

For information

**Legislative Council Panel
on Administration of Justice and Legal Services**

Legal Aid Costs

PURPOSE

This paper briefs Members on the principles and operation of the legal aid services provided by the Legal Aid Department (LAD) and provides information relating to legal aid spending over the past five years.

BACKGROUND

2. At the meeting of the Legislative Council (LegCo) Panel on Administration of Justice and Legal Services (AJLS Panel) on 25 June 2013, the Administration was requested to provide (a) the annual expenditure of LAD in the past five years for the delivery of legal aid services; (b) the actual expenditure involved in the judicial review case of Hong Kong-Zhuhai-Macao Bridge; and (c) information in response to the assertion made by the Hong Kong Bar Association (HKBA) that LAD's budget on legal aid costs was "*de facto* capped", including how the provision of legal aid services will not be affected by financial constraints.

POLICY OBJECTIVE OF LEGAL AID

3. The provision of legal aid is an integral part of Hong Kong's legal system. Our policy objective is to ensure that no one with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means. To qualify for legal aid, a person is required by law to satisfy the means and merits tests as provided by the Legal Aid Ordinance (LAO) (Cap. 91).

4. At present, a person whose financial resources¹ do not exceed

¹ "Financial resources" means the aggregate of an applicant's yearly disposable income and disposable capital. A person's disposable income is his gross income minus deductible items as allowed under the LAO. A person's disposable capital is the sum of his credit balance, money due to him, the market value of non-money resources and the value of business or share in a company, minus deductible items as allowed under the LAO.

\$269,620 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (OLAS), which covers most civil proceedings at District Court level and above. The eligibility limit also applies to criminal legal aid under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance (Cap. 221D). The corresponding limit for the Supplementary Legal Aid Scheme (SLAS) is \$1,348,100. The financial eligibility limits (FELs) of OLAS and SLAS are reviewed annually, biennially and five-yearly to take into account changes in the Consumer Price Index (C), litigation costs and the financial eligibility of legal aid applicants respectively².

5. Funding for OLAS and criminal legal aid is provided by the Government, while SLAS is a self-financing scheme and is mainly funded by the application fees payable by applicants, the interim contributions from aided persons and the final contributions from a percentage deduction of the damages recovered in successful cases. In recent years, the major improvements to civil and criminal legal aid are as follows –

- (a) **OLAS:** the scope was expanded in November 2012 to cover monetary claims in derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation or deception was involved in respect of the sale;
- (b) **SLAS:** in addition to claims relating to personal injuries, employees compensation and medical, dental and legal professional negligence, the scope of SLAS was significantly expanded in November 2012 to cover a wider range of professional negligence claims, negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products, and monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties. In December 2012, the Administration obtained the LegCo Finance Committee's approval to inject \$100 million into the Supplementary Legal Aid Fund to support the operation of the expanded SLAS; and

² Pursuant to the last five-yearly review, the FELs of OLAS and SLAS were increased substantially in May 2011 (i.e. from \$175,800 to \$260,000 for OLAS, and from \$488,400 to \$1,300,000 for SLAS). In June 2013, the FELs of OLAS and SLAS were further increased to \$269,620 and \$1,348,100 respectively in accordance with the results of the 2012 annual review. Preparatory work for the next biennial and five-yearly reviews is being conducted by the Home Affairs Bureau and LAD.

- (c) **Criminal legal aid:** following LegCo's approval, the Legal Aid in Criminal Cases (Amendment) Rules 2012 commenced operation in March 2012 to improve the payment structure of the criminal legal aid fees system.

BUDGETING OF LEGAL AID

6. The statutory means and merits tests have been the only criteria provided by the LAO since it came into operation in 1967 in assessing legal aid applications, and LAD officers need not be concerned with the financial provisions of the Department when processing applications. In other words, a person's access to justice would not be hindered by LAD's fiscal position, and an application for legal aid that has passed both the means and merits tests would not be refused due to insufficient legal aid funding.

7. LAD's annual estimates of Subhead 208 "Legal aid costs" are drawn up holistically taking into account past actual expenditure and estimated costs which mainly include the following factors –

- (a) amount of legal aid costs spent in the preceding fiscal year;
- (b) number of existing on-going cases (including cases where it is expected that significant costs may be taxed against aided persons should the aided cases are lost in the appellate courts);
- (c) estimated number of new applications / cases;
- (d) changes, if any, to the FELs;
- (e) changes, if any, to legal aid fees (e.g. solicitor costs and counsel fees); and
- (f) changes, if any, to the scope of OLAS.

8. The estimates and actual spending in legal aid costs (covering both OLAS and criminal cases) in the past five years are as follows –

Estimates and actual spending in Subhead 208 “Legal aid costs” from 2008-09 to 2013-14

Financial year	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
	\$ million					
Approved estimate	528.0	516.1	519.1	545.5	538.8	571.0
Revised estimate	455.0	489.2	514.5	475.5	508.6	Not available
Actual expenditure	430.1	485.8	505.3	463.2	512.8	Not available

9. For administrative purpose, an approved funding amount is set at the beginning of each financial year. In the approved estimate for 2013-14, the provision for legal aid costs is set at \$571 million, representing an increase of 12% as compared to the revised estimate for 2012-13. The increased provision is mainly due to the anticipated increase in legal aid costs, including the additional provision for implementing the revised criminal legal aid fees structure. As far as OLAS is concerned, with the substantial increase in FEL since May 2011, together with the expanded scope as set out in paragraph 5(a) above, we expect that more people would be eligible for legal aid. However, the exact rate of increase in applications is difficult to estimate as legal aid applications are demand-driven. The need for litigation will neither arise automatically nor increase proportionately once more people become financially eligible or as more types of proceedings fall within the scope of legal aid.

10. As such, legal aid costs are highly demand-led and as demonstrated in the table above, adequate provision has all along been provided for the subhead to meet the potential costs. In exceptional circumstances where the costs exceed the approved provisions within a financial year, supplementary provision would be sought according to the relevant provisions of the Public Finance Ordinance (PFO) (Cap. 2)³ to ensure that no eligible legal aid applications would be turned down owing to lack of funds. This financial arrangement for OLAS and criminal

³ Section 6(3) of the PFO provides that expenditure for the financial year on the services of the Government shall be arranged in accordance with the heads and subheads and be limited by the provision in each subhead shown in the Estimates of Expenditure as approved. Under section 8 of the PFO, any subsequent changes to the approved Estimates of Expenditure can only be made with the approval of the Finance Committee (FC) of LegCo upon a proposal of the Financial Secretary, and the FC may delegate to the Financial Secretary the power to approve changes subject to such conditions, exceptions and limitations as specified in the delegation.

legal aid is a key underpinning of LAD’s delivery of legal aid services, as the provision of legal aid is enshrined in law and the demand is beyond the control of the controlling officer⁴.

11. We do not agree with HKBA’s observation that the LAD budget is “*de facto* capped”. As explained in paragraphs 6 to 10 above, LAD’s underspending in the past years shows that the Government has been providing sufficient provision in the Estimates for this demand-driven service all along. Based on its own understanding, HKBA has reached the conclusion that “the obstacle created by the uncapped budget, portrayed as an unusual benefit, in the Report⁵ is just a myth. There is no reason why [an independent legal aid authority] (ILAA) cannot take over the work of LAD and operate within a capped budget. ...It seems that the price to pay for ILAA to operate within a capped budget is a small one. Therefore, now is the time to have an ILAA (albeit on a capped budget)”⁶. We welcome further discussion with HKBA, following our explanation at the AJLS Panel and supplemented by this information note to the Panel.

JUDICIAL REVIEW CASE OF HONG KONG-ZHUHAI-MACAO BRIDGE

12. To ensure that only those cases with reasonable grounds for taking the proceedings are granted legal aid, all legal aid applications are processed by legal aid counsel appointed to serve in the LAD. In assessing the merits of an application, LAD will consider the background

⁴ In fact, up until 2005-06, LAD’s Subhead 208 “Legal aid costs” was annotated with an asterisk in the Estimates, similar to other services such as the Comprehensive Social Security Assistance and Social Security Allowance schemes and student financial assistance, denoting that these subheads were not by definition cash limitable. From 2006-07 onwards, the practice of annotating subheads with asterisks was discontinued in a purely formatting change as the annotation itself did not obviate the need for the Government to seek LegCo Finance Committee’s approval for any variation to a subhead exceeding \$10 million. That said, explanation was made in the Introduction to the Estimates for the same year that certain recurrent expenditure subheads are by nature non-cash limitable because the demand for the relevant services is beyond the control of the controlling officer.

⁵ “Final Report of the Consultancy Study on the Feasibility and Desirability of Establishing an Independent Legal Aid Authority” issued by Deloitte Consulting (Hong Kong) Limited in March 2013.

⁶ Extract from paragraphs 39 – 40 of the “Submission of the Hong Kong Bar Association on the recommendations made by the Legal Aid Services Council to the Chief Executive of HKSAR on the issue of the establishment of an independent legal aid authority” (LC Paper No. CB(4)830/12-13(01)).

of the case, evidence provided and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted. Regarding legal aid applications for judicial review, legal aid will be granted, subject to means, if the applicant has a sufficient interest in the matter to which the judicial review application relates and the case has reasonable grounds. Insofar as Members' specific request concerning the amount of costs incurred in the judicial review case of the Hong Kong-Zhuhai-Macao Bridge, the costs in this case have not yet been agreed/taxed, while it is noted that the costs incurred up to July 2013 amounted to \$1.49 million.

ADVICE SOUGHT

13. Members are invited to note LAD's spending over the past five years, and the details of the provisions for legal aid services.

**Home Affairs Bureau
Legal Aid Department
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