



法律援助署
Legal Aid Department

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Clerk , Public Accounts Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Hong Kong.

1 December 2005

(Attn: Ms. Dora Wai)


Dear Ms. Wai,

**The Director of Audit's Report on the
Results of value for money audits (Report No. 45)
Chapter 7: Recovery of legal costs by the Legal Aid Department**

Thank you for your letter dated 24 November 2005.

I enclose my response to the questions raised by the Public Accounts
Committee.

Yours sincerely,


(Benjamin Cheung)
Director of Legal Aid

c.c. Director of Administration (Attn.: Mrs. Alice Cheung)
Director of Accounting Services
Secretary for Financial Services and the Treasury (Attn.: Mr Vincent Chuk)
Director of Audit

Encl

Director of Legal Aid's Response to the Questions raised by PAC

Costs recovery of the legal aid schemes

- (a) The suggestion for LAD to prepare income and expenditure statements for OLAS cases similar to those for SLAS is closely related to the proposal under item (f), regarding accrual accounting and we have provided our consolidated reply under item (f).
- (b) Reasons for discontinuing the provision of percentage recovery
- As pointed out in the Audit report, LAD has since 1995-96 discontinued the preparation of statistics on “amount of damages, maintenance and costs recovered as percentage of total amount due to department and aided persons”. It was accepted that there is no direct relationship between LAD’s performance and the damages/costs recovery ratio. A higher or lower ratio in a year could not serve as a relevant or reliable indicator of LAD’s performance in that year. The recovery ratio is indeed affected by many external factors beyond the control of LAD. The most pertinent ones being the nature of the cases involved, the financial circumstances of opposite parties and the general economic situation in Hong Kong, as elaborated below:
 - (i) Case nature: Experience shows that full recovery of damages and costs is more likely or achievable only in personal injuries claims because most if not all of the opposite parties are insured. Also, in some cases, payment is underwritten by bodies such as the Employees Compensation Assistance Fund Board and the Motor Insurers’ Bureau.
 - (ii) Financial circumstances of opposite parties: Take for instance the legal costs written off in 2004-2005. About 92% of the amount written off are attributable to two types of cases, namely wages claims against insolvent employers (at \$38M, or 61%) and matrimonial cases (at \$ 19.4M, or 31%). For insolvency cases, by nature, the chance of recovery is very slim since the employers who are the judgment

debtors are invariably financially insolvent, and are the subjects of either a bankruptcy or winding-up order. As for matrimonial cases, many of the judgment debtors faced similar financial difficulties as our aided persons, often unemployed or of low income and their financial well-being is particularly susceptible to changes in the economic conditions in Hong Kong.

- (iii) The impact of the economic situation in Hong Kong on costs recovery rate is best illustrated by the drastic drop in the write-off amount for the first 6 months of 2005-06, at \$18.3M, which is 45% less than that in the same period in 2004-05. This helps to show that judgment debtors in legally aided cases are particularly vulnerable to the economic downturn in the past few years and explain their failure to pay costs due to aided persons.

To disclose these statistics to the public in future

- We have explained the above to Audit during its study and took it that Audit has accepted our explanation, as we note that Audit has removed from its recommendations in paragraphs 2.21 its original proposal for LAD to re-introduce the compilation of the percentage recovery statistics. The replacement proposal now set out in paragraph 2.21(a) for LAD to identify additional indicators for evaluating the efficiency and effectiveness of legal aid services is accepted by LAD on this understanding.
- Notwithstanding this, since PAC is concerned, LAD will make available the information to the public.

(c) Statistics on payment of legal costs to the opposite party

- Similar to the issue of recovery of legal costs from opposite parties in (b) above, the amount of legal costs paid to opposite parties bears no direct relationship with and provide little information on the performance of LAD: by law, legal aid should be granted where there is a reasonable case for court proceedings. It is not our policy objective that legal aid is granted only to a cast-iron case. Neither would it be appropriate to use the outcome of court cases or amount of legal costs paid to opposite parties as LAD's performance indicator.

- We thought that by excluding from its Recommendations now in paragraphs 2.21 its original proposal on the requirement for statistics of payment of legal costs to opposite parties, Audit has accepted our explanation. Rather, paragraph 2.21(a) only contains a new recommendation that LAD should identify additional indicators for evaluating the efficiency and effectiveness of legal aid services, to which LAD has agreed as indicated in paragraph 2.22(a) of the Audit Report.
- The above notwithstanding, since PAC is concerned, LAD will provide the information to the public.

(d) Additional indicators to evaluate efficiency and effectiveness

- We have already agreed to the Audit's recommendation to identify additional indicators and have been actively exploring various alternatives since, drawing reference from experiences of overseas legal aid authorities. We shall keep PAC informed of developments.

(e) Computerized staff time-charging system

- The computerized staff time-charging system commonly adopted by professional firms is to record the staff time expended in each case and the staff cost incurred, for the purpose of cost management and billing arrangements.
- LAD has in place a similar computerized system, namely the time-costing programme, in respect of areas of work for which costs are chargeable for in-house litigation cases. The objective of this system is to support costs assessment and generate bills of costs similar to the arrangements in professional firms in private practice.

(f) Prepare financial statements for OLAS cases similar to those in SLAS

- The issue here is the difference between cash-based accounting and accrual based accounting, a subject not just relevant to the legal aid schemes but also the Government accounting arrangement as a whole. As PAC will note, the Government's General Revenue Account adopts cash-based accounting.

- As background, we should explain the fundamental difference in nature and in the mode of operation of OLAS and SLAS. SLAS, operated on a contingency fund basis, is set up as a self-financing scheme. The successful aided person pays a percentage of the damages recovered to the SLAS Fund, which are to support the administration cost and other cases under SLAS, to maintain its self-sufficiency.
- On the other hand, OLAS, like many other government services, is a form of public service which incurs expenditure on the Government. Though it also receives payments, its objective is not to make a profit or surplus. And indeed, it can never make a profit. The design of OLAS is such that LAD can at best recoup only the expenses it paid out for the purpose of the legal aid proceedings. LAD bears the entire cost for processing applications and their subsequent monitoring. Against the above background, the expenditure of OLAS should not, as a matter of principle, be used as a benchmark to measure the success or otherwise of the scheme, bearing in mind the policy objective for OLAS is to ensure no one with a reasonable case for pursuing or defending legal proceedings should be denied access to court because of lack of means.
- The current cash-based presentation of financial information on OLAS in the Annual Estimates is in line with the format adopted by other departments in the Estimates in respect of services provided to the public. Under the cash-based accounting principle, legal aid costs incurred for OLAS are recorded on a rolling basis and a position at a point in time/in a period of time is shown in the Annual Estimates with the primary aim of monitoring the expenditure of legal aid costs to ensure the expenditure stays within the approved estimates. Similarly, the costs recovered from legal aid cases for a financial year are also recorded on a rolling basis and a position at a point in time/in a period of time is also shown in the Annual Revenue Estimates. It is however not necessary to match the actual income and expenditure in order to ascertain the surplus or deficit as OLAS is not a self-financing scheme and will never make a profit.
- As for SLAS, because of its self-financing nature, it is of the greatest importance to ensure the financial well-being of the fund at all times. To this end, the financial statements for SLAS, differ from the usual format for other government services including OLAS and are prepared on an accrual

basis. The statement of income and expenditure shows income and expenditure for a financial year on accrual basis so as to identify surplus or deficit for that year. Some of the income/expenditure are directly related to the finalized cases (e.g. payment from aided persons out of damages recovered from finalized cases, legal costs and disbursements incurred in the finalized cases); some do not (administration cost incurred in processing and monitoring, bank interest and charges). The balance sheet shows the accumulated balance of the fund as at end of the financial year. Similar accounting arrangements are also adopted for other Government funds which are run on a self-financing basis, for instance, the trading fund operated by trading fund departments.

- In light of the above, it would not be cost-effective or appropriate to adopt the accrual-based accounting principle and prepare financial statements for OLAS cases on a par with the accounting arrangements in respect of SLAS. Reasons are -
 - As stated above, OLAS is not a self-financing scheme and, given the nature of OLAS, the costs incurred will invariably exceed the income. Preparing financial statements similar to SLAS, the main purpose of which is to show the surplus/deficit position so that LAD can monitor the viability of the fund, will not provide additional meaningful or useful information to both LAD and the users.
 - The current cash-based accounting principle adopted for OLAS is in line with service wide arrangements. We have consulted the Director of Accounting Services who also advises that the present different formats of the financial statements for OLAS and SLAS are in line with the accounting policy of the government for monitoring the financial aspects of the two legal aid schemes.
 - The use of the accrual-based accounting involves an overhaul of LAD's current system. For instance, apportioning the staff costs for processing and monitoring thousands of cases, staff (officers and clerical alike) will need to clock their activities and input the time into the system even though the costs are not to be recovered, the current Case Management and Case Accounting System has to be overhauled. Additional resources implications for enhancement of the system would be significant and that the time taken for staff to clock and input the time spent on every piece of work they carry out into the system will inevitably hamper the

efficiency and effectiveness of the services provided to the public if there is no additional staff provided.

- As the Government still adopts cash-based accounting for its General Revenue Account, it means that LAD would have to run both systems in parallel. The existing accounting support resources (one Treasury Accountant and one Accounting Officer I) will have to be increased significantly to undertake the large volume of extra work generated.
- We note that with our explanation above, Audit decided not to include in its Recommendations in paragraphs 2.21 of the Audit Report its original proposal for the adoption of such accounting arrangements.

Enforcement proceedings against judgment debtors

- We would firstly like to explain that when it comes to taking enforcement proceedings, LAD is acting as solicitors of aided persons in civil proceedings. That being the case, LAD owes a duty to act professionally not only to the aided person but also to the court. Costs and disbursements incurred in the enforcement proceedings may only be recovered from the opposite party if we can demonstrate to the court that it is proper and necessary to incur them, and that the amounts incurred are fair and reasonable. The need for and the frequency of conducting searches under items (g) and (h) below must therefore be determined by the facts of the cases in question. Since each case is different, action should be taken only where the circumstances of a particular case warrant it. It is also noteworthy that, for costs that cannot be recovered from the opposite party, they will be borne by the aided person where property has been recovered or by the public fund in other cases. Hence, there is a need to be prudent in conducting enforcement proceedings.
- (g) Conduct periodic searches for judgment debtors' addresses with all relevant government departments and Hospital Authority, in computer readable form, which may have such information
- LAD has indeed been sending requests to all relevant government departments and the Hospital Authority if, based on the facts of the cases in question, there are reasons to believe that these departments/agencies may

have the required information. We wish to assure PAC that we will continue to exercise our professional judgment with due care and make our best endeavours in this regard.

- Regarding the form of delivery, LAD has already been sending requests in electronic forms and templates wherever possible. We will continue to do so.
 - As explained above and in paragraph 4.13 of the Audit report, we wish to highlight that in making the relevant searches, we should exercise prudence in deciding what is the 'relevant' organization that may have the information required for the specific case in question, bearing in mind that –
 - the costs of the searches may need to be borne by the aided person where property has been recovered or by the public fund and we should hence minimize unnecessary searches and reduce related costs. If LAD is to conduct all the searches with the departments/agencies referred to in paragraph 4.9 of the Audit report, the costs of the searches will come to about \$3,500 for each case;
 - the work involved, not only in respect of LAD, but also of the receiving departments, could be substantial if such searches are conducted indiscriminately or as a matter of course, bearing in mind there are a large number of such searches ongoing at any one time. For example, there are currently about 370 address searches being conducted each month. The cumulative effect and hence the workload for the departments/agencies on the receiving end would be significant and it is imperative that LAD should be prudent and ensure that the searches are relevant and likely to be useful before we require the departments/agencies to devote resources to facilitate the searches. For instance, we should not insist on a particular area of search if the instructions given by the aided person and the information to LAD already show that a department/agency does not possess or cannot provide the information required.
- (h) Conduct searches for assets and income of judgment debtors at the Land registry, Companies registry, Business registration Office and Transport Department for cases other than those with sufficient and clear reasons for write-off

- We wish to clarify that LAD will only write off outstanding costs when there are sufficient reasons for doing so. As the costs of the searches may need to be borne by the aided persons or the public fund eventually, we have reservations about indiscriminate searches on an across-the-board basis, without paying due regard to the facts of the case. Nevertheless, LAD would like to assure PAC that the Department will endeavour to conduct relevant and appropriate searches among identified departments, with due consideration given to the circumstances of the case.

(i) Checklist of enforcement actions to help staff document the actions taken (including the results) and the reasons for not pursuing certain courses of actions

- In determining the mode of recovery action for a particular case, the professional officer has to assess the prospect of success of such action and which mode is the most cost-effective, subject to the circumstances of the case because, as explained above, we owe a professional duty not only to the aided person but also to the court. Indeed, we note that Audit has excluded from its Recommendations in paragraph 4.24 its original proposal on the requirement for the above check-list of enforcement actions.
- The above notwithstanding, we will heed PAC's concern and consider the format and effective use of such a checklist of enforcement actions before writing off outstanding costs.

Administration of outstanding and irrecoverable legal costs

(j) To include in the annual return on arrears of revenue (under SAI 1020) the outstanding legal costs awarded to the aided person

- To enhance public accountability and to facilitate monitoring, we agree with the Director of Accounting Services on the need for the LAD to compile annual returns on the outstanding legal costs awarded to aided persons.
- Taking into account the legal position, as confirmed by legal advice of DOJ, that costs due from an opposite party are costs due to the aided person and not to the Government, it would not be appropriate to report such amounts in the specific annual return on arrears of revenue (under SAI 1020) due to

Government.

- An alternative and pragmatic way forward could be for LAD to devise, as set out in paragraph 5.16 of the Audit Report, appropriate reports to the Director of Accounting Services to achieve the same objectives underlined by Audit. In this regard, we also note the Secretary for Financial Services and Treasury's advice, as stated in paragraph 5.17 of the Audit Report, that LAD may consider including the amounts in other suitably formatted reports. Hence the proposed alternative report to Director of Accounting Services.
- We are grateful to the Director of Accounting Services who, in her reply to PAC of 1 December 2005, has offered to work with LAD to design a specific form for use, to cater for the special circumstances of LAD. We will work with DAS closely and are confident that we will be able to develop a mutually agreeable format for LAD to report on outstanding legal costs awarded to aided persons in future.
- We will keep PAC informed of the progress.

(k) Provision of list of legal aid cases with outstanding legal costs to be recovered as at 31 March 2005

- For PAC's information, LAD and Audit have had detailed discussions on the specific cut-off or point in time that legal costs due to an aided person should be regarded as outstanding legal costs to be recovered. This is because there are many outside but complex issues that will affect the progress and outcome of a particular case. For instance, an opposite party may appeal against the costs order or the court order as a whole, the amount of costs has to be agreed or assessed by the court, or the opposite party may seek a review even after the court has determined the costs after taxation.
- In light of the above, we have explained to Audit that we may arrive at the outstanding costs to be recovered only when an opposite party has agreed to pay the costs by signing an undertaking or has been ordered by the court to pay the costs by instalments. It is on this basis that Table 6 of the Audit Report is prepared to capture the amount of outstanding legal costs to be recovered at a specific timeline of 31 March 2005.

The Audit Commission's access to legal aid case files

(l) Photocopies of case files

- We would first of all wish to assure the PAC that, as we have undertaken in paragraph 6.13 of the Audit report, we will continue to facilitate access by Audit to our case files even for cases to which the legally aided persons have not granted us their consent for such disclosure. In these cases, the Department stands ready to make photocopies of the case files with all personal data obliterated. This would serve to balance the need for Audit to have access to case files to conduct value for money audit, whilst observing the need to respect the fundamental right of privacy of aided persons.
- As to the incident referred to in paragraph 6.9 of the Audit Report, we wish to explain that LAD has on no occasion refused to photocopy the case files. We consider it helpful to provide some further background leading to this particular incident so as to dispel possible misunderstanding.
- While the discussion of the possibility of making photocopies of case files took place in February 2005, Audit requested on 26 April 2005 to have the files for 513 cases for inspection, with a request that the files should be provided within a month's time, i.e. by 26 May 2005. LAD immediately began to seek consent from the 500 odd aided persons to disclose to Audit their case files. In view of the fact that Audit might require photocopies of those files where the aided persons had refused to give consent, we invited Audit to consider, before it made a decision, the resource constraints for LAD to provide the large volume of case files, with all the personal data removed manually. We also appealed to Audit that should they decide to have photocopies of case files, the number of such case files be kept to a manageable size.
- We hope PAC would appreciate that LAD stands ready to cooperate and facilitate Audit's VFM study as always, but the Department also faces the issue of limited resources. Nevertheless, we would use our best endeavours within this reasonable remit.

(m) To set up an independent team to examine the case files selected by Audit where consent of the aided persons has not been given

- LAD has engaged its internal audit team to examine the case files in question with a view to identifying non-compliance with the relevant LAD's guidelines and areas for improvement. We will keep PAC informed of the progress in due course.
