

**For discussion  
on 23 March 2015**

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

**Provision of legal aid and assignments of lawyers to  
legally aided persons by the Legal Aid Department**

**INTRODUCTION**

This paper briefs Members on the provision of legal aid and assignments of lawyers to legally aided persons by the Legal Aid Department (“LAD”).

**PROVISION OF LEGAL AID**

2. 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).

3. At present, a person whose financial resources<sup>1</sup> do not exceed \$269,620 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (“OLAS”), which covers most civil proceedings at the 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”)<sup>2</sup> is \$1,348,100.

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<sup>1</sup> “Financial resources” means the aggregate of an applicant’s disposable income within a 12-month period 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.

<sup>2</sup> The SLAS is a self-financing scheme which aimed at providing legal assistance to the middle class.

4. Additionally, Section 5AA of the LAO provides that the Director of Legal Aid (“DLA”) may waive the financial eligibility limit (“FEL”) of OLAS for applicants in meritorious cases in which a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue.

5. To ensure that only those cases with reasonable grounds are granted legal aid, all legal aid applications are processed by legal aid counsel appointed to serve in LAD. In conducting the merits test, LAD will consider the background of the case, evidence available and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted. In assessing the merits, LAD must be satisfied that there are reasonable grounds or points of law involved for which it is desirable to grant legal aid to enable the matter to be submitted to the court for decision or judgment. For individual applications, if the available documents already demonstrate strong ground(s) for taking proceedings or that the issues raised are already covered by previous judgments or advice, legal aid may be granted to applicants who have passed the means test. If complicated legal issues are involved in the application, LAD may seek independent legal opinion from counsel in private practice on the merits of the application under section 9(d) of the LAO.

6. 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. In the case of *R v. Legal Aid Board, ex p. Hughes* (1992) 24 H.L.R. 698, it was held by the English Court of Appeal that generally speaking, if the court grants leave, it is likely that the legal merits test will be satisfied.

7. If an application is refused, the applicant may appeal against DLA’s decision to the Registrar of the High Court (or, for Court of Final Appeal proceedings, to a review committee chaired by the Registrar and comprising a barrister and a solicitor as members). The decision of the Registrar or the review committee is final.

### **Recent improvements on legal aid services**

8. In recent years, the major improvements on legal aid services are as follows –

- (a) **FELs:** pursuant to a comprehensive review to enhance access to legal aid, the OLAS and SLAS FELs were significantly increased from \$175,800 to \$260,000 (an increase of 48%) and from \$488,400 to \$1,300,000 (an increase of 166%) respectively in May 2011. In June 2013, the FELs of OLAS and SLAS were further increased to the present levels of \$269,620 and \$1,348,100 respectively;
- (b) **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;
- (c) **SLAS:** in addition to pre-existing 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, monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties, and representation for employees in appeals against decisions made by the Labour Tribunal. In December 2012, the Government obtained the Legislative Council (“LegCo”) Finance Committee’s approval to inject \$100 million into the Supplementary Legal Aid Fund to support the operation of the expanded SLAS.

9. Furthermore, as per our briefing to the LegCo Panel on Administration of Justice and Legal Services (“AJLS Panel”) on 16 February 2015 (vide LC Paper No. CB(4)493/14-15(04)), we will be introducing legislative amendments in the second quarter of 2015 to implement a revised set of bandwidths of assessed financial resources for determining contribution payable under the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B). We will also introduce legislative amendments in the second quarter of 2015 to increase the FELs of OLAS and SLAS by 7.7% to \$290,380 and \$1,451,900 respectively to take into account changes in the Consumer Price Index (C) subsequent to the last adjustments in June 2013.

10. As regards the scope of SLAS, whilst we are still gaining experience on the newly added proceedings, we have invited the Legal Aid Services Council (“LASC”) to conduct a further review with a view to presenting a new round of recommendations to the Government. Towards this end, the LASC has formed a Working Group on Expansion of SLAS to follow up on the review. In the course of the review, the Working Group will take into account comments expressed by stakeholders including the AJLS Panel and the two legal professional bodies. The Government will provide assistance and information as required to facilitate the work of the Working Group.

## **COMPARISON WITH OVERSEAS JURISDICTIONS**

### **Scope**

11. As stated in paragraph 3 above, the OLAS covers most civil proceedings at the District Court level and above. Among the types of cases covered, personal injuries and matrimonial cases account for the majority of civil legal aid applications and legal aid certificates granted<sup>3</sup>. In 2013, personal injury and matrimonial cases accounted for 82.3% of all civil legal aid applications and 92.1% of all civil legal aid certificates granted<sup>4</sup>.

12. However, personal injury and matrimonial cases are usually not covered under legal aid in overseas jurisdictions. In England and Wales, United Kingdom, following an initiative to reform legal aid to enhance management and financial control, legal aid spending and the scope of civil legal aid has been significantly curtailed since 2013. As a result, tortious claims, including personal injuries and divorce, are no longer covered under legal aid in England and Wales. Similarly, legal aid in New South Wales, Australia, does not cover personal injuries, while divorce proceedings are not covered in New Zealand.

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<sup>3</sup> Other common types of cases for civil legal aid include land and tenancy matters, employment disputes, immigration matters and wage claims. These account for a combined 5.7% of civil legal aid applications and 3.1% of civil legal aid certificates granted in 2013.

<sup>4</sup> Personal injury cases accounted for 35.4% of all civil legal aid applications and 41% of all legal aid certificates granted, while matrimonial cases accounted for 46.9% of applications and 51.1% of legal aid certificates granted.

13. In Hong Kong, apart from OLAS, the self-financing SLAS has been in place since 1984 to provide legal assistance to the middle class whose financial resources may exceed the OLAS FEL, but below a certain limit. The SLAS FEL is currently set at \$1,348,000. As set out in paragraphs 8(c) and 10 above, notwithstanding the recent expansion of the scope of SLAS in November 2012, we have invited the LASC to conduct a further study with a view to presenting a new round of recommendations to the Government. SLAS is a unique scheme not found anywhere else in the world which allows for settlement of costs of both parties even when the case is not successful.

### **Financial eligibility limit**

14. Hong Kong also compares favourably with other overseas jurisdictions in conducting the means test of legal aid applicants. At present, LAD 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 favour of those having both. For example, in England and Wales, UK and New South Wales, Australia, legal aid applicants have to pass both the income and capital tests in order to be financially eligible for legal aid.

15. Furthermore, statutory allowances and deductibles (e.g. median monthly household expenditure as a deductible component) under the LAO are applicable when assessing the financial resources of legal aid applicants. For legal aid applicants aged 60 or above, an amount equivalent to the OLAS FEL (i.e. \$269,620) is also disregarded from his/her savings in the assessment of financial resources. In assessing a legal aid applicant’s disposable capital, the value of his/her primary residence is disregarded while in Ontario, Canada, New Zealand and New South Wales, the value of primary residence is only disregarded up to a certain limit.

16. A table summarising the basic financial eligibility limits for legal aid in selected jurisdictions is set out below. That said, as the detailed calculations and methodologies adopted are different among the jurisdictions, the figures in the following table are for general reference only.

<b>Jurisdiction</b>	<b>Financial eligibility limit in local currency</b>	<b>Financial eligibility limit in Hong Kong Dollars<sup>#</sup></b>
Hong Kong	HKD 269,620	HKD 269,620
England and Wales, UK	GBP 16,796	HKD 194,582
New Zealand	NZD 25,866	HKD 145,044
New South Wales, Australia	AUD 20,120	HKD 117,642
Ontario, Canada	CAD 14,310	HKD 86,504

<sup>#</sup> Exchange rate as at 10 March 2015 as published by the Hong Kong Association of Banks

## **ASSIGNMENTS OF LAWYERS TO AIDED PERSONS**

17. Section 13 of the LAO provides that where a legal aid certificate is granted, the DLA may act for the aided person through legal aid counsel or assign any lawyers in private practice who are on the Legal Aid Panel (“the Panel”)<sup>5</sup> selected by either the aided person if he so desires, or the DLA.

18. Cases that the LAD cannot or choose not to take up are assigned out to lawyers on the Panel. In general, the LAD handles up to one third of all matrimonial and personal injury related cases as solicitors for the aided persons. Insolvency and seaman’s wages claims and the majority of enforcement cases are handled by in-house lawyers to achieve cost effectiveness. To avoid conflict of interests and to maintain the independence of the LAD, all judicial review cases are assigned out.

19. When distributing legal aid work to lawyers on the Panel, irrespective of the types of cases involved, LAD will adhere to the fundamental principle that the aided person’s interest is of paramount importance. The LAD’s primary duty towards the aided person is to facilitate access to and attainment of justice through competent legal representation. To this end, the LAD has devised and published criteria on assignment of legal aid cases based on the experience and expertise of the lawyers. The criteria, which have been endorsed by the LASC and are available on LAD’s website and contained in the Manual for Legal Aid Practitioners, seek to ensure that the DLA fulfills his duty of assigning competent lawyers to act for aided persons. The criteria include features such as imposition of a limit on the number of

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<sup>5</sup> As at end February 2015, 921 counsel and 2 259 solicitors were registered on the Panel.

assignments and amount of fees paid that aim to facilitate an equitable distribution of legal aid work. A copy of the assignment criteria is at **Annex**.

20. When processing the nomination of lawyers, LAD will base on the assignment criteria to determine whether the choice of lawyer is appropriate by assessing whether the nominated lawyer has attained the relevant seniority, experience and expertise required to take up the assignment. If the nominated lawyer is considered not appropriate on grounds such as having previous records of unsatisfactory performance in handling legal aided cases or currently handling an overwhelming number of legal aid cases, etc., LAD will discuss the choice of lawyer with the aided person. When necessary, LAD will ask the aided person to select another Panel lawyer and assess whether the newly nominated lawyer is appropriate in taking up the case.

### **Declaration system and monitoring mechanism**

21. To address the public concern on improper touting or champerty activities, LAD has introduced a “Declaration System” for legal aid cases in September 2013 after consulting LASC and the two legal professional bodies. The system seeks to ensure that the nominations of lawyers are made out of the aided persons’ own free will and they have not agreed to share any damages, property or costs which they may get or retain in the proceedings with any person(s) including the lawyers nominated, the lawyers’ employee, agent or claims agent. Corresponding clauses are also set out in the assignment letters issued to lawyers as assignment conditions. A nominated lawyer who is unable to accept such conditions will not be allowed to take up assignment to handle the case.

22. A Departmental Monitoring Committee chaired by the DLA is established to evaluate the performance of assigned lawyers in handling legal aid cases and the number of legal aid cases assigned. LAD’s directorate officers also keep all assigned-out cases under constant review to ensure that there are no impropriety or undue delays in the handling of legal aid cases.

23. To enhance the transparency and fairness in the assignments of lawyers, LAD and the Independent Commission Against Corruption (“ICAC”) have formed a Corruption Prevention Group in mid-2013 to discuss issues relating to prevention of corruption and bribery. ICAC has recently completed their study on LAD’s assignment system for lawyers and experts, and has submitted its report with recommendations

to LAD in January 2015. LAD will carefully study ICAC's report and recommendations.

24. Furthermore, LAD currently has in place a mechanism for making "representations" regarding legal aid cases. If anyone believes a person should not have been granted legal aid (for example, that the person has withheld essential information that affects the strength of the case or has provided false information on either merits or means), he or she can make a representation to LAD. If the representation is verified after investigation, LAD will discontinue the relevant aided person's legal aid certificate and refer the matter to the police for follow up action if necessary. If improper conduct on the part of lawyers is involved, LAD will also take appropriate actions, including issuing advisory letters to the lawyers concerned, placing their names on the Record of Unsatisfactory Performance and Conduct, removing their names from the Legal Aid Panel, as well as referring the cases to the relevant legal professional bodies for follow-up actions. In 2014, legal aid was discontinued for 27 cases following internal investigation or representation. Among which, 18 cases were forwarded to the police for follow up action. As regards Panel lawyers, advisory letters were issued to four Panel solicitors while 11 Panel solicitors were put on the Record of Unsatisfactory Performance in 2014.

### **ADVICE SOUGHT**

25. Members are invited to note the provision of legal aid and assignments of lawyers to legally aided persons by the LAD as set out above.

**Home Affairs Bureau  
Legal Aid Department  
March 2015**



## **Selection of Counsel and Solicitors for Legal Aid Assignments**

Legal aid work is not distributed to counsel or solicitors on the Legal Aid Panel equally regardless of merits, the legally aided persons' interests being the paramount consideration. The Legal Aid Department's primary duty is therefore towards the aided persons by facilitating the access and attainment of justice through competent legal representation. Counsel or solicitors are selected by Legal Aid Counsel having regard to the level of experience and expertise of the practitioners concerned and the type and complexity of the particular case. In general, counsel or solicitors are selected in accordance with the following criteria:

### **General**

2. Counsel or solicitors should –
  - (a) be on the Legal Aid Panel;
  - (b) be in active practice;
  - (c) have a satisfactory past performance record\*;
  - (d) satisfy the minimum experience requirement specified for the relevant area of work;
  - (e) not exceed the limit on assignments of legal aid work and/or, where appropriate, costs and fees paid or payable for such work in the past 12 months;
  - (f) (in the case of solicitors) have the necessary support and facilities afforded by their firms to handle legal aid work.

### **Minimum Experience Requirements**

#### **Civil Case**

3. Counsel or solicitors should –
  - (a) have at least 3 years of post-call / post-admission experience; and
  - (b) have handled a minimum number of civil cases in the relevant area of work within a specified period –
    - (i) for medical negligence, professional negligence, administrative / constitutional law (including Bill of Rights) cases, have handled at least 5 such cases\* in the past 3 years; and

- (ii) for other cases, have handled at least 16 cases\* in the relevant area of work in the past 3 years.

### **Criminal Cases**

4. Counsel or solicitors should –
- (a) have at least 3 years of post-call / post-admission experience;
  - (b) have handled at least 5 cases\* in the past 3 years in the relevant area of work; and
  - (c) meet the minimum experience requirements specified below –
    - (i) *Cases in the District Court*
      - at least 3 years relevant criminal litigation experience;
    - (ii) *Cases in the Court of First Instance and appeals from the Magistrates' Court*
      - at least 5 years relevant criminal litigation experience;
    - (iii) *Appeals to Court of Appeal and Court of Final Appeal<sup>#</sup>*
      - Court of Appeal:
        - Counsel – at least 7 years relevant criminal litigation experience
        - Solicitors – at least 5 years relevant criminal litigation experience
      - Court of Final Appeal:
        - Counsel – at least 10 years relevant criminal litigation experience
        - Solicitors – at least 7 years relevant criminal litigation experience

\* including both legally aided and non-legally aided cases

<sup>#</sup> the number of cases handled in the Court of Appeal and the Court of Final Appeal are considered jointly for the purpose of counting past experience in paragraph (c)(iii) above.

5. For Senior Counsel, they are exempted from the minimum experience requirements for assignment of legal aid work.

### **Limits on Legal Aid Assignments**

6. Assignments should not generally exceed the limits set out below –

*Civil Cases:*

- (a) for solicitors – 45 cases within the past 12 months; and
- (b) for counsel – 25 cases within the past 12 months.

*Criminal Cases:*

- (a) for solicitors – 30 cases or \$600,000 legal aid costs within the past 12 months (whichever occurs first); and

(b) for counsel – 30 cases or \$1.2 million legal aid fees within the past 12 months (whichever occurs first).

7. Assignment to counsel and solicitors who do not meet the above selection criteria may be allowed with the approval of a directorate officer.

\* In the assignment of legal aid cases, the Department will take into account such matters as the Record of Unsatisfactory Performance/Conduct and the record of disciplinary decisions of the Bar Association and the Law Society for which the Department maintains a separate list.