

For discussion on
21 December 1999

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

**The Honourable Chan Kwok-keung's proposal
To amend the Legal Aid Ordinance**

Purpose

This paper sets out the Administration's preliminary comments on the Honourable Chan Kwok-keung's proposal to amend the Legal Aid Ordinance.

Background

2. The Honourable Chan Kwok-keung seeks to introduce a Bill to empower the Director of Legal Aid (DLA) to grant legal aid to a person involved in cases where a breach of the provisions of an employment contract or the Employment Ordinance is an issue, even though the person's financial capacity exceeds the eligibility limits for the standard legal aid scheme. Specifically, the Bill amends section 5AA of the Legal Aid Ordinance (Cap.91) to extend the discretion of DLA to waive the upper limit of financial eligibility to the above-mentioned type of cases.

3. In response to a recommendation of the Amnesty International, section 5AA was added to the Legal Aid Ordinance in 1995 to provide DLA with the discretion to waive the upper limit of the eligibility test for persons in cases involving the Bill of Rights. The Administration made it explicitly clear, through the then Chief Secretary's speech to move the Second Reading of the relevant Bill, that the discretion was given as a matter of human rights policy.

The Government's Policy

4. In the course of the recently completed Legal Aid Policy Review, the

question of whether the upper limits of the means test should be waived for employees in appeals brought by employers to the Court of First Instance against the Labour Tribunal had been examined thoroughly. We have explained our consideration and policy in this regard to this Panel on three occasions from September 1998 to February 1999. Our policy can be summed up in an extract of the paper we submitted to this Panel on 16 July 1999 at Annex A. The same policy was also set out in the LegCo Brief for the Legal Aid (Amendment) Bill 1999 (see relevant extract at Annex B).

Assessment

5. Our preliminary assessment is that the Honourable Chan Kwok-keung's proposed amendment to the Legal Aid Ordinance would have several implications:

- (a) it would have a substantive effect on the operation of the Legal Aid Department in handling applications for legal aid. If DLA were given the discretion to waive the means test for the type of applications mentioned in paragraph 1 above, he would have to proceed with the merits test even if the relevant applicants failed the means test. In addition, DLA would probably find it necessary to grant legal aid to almost all applicants who passed the merits test, since the circumstances in which he could properly exercise his discretion to refuse to waive the means test would be very limited. This would result in both a departure from the Administration's long-established principle that all legal aid applicants should be subject to means test, and from the existing procedure followed by DLA of subjecting applications to the means test as required by section 5(1) of the Legal Aid Ordinance;
- (b) there would be additional legal cost for LAD if DLA should decide to waive the financial eligibility limit and grant legal aid to applicants whose financial capacity exceed the eligibility limits. For instance, in 1998, LAD received a total of 375 applications involving employment disputes. 82 applications were successful. 86 applications were rejected on means ground, while 160 were rejected on merits ground. (The remaining 47 applications were either withdrawn subsequently or were still being processed when the

figure for the year was compiled.) If DLA were given the discretion as proposed, and assuming that half of the 86 cases rejected on means ground were meritorious, 43 additional cases would have been granted legal aid in the year. Our estimate is that each case would have incurred a legal cost ranging from \$40,000 to \$200,000, and the total estimated legal cost for the 43 cases could amount to \$5 million.

Conclusion

6. As previously explained to this Panel, we do not see any strong reason for departing from our long-established principle by treating the type of cases in question in a different manner. We are therefore not inclined to support the introduction of the proposed amendment to the Legal Aid Ordinance.

Administrative Wing
Chief Secretary for Administration's Office
December 1999

For information on
20 July 1999

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

Legal Aid Policy Review 1997: Final Recommendations

(e) *means test for employees*

20. At present, employees involved in appeals brought by employers to the Court of First Instance against judgments of the Labour Tribunal are subject to a means test before they can qualify for legal aid. In the consultation paper, we propose to continue with such practice. We received a number of submissions suggesting that either the means test in these cases should be waived automatically, or the DLA should be given the discretion to waive the upper limit of the means test in deserving cases. This Panel also suggested that the means test should be waived in cases where the ground of appeal was an error in law.

21. It is our long-established principle that all legal aid applicants should be subject to the means test. We do not see any strong reason for departing from this principle by treating the type of cases in question differently. Exempting one type of cases from the means test could open the floodgate for exempting other types of cases. Indeed, the inequality in the financial positions of employers and employees, which is quoted to support differential treatment, also exists in other cases such as landlords and tenants in private litigation. Experience also shows that most employees in these cases are able to satisfy the means test. Between 1 January 1997 and 31 March 1999, out of the 197 legal aid applications lodged by employees responding to these appeals, only 31 (15.7%) were refused on means ground. Based on the above, we do not see justification for making exceptions for such appeals.

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LEGISLATIVE COUNCIL BRIEF
LEGAL AID (AMENDMENT) BILL 1999

(e) *means test for employees*

20. At present, DLA does not have power to waive the means test for any applicant except that DLA may waive the upper limit of means test for Bill of Rights Cases. In the consultation paper, we propose to maintain the status quo. We received a number of submissions suggesting that in relation to employees applying for legal aid to defend appeals brought by employers to the Court of First Instance against judgments of the Labour Tribunal, either the means test should be waived automatically or the DLA should be given the discretion to waive the upper limit of the means test in deserving cases. The AJLS Panel has also suggested that the means test should be waived in cases where the ground of appeal was an error in law.

21. It is our long-established principle that all legal aid applicants should be subject to the means test. We do not see any strong reason for departing from this principle by treating the type of cases in question differently. Exempting one type of cases from the means test could open the floodgate for exempting other types of cases. Indeed, the inequality in the financial positions of employers and employees, which is quoted to support differential treatment, also exists in other cases such as landlords and tenants in private litigation. Experience also shows that most employees in these cases are able to satisfy the means test. Between 1 January 1997 and 31 March 1999, out of the 197 legal aid applications lodged by employees responding to these appeals, only 31 (15.7%) were refused on means ground. Based on the above, we do not see justification for making exceptions for such appeals.

Administration Wing
Chief Secretary for Administration's Office
September 1999