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28 February 2004

By Fax [2509 9055]

Clerk to Subcommittee
Legislative Council
3rd Floor, Citibank Tower
3 Garden Road, Hong Kong

[Attn: Mrs Percy Ma]

Dear Mrs Ma,

**Subcommittee on proposed resolution
under section 7(a) of the Legal Aid Ordinance**

Follow-up to meeting on 24 February 2004

Thank you for your letter of 24 February 2004. Please find enclosed to this letter the following documents as requested by Members -

- (a) at Annex A, the Administration's legal advice on whether refusal of the Legal Aid Department to provide legal aid on grounds of means to an applicant who is unable to meet the costs of litigation would contravene Article 25 of the Basic Law; and
- (b) at Annex B, tables showing the financial resources of the legal aid applicants and the contributions they were required to make, in relation to criminal cases in years 2001 to 2003, which the Director of Legal Aid ("DLA") had exercised discretion to waive the financial eligibility limit, but the offers were not accepted.

In compiling the tables at **Annex B**, it has come to the attention of the Legal Aid Department that the case statistics it had earlier compiled for year 2001 and year 2003, as set out in **page 1 and 3 of Annex F** to my letter of 17 February 2004, contain a number of typos. With apologies on the inconvenience caused, I enclose at **Annex C** two revised tables with the corrections highlighted for Members' information and record.

It is the Administration's intention to give notice on 2 March 2004, for the Chief Secretary for Administration to move the captioned resolution at the Council sitting on 17 March 2004. I should be grateful if you could draw the subcommittee Members' attention to the timetable.

Yours sincerely,

(Chan Yum-min, James)
for Director of Administration

The Administration’s legal advice on whether refusal of the Legal Aid Department to provide legal aid on grounds of means to an applicant who is unable to meet the costs of litigation would contravene Article 25 of the Basic Law

Article 25 of the Basic Law (BL25) provides that “All Hong Kong residents shall be equal before the law”. The article has been examined by our court on several occasions and it appears that the court perceives BL25 as a constitutional guarantee of the right of equality.

The focus of BL25, however, is on whether the law treats people in an equal, non-discriminatory manner, not whether the parties are equal with each other. For instance, in *Equal Opportunities Commission v Director of Education*¹, Hartmann J, citing Li CJ in *Ng Ka Ling & Others v Director of Immigration* ((1999) 2 HKCFAR 4), agreed that the Basic Law, as evidenced by BL25, enshrines “the principle of equality, the antithesis of any discrimination”. In paragraph 84, Hartmann J said:

“Article 25 of the Basic Law is reflected in Article 22 of the Bill of Rights, the Bill effectively bringing the provisions of the ICCPR into our domestic law:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.”

¹ [2001] 2 HKLRD 690, para. 83-84.

Evident from the case law is that our court in its interpretation of BL25 has closely followed the UN Human Rights Committee’s general comment on the right to equality guaranteed under Article 26 of the International Covenant on Civil and Political Rights (ICCPR)². According to the Human Rights Committee, “Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and the guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”³.

The guarantee in BL25 is reinforced by the right to fair hearing protected under Article 10 of the Hong Kong Bill of Rights. Article 10 incorporates into domestic law Article 14 of the ICCPR. The first sentence of both articles state clearly that “[a]ll persons shall be equal before the courts and tribunal”. According to Nowak, Article 14 of the ICCPR guarantees that the law should be applied without discrimination by the judiciary⁴. The judiciary is under a legal obligation to treat both litigant in person and litigant legally represented in a fair and non-discriminatory manner.

Under our legal aid regime, or Ordinances regulating it, all applicants who pass both the means test and merits test are eligible for legal aid. In the circumstances, it is most unlikely that the current legal aid regime would raise an issue under BL25.

² Article 26 of ICCPR is identical to Article 22 of the Hong Kong Bill of Rights.

³ General comment 18, para. 1.

⁴ Nowak, M., *ICCPR Commentary*, NP Engel, Khel, 1993, 239.

Annex B

14 criminal cases where DLA had exercised discretion to offer legal aid but offers were not accepted

For the period of 1.1.2001 to 31.12.2001

	Financial Resources³	Legal Aid Contribution required
1	\$188,590	\$56,577
2	\$188,592	\$56,577
3	\$192,510	\$57,753
4	\$193,036	\$57,911
5	\$269,233	\$80,770
6	\$279,554	\$97,844
7 ²	\$280,605 (\$11,913)	\$98,212 (free legal aid)
8 ²	\$284,377 (\$135,257)	\$99,532 (\$27,051)
9	\$397,392	\$158,957
10 ²	\$623,058 (\$623,058)	\$311,529 (\$311,529)
11 ²	\$623,058 (\$623,058)	\$311,529(\$311,529)
12	\$850,000	\$510,000
13 ¹	\$1,158,229	\$400,000
14 ¹	\$11,588,500	\$100,000

- 1 Contribution is based on the DLA's estimate of expenditure to be incurred in the proceedings and is less than the "maximum" level as stipulated in Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations.
- 2 Four applicants were subsequently granted legal aid with varied or same amount of contribution upon re-application and re-assessment of their financial resources. The financial resources and contributions upon re-assessment are set out in brackets.
- 3 "Financial resources" are the sum total of disposable income and disposable capital less deductible allowances as stipulated in the Legal Aid Ordinance.

18 criminal cases where DLA had exercised discretion to offer legal aid
but offers were not accepted

For the period of 1.1.2002 to 31.12.2002

	Financial Resources³	Legal Aid Contribution required
1 ²	\$190,432 (\$140,224)	\$57,129 (\$28,044)
2	\$191,536	\$57,460
3	\$192,375	\$57,712
4 ²	\$200,465 (\$332)	\$60,139 (free legal aid)
5	\$216,881	\$65,064
6	\$224,294	\$67,288
7 ²	\$260,819 ((\$1,072)	\$78,245 (free legal aid)
8	\$302,169	\$105,759
9	\$347,640	\$121,674
10	\$352,530	\$123,385
11	\$423,637	\$169,454
12 ¹	\$435,440	\$150,000
13 ²	\$451,729 (\$23,597)	\$180,691 (\$1,000)
14	\$452,596	\$181,038
15 ²	\$508,648 (\$63,847)	\$228,891 (\$3,192)
16	\$558,190	\$251,185
17	\$622,020	\$311,010
18 ¹	\$858,522	\$315,000

- 1 Contribution is based on the DLA's estimate of expenditure to be incurred in the proceedings and is less than the "maximum" level as stipulated in Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations.
- 2 Five applicants were subsequently granted legal aid with varied amount of contribution upon re-application and re-assessment of their financial resources. The financial resources and contributions upon re-assessment are set out in brackets.
- 3 "Financial resources" are the sum total of disposable income and disposable capital less deductible allowances as stipulated in the Legal Aid Ordinance.

19 criminal cases where DLA had exercised discretion to offer legal aid
but offers were not accepted

For the period of 1.1.2003 to 31.12.2003

	Financial Resources²	Legal Aid Contribution required
1	\$200,975	\$60,292
2	\$246,706	\$74,011
3 ¹	\$260,819 (\$1,072)	\$78,245 (free legal aid)
4	\$284,964	\$99,737
5	\$305,109	\$106,788
6 ¹	\$311,469 (\$50,292)	\$109,014 (\$2,000)
7 ¹	\$349,219 (NIL)	\$122,226 (free legal aid)
8	\$435,126	\$174,050
9	\$469,518	\$187,807
10 ¹	\$476,013 (\$293,209)	\$214,206 (\$102,623)
11	\$478,505	\$215,327
12	\$481,887	\$216,849
13	\$516,860	\$232,587
14	\$549,019	\$247,058
15	\$615,400	\$307,700
16	\$676,023	\$371,812
17 ¹	\$700,146 (\$146)	\$385,080 (free legal aid)
18 ¹	\$1,410,221 (\$1,283,575)	\$944,848 (\$859,995)
19	\$1,420,850	\$951,970

- 1 Six applicants were subsequently granted legal aid with varied amount of contribution upon re-application and re-assessment of their financial resources. The financial resources and contributions upon re-assessment are set out in brackets.
- 2 “Financial resources” are the sum total of disposable income and disposable capital less deductible allowances as stipulated in the Legal Aid Ordinance.

Number of cases in which the Director of Legal Aid (“DLA”) had exercised discretion to waive the financial eligibility limit, and the numbers of cases where the legal aid offers were accepted and not accepted in the past three years

Year 2001

Financial Resources Ranges		Level of Contribution as stipulated in Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations	Civil Cases (under s.5AA of the Legal Aid Ordinance)			Criminal cases (under r.15(2) of the Legal Aid in Criminal Cases Rules)		
			No. of cases with legal aid offered under DLA’s discretion	No. of legal aid offers accepted	No. of offers lapsed	No. of cases with legal aid offered under DLA’s discretion	No. of legal aid offers accepted	No. of offers lapsed
From	To							
\$169,701	\$269,700	30%				16	11	5
\$269,701	\$369,700	35%				65	2	43
\$369,701	\$469,700	40%	1	1	0	1	0	1
\$469,701	\$569,700	45%				1	1	0
\$569,701	\$669,700	50%				4	2	2
\$669,701	\$769,700	55%				10	0	10
\$769,701	\$869,700	60%				2	1	1
\$869,701	\$1,200,000	65%				<u>1</u>	<u>0</u>	<u>1</u>
Exceeding \$1,200,000		67%				<u>1</u>	<u>0</u>	<u>1</u>
Total:			1	1	0	31	17	14

Note: The Legal Aid Department does not keep record on the applicants’ reason of not accepting legal aid offers.

Year 2003

Financial Resources Ranges		Level of Contribution as stipulated in Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations	Civil Cases (under s.5AA of the Legal Aid Ordinance)			Criminal cases (under r.15(2) of the Legal Aid in Criminal Cases Rules)		
			No. of cases with legal aid offered under DLA's discretion	No. of legal aid offers accepted	No. of offers lapsed	No. of cases with legal aid offered under DLA's discretion	No. of legal aid offers accepted	No. of offers lapsed
From	To							
\$169,701	\$269,700	30%				22	19	3
\$269,701	\$369,700	35%				9	5	4
\$369,701	\$469,700	40%	1	1	0	43	1	32
\$469,701	\$569,700	45%				56	1	45
\$569,701	\$669,700	50%				1	0	1
\$669,701	\$769,700	55%				4	2	2
\$769,701	\$869,700	60%						
\$869,701	\$1,200,000	65%						
Exceeding \$1,200,000		67%				5	3	2
Total:			1	1	0	50	31	19