

DISCUSSION PAPER

LEGAL AID SERVICES COUNCIL

**Comments of Legal Aid Services Council on -
Legal Aid Policy Review 1997 :
Findings and Recommendations**

BACKGROUND

In early 1997, the Government appointed an inter-departmental Working Group, comprising representatives from the Administration Wing of the Chief Secretary for Administration's Office, Legal Aid Department (LAD), Department of Justice and Finance Bureau, to conduct a comprehensive review of the criteria used to assess financial eligibility of applicants for legal aid services provided by the Legal Aid Department. The Working Group has also reviewed the scope of legal aid and the operation of the Legal Aid Ordinance (Cap. 91).

2. To seek initial reaction of the Legal Aid Services Council (the Council), the Administration Wing of the Chief Secretary for the Administration's Office presented a report on "Preliminary Findings and Recommendations of the Working Group" in September 1997. The paper was subsequently revised after taking into account views of the Executive Council, and a consultation document on "Legal Aid Policy Review : Findings and Recommendations" (the Report) was issued last December. The public and the Council were invited to comment before 17 March 1998.

CURRENT POSITION

3. During the past few months, the Council has held lengthy discussions to study the findings and recommendations of the Working Group. We should like to express our appreciation to the Administration Wing, the Legal Aid Department and the Census and Statistics Department, for providing supplementary information to us, which has facilitated our deliberations.

4. The Council recognizes the importance of upholding the rule of law in Hong Kong, and the importance of providing publicly-funded legal aid services to those who do not have the means for private litigation. Hence, the Council considers the Working Group's Report is heading towards the right direction and generally supports the spirit of its recommendations. Nonetheless, the Council should like to ask the Working Group to consider certain issues raised in its Report. Our comments below are made with this positive approach in mind.

COMMENTS ON THE WORKING GROUP'S REPORT

Ref. : Paragraph 4

Subject : Background of the consultation paper

Comments : It is noted that an inter-departmental Working Group comprising representatives of various government departments was formed in early 1997 to review the approach used to assess the financial eligibility of applicants for legal aid and the scope of legal aid after the establishment of the Legal Aid Services Council in September 1996. The Council *considers* it desirable to be consulted in the first instance and should take active part in policy initiatives, as it is the statutory duty of the Council 'to supervise the provision of legal aid services in Hong Kong provided by the Legal Aid Department and to advise the Chief Executive on legal aid policy'.

I Criteria Used to Assess the Financial Eligibility of Legal Aid Applicants

Ref. : Paragraph 9

Subject : Approach for Assessing Financial Capacity

Comments : The Council *agrees* to the Report's recommendation.

Ref. : Paragraphs 10 - 12

Subject : Method of Computing Disposable Income

Comments : After lengthy discussions on this topic and upon receiving further supplementary information from the Director of

Administration and Commissioner for Census & Statistics whose hard work acknowledged by the Council, members have the following observations and recommendations:-

According to the Report, the target group for legal aid in our society is the lower-middle class. This presumably means the lower and lower-middle class. We agree to this concept because given the wide income disparity in society and the high cost of engaging private lawyer, they are at risk of being not legally represented because of limited means.

The Report suggests that the average monthly expenditure of the lowest 50% households will be the appropriate measurement. The Council is of the view that the average monthly expenditure of these households does not reflect the expenditure pattern of the lower-middle class since the analysis of the data indicates that about three-quarters of Hong Kong households exceed this expenditure level. It believes that to this end, the median monthly expenditure of Hong Kong households will be more appropriate, since it covers the lowest 50% households.

If however, it is the intention to cover only the lower, not the lower-middle households, the average monthly household expenditure may be adopted as recommended. The Council however considers that the overall average monthly expenditure of all the lowest 50% households do not reflect individual situations of households of different sizes from one to more than seven persons. Therefore the Council proposes that the average monthly expenditure of each type of households by size, should be separately calculated to arrive at the allowable expenditure. Also, it is understood that other expenditures are taken into account, such as actual rents, etc in calculating disposable income.

In agreeing to using the average expenditure of the lowest 50% households separately calculated by household size for estimating allowable expenditure, the Council is anxious to be assured that all CSSA recipients will be eligible for legal aid irrespective of whether they are covered by the new proposal.

Finally, we should like to point out that the overall percentile of

27.8 in Annex A of Director of Administration's letter of 13 March should be re-checked, alongside with the range for various types of households which is from 21.5 to 26.5.

Ref. : Paragraph 13
Subject : Annual Updating of Expenditure Figure

Comments : The Council **agrees** to revising the expenditure figure every year according to Consumer Price Index A to take account of inflation, until the next Survey has revealed a new expenditure figure. Legislative amendment is required to delink the personal allowances with the Comprehensive Social Security Assistance Scheme.

Ref. : Paragraph 16
Subject : Average Cost of Private Litigation

Comments : The Council notes with concern that according to the Report, legal aid cases generally cost more than non-legal aid cases as the assigned lawyers are required to report to both the clients and the LAD. The Council, however, notes that generally legal aid cases tend to demand more work from the assigned solicitors, e.g. it is necessary for them to seek approval from LAD for incurring expenditure for certain work, but whether or not legal aid cases generally cost more than non-legal aid cases would very much depend on the type of cases in question. Therefore, the Council **considers** that the subject should be looked into in the study of monitoring of legal aid cases, a subject the Council will attend to this year according to its work schedule.

Ref. : Paragraph 19 - 20
Subject : Financial Eligibility Limit for Standard Legal Aid Scheme - Traffic Running Down and Miscellaneous Personal Injury Cases

Comments : According to the Report, the average litigation cost for both traffic running down cases and personal injury cases is much higher than matrimonial and employee compensation cases and exceed the existing financial eligibility limit of HKD169,700. This, the Council believes, would create hardship for people whose resources exceed this financial limit. The Report notes

that an applicant in a personal injury case who fails to satisfy the means requirement of the standard scheme would have the alternative of applying under the Supplementary Legal Aid Scheme (SLAS). This the Council considers will not be an appropriate substitute because firstly, the legal aid applicant would have to pay more contribution under the SLAS; and secondly, an applicant who fails under the Standard Scheme does not automatically qualify for the SLAS.

The Council *recommends* that the Working Group should explore adopting a flexible approach in setting the financial eligibility limits, i.e. setting different thresholds for different types of cases like traffic running down cases and personal injury cases where the litigation costs are much higher than others so as to be consistent.

Ref. : Paragraph 23
Subject : Financial Eligibility Limit for Supplementary Legal Aid Scheme (SLAS)

Comments : The Council considers that the upper limit of SLAS should be increased since cases conducted under the SLAS are usually costlier and more difficult, and a person who possesses financial resources over the upper limit of SLAS may not be able to employ a private lawyer. As the financial eligibility limit of the SLAS is still relatively low compared with the average cost of litigation in running down and personal injuries cases, the Council *recommends* an increase in the upper eligibility limit. As the Report proposes to require applicant's contribution in future, this may help to reduce the likely financial impact on the SLAS Fund.

Ref. : Paragraph 24
Subject : Review Cycle

Comments : The Council *agrees* to the Report's recommendation that the financial eligibility limits for the two legal aid schemes should be reviewed once every two years. It *proposes* however that the inflation factor should be removed from the biennial review, as inflation, being an issue of annual adjustment, should be automatically taken into account. Accordingly, Council proposes that the relevant legislation be amended to authorize

the Chief Executive-in-Council to alter the financial eligibility limited annually to take into account of changes in the rate of inflation.

Ref. : Paragraph 27
Subject : Financial Capacity of Infants

Comments : The Council ***agrees*** to the Report's recommendation.

II Scope of Legal Aid

Ref. : Paragraph 33 - 34
Subject : Legal Assistance for Persons Required to attend Coroners' Inquests

Comments : The Council ***agrees*** to the Report's recommendations that the Duty Lawyers Service be entrusted with this responsibility. However, since the work involved is likely to be more substantial than just giving advice (as in the case of free legal advice), the Council considers that the duty lawyer should be remunerated for the service rendered.

Ref. : Paragraph 38
Subject : Residency Status

Comments : The Council ***agrees*** to the Report's recommendation.

III Operation of the Legal Aid Ordinance

Ref. : Paragraph 39 - 40
Subject : Continuing the Means Test for Employees in Appeals to the Court of First Instance brought by Employers against Judgments of the Labour Tribunal

Comments : The Council ***agrees*** to the Report's recommendation.

Ref. : Paragraph 42
Subject : Discretion not to Discharge a Legal Aid Certificate

Comments : The Council ***agrees*** to the Report's recommendation.

Ref. : Paragraph 44
Subject : Legal Aid Contributions

Comments : The Council ***agrees*** to the Report's recommendation.

Ref. : Paragraph 48 - 50
Subject : Legal Aid Contributions Payable by Legally Aided Persons
under the Standard Legal Aid Scheme

Comments : The Council ***agrees*** to the Report's recommendations.

Ref. : Paragraph 52 - 54
Subject : Contributions Payable by Legally Aided Persons under the
SLAS

Comments : The Council ***agrees*** to the Report's recommendations, but would like to observe that the wording of section (c) of paragraph 54 - "to contribute a sum of the total legal costs incurred" could be rephrased as "to contribute a sum equal to the aggregate of the legal costs incurred plus 15% of the property recovered or preserved less, where applicable, costs recovered from the opposite party and any interim contribution paid".

Ref. : Paragraph 56
Subject : Contribution to Bill of Rights Cases

Comments : Council ***agrees*** to the Report's recommendation.

Ref. : Paragraph 60
Subject : Discretion to Reduce or Waive Interest Accrued on the DLA's
First Charge

Comments : The Council ***agrees*** to the Report's recommendation. However, the Council considers as a general principle, the successful applicants' right to know to be of great importance and therefore ***recommends*** that they should be made fully aware of their rights and liability during the various stages of application, e.g. deferment of enforcement of DLA's first charge and the condition to pay interest accrued thereon.

Ref. : Paragraph 63
Subject : Enhanced Protection for the Legal Aid Fund

Comments : The Council **agrees** to the Report's recommendation.

Ref. : Paragraph 64
Subject : Legal Aid Funding

Comments : The Council **supports** the rationale that there should not be any ceiling imposed on the spending on each publicly-funded legal aid case as this will not be in the interest of justice and the interest of the legally aided person. The Council also disagrees to any notion to place a ceiling on total legal aid spending, as this would in effect be determining the maximum number of persons needing legal aid service in total disregard of others' financial eligibility or merit of their cases.

Ref. : Paragraph 65
Subject : Monitoring of Legal Aid Services

Comments : The Council fully agrees to the thinking that legal aid services should be effective and efficient. Indeed, since its inception, the Council has worked to this goal. In the coming meetings, the Council will examine further ways and means to enhance cost control and case progress monitoring through working closely with LAD's Working Group on Monitoring of Legal Aid Cases.

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