

經辦人／部門

節錄自 1998 年 9 月 15 日

司法及法律事務委員會會議紀要

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V. 法律援助政策檢討

(1997 年法律援助政策檢討的諮詢文件、立法會 CB(2)207/98-99(02)、CB(2)200/98-99(02)及 CB(2)270/98-99(01) 號文件)

29. 對於當局在 1997 年 12 月發出的 1997 年法律援助政策檢討諮詢文件，行政署長向委員簡介公眾對當中所載結果及建議的反應。她表示，政府當局共收到 13 份意見書，當中涉及諮詢文件的各項建議。有關建議包括：評定法律援助申請人經濟能力的方法、各法律援助計劃的經濟限額、就進行死因研訊提供法律協助、重訂法律援助受助人的費用分擔級別表，以及授予法援署署長酌情權，使其在受助人的財務資源在獲批法律援助後有所增加，以至超過有關的經濟限額時，亦可決定不取消法律援助證書。立法會 CB(2)207/98-99(02)號文件載列了諮詢文件的建議詳情及公眾反應的撮要。

30. 戴啓思先生詢問，工作小組為何建議授權法援署署長，在外委律師或大律師沒有遵守直接付款予法援署署長的規定或《法律援助條例》的其他規定時，追討法律援助基金的任何損失。法援署署長回覆謂，根據法例規定，在訴訟中為受助人收回的款項，法援署署長有權訂立第一押記。但以往曾出現過外委律師未能保障該第一押記的事例，例如，對立一方或其律師直接將款項付給受助人，並無通知法援署署長。在另一些情況下，外委律師在收到對立一方的款項後，直接付款予受助人，而沒有將款項直接付予法援署署長。為加強對法律援助基金的保障，工作小組建議修訂《法律援助條例》，使直接付款予法援署署長的規定除適用於負責付款的人（即對立的一方）外，亦適用於代表受助人的外委律師；如有關人士沒有遵守直接付款予法援署署長的規定，法援署署長應有權追討任何損失。

31. 主席及劉健儀議員指出，在某些情況下，例如達成庭外和解協議，或法庭判給受助人一大筆款項，則訴訟雙方可能私下安排付款事宜，而外委律師卻毫不知情。法律署署長回應時解釋，如外委律師事前不知道付款的事宜，便無須負上法律責任。

32. 穆士賢先生表示，根據《法律援助條例》的規定，倘有關款項並沒有按該條例的規定支付，負責付款的人便不會獲發有效收據。因此，當中設有補救方法，讓法援署署長可要求該人再次付款。法援署署長回覆謂，倘受助人已獲支付有關款項，法援署在收回該筆款項方面會有實際困難。建議的修訂旨在改善保障措施，以致在法律援助案件中，有關各方會遵守直接付款予法援署署長的規定。

33. 主席認為，在所述情況下規定外委律師負責付還有關款項，實在是過份嚴苛的懲罰。她要求政府當局為對有關各方公平起見，再考慮該建議。法援署署長察悉在會上提出的意見。

34. 對於涉及公眾利益的死因研訊，涂謹申議員建議，為確保秉行司法公正，死者家屬應可獲得法律援助，以追討索償。他引述澳洲的制度，即某案件若引起公眾極大關注，則在符合其他資格準則的情況下，死者家屬會獲得法律援助。就此，主席請委員參閱在會上提交、由香港人權監察擬備的意見書（立法會 CB(2)270/98-99(01)號文件）。政府當局回應時表示，當局在研究諮詢結果時，會一併考慮此事。

35. 主席建議，當局亦應考慮在僱主就勞資審裁處的裁決中某項法律觀點提出上訴時，豁免申請法律援助的涉訟僱員接受經濟狀況審查。她指出，上訴案件與在審裁處進行的案件不同，後者無需法律代表。因此，倘僱主向較高級法院提出上訴，僱員便要應付極高的法律費用。法援署署長回覆謂，政府當局必須小心研究因實施該建議而在經濟及其他方面帶來的影響。他補充，在大部分僱主提出的上訴案件中，涉訟僱員均可通過經濟狀況審查，並獲得法律援助。

36. 涂謹申議員詢問，倘某人獲得法律援助，而對立一方亦獲得法律援助，則該人的案件會否受到妨害，因為法援署不可能收回全部法律費用。法援署署長表示，提供法律援助與否，須根據案件的成功機會和其他適用的資格準則評定。在某些案件中，訴訟雙方均會獲得援助。法援署會在法律程序中的不同階段檢討該等案件，以決定是否繼續提供法律援助。

37. 主席問及檢討何時完成。行政署長表示，當局在全面研究公眾提交的意見書後，便會發表最後報告。暫定的時間表是在本年度會期內提交立法修訂建議予立

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法會審議。

38. 委員同意，在政府當局發表最後報告前，在另一次會議上繼續討論此事。

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**Extract from minutes of the
Panel on Administration of Justice and Legal Services
on 15 September 1998**

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V. Legal Aid Policy Review

(Consultation Paper on Legal Aid Policy Review 1997; LC Paper Nos. CB(2)207/98-99(02); CB(2)200/98-99(02); and CB(2)270/98-99(01))

29. D of A briefed members on the public's responses to the findings and recommendations in the Legal Aid Policy Review 1997 as contained in a consultation paper released in December 1997. She said that the Administration had received a total of 13 submissions on the various recommendations made in the consultation paper relating to, inter alia, the method for assessing the financial capacity of an applicant for legal aid; the financial eligibility limits for the legal aid schemes; legal assistance covering coroners' inquests; a revamped scale of contribution to be made by legally aided persons; and the DLA's discretion not to discharge a legal aid certificate even if the financial resources of a legally aided person had exceeded the respective financial eligibility limits after legal aid had been granted etc. Details of the recommendations of the consultation paper and a summary of the public responses received were set out in LC Paper No. CB(2)207/98-99(02).

30. Mr Philip DYKES enquired about the reasons for the Working Group's recommendation to empower the DLA to recover any loss to the Legal Aid Fund which resulted from the failure on the part of the assigned solicitor or counsel to comply with the requirement of direct payment to DLA or other provisions of the Legal Aid Ordinance. DLA replied that by law, DLA was entitled to a first charge on moneys recovered for the aided person in the proceedings. However, there had been instances that the assigned solicitor had failed to protect this first charge, for example, where the opposite party or his solicitors paid moneys direct to the aided person without notifying the DLA. In some other cases, the assigned solicitor made direct payment to the aided person rather than the DLA, after receiving the amount from the opposite party. In order to better protect the Legal Aid Fund, a recommendation was made to amend the Legal Aid Ordinance so that the requirement to make direct payment to DLA should apply not only to the person responsible for payment (i.e. the opposite party) but also to assigned solicitor acting for the aided person, and DLA should be empowered to recover any loss arising from the failure to comply with the requirement of direct payment to DLA.

31. The Chairman and Mrs Miriam LAU pointed out that in certain cases where an agreement was reached out-of-court between both parties, or a lump sum award was made by the court in favour of the aided person, the two parties might settle the amount between themselves without the assigned solicitor being aware of the actual payment. In response, DLA explained that the assigned solicitor would not be held responsible for the liability if he had no prior knowledge about the payment.

32. Mr Patrick MOSS said that under the provisions of the Legal Aid Ordinance, no valid receipt would be issued to the person responsible for payment if the payment was not made in accordance with the Ordinance. There was hence a remedy for the DLA to ask that person to make the payment again. DLA answered that there were practical difficulties for the LAD to recover the amount if payment had already been made to the aided person. The purpose of the proposed amendment was to improve the safeguard to achieve better compliance with the requirement of direct payment to DLA in legally aided cases.

33. The Chairman opined that it was an unjustifiably harsh punishment to hold the assigned solicitor responsible for the payment in the circumstances described. She called upon the Administration to reconsider the proposal in the interests of fairness to all parties concerned. D of A noted the meeting's views.

34. Referring to coroners' inquests where public interest was at issue, Mr James TO suggested that to ensure that justice was done, legal assistance should be granted to members of the bereaved family to pursue their claims. He cited the system in Australia where, subject to other eligibility criteria, legal assistance was available to the family of the deceased where the case involved was of great public concern. In this connection, the Chairman referred members to a submission from the Hong Kong Human Rights Monitor which was tabled at the meeting. (LC Paper No. CB(2) 270/98-99(01)) The Administration responded that the issue would be considered in the Administration's deliberation of the consultation exercise.

35. The Chairman suggested that consideration should also be given to waiving the means test for legal aid applicants who were employees involved in appeal cases brought by employers against judgments of the Labour Tribunal on a point of law. She pointed out that unlike cases heard at the tribunal where legal representation was not required, the employee would face bearing much higher legal costs if the case was taken to a higher court on appeal by the employer. DLA replied that the Administration had to carefully consider the financial and other implications involved in implementing the suggestion. He added that most of the employees involved in appeal brought by employers were able to pass the means test and granted legal aid.

36. Mr James TO asked whether a legal aid recipient's case would be prejudiced if the opposite party was also legally assisted, hence making the LAD unlikely to recover the full legal costs. DLA said that legal aid was given on the merits of the case and subject also to other eligibility criteria applicable. In some cases, legal assistance was available to both parties to the litigation if they both met the criteria. The LAD would review such cases at different stages in the process to determine if legal aid should continue to be made available.

37. The Chairman enquired of the timeframe for completing the review. D of A said that a final report would be released after a thorough study of the public's submissions. The tentative timetable was that the legislative amendments would be

put to the Legislative Council for deliberation within the current legislative session.

38. Members agreed that discussion of the subject matter should continue at another meeting before the Administration published its final report.

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For discussion on
15 September 1998

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

Legal Aid Policy Review 1997: Public Responses

Purpose

This paper informs and seeks Members' views on the public's responses to the findings and recommendations of the Legal Aid Policy Review 1997, contained in a consultation paper released in December 1997.

Background

2. In early 1997, an inter-departmental Working Group (comprising representatives from the Administration Wing, the Legal Aid Department, the Finance Bureau and the Department of Justice) was formed to conduct a review of the criteria for assessing the financial eligibility of legal aid applicants, the scope of legal aid and the operation of the Legal Aid Ordinance (Cap. 91). A paper on the Working Group's findings and recommendations was released in December 1997 for public consultation. A list of the findings and recommendations is at the Annex. The consultation ended on 16 March 1998.

3. The Administration received a total of 13 submissions on the consultation paper. Their contents are summarised in the following paragraphs.

Major Comments and Responses

A. *Assessment of Financial Eligibility*

Recommendation 1: **The current method for assessing the financial capacity of an applicant for legal aid on the basis of the aggregate of his disposable income and disposable capital should be maintained.**

4. On this recommendation, we received one submission which is in support.

Recommendation 2: **The average expenditure of the lowest 50% households (excluding rent) should be adopted as the amount of personal allowances deductible in the assessment of disposable income.**

5. There were six submissions. It is suggested that the proposed index does not go far enough. Four of these submissions counter-propose that the median expenditure be used. A submission further suggests that even if our proposed index were to be used, it should be refined to take account of the expenditure situation of each household size group.

Recommendation 3: **The present financial eligibility limits for the standard legal aid scheme and the Supplementary Legal Aid Scheme (SLAS) should be maintained.**

6. We received eight submissions on this recommendation. One supports our recommendation; five suggest that the present limits should be increased. Two submissions suggest that a higher financial eligibility limit should be set for personal injuries cases.

Recommendation 4: **The financial eligibility limits for the two legal aid schemes should be reviewed once every two years to take account of inflation, change in litigation costs and other relevant factors.**

7. We received two submissions in response to this recommendation. It is suggested that the review should take place once every year.

Recommendation 5: **The current method of calculating the financial eligibility of "infant" applicants (defined as an unmarried person under 18 years of age) should be maintained, i.e. the financial resources of the parents or guardians of an infant applicant will not be taken as his in the assessment of his financial eligibility.**

8. We received two submissions on this recommendation. Both of them agree to our recommendation.

B. Legal Assistance for Persons required to Attend Coroners' Inquests

Recommendation 6: **The Duty Lawyer Service should provide legal assistance to persons 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 coroners' inquests.**

9. We received four submissions on this recommendation. All support our recommendation. One further suggests that legal assistance should be extended to cover others who have a potential civil claim in respect of the death in question. Another suggests that assistance should be made available to cover the deceased's family, and that assistance should not be confined to the provision of legal advice.

Recommendation 7: **The Legal Aid Department should provide legal aid to persons who have been granted legal aid to cover proceedings in a coroner's inquest where it appears to be necessary to do so for the proper conduct of the proceedings for which legal aid has been granted.**

10. We received one submission which supports our recommendation.

C. Residency Status

Recommendation 8: The Legal Aid Department should continue to provide legal assistance to eligible persons regardless of their residency status or years of residency in Hong Kong.

11. All three submissions on this recommendation support our proposal to maintain the practice.

12. While supporting the recommendation, a submission further suggests that we should consider whether this proposal is consistent with the regulation that legal aid may be revoked by reason of absence from Hong Kong.

D. Operation of the Legal Aid Ordinance

Recommendation 9: The means test for employees in appeals brought by employers to the Court of First Instance against judgements of the Labour Tribunal should continue to apply.

13. There were seven submissions in response to this recommendation. One submission supports our recommendation. Five suggest that either the means test in these cases should be waived automatically, or the Director of Legal Aid be given the discretion to waive the upper limit of the means test in deserving cases. The remaining submission suggests that the means test should be waived in cases where the ground of appeal is an error in law.

Recommendation 10: The Director of Legal Aid should be given the discretion not to discharge a legal aid certificate even if the financial resources of a legally aided person have become greater than the respective financial eligibility limits after legal aid has been granted.

14. There were two submissions, both supporting our recommendation.

Recommendation 11: Contributions to be made by a legally aided person should continue to be determined on the basis of his financial resources.

15. We received three submissions, one supports our recommendation. Another suggests that the amount of contribution should be linked to the amount claimed. The remaining submission suggests that the amount should either be the financial capacity, the legal costs or the amount claimed, whichever is the lowest.

Recommendation 12: Legally aided persons under the standard scheme should be required to pay a contribution according to a revamped sliding scale of contribution, except those on Comprehensive Social Security Assistance who should be exempt from paying any contribution.

16. There were four submissions. One submission supports our proposed contribution scale. One suggests that the level of financial resources under which no contribution should be made (the "non-contribution" level) should be set at \$80,000. Two suggest that the non-contribution level should be set at \$86,000.

Recommendation 13: Legally aided persons under the SLAS should be required to pay an application fee of \$1,000 and contributions irrespective of the outcome of the case, with the amount set at the maximum amount under the standard scheme. The payment of \$1,000 payable when legal aid is granted should be dropped.

17. We received three submissions on this recommendation. One submission supports our recommendation. One suggests that the amount of contribution should be 15% of the damages recovered or the actual legal costs, whichever is lower. One considers it unreasonable for an aided person under the SLAS to be responsible for the legal costs and to pay 15% of the damages received.

Recommendation 14: **In Bill of Rights cases, legally aided persons with financial capacity falling under the coverage of the standard scheme should contribute according to the contribution scale under the standard scheme. If their financial capacity exceeds the limit for the standard scheme, they should contribute an amount in accordance with a revamped sliding scale, with band widths of \$100,000.**

18. We received three submissions. One supports our proposal. The remaining two suggest that persons involved in Bill of Rights cases should be exempt from contributing.

Recommendation 15: **The Director of Legal Aid should be given the discretion to reduce or not to seek interest on his charge on a preserved or recovered property.**

19. The only submission that we received supports this recommendation.

Recommendation 16: **Amendments to the Legal Aid Ordinance should be made so as to better protect the Legal Aid Fund against omission or failure on the part of assigned solicitors to protect the Director of Legal Aid's first charge or to comply with the provisions in the Ordinance.**

20. We received three submissions on this recommendation. One supports this recommendation. The other two oppose on the grounds that the existing arrangement already provides sufficient protection for the Fund.

Recommendation 17: Measures to further enhance the cost-effectiveness of our legal aid services should be explored.

21. We received three submissions on this recommendation. Agreeing that measures should be taken to enhance the cost-effectiveness of our legal aid services, a submission suggests that the structure of the whole legal system should be reviewed and reiterates the suggestions previously made to the then Attorney General's Chambers in the context of the Review on Legal Services in 1995. Another supports our existing practice that no ceiling on legal aid funding should be imposed. The remaining submission asks whether there is any real case for concern.

Other Suggestions and Responses

22. There are other suggestions in the submissions which are not directly related to the findings and recommendations set out in the consultation paper. These suggestions are summarised in the following paragraphs.

A. *Assessment of Financial Eligibility*

23. One submission suggests that the compensation obtained by applicants involved in industrial injury or accidents should not be treated as their financial resources. It also suggests that capital assets of permanently disabled applicants should be discounted according to the level of disability, age and family status, etc.

24. One submission suggests that the Director of Legal Aid should reassess the financial capacity of aided persons whose financial resources have diminished after legal aid has been granted.

25. One submission suggests that an order made in a maintenance pending suit should not be taken into account in the assessment of an applicant's financial resources.

26. Two submissions suggest that the formula on how the financial resources of legal aid applicants are calculated should be explained more clearly.

27. One submission suggests that the Director of Legal Aid should be given the discretion to discount a certain level of an applicant's financial resources if it is considered reasonable to do so.

B. Scope of Legal Aid

28. One submission suggests that legal aid should be provided to cases which involve administrative bodies whose decisions have serious consequences for the persons affected, for example, the Long-term Prison Sentences Review Board.

C. Operation of the Legal Aid Ordinance

(a) Contribution

29. One submission suggests that the Director of Legal Aid should be given the discretion to waive, reduce or return part of or all of the contribution if strict enforcement will bring hardship or if it is in the interests of justice to do so.

30. One submission suggests that it would not be reasonable for aided persons whose financial capacity is composed mainly of disposable income to make an interim contribution, since their financial capacity may become weaker in the following year.

(b) Means-testing

31. A number of submissions suggest that the means test (or the upper limit of it) for different types of cases should be waived. Some suggest waiving the means test for employees involved in wage claims relating to bankruptcy cases; employees in industrial injury cases; and applicants in cases where there is a disparity of resources or where the appellant is using its resources to hurt the respondent. Others suggest waiving the upper limit of the means test for cases involving the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Personal Data (Privacy) Ordinance (Cap. 486), and the Family Status Discrimination Ordinance (Cap. 527), and provisions of the Basic Law relating to the rights of citizens; and applicants who are the elderly, pensioners, the disabled and those who are seriously ill. There were also suggestions that the means test (and contributions) should be waived for cases concerning the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights

Ordinance (Cap. 383); and that the Director of Legal Aid should be given the discretion to waive or reduce the means test if strict enforcement will bring hardship or if it is in the interests of justice to do so.

(c) Miscellaneous Suggestions

32. One submission suggests that applicants whose applications are rejected should be provided with information on the reasons for rejection.

33. One submission suggests that the Legal Aid Department should take positive steps to guard against discriminatory attitudes towards "vulnerable" groups.

34. One submission asserts that it was reported that the Legal Aid Department excludes lawyers from joining the Legal Aid Panel on the ground of political beliefs. It requests the Department to clarify and put in place a fair, open and transparent system of assigning out legal aid cases.

35. Two submissions suggest that payments to assigned lawyers and aided persons should be speeded up.

36. One submission alleges that some aided persons in personal injury cases are forced by their lawyers to accept settlement. It proposes that the system of monitoring should be strengthened.

37. Finally, four submissions suggest that the Legal Aid Department should be made more independent.

Way Forward

38. The inter-departmental Working Group (referred to in paragraph 2 above) has been reconvened to examine the public's responses and the various suggestions made. Current planning is that a final report will be released after a thorough consideration of the various submissions.

Administration Wing
Chief Secretary for Administration's Office
August 1998

List of Findings and Recommendations in the Consultation Paper

Assessment of Financial Eligibility

1. The current method for assessing the financial capacity of an applicant for legal aid on the basis of the aggregate of his disposable income and disposable capital should be maintained.
2. The average expenditure of the lowest 50% households in Hong Kong as revealed by the five-yearly Household Expenditure Survey (excluding rent payments) should be used as the amount of personal allowances deductible from an applicant's gross income in the assessment of his financial eligibility. The expenditure figure should be revised every year according to Consumer Price Index A and to take account of inflation, until the next survey has revealed a new expenditure figure.
3. The current financial eligibility limit of \$169,700 for the standard legal aid scheme and that of \$471,600 for the Supplementary Legal Aid Scheme (SLAS) should be maintained.
4. The financial eligibility limits for the standard scheme and the SLAS should continue to be reviewed once every two years to take account of inflation, change in litigation costs and other relevant factors.
5. The current method of calculating the financial eligibility of "infant" applicants for legal aid should be maintained.

Legal Assistance for Persons required to attend Coroners' Inquests

6. The Duty Lawyer Service should provide legal assistance to persons who are likely to face a reasonable chance of criminal prosecution that would lead to a jail sentence or loss of livelihood as result of giving evidence at coroners' inquests.

7. The Legal Aid Department (LAD) should be empowered to provide legal aid to persons who have been issued legal aid certificates to cover proceedings in a coroner's inquest where it appears to be necessary to do so for the proper conduct of the proceedings for which legal aid has been granted.

Residency Status

8. The LAD should continue to provide legal assistance to eligible persons regardless of their residency status or years of residency in Hong Kong.

Operation of the Legal Aid Ordinance (Cap. 91)

9. A means test for employees in appeals brought by employers to the Court of First Instance against judgements of the Labour Tribunal should continue to apply.
10. The Director of Legal Aid (DLA) should be given the discretion not to discharge a legal aid certificate even if the financial resources of a legally aided person have become greater than the respective financial eligibility limit after legal aid has been granted.
11. Contributions to be made by a legally aided person should continue to be determined having regard to the amount of his financial resources.
12. Legally aided persons under the standard scheme should be required to pay a contribution according to a revamped sliding scale of contribution, except those on Comprehensive Social Security Assistance who should be exempt from paying any contribution.
13. Legally aided persons under the SLAS should be required to pay an application fee of \$1,000 and interim contributions irrespective of the outcome of the case, with the amount being set at the maximum amount under the standard scheme. The payment of \$1,000 payable when legal aid is granted should be dropped.

14. In Bill of Rights cases, legally aided persons with financial capacity falling under the standard scheme should contribute according to the contribution scale under the standard scheme. If their financial capacity exceeds the limit for the standard scheme, they should contribute in accordance with a revamped sliding scale, with band widths of \$100,000.
15. The DLA should be given the discretion to reduce or not to seek interest on the DLA's charge on a preserved or recovered property.
16. Amendments to the Legal Aid Ordinance should be made so as to better protect the Legal Aid Fund against omission or failure on the part of assigned solicitors to protect the DLA's first charge or to comply with the provisions in the Ordinance.
17. Measures to further enhance the cost-effectiveness of our legal aid services should be explored.

Letterhead of Hong Kong Bar Association

LC Paper No. CB(2)200/98-99(02)

20 August, 1998

Your Ref: CB2/PL/AJLS

Mrs Percy Ma
Clerk to Panel
LegCo Panel on Administration of Justice & Legal Services
Legislative Council
SAR

Dear Mrs Ma

LegCo Panel on Administration of Justice & Legal Services

I refer to your letter dated 15 July inviting us to send a paper on the topics in the agenda for the meeting on 15 September.

In relation to item V on the agenda, I enclose herewith a letter we wrote to the Working Group on the Legal Aid Policy Review dated 20 March 1988. We do not appear to have received any reply thereto.

One other matter related to the means test is that the assessment of disposable income or disposable capital is defined as the gross income less personal allowances. This does not take into account the applicant's accrued or potential liabilities or indebtedness of the applicant (other than mortgage payments or tax) for which he is liable.

Yours sincerely

Audrey Eu, S.C.
Chairman

Encl.

Letterhead of Hong Kong Bar Association

20th March 1998

Secretary
Working Group on Legal Aid Policy Review 1997
c/o Administration Wing
Chief Secretary for Administration's Office
12/F Central Government Offices (West Wing)
Lower Albert Road
Central
Hong Kong

Dear Sirs,

Legal Aid Policy Review

Our attention has been drawn to the above review which has been completed by the Administration without any apparent consultation with the Bar.

The Bar Council's attention has been specially drawn to paragraphs 61 and 62 in the Review.

In paragraph 61, it is said that there have been instances in the past that the assigned counsel have failed to protect the first charge of the DLA under section 18A of the Legal Aid Ordinance. The sentences that follow do not refer to counsel's involvement and we cannot envisage any such situation involving acts or defaults of counsel. We would be grateful if you could inform us under what circumstances an assigned counsel, what is it that he may do or fail to do, which may not protect the first charge.

/2.

As to paragraph 62, we would be grateful if you can inform us of the incidents in the past where counsel's failure to comply with Regulation 21 or any other specific provision of the Legal Aid Ordinance has led to a loss of the legal aid fund.

We are happy to see a general relaxation of the eligibility criteria for legal aid but we believe the proposals do not go far enough.

Yours sincerely,

Audrey Eu, S.C.
Chairman

cc Angela Cheung
Legal Aid Services Council

A Response to Legal Aid Policy Review 1997

March 1998

I. Financial Eligibility for Legal Aid

The high level of legal costs in Hong Kong has made it difficult for an average family to meet those costs. The average costs for an employee compensation case are \$90,000. The average in a traffic running down case is \$350,000 while that in a miscellaneous personal injuries case is \$500,000. These figures will clearly deter a person from fighting his case in court (except in those set up to ensure a relatively cheap process such as the Labour Tribunal, the Small Claims Tribunal) unless he is relatively well-off or legally aided.

Currently, the amount deductible from the family resources to arrive at the personal allowance is the Comprehensive Social Security Assistance (CSSA) standard rate. This definition of personal allowance taken together with the current financial limit of disposable financial resource of \$169,700 results in quite a harsh eligibility regime. It unreasonably deprives many families of legal aid services. It also drives many eligible families closer to or below the CSSA subsistence level.

The Government proposes to increase the deductible amount from the CSSA level to "the average expenditure of the lowest 50% households (excluding rent payment)" while maintaining the current eligibility limit. The Statistics Department is of the opinion that the lower middle class would become eligible for legal aid.

The Monitor agrees with the Government that "affordability" should be the key concept underlying legal aid policy. Basically, we agree with the Government's proposal if it would genuinely ensure that the lower middle class people would all be covered.

Our concern is that the costs in employees' compensation, traffic running down and miscellaneous personal injury cases are substantially higher than the current eligibility limit. Different and more relaxed financial limits should be set for these cases to take account of such differences in costs.

To ensure justice in some exceptional cases, the Director of Legal Aid (DLA) should have the discretion to exclude certain assets or incomes in calculating the aggregated financial resources if it is reasonable to do so. He should also have the discretion to grant legal aid to applicants where their disposable financial resources have exceeded

the financial limit if there are good reasons to do so.

As the Consumer Price Index A is revised every year, it is reasonable and necessary for the Government to review the financial eligibility limit annually to reflect closely the inflation rate, the changes in legal costs and other relevant factors. The annual review should also keep track to ensure that legal aid coverage would continue to be available to all lower middle class people.

The Monitor supports the Government's current policy of excluding the financial resources of an infant's parents to prevent the parents from being discouraged from pursuing a case because of the threat of financial contribution. The interests of the infant should always be our first and paramount consideration.

The Monitor is concerned that the financial limit in the Supplementary Legal Aid Scheme is \$471,600 which is even below the average costs of personal injury cases (\$500,000). The Government's reason not to review it is that the scheme was expanded just two years ago and any increase may have an adverse impact on its financial viability. We, however, consider that the measures adopted and the resources allocated two years ago are probably insufficient to deal with the problem, and further review should not be delayed.

The Monitor is also concerned that special classes of people who are unable to replenish their financial resources in the future and who actually have limited means, should perhaps be given special consideration in requiring a contribution from them. The DLA should be given the discretion to waive or reduce the amount of contribution or the eligibility limit of such persons who are elderly, on pension, disabled or seriously ill. A rule of thumb may be to enable them to retain a minimum pension or fund of say \$160,000.

Five hundred dollars will often mean a lot to very poor persons. Subject to the suggestion in the preceding paragraph, there should not be any nominal contribution or a nominal contribution of just 1% levied on them, especially for those with disposable resources of an amount less than \$60,000.

We also want to remind the Government that the level of contribution of a person assessed in the high means bracket should not be charged at a rate which would leave them with a lower net balance than those assessed to be in a lower bracket -- an inevitable result of the current proposal as seen from the enclosed table we have prepared.

II. Scope of Legal Aid

We support the extension of Duty Lawyer Service (DLS) and legal aid to coroners' inquests. Persons who are likely to face criminal charges should also be aided provided that they pass the means test.

However, subject to a means test, such legal assistance should also be made available to the deceased's family. Moreover, such legal assistance to the deceased's family should not be limited to legal advice. In many cases the proper conduct of the inquest may be compromised if the family is not legally represented. It is also essential in the interests of justice to have legal representation for the family funded by legal aid, especially in cases where the death involves the police or other Government agencies and in industrial accidents when the other parties are usually funded by the

Government or more wealthy employers.

The Monitor opposes the limit on the Director's discretion to grant legal aid to inquests where a legal aid certificate has been issued for a related civil case. Such a limit will lead to absurd and unjust results.

For example, on the one hand, the deceased's family, with limited means of investigation, rely heavily on the inquest to produce evidence that establishes that there is merit in a proposed civil action. Unless they get legal aid for the inquest, they may have difficulties in getting legal aid in the related civil claims because they will not have had skilled legal assistant in eliciting information during the inquest hearing. On the other hand, without a certificate of legal aid for a related civil action, they will not be eligible to legal aid in the death inquest. Therefore, the Government is in fact telling the poor family to find the open end of a closed loop.

Another likely absurd situation is that in an alleged police abuse case, the police officer is guaranteed legal representation while the family is not. The police officer who allegedly beat the deceased to death in custody either has government lawyers defending him until he is discharged by the police or, where he has been discharged, he is entitled to legal aid (subject to financial eligibility) as he is likely to be charged and sentenced to imprisonment. At the same time, the family is placed in the difficult situation of not knowing where to begin.

The Monitor therefore is strongly of the view that, subject to financial eligibility, the DLA should also have the duty to provide legal representation to at least the deceased's family if he reasonably considers it is in the interests of justice or the proper conduct of the inquest.

The McKenzie adviser available in coroners' inquests under the Green Form system of the UK Legal Aid Board highlights the need for legal representation at coroners' inquests. The UK system is inadequate and needs to be expanded. It would also be a serious waste of resources and a source of injustice in a death inquest if a lawyer is paid only for his sitting next to his client and for his strictly personal advice whispered into his client's ears. The strict rules of the McKenzie adviser system would bar him from addressing the coroner directly although such a direct address would be of more assistance both to the coroners' court and to his client. In reviewing and reforming our own system, we should not adopt a halfway solution mimicking a UK system which is itself inadequate and needs urgent reform.

The Monitor fully endorses the proposal that there should not be any residency status requirements. This is in line with the guarantee of legal representation enshrined in the International Covenant on Civil and Political Rights entrenched in the Basic Law.

Moreover, the Government should be very vigilant in guarding against unfavourable treatment to groups who face discrimination in society. Migrant workers, asylum seekers, illegal immigrants, ethnic minorities, drug addicts and political opponents are most vulnerable to discrimination if the Legal Aid Department is not vigilant enough. Positive measures should be introduced like circulars and posters to remind staff to guard against discriminatory attitudes and behaviour.

There are reports of a 1991 agreement between the then DLA and the then Solicitor General to withhold granting of legal aid to Vietnamese asylum seekers where procedural defects were found in the screening process so that those cases would only be dealt with administratively. The Monitor is strongly against any interdepartmental

agreement to delay or deny legal aid to any class of people, especially to minorities. Such an agreement imposes new requirements which have no basis in law and amount to denial of these applicants' rights to legal representation and to have their case heard.

Legal aid or the DLS should also be extended to cover other administrative bodies whose decisions have serious consequences for the person affected, especially where volunteer services are not available to fill the gaps. The Monitor is particularly concerned that there is no legal aid to assist prisoners to prepare and argue their cases before the Long-term Prison Sentences Review Board (e.g. the "Her Majesty's Pleasure" cases).

III. Operation of the Legal Aid Ordinance

1. Discretion to Waive the Means Test for Employees in Appeals to the Court of First Instance Brought by Employers against Judgments of the Labour Tribunal

There are calls in the community to grant the DLA a discretion to waive the means test for employees in appeals to the Court of First Instance brought **by employers against judgments of the Labour Tribunal**.

The special situation in these cases is that the employees have judgments in favour of them already. Moreover, such judgments were awarded to them in the Labour Tribunal which is relatively inexpensive, quick and informal, making the legal contest fairer as the advantage of wealth, education, and other resources the employer has over the employee become less significant. By appealing to a higher court, the employer revives the disparity and even transfers his costs to the employee if the employer wins his case. If an employee is not legally aided, he has to consider the possibility that he has to bear the exorbitant costs - the average cost is \$90,000. If he is legally aided, he has to pay his contribution. Even if the employee wins his case in higher courts, the contribution accompanying the means test will dissipate the limited amount of money an employee gets.

The mischief which should be addressed is that unscrupulous employers can take advantage of their overwhelming financial resources and other advantages in filing an appeal to a higher court as an oppressive measure to deter their current or former employees from continuing their cases in the higher court. It was reported not long ago that an employee who had won his case in the Labour Tribunal gave up his defence when the employer filed an appeal to the Court of First Instance. In addition, we should also bear in mind that an employer sometimes may have an incentive to concentrate his effort in singling out an employee to bring him to a higher court to set an example to his employees to deter them from making similar claims. While the employer has the benefit of bringing a test case, the employees are less well-off and are unable to do so.

Clearly, there are sufficient reasons for the DLA to have such **a discretion**.

Alternatively, the DLA should only be allowed to conduct means tests and require for contribution if he considers the employer's case is overwhelming and he should always be given the discretion to waive the means test for the respondent employees.

The report's argument, that most of the employees involved in the majority of the cases would come within the current financial eligibility limit, means that the resource

implications are relatively small in implementing the alternative we are proposing.

The Government's argues that there are similar appeal cases to the Court of First Instance against judgments from other Tribunals. We see no difficulties in granting the Director such a discretion to ensure an even playing field for parties with disparity in resources or where the appellant is using its resources unfairly to hurt the respondent.

2. Discretion Not to Discharge a Legal Aid Certificate

The Monitor supports the proposal that the DLA should have the discretion not to discharge a legal aid certificate in cases where the aided person's financial situation improves beyond the eligibility limit. If he is allowed to discharge a certificate during a case it may seriously affect the interests of the legally aided party and it will raise doubts as to the impartiality of the Government before the Legal Aid Department becomes independent.

3. Rights and Constitutional Cases

The Monitor is of the opinion that in cases concerning the ICCPR or the Bill of Rights Ordinance (BORO) or rights clauses found in the Basic Law, especially those in Chapter Three but not limited to it, or those about the constitutional safeguards of rights or institutions, where the applicants would have no or only nominal financial gain, should not be required to be means tested nor any contribution required provided they pass the merit test. No financial hurdle should be placed in the way of such cases as they are more often in the nature cases brought for the public good than for any personal gain.

4. No Capping of Expenditure in Any Single Case

No ceiling on the spending on each publicly-funded legal aid case should be imposed. Otherwise justice will be rationed. It would involve a lot of value and political judgements to set and implement a cost ceiling. It is both impractical, dangerous, and compromises the justice process to set and enforce such a cost cap. It is almost an impossible task to place a cap in any case beforehand. It will not be in the interests of justice to avoid important arguments or courses of action just to save costs.

The Monitor will be opposed in the strongest possible terms were there any fund-rationing element introduced into our legal aid system. We strongly support the Government's current proposal not to cap the spending on any publicly-funded legal aid case.

The Monitor reiterates that the Director of Legal Aid should be able to apply for further funding without holdup by the Government whenever the fund allocated for legal cases is exhausted or is just sufficient to cope with the moment until new funding is approved by the Legislative Council.

While the Monitor is sensitive to ensuring our legal aid system is more cost-effective, we would like to caution the government not to compromise justice and introduce political and value controversies into the administration of the legal aid scheme.

IV. General Discretion to Alleviate Hardship

The DLA should have a general discretion to waive or reduce the means test or dispense with the eligibility limit for a particular applicant if the strict enforcement of

such a test or limit will bring undue hardship to a person or it is in the interests of justice to do so. Similarly, he should also have a general discretion to waive, reduce or return part of or all of the contributions a legally aided person is or has been required to pay.

節錄自 1998 年 12 月 15 日

司法及法律事務委員會會議紀要

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V. 一九九七年法律援助政策檢討
(立法會 CB(2)845/98-99(04)號文件)

28. 應主席之請，行政署長介紹有關的參考文件（立法會 CB(2)845/98-99(04)號文件），當中闡釋政府當局對委員在 1998 年 9 月 15 日舉行的會議上，就一九九七年法律援助政策檢討提出的論點的初步意見。

加強對法律援助基金的保障

29. 劉健儀議員要求政府當局進一步澄清，外委律師若沒有遵守《法律援助條例》（第 91 章）第 19A(1)條所訂直接付款予法律援助署（下稱“法援署”）署長的規定，須承擔的法律責任為何。法援署署長回應時表示，獲提供法律援助的訴訟所需的費用（包括法援署委派的大律師及律師所收取的費用）均由法律援助基金支付，並從替其代表的受助人收回的款項中扣除。若外委律師不理會第 19A(1)條的規定，而有關款項又不能追回，以致法援署署長未能收到應得的款項，並令法律援助基金蒙受損失，當局便有理由不支付該律師的費用。但考慮到委員在 1998 年 9 月 15 日會議上表達的意見，政府當局打算修改其建議，以規定只有那些未有將其收到的款項轉交法援署署長的外委律師，才須就法律援助基金因而蒙受的損失承擔責任。政府當局與香港律師會討論後，亦正在考慮可否授權法援署署長在外委律師遵照第 19A(1)條的規定行事後才支付其服務費用，或在法律援助基金蒙受損失及香港律師會對不遵法定規定的律師採取紀律處分的情況下，不支付該等費用。法援署署長表示，英國在保障法律援助基金方面亦採納了一項相類的原則。根據英國的法律援助計劃，若基金因某律師失責或不作為而蒙受損失，則法律援助局有權延遲向該律師支付律師服務費用；若該律師遭受紀律處分，法律援助局亦有權保留其本來應付給該律師的款項。

30. 至於對律師採取的紀律處分，法援署署長表示，此事純屬律師會的決定。他補充，政府當局會繼續與律師會討論上述建議。

律師會

31. 何志強先生回應主席時表示，律師會反對一九九七年法律援助政策檢討工作小組就加強對法律援助基金的保障提出的原來建議。他表示，對於政府當局提出的修訂建議，即依賴律師會的紀律處分機制來決定法律援助基金應否不向未有遵守《法律援助條例》第 19A(1)條的外委律師支付律師服務費用，律師會尚未作出深入研究和得出意見。何先生表示，律師會會以書面形式作出較具體的回應。

將提供法律援助的範圍擴大至包括死因研訊中的死者近親

32. 涂謹申議員表示，他已研究過政府當局的回應，並仍然認為提供法律援助的準則應予放寬，以涵蓋死因研訊。他指出，根據《死因裁判官條例》（第 504 章），律政司司長在合理情況下有權要求就某人的死亡進行研訊。他認為，若律政司司長在某案件中行使該項權力，該案件便可能涉及重大的公眾利益，因此，死者的家屬應獲給予法律援助。此外，他認為法律援助的範圍亦應擴大至包括某人在正式拘留期間死亡的案件，而在該等案件中，死因裁判官必須就死因進行研訊。涂議員補充，鑑於該類別的死因研訊案件為數不多，就該等案件給予法律援助所涉及的財政影響亦很輕微。李柱銘議員和應涂議員的意見時表示，他認為法援署署長沒有理由拒絕該項增加其根據《法律援助條例》批准法律援助的酌情權的建議。李議員亦對政府當局認為難以界定“公眾利益”的看法（載於文件第 9 段）表示不能接受。

33. 法援署署長回覆時表示，在大部分情況下，在進行死因研究前，申請人便已獲給予法律援助以提出民事申索。目前，若當中並無涉及民事申索，則在死因裁判官席前的法律程序將不獲提供法律援助。工作小組提出的建議，即法援署可為已獲發法律援助證書並須出席死因研訊的人士，在死因研訊中提供律師代表，應可釋除委員的關注事項。

34. 李柱銘議員認為，與公眾利益有關的案件未必涉及賠償申索。在某些案件中，由於公眾利益使然，有必要進行研訊以確定某人的死因，以決定當中是否有不公正的情況。他表示，法律援助的範圍應擴大至包括該等案件。法援署署長表示，所提出的事宜涉及政策上的考慮因素，政府當局需再作考慮。

政府當局

當值律師服務

35. 何俊仁議員建議，對於一些須面對複雜的死因研訊程序的人士，當局應考慮以標準法律援助計劃而非當值律師服務向其提供協助。政府當局回應時表示，當值律師服務所規定的申請人資格準則較為寬鬆，在處理該等案件方面更具彈性。若案件極為複雜，當局可在研訊的整個程序中委派當值律師以外的律師代表受助人。

涉及《人權法案條例》及《基本法》的案件

36. 法援署署長回應何俊仁議員的問題時澄清，就違反《人權法案條例》的案件申請獲得法律援助的人士須受經濟狀況審查。但即使該人的經濟能力較標準法律援助計劃的經濟限額為高，法援署署仍有權批准向該人提供法律援助。受助人須按照《法律援助條例》的規定分擔費用。何議員建議，同樣的安排應適用於涉及憲制事宜的案件，例如涉及是否遵守《基本法》條文的案件。

向涉及僱主破產案件的僱員提供法律援助

37. 政府當局告知與會各人，當局現正考慮改善法援署及破產欠薪保障基金委員會之間處理李卓人議員所提類別案件的程序。在該等案件中，申請法律援助以透過正常法律程序追討欠薪的僱員，其須繳付的分擔費用可能超過欠薪的數額。

總結

38. 主席表示，她亦很關注法律援助政策檢討所引起的其他問題，包括關於評估法律援助申請人的可動用收入及法律援助輔助計劃受助人繳付分擔費用的事宜。她要求政府當局在對該檢討作出最後建議前，與事務委員會就上述問題及委員在是次會議上提出的問題再進行討論。

政府當局

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**Extract from minutes of the
Panel on Administration of Justice and Legal Services
on 15 December 1998**

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V. Legal Aid Policy Review 1997

(LC Paper No. CB(2)845/98-99(04))

28. At the invitation of the Chairman, D of A introduced the information paper (LC Paper No. CB(2)845/98-99(04)) which explained the Administration's preliminary views on the points raised by members at the meeting held on 15 September 1998 on the Legal Aid Policy Review 1997.

Enhanced protection of Legal Aid Fund

29. Mrs Miriam LAU asked the Administration to further clarify the liabilities of an assigned solicitor who failed to comply with the requirement under section 19A(1) of the Legal Aid Ordinance (Cap. 91) to make direct payment to the Director of Legal Aid ("DLA"). DLA responded that the costs of legally aided proceedings, including fees to counsel and solicitors assigned by the Legal Aid Department, were paid by the Legal Aid Fund and recouped from any moneys recovered on behalf of the aided person for whom they acted. There would be a ground for not paying the assigned solicitor if he ignored the requirement in section 19A(1), thereby depriving the DLA of the moneys received and incurring a loss to the Legal Aid Fund, if the moneys could not be recovered. However, having considered members' views expressed at the meeting on 15 September 1998, the Administration intended to revise its proposal so that only the assigned solicitors who failed to remit the moneys received by him to DLA would be held responsible for the consequential loss to the Legal Aid Fund. After discussing with the Law Society of Hong Kong, the Administration was also considering to empower the DLA to defer payment of the solicitor's profit costs until the requirements in section 19A(1) had been complied with, or to withhold such payment when the Legal Aid Fund suffered a loss and the Law Society took disciplinary action against the solicitor for failure to comply with the statutory requirement. DLA advised that a similar principle regarding protection of legal aid fund was adopted in the U.K. where under the English Legal Aid Scheme the Legal Aid Board had power to defer payment of the solicitor's profit costs if, as a result of his default or omission, the fund incurred a loss, and where the solicitor was disciplined, to retain the sum which would otherwise be payable by the Legal Aid Board to the solicitor.

30. Regarding disciplinary action against solicitors, DLA said that it was solely a matter for the decision of the Law Society. He added that the Administration would continue to discuss with the Law Society on the above proposal.

31. In response to the Chairman, Mr Raymond HO said that the Law Society opposed to the original proposal made by the Working Group on the Legal Aid Policy

Action
Column

Law
Society

Review 1997 relating to enhanced protection of the Legal Aid Fund. He advised that the Law Society had yet to form a considered view on the Administration's revised proposal of relying on the Law Society's disciplinary mechanism to determine whether the Legal Aid Fund should withhold payment of profit costs to an assigned solicitor who failed to observe section 19A(1) of the Legal Aid Ordinance. Mr HO said that the Law Society would provide a more detailed response in writing.

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

32. Mr James TO said that he had considered the Administration's response and remained of the view that the criteria for providing legal aid should be relaxed to cover coroner's inquests. He pointed out that under the Coroners Ordinance (Cap.504), SJ had power to require inquest into the death of a person in justifiable circumstances. He considered that the exercise of such power of SJ in a particular case would mean that significant public interest was involved in the case, and legal aid should therefore be granted to members of the bereaved family concerned. In addition, he opined that legal assistance should also be extended to cover cases where a person died in official custody for which a coroner was required to hold an inquest into the death. Mr TO supplemented that in view of the small number of coroner's inquests in these categories, the financial implications involved in granting legal aid to such cases would be minimal. Echoing on Mr TO's views, Mr Martin LEE said that he saw no reason for the DLA to reject the proposal which would enhance his discretionary power to grant legal aid under the Legal Aid Ordinance. Mr LEE also found the Administration's view that it was difficult to define "public interest" unacceptable (paragraph 9 of the paper refers).

33. In reply, DLA said that in most cases, legal aid would have been granted to the applicants to pursue civil claims before the coroner's inquest took place. At present, legal aid was not available to proceedings before the coroner's court if there were no civil claims involved. The recommendation of the Working Group that persons who had already been granted legal aid certificates and who were required to attend coroner's inquests might be legally represented at coroner's inquests would address members' concern.

34. Mr Martin LEE expressed the view that cases of public interest might not necessarily involve claims for compensation. In some cases, public interest warranted an inquest to reveal the cause of death of a person for the purpose of deciding whether injustice had been done. He said that legal aid should be extended to cover such cases. DLA said that the matter raised involved policy implications and would need to be further considered by the Administration.

Adm

Duty Lawyer Service

35. Mr Albert HO suggested that consideration should be given to replacing the Duty Lawyer Service ("DLS") with the standard legal aid scheme to assist persons in complicated proceedings in coroner's inquests. In response, the Administration

advised that the DLS, whose eligibility criteria were less stringent, afforded more flexibility in dealing with such cases. Where there was a very complicated case, a solicitor other than the duty lawyer could be assigned to represent the aided party throughout the entire proceedings at the inquest.

Cases involving the Bill of Rights Ordinance and the Basic Law

36. In response to Mr Albert HO's question, DLA clarified that an applicant for legal aid in respect of a case of a breach of the Bill of Rights Ordinance was subject to the means test, but the DLA was empowered to grant legal aid to the person even if his financial capacity was greater than the eligibility limit for the standard legal aid scheme. The aided person would be required to make a contribution in accordance with the Legal Aid Ordinance. Mr HO suggested that the same arrangement should apply to cases involving constitutional matters such as compliance with the provisions of the Basic Law.

Legal aid for employees involved in employers insolvency cases

37. The Administration informed the meeting that consideration was being given to improving the procedures between the Legal Aid Department and the Protection of Wages on Insolvency Fund Board in handling the type of cases raised by the Hon. LEE Cheuk-yan, i.e. cases where the employees seeking to obtain legal aid to recover arrears of wages through normal legal proceedings might be required to make contributions which could exceed the amount of wages outstanding.

Conclusion

38. The Chairman said that she was also concerned about other issues arising from the Legal Aid Policy Review. These included, for example, assessment of disposable income of a legal aid applicant and payment of contribution by the aided persons under the supplementary legal aid scheme. She requested the Administration to have further discussions with the Panel on these and the issues raised by members at this meeting before finalising its recommendations on the Review.

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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 coronor'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 resubmit 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
December 1998

節錄自 1999 年 2 月 25 日

司法及法律事務委員會會議紀要

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III. 法律援助政策檢討

(1997 年法律援助政策檢討諮詢文件；
先前就 1998 年 9 月 15 日的會議發出的立法會
CB(2)207/98-99(02)及 **CB(2)845/98-99(04)**號文件；
在會前送交各委員的立法會 **CB(2)1324/98-99(05)**號文件；及
在會上提交的立法會 **CB(2)1359/98-99(01)**及 **(02)**和
CB(2)1370/98-99(01)號文件)

24. 副行政署長表示，政府當局的文件（立法會
CB(2)1324/98-99(05)號文件）跟進事務委員會在較早前討論
“1997 年法律援助政策檢討”一事時提出的問題，並就該項
檢討所引起而委員有興趣討論的事宜，解釋政府當局的考慮
點。工作小組希望在收集委員的意見後盡快就其建議作出最後
決定，並著手草擬有關法例所需的修訂。政府當局打算在本年
度立法會會期內提交有關的修訂條例草案。

25. 政府當局的文件論及 3 個事項，即法律援助署署長
（下稱“法援署署長”）對收回或保留的財產的第一押記、分
擔費用款額，以及評定可動用收入。有關該等事項的建議如下

- (a) 接納工作小組的建議，即《法律援助條例》第 18A 條現時所訂的安排應予保留，而法援署署長若信納在有關情況下，省免或減收在其第一押記之上孳生的利息是公平合理的做法，可酌情決定省免或減收該等利息（根據第 18A 條，若法律援助（下稱“法援”）受助人有未繳付的分擔費用，或分擔費用總額少於法援署署長就案件所承擔的費用淨額，則法援署署長將擁有對收回或保留的財產的第一押記。當局亦會在徵得受助人同意後，收取每年 10% 的利息，直至未繳付的費用付清為止）；
- (b) 保留現行按財政資源釐定標準法律援助計劃（下稱“標準計劃”）受助人應繳付的分擔費用的辦法；
- (c) 法律援助輔助計劃的案件應與標準計劃案件採取一致做法，即不論訴訟的裁決如何，受助人亦須繳付一筆中期分擔費用，以支付法律費用。受助

人若最終敗訴，所須繳付的分擔費用最高約為 42,000 元，與標準計劃的款額相同。就受助人勝訴的案件，現行規定受助人須分擔法律費用總數，並付出所收回的財產的 15% 的安排應繼續適用；及

- (d) 為釐定法援申請人的可動用收入，應採用住戶開支統計調查所示支出最低的 50% 家庭的開支，作為可扣除的個人開支豁免的指數。當局認為，新的指數較綜合社會保障援助（下稱“綜援”）金額更能反映法援服務對象的中低層家庭的開支模式。

香港律師會（下稱“律師會”）的意見

26. 穆士賢先生回應主席時表示，律師會不反對上述建議，但提議廢除法律援助輔助計劃申請人須繳付申請費用的規定。律師會是基於公平對待申請人的原則提出該建議，因為按政府當局現時的建議，法律援助輔助計劃申請人須繳付的中期分擔費用最高款額與標準計劃相同。

27. 法援署署長回應時表示，根據法律援助輔助計劃的新建議，若受助人敗訴，其所須繳付的最高款額為 1,000 元申請費用和 42,000 元中期分擔費用。受助人若勝訴，便可獲退回申請費用。他補充，法律援助輔助計劃為不符合標準計劃有關資格的人士提供另一個獲得法援的途徑。由於法律援助輔助計劃是以自負盈虧的方式運作，若該計劃有足夠的資金，便可讓更多有需要的人士受惠。

28. 法律援助署政務統籌專員補充，法律援助輔助計劃的案件很多時會庭外和解。由於法律費用得以減少，受助人須繳付的分擔費用亦會較少。

29. 劉慧卿議員認為，法律援助署應加強宣傳，以確保法援申請人事先知道須分擔訴訟引起的法律費用的規定。

30. 何志強先生表示，律師會會就外委律師未能遵守第 19A 條的規定而延遲向其支付費用的安排，與法援署署長再作討論。

計算可動用收入的方法

31. 應主席之請，法援署署長解釋立法會 CB(2)1370/98-99(01)號文件載述的計算方法，當中闡明採用上文第 25(d)段建議的可扣除個人開支豁免的新指數，對計算可動用收入的方法有何影響。在所舉的例子中，按現時

以綜援標準計算的方法，月入 25,000 元的申請人將不能通過經濟狀況審查，但根據新的建議計算，該等申請人便會符合資格。

32. 李卓人議員認為較恰當的做法是以家庭開支中位數作為計算生活津貼的指標，此舉可使更多家庭在經濟上符合獲得法援服務的資格。他進一步指出，當局亦應對高齡或失業的申請人提供適當的協助。因此，在評估申請人是否符合資格時，當局不應單憑申請人在提出申請之前 12 個月所賺取的收入作決定，亦應考慮申請人日後賺取收入的能力。

33. 法援署署長回應時表示，根據現行的安排，申請人的財政資源是其每年可動用收入及可動用資產的總和。《法律援助條例》規定，法援署署長在考慮個別申請人的情況後，有權在評估有關申請時作出彈性處理。申請人日後可能賺取的收入是相關的考慮因素之一。政府當局仍未決定計算可扣除生活津貼的最佳方法。

34. 李卓人議員提醒政府當局，法援署署長批准給予法律援助的酌情權，必須對所有申請貫徹適用。

將法律援助的範圍擴大至須出席死因研訊的死者近親

35. 由於李柱銘議員已離席，劉健儀議員代其轉述意見。李議員不同意政府當局在立法會 CB(2)845/98-99(04)號文件第 9 段提出的意見，即進行死因研訊的原意並非在於確定民事法律責任。他認為，研訊結果會直接影響到某方是否就案件進行民事訴訟的決定。他認為，正如事務委員會在 1998 年 9 月 15 日及 1998 年 12 月 15 日的會議上已討論過，在涉及“重大公眾利益”的案件中，應將法律援助的範圍擴大至死者的近親。

36. 主席要求政府當局就有關建議作出最後決定和著手草擬有關法例所需的修訂前，仔細考慮事務委員會的意見。

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**Extract from minutes of the
Panel on Administration of Justice and Legal Services
on 25 February 1999**

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III. Legal Aid Policy Review

(Consultation Paper on Legal Aid Policy Review 1997;

LC Paper Nos. CB(2)207/98-99(02) and 845/98-99(04) previously issued for the meeting on 15 September 1998;

LC Paper No. CB(2)1324/98-99(05) circulated before the meeting; and

LC Paper Nos. CB(2)1359/98-99(01) & (02) and CB(2)1370/98-99(01) tabled at the meeting)

24. Deputy Director of Administration (DDA) advised that the Administration's paper (LC Paper No. CB(2)1324/98-99(05)) followed-up on previous discussions by the Panel regarding the Legal Aid Policy Review 1997 and explained the Administration's considerations on certain issues of interest arising from the Review. Subject to members' comments, the Working Group aimed at finalizing its recommendations as soon as practicable and proceed with the necessary legislative amendments. It was the Administration's intention to introduce the relevant amendment bill within the current legislative session.

25. The Administration's paper dealt with three issues, namely, the Director of Legal Aid's first charge on property recovered or preserved; contribution rates and assessment of disposal income. The recommendations with respect to these issues were -

- (a) to maintain the recommendations of the Working Group that the present arrangement under section 18A of the Legal Aid Ordinance should be retained and that the Director of Legal Aid (DLA) should have the discretion to waive or reduce the interest accrued on the DLA's first charge if he was satisfied that it was just and equitable to do so in the circumstances (under section 18A, DLA would have a first charge on property recovered or preserved if there was unpaid contribution or the total contribution was less than the net liability of DLA in the case, and a 10% interest would be charged per year until the outstanding sum was repaid where such had been agreed to by the client);
- (b) to retain the current method of determining the contribution payable by an aided person under the standard scheme, based on his financial resources;
- (c) for cases under the Supplementary Legal Aid Scheme (SLAS), in line with the practice under the standard scheme, the aided persons should also be required to pay an interim contribution to the legal costs regardless of the outcome of the proceedings. The maximum contribution for a case which

turned out to be unsuccessful was about \$42,000, i.e. the same as that under the standard scheme. For successful cases, the current arrangement under which the aided persons had to contribute the sum of total legal costs and 15% of the property recovered should be retained; and

- (d) for the purpose of determining disposable income of legal aid applicants, the expenditure of the lowest 50% households as revealed in the Household Expenditure Survey should be used as the index for deductible personal allowance. This new index was considered to be more appropriate than the Comprehensive Social Security Allowance (CSSA) rates in describing the expenditure pattern of lower-middle class households which were the target group for legal aid services.

The Law Society of Hong Kong's views

26. In response to the Chairman, Mr Patrick MOSS said that the Law Society had no objection to the above proposals, but it suggested that the requirement for SLAS applicants to pay an application fee should be removed. This suggestion was made on the basis of equal treatment, since SLAS applicants were required to pay an interim contribution at the same maximum rate as that for the standard scheme under the present proposal.

27. DLA responded that under the new proposal in relation to SLAS, the sum total of the application fee of \$1,000 and the interim contribution of \$42,000 would be the maximum amount payable by an aided person who happened to lose his case. If the case was won, the application fee would be returned to the aided person. He added that the SLAS provided an extra avenue to assist people who might not be eligible for assistance under the standard scheme. SLAS was operating on a self-financing basis. A sufficient fund would mean that more people in need would be able to benefit from the scheme.

28. Policy and Administration Coordinator, LAD supplemented that very often cases under the SLAS were settled out of court. The contribution payable by the aided persons in such cases would be less because of the reduced legal costs.

29. Ms Emily LAU considered that the Legal Aid Department should step up publicity to ensure that legal aid applicants would know in advance the requirement to make contribution to the legal costs incurred.

30. Mr Raymond HO advised that the Law Society would further discuss with the DLA concerning the arrangement for deferred payment to assigned solicitors regarding their failure to comply with Section 19A.

Computation of disposable income

31. As requested by the Chairman, DLA explained the calculation set out in LC Paper No. CB(2)1370/98-99(01) which illustrated how computation of disposable income would be affected by using the proposed new index for deductible personal allowance as described in paragraph 25(d) above. In the example given, an applicant earning a monthly salary of \$25,000 who failed to pass the means test under the current method of calculation using the CSSA standard, would become eligible under the new proposal.

32. Mr LEE Cheuk-yan opined that it would be more appropriate to use the median household expenditure as the indicator in calculating living allowances so that more households would become financially eligible for legal aid services. He further pointed out that due assistance should be provided to old-aged or unemployed applicants. Therefore, in assessing eligibility, rather than relying solely on the applicant's income earned in the 12 months prior to application, the Administration should also take into consideration the applicant's future earning capacity.

33. In response, DLA said that under the existing arrangement, the financial resources of an applicant was taken to be the sum of his annual disposable income and disposable capital. The Legal Aid Ordinance provided the DLA with the authority to exercise flexibility in assessing applications having regard to the merits of the case. The future income prospect of an applicant would be a relevant factor for consideration. With regard to deductible living allowance, the Administration had yet to decide on the best method of calculation.

34. Mr LEE Cheuk-yan reminded the Administration that the DLA's discretion in granting legal aid must be consistently applied to all applications.

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

35. Mrs Miriam LAU relayed a comment made by Mr Martin LEE, who had left the meeting at that juncture. According to Mr LEE, he disagreed with the Administration's view expressed in paragraph 9 of LC Paper No. CB(2)845/98-99(04) that coroner's inquests were not to establish civil liability. He opined that the result of an inquest would have a direct bearing on a party's decision as to whether or not to proceed with civil litigation in relation to the case. He considered that legal aid should be extended to next of kin in cases of "significant public interest" as discussed at the Panel's meetings on 15 September 1998 and 15 December 1998 respectively.

36. The Chairman called upon the Administration to consider the Panel's views carefully before it finalized its recommendations and proceeded with the necessary legislative amendments.

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For information on
25 February 1999

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

Legal Aid Policy Review 1997

Purpose

This paper sets out the Administration's considerations on certain issues of interest to Members. These issues are, namely, maintaining DLA's first charge, and our proposals on contribution rate and assessment of disposable income.

Issues and Considerations

A. *DLA's First Charge*

2. Under section 18A of the Legal Aid Ordinance, DLA will have a first charge on property recovered or preserved if there is unpaid contribution or the total contribution is less than the net liability of DLA in the case. A 10% interest will also be charged per year until the outstanding sum is repaid where such has been agreed to by the client. This arrangement allows aided persons who cannot fulfil their obligation to defer payment until they can afford to do so. The Working Group recommended that the above arrangement should be retained and that DLA should have the discretion to waive or reduce the interest accrued on the DLA's first charge if he is satisfied that it would cause serious hardship to the aided person, and that in the circumstances it is just and equitable to do so.

3. We appreciate that some aided persons may be in a difficult financial situation and have no other financial resources apart from the property recovered. We are aware of the views of some interested parties that in cases where the property recovered or preserved is the principal residence of the aided persons (such as persons involved in matrimonial cases), it is unlikely that the aided persons would dispose of the property and discharge the first charge. The first charge will not therefore facilitate contribution to DLA but will instead create a psychological burden on the aided persons.

4. We have considered alternative arrangements such as waiving the payment or reducing the amount due. However, it is important to treat all aided

persons fairly. Introducing alternative arrangements for the persons described in paragraph 3 above will be unfair to those who are able to pay up because the damages recovered are in cash. It should also be noted that the first charge in favour of the Government is not unique to legal aid cases. In other instances, the Government will also register a first charge on an individual's property if he cannot pay off the liability owed to the Government. One example is where the Government has carried out urgent and necessary building repair works and owners subsequently refuse to pay. Altering the arrangement for legal aid cases may entail wider implications than originally contemplated. We therefore propose to maintain our recommendation at paragraph 2 above.

B. Contribution Rates

5. One of the primary principles of our legal aid policy is that those with financial resources should contribute to the legal costs incurred by the Legal Aid Department ("LAD") in litigation engaged on the person's behalf. The Working Group recommended that, with the exception of applicants receiving CSSA, we should retain the current method of determining the contribution payable by a legally aided person under the standard scheme based on his financial resources. For cases under the Supplementary Legal Aid Scheme ("SLAS"), the Working Group recommended that aided persons should also be required to pay an interim contribution to the legal costs upon the granting of legal aid regardless of the outcome of the proceedings and that we retain the current arrangement for successful cases under which the aided persons have to contribute the sum of total legal costs incurred by the LAD and 15% of the property recovered or preserved, less costs recovered from the opposite party.

6. Some of the comments we received during the consultation exercise suggested that we should establish a non-contribution level, below which the aided person need not contribute towards the legal costs. The reasoning is that the legal aid scheme should not create an undue burden on aided persons with little financial resources. Some commented on the contribution arrangement for SLAS cases and suggested that the aided persons should not be asked to contribute both the legal costs and 15% of the property recovered and preserved. We are considering the implications of setting a non-contribution level and comments regarding contributions by persons aided by the SLAS, and welcome Members' views in this regard.

C. Assessment of Disposable Income

7. Under the existing arrangement, resources of a person applying for legal aid is determined by adding together his annual disposable income and disposable capital. For the purpose of determining disposal income, it is defined as the net income left after various permitted deductions such as rent, rates, and living expenses

for the applicant and his/her dependants have been made. For living expenses, while CSSA rates are used under the current arrangement, the Working Group recommended using the average expenditure of the lowest 50% households as revealed in the Household Expenditure Survey. The respective personal allowances by household size under the two different indices are as follows -

<u>Scenario</u>	<u>Personal allowances by household size</u>			
	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>
Current Index	1,760	3,202	4,643	6,084
Proposed Index	3,651	5,847	7,750	8,666

The new index is considered to be more appropriate than the CSSA rates in describing the expenditure pattern of lower-middle class households (being the target group for our legal aid services). Our data also indicates that more households will become financially eligible for legal aid under the new index. Comments on this proposal suggested that we should use the median household expenditure. We do not consider this to be an appropriate indicator since the median figure also includes the wealthiest sector of the society which is not the target group for our legal aid services.

Way Forward

8. Subject to Members' comments, the Working Group aims to finalise its recommendations as soon as practicable and proceed with the necessary legislative amendments. In the process, we shall also take into account the views expressed by Members at the meeting of 15 December 1998 on the extension of legal aid to next of kin involved in coroner's inquests ordered to be held by the Secretary for Justice, and on enhanced protection of Legal Aid Fund. It is our intention to introduce the relevant amendment bill within this current legislative session since the recommendation will improve existing legal aid services and enable more households to benefit from such services.

Administration Wing
Chief Secretary for Administration's Office
February 1999

Letterhead of THE LAW SOCIETY OF HONG KONG

LC Paper No. CB(2)1359/98-99(01)

Our Ref: SG/FA/062

2nd February, 1999

Mr. S. Y. Chan, JP,
Director of Legal Aid,
Legal Aid Department,
24th Floor, Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear S. Y.

The Law Society Legal Aid Committee met on 18th January to discuss the revised proposal that you had made in relation to the enforcement under Section 19A of the Legal Aid Ordinance of your first charge on properties recovered for an aided person.

At the time of the last LegCo Panel Meeting your proposal was that you should be permitted by legislation to defer payment of profit costs due to a solicitor if the solicitor failed to remit any money received by him to the Director of Legal Aid in compliance with Section 19A(1) or to withhold such payment, subject to disciplinary proceedings having been brought against the defaulting solicitor by The Law Society.

Members of the Committee considered that this proposal was unsatisfactory for a variety of reasons. The most pertinent reason was that it linked failure to comply with Section 19A to disciplinary proceedings. Members of the Committee were of the view that even if failure to comply with Section 19A amounted to negligence it was unlikely that in most circumstances it would amount to professional misconduct giving rise to disciplinary proceedings.

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The Law Society of Hong Kong

2nd February, 1999

Mr. S. Y. Chan, JP
Director of Legal Aid

Members also took the view that in the event of a failure to deduct the first charge from the monies paid to the aided person there already is a remedy contained in Section 19A that provides that only the Director of Legal Aid can give a valid receipt for any monies paid to the aided person.

Comparison with the legislation in England & Wales had been made by the Administration. However, the procedures for application for legal aid and its management are wholly different in Hong Kong. The Director of Legal Aid has much greater control over the assignment of cases to solicitors and it is unlikely that any solicitor would risk the wrath of the Director and the likelihood of receiving no further legal aid cases by failing to ensure compliance with Section 19A.

The Law Society's underlying objection to the totality of this proposal notwithstanding that I now understand that you are no longer insisting upon the link with disciplinary proceedings, is that no evidence has been adduced to indicate that there is a very real problem that needs to be addressed. The Law Society has never received any complaint from the Legal Aid Department relating to the failure of solicitors to comply with the provision of Section 19A and we therefore do not believe that there is any need to change the Ordinance.

We are, of course, fully prepared to discuss this matter further and if there is any statistical information which shows that there is an existing problem in relation to this section then we shall be happy to discuss this but at present the views of The Law Society Legal Aid Committee are as set out above.

I have to qualify our response by saying that those views are those of the Legal Aid Committee because the matter has not been discussed by the Council of the Law Society. If you wish to pursue this proposal then I will ask the Council to express its views.

Yours sincerely,

Patrick Moss
Secretary General

PM/ff

Letterhead of THE LAW SOCIETY OF HONG KONG

LC Paper No. CB(2)1359/98-99(02)

Our Ref: SG/FA/1149

25th February, 1999

Mr. S. Y. Chan, JP, by fax and post
Director of Legal Aid, (fax no. 2877 5122)
Legal Aid Department,
27th Floor, Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear S. Y.,

I refer to my letter dated 22nd February and have now had the opportunity of consulting briefly with members of the Legal Aid Committee.

In your letter of 13th February you refer to "tremendous difficulties" in recovering monies paid over the aided persons by their solicitors without your authority. We would be grateful to have some rather more precise information as to the number of occasions on which this has occurred and over how long a period of time, the outcome of the efforts made to resolve each matter and whether any loss has actually been sustained by the LAD.

Members of the Committee had already considered the case of *Manley vs The Law Society* but I am grateful to you for providing the copy. However, that case involved a deliberate attempt by the solicitor to deprive the legal aid fund of the charge in respect of his costs and as such must be distinguished from the position where a solicitor negligently fails to account to the Director under Section 19(A)(1). In the former event the solicitor would be precluded from making any claim on the legal aid fund for his costs and might also be liable to disciplinary sanction but where the solicitor has acted negligently he would be liable to compensate the Director for the loss occasioned by his failure to comply with Section 19(A)(1).

I think that I can confidently say that all members of the Committee are aware of the point that you are making namely whether an assigned solicitor should still be entitled to make the legal aid fund pay his costs when monies recovered in the course of

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The Law Society of Hong Kong

25th February, 1999

Mr. S. Y. Chan, JP
Director of Legal Aid
Legal Aid Department

proceedings have been paid directly to the aided persons. In general terms the answer must be "no" but we question whether this is such a frequent occurrence that it justifies a change in the law and we are concerned that there may be occasions when the avoidance of the first charge takes place without the solicitor's knowledge.

I mentioned in my letter to you that Section 19(A) provides that only the Director of Legal Aid can give a valid receipt for any monies paid to the aided person. That is the law and is a matter of which those engaged in litigation should be well aware. If the paying party pays directly to the aided person, it must be said to be doing so at its own risk. I understand that notices of assignment all clearly set out the provisions of Section 19(A). You may wish to include a similar warning on the Notice of Legal Aid served on the opposing party. I have little doubt that The Law Society would be very ready to issue a reminder to members that they must comply with Section 19(A) and account to you for any monies recovered.

Another aspect of the proposal which concerns the Legal Aid Committee is the absence of any "checks and balances" if authority were given to the Director of Legal Aid to withhold payment of costs. Members of the Committee felt that at the very least there should be some form of appeal procedure on the exercise of such power.

I note your suggestion that this matter should be discussed further and that you would be prepared to send a representative from the Legal Aid Department to meet with the Committee. I think that this is the most appropriate way in which to proceed with the matter and perhaps the LegCo Panel can be told that this is what we intend to do so that the discussion on 25th February can then be adjourned pending a meeting of The Law Society Legal Aid Committee to which a representative from your Department would be invited to attend.

Yours sincerely,
Patrick Moss

Secretary General

c.c. The Hon. Ms. Margaret Ng (Fax No. 2801 7134)

PM/ff

Letterhead of Legal Aid Department

LC Paper No.CB(2)1370/98-99(01)

Our Ref : LA/ADM/55/15 (C) I

Tel: 3867 3010

Fax: 2877 5122

29 January 1999

The Honourable Margaret Ng,
New Henry House,
10/F,
19 Ice House Street,
Hong Kong

Dear

Further to our telephone conversation, I enclose some calculations illustrating how computation of disposable income and payment of contribution by the aided persons under the supplementary legal aid scheme will be affected by our proposals arising from the Legal Aid Policy Review.

Please do not hesitate to let me know if you require any further information or clarification.

Yours sincerely,

(S. Y. Chan)
Director of Legal Aid

**Contribution and Fees Payable by
Legally Aided Persons (A/P) under SLAS**

Example

I. APPLICATION STAGE

	<u>Proposed</u>	<u>Current</u>
Application fee	\$1,000	\$1,000
Registration fee	Nil	\$1,000
Interim contribution	\$42,425	Nil

II. UPON CONCLUSION OF THE CASE

Assuming litigation costs is \$350,000

(a) If A/P loses case, no further contribution is payable. In other words, the A/P's liability is \$43,425 \$2,000

(b) If A/P succeeds, contribution payable by the aided person = litigation costs + (15% x damages recovered from opposite party)
 - costs recovered from opposite party
 - contribution paid under (I)

Assuming:

damages from opposite party is \$1,000,000

costs from opposite party is \$315,000

	litigation costs	\$350,000	\$350,000
<u>plus</u>	15% of damages	\$150,000	\$150,000
<u>less</u>	costs from opposite party	(\$315,000)	(\$315,000)
<u>less</u>	contribution paid	(\$42,425)	Nil
<u>less</u>	refund of application and registration fees	(\$1,000)	(\$2,000)
	contribution payable by client, i.e. deductible from damages	\$141,575	\$183,000
	Amount payable to the client		
	= Damages - amount payable by client	\$858,425	\$817,000
	In other words, the A/P's net gain =	\$815,000	\$815,000
	Damages - costs unrecovered - (15% of damages)		

III. IMPACT ON SLAS FUND

	<u>Proposed</u>	<u>Current</u>
(a) If the case is unsuccessful		
Income from A/P contribution and fee	\$43,425	\$2,000
<u>less</u> litigation cost	(\$350,000)	(\$350,000)
Amount subsidized by SLAS Fund	(\$306,575)	(\$348,000)
(b) If the case is successful		
Costs recovered from O/P	\$315,000	\$315,000
Costs recovered from A/P	\$35,000	\$35,000
(\$350,000 - \$315,000)		
15% contribution from A/P	\$150,000	\$150,000
	\$500,000	\$500,000
<u>less</u> litigation cost	(\$350,000)	(\$350,000)
Net contribution to SLAS Fund	\$150,000	\$150,000

Example of Computing Disposable Income

Financial Position of Applicant

Applicant's monthly salary	\$20,000
Applicant's spouse monthly salary	\$5,000
Applicant has 2 sons aged 2 and 5	\$10,000
Monthly Rent	
Applicant's saving in bank	\$30,000
Applicant's spouse savings in bank	\$10,000
Applicant holds 2000 shares of HK Bank (current market value \$175 per share)	

Means Test

Scenario

- (A) Based on proposed method of calculation using average expenditure of the lowest 50% households (excluding rent payable) as personal allowance deductible.
- (B) Based on current method of calculation of disposable income using CSSA standard as personal allowances deductible.

Using the figures for personal allowances in para. 11 of the Consultation Paper for illustration purpose:

			(A)	(B)
Disposable Income per month	salary		\$25,000	\$25,000
	<u>less</u> personal allowances		\$8,666	\$6,084
	<u>less</u> rent		\$10,000	\$10,000
	Total		\$6,334	\$8,916
Disposable Capital	savings		\$40,000	\$40,000
	<u>add</u> shares		\$35,000	\$35,000
	Total		\$75,000	\$75,000
Disposable Financial Resources	disposable income		\$6,334	\$8,916
			x 12	x 12
	<u>add</u> disposable capital		\$75,000	\$75,000
	Total		\$151,008	\$181,992
Result of Means Test	Applicant's financial resources		below \$169,700: <u>pass</u>	exceed \$169,700: <u>fail</u>