

For information on  
15 December 1998

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

**Legal Aid Policy Review 1997**

**Purpose**

This paper sets out the preliminary views of the Administration on the three issues raised by Members at the Panel meeting on 15 September, namely, the proposal to enhance protection of the Legal Aid Fund, extending legal aid to family of the deceased in coroner's inquests, and waiving the means test for employees in appeals brought by employers against judgments of the Labour Tribunal on a point of law.

**Background and Argument**

A. *Enhanced Protection of Legal Aid Fund*

2. The Working Group on the Legal Aid Policy Review 1997 ("the Working Group") proposed that, in order to better protect the Legal Aid Fund, -

- (a) section 19A(1) of the Legal Aid Ordinance should be amended so that the requirement to make direct payment to the DLA should apply not only to the person responsible for payment (i.e. the opposite party) but also to the assigned solicitor acting for the aided person; and
- (b) the DLA should be empowered to recover any loss if the person responsible for payment or the solicitor assigned to act for the aided person, or the aided persons, fails to comply with the requirement of direct payment to DLA and other provisions of the Legal Aid Ordinance.

3. Members expressed concern that the above proposals might impose too harsh a punishment on the assigned legal representatives. Members do not consider it justified to hold legal representatives responsible for payment since they might not be aware that the aided person has been paid directly or they would not have been able to stop it. In addition, the Legal Aid Ordinance already provides for DLA to have a first charge on property recovered or preserved.

4. We have considered Members' views carefully. Members may wish to note that the costs of legally aided proceedings (including fees to counsel and solicitors assigned by LAD) are paid by the legal aid fund and recouped from any moneys recovered on behalf of the aided persons for whom they act (including costs recovered from the opposite parties). A loss to the fund occurs if the assigned solicitor, having received these moneys, paid them over to his legal aid client, instead of to DLA as required by section 19A(1) of the Legal Aid Ordinance, thereby depriving DLA of the moneys from which the sum payable to him in respect of his fees and disbursements may be deducted. We doubt whether the legal aid fund should still be liable to pay the solicitor in that event.

5. Members may also wish to note that under the English Legal Aid Scheme an aided person's solicitor has a specific duty to pay all moneys received by him for his aided client to the Legal Aid Board and the Legal Aid Board has power to defer payment of the solicitor's profit costs if, as a result of his default or omission, the fund incurs a loss and where the solicitor is disciplined, to retain the sum which would otherwise be payable by the Legal Aid Board to the solicitor. Although there are differences between the English and Hong Kong legal aid systems, we are of the view that the principle regarding protection of legal aid fund is the same.

6. That said, we accept that it may not be fair to hold solicitors responsible for any loss if there is clear evidence that their legal aid clients or the opposite parties choose to ignore the requirement in section 19A(1). In the circumstances, we intend to revise our proposal so that only the assigned solicitors who fail to remit the moneys received by him to DLA will be held responsible for the consequential loss to the fund. This includes, for example, a case where the moneys were paid by the assigned solicitor directly to his legal aid client and cannot be recovered from the latter.

7. As a result of recent discussion with the President and representatives of the Law Society, we are also considering only to empower DLA to defer payment of the solicitor's profit costs until the statutory

requirements have been complied with. In addition, we are exploring whether the Law Society may take disciplinary action against the solicitor for failure to comply with such requirements and whether the payment of his profit costs would be withheld only when the fund incurs a loss and the solicitor is disciplined.

*B. Extending legal aid to next of kin in coroner's inquests*

8. The Working Group recommends, as a step forward, that the Duty Lawyer Service should provide legal aid to those 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 a coroners' inquest. The Working Group also recommends that DLA may provide legal representation at coroner's inquests to those who have been issued with legal aid certificates and who are required to attend coroners' inquests.

9. At the September meeting, a Member suggested that the Administration should consider extending legal aid to the family of the bereaved in cases of "significant public interest". We have considered this proposal carefully. Since coroner's inquests are not to establish civil liability and it is difficult if not impossible to define "public interest", we do not consider it appropriate to categorically provide legal aid to the deceased's family at an inquest. Nevertheless, we would refine our proposal to ensure those who require legal assistance at a coroner's court would be better protected as outlined in paragraph 8 above.

*C. Waiving the means test of employees in appeals on point of law*

10. The Working Group recommends that the means test for employees involved in appeals brought by employers against Labour Tribunal decisions should continue in the light of fairness to other parties and the likelihood that the majority of employees would meet the means test. Members suggested that the Administration should consider waiving the means test in appeals on point of law since legal representation would be all the more critical in these cases.

11. We agree that there may be an imbalance in the financial positions of the employer and the employee engaged in these appeals. However, such imbalance is not uncommon in other civil cases such as landlord and tenant in private litigation. Waiving the means test for a particular group would be a significant departure from the cardinal principle of our long-established policy that legal aid is to be provided to persons who otherwise will not be able

financially to pursue legal action. We therefore intend to maintain our proposal to continue to apply the means test to employees involved in such appeals.

### **Recent Developments**

12. The Hon Lee Cheuk-yan had recently drawn to LAD's attention certain cases whereby employees in seeking to obtain legal aid to bring action against employers who failed to comply with decisions of the Labour Tribunal to repay outstanding wages might be required to make contributions which would exceed the amount of wages outstanding. The Hon Lee Cheuk-yan further suggested improving the handling of such cases by either assigning lawyers to the Protection of Wages on Insolvency Fund Board, or having LAD referred these cases to the Board automatically, on grounds that it would be unreasonable or uneconomical to go through normal legal proceedings.

13. We recognise that there may be room for streamlining procedures between the Fund Board and LAD on the handling of the type of cases highlighted by the Hon Lee Cheuk-yan, and the Administration is considering how best to address the problem. In studying the matter, we are also aware that an amendment to the Bankruptcy Ordinance which came into operation on 1 April 1998 has inadvertently led to an absence of provision for referral of insolvency cases by LAD to the Insolvency Fund Board. This situation has since been rectified. LAD is following up on those legal aid applicants who might have been affected by the omission. Where appropriate, the applicants may be invited to re-submit applications to LAD.

### **Way Forward**

14. With Members' views on other issues covered by the Review, we will finalise the recommendations and proceed with the necessary legislative amendments. We plan to introduce the relevant amendment bill within this current legislative session.

Administration Wing  
Chief Secretary for Administration's Office  
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