	✓	✓
Judicial review	✓	×	✓	✓	✓
Class actions/ multi-party actions	×	×	✓	✓	✓

Note: (1) This is a rough categorization of cases for comparison only.

Appendix II

Legal aid expenditures in the selected places and Hong Kong

	Hong Kong (Total) ⁽¹⁾	Hong Kong (LAD only)	England and Wales	Ontario ⁽²⁾	New South Wales
Total legal aid expenditure, 2007-2008 (in million)					
Including administrative costs ⁽³⁾	HK\$746.2	HK\$646.8	£2,019.6 (HK\$24,851.2)	CAN\$332.8 (HK\$2,570.7)	AUS\$196.9 (HK\$1,508.9)
Excluding administrative costs	HK\$479.9	HK\$428.2	£1,860.5 (HK\$22,893.5)	CAN\$251.7 (HK\$1,944.3)	AUS\$107.6 (HK\$824.6)
Per capita legal aid expenditure, 2007-2008					
Population (in million)	6.98	6.98	54.46	12.93	7.07
Including administrative costs	HK\$106.9	HK\$92.7	£37.1 (HK\$465.5)	CAN\$25.7 (HK\$198.5)	AUS\$27.9 (HK\$213.8)
Excluding administrative costs	HK\$68.8	HK\$61.3	£34.2 (HK\$420.8)	CAN\$19.5 (HK\$150.6)	AUS\$15.2 (HK\$116.5)
Total legal aid expenditure less client contributions and costs received, 2007-2008 (in million)					
Client contributions and costs received	HK\$184.3	HK\$184.3	£222.0 (HK\$2,731.7)	CAN\$19.2 (HK\$148.3)	Not available
Including administrative costs	HK\$561.9	HK\$462.5	£1,797.6 (HK\$22,119.5)	CAN\$313.6 (HK\$2,422.4)	
Excluding administrative costs	HK\$295.6	HK\$243.9	£1,638.5 (HK\$20,161.7)	CAN\$232.5 (HK\$1,795.9)	
Per capita legal aid expenditure less client contributions and costs received, 2007-2008					
Including administrative costs	HK\$80.5	HK\$66.3	£33.0 (HK\$406.1)	CAN\$24.3 (HK\$187.7)	Not available
Excluding administrative costs	HK\$42.3	HK\$34.9	£30.1 (HK\$370.4)	CAN\$18.0 (HK\$139.0)	

Notes: (1) Legal aid expenditures of the Legal Aid Department (LAD) + The Duty Lawyer Service + Legal Aid Services Council.

(2) In the calculation of legal aid costs, all expenses of legal aid clinics are included.

(3) Legal aid costs + administrative costs (such as personal emoluments, personnel related expenses, departmental or administrative expenses, and other expenses).

Appendix II (cont'd)

Legal aid expenditures in the selected places and Hong Kong

	Hong Kong (Total) ⁽¹⁾	Hong Kong (LAD only)	England and Wales	Ontario ⁽²⁾	New South Wales
Total legal aid expenditure, 2008-2009 (in million)					
Including administrative costs ⁽³⁾	HK\$764.8	HK\$661.1	£2,247.0 (HK\$27,649.3)	CAN\$356.1 (HK\$2,750.7)	AUS\$215.9 (HK\$1,654.5)
Excluding administrative costs	HK\$482.5	HK\$430.1	£2,091.1 (HK\$25,731.0)	CAN\$272.2 (HK\$2,102.6)	AUS\$116.9 (HK\$895.9)
Per capita legal aid expenditure, 2008-2009					
Population (in million)	7.00	7.00	54.81	13.06	7.19
Including administrative costs	HK\$109.2	HK\$94.4	£41.0 (HK\$504.5)	CAN\$27.3 (HK\$210.9)	AUS\$30.0 (HK\$229.9)
Excluding administrative costs	HK\$68.9	HK\$61.4	£38.2 (HK\$470.1)	CAN\$20.8 (HK\$160.7)	AUS\$16.3 (HK\$124.9)
Total legal aid expenditure less client contributions and costs received, 2008-2009 (in million)					
Client contributions and costs received	HK\$181.1	HK\$181.1	£197.5 (HK\$2,430.2)	CAN\$21.8 (HK\$168.4)	Not available
Including administrative costs	HK\$583.7	HK\$480.0	£2,049.5 (HK\$25,219.1)	CAN\$334.3 (HK\$2,582.3)	
Excluding administrative costs	HK\$301.4	HK\$249.0	£1,893.6 (HK\$23,300.7)	CAN\$250.4 (HK\$1,934.2)	
Per capita legal aid expenditure less client contributions and costs received, 2008-2009					
Including administrative costs	HK\$83.4	HK\$68.6	£37.4 (HK\$460.2)	CAN\$25.6 (HK\$197.7)	Not available
Excluding administrative costs	HK\$43.1	HK\$35.6	£34.5 (HK\$424.5)	CAN\$19.2 (HK\$148.3)	

Notes: (1) Legal aid expenditures of the Legal Aid Department (LAD) + The Duty Lawyer Service + Legal Aid Services Council.

(2) In the calculation of legal aid costs, all expenses of legal aid clinics are included.

(3) Legal aid costs + administrative costs (such as personal emoluments, personnel related expenses, departmental or administrative expenses, and other expenses).

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