

EXECUTIVE SUMMARY

Direct Investigation: Monitoring of Assigned-out Cases

Background

The Legal Aid Department (“LAD”) provides financial assistance to litigants who meet the statutory criteria of financial eligibility and the merits for taking or defending legal proceedings. Legal aid cases are either dealt with by in-house counsel or assigned to lawyers in private practice (“assigned lawyers”).

2. Over the years, we have received a number of complaints against LAD. We have also noted media reports alleging inadequacies of legal aid arrangements. Our view is that, as a custodian of public funds and provider of a public service, LAD has a duty to monitor progress of cases handled by assigned lawyers, ensuring efficient and cost-effective utilization of the Legal Aid Fund as well as appropriate service to the aided persons. In view of the public interest involved, The Ombudsman declared a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397, on 7 April 2005.

The Ambit

3. The ambit of this direct investigation covered:
- (a) administrative arrangements for assigning out legal aid cases;
 - (b) mechanism for monitoring progress of assigned-out legal aid cases, including the enforcement of court orders in such cases;
 - (c) system for evaluating the performance of assigned lawyers in handling assigned-out legal aid cases, including post-hearing follow-up action; and
 - (d) any problems identified in the current mechanism.

Access to Justice

4. Access to the courts and the right to confidential legal advice are enshrined in Article 35 of the Basic Law. However, litigation is costly. Unsuccessful litigant has to pay his own legal costs, and may be ordered by the court to pay the costs of the successful party. Government provides funds for legal aid to those who cannot afford the legal costs but satisfy the statutory criteria. Set up in 1970, LAD administers initially one scheme and then a supplementary scheme in 1984 to assist the “sandwich class” who would otherwise exceed the financial limit of the ordinary scheme.

Legal Aid Services Council

5. In 1996, Government established the Legal Aid Services Council (“LASC”) under the Legal Aid Services Council Ordinance, Cap. 489, to supervise the provision of legal aid services and to advise the Chief Executive on legal aid policy.

Legal Aid

6. In this investigation, we focus on LAD’s monitoring of civil cases, because in criminal cases involving personal liberty of the accused, the prosecution usually sets the pace for the proceedings under the watchful eye of the court.

7. In civil cases, legal aid is available for proceedings such as matrimonial and personal injury cases. To qualify, applicants must satisfy the means test and the merits test. Unsuccessful applicants may appeal to the Registrar of the High Court against the decision.

Director’s First Charge

8. Being granted legal aid does not mean that services are necessarily provided free. If the aided person wins his case and succeeds in recovering damages or preserving property in the proceedings, the Director of Legal Aid (“DLA”) has a right to recover from the aided person all the expenses and costs incurred in the case that cannot be fully recovered from the other party. This is DLA’s right to first charge, stipulated in all legal aid certificates. By signing the certificate, an aided person agrees and is bound to pay the first charge. LAD also requires assigned lawyers to explain this to aided persons where appropriate.

Discharge and Revocation

9. A legal aid certificate is discharged when the aided proceedings have been disposed of. The certificate may also be discharged if the aided person insists on continuing with the proceedings even though there is no merit to do so.

10. DLA can also revoke legal aid granted in circumstances where the aided person fails to make a full and true disclosure of his financial resources or knowingly furnishes a false statement.

Assigning Out

11. LAD has formulated guidelines and procedures on the assignment and monitoring of legal aid cases in its Operation Manual. Statistics on civil cases assigned out in the past three years are set out below:

Year	Civil Cases
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	Total	Assigned out
2002/03	10,014	7,660
2003/04	10,531	6,788
2004/05	8,408	5,349
Total	28,953	19,797

Source: LAD

Choice of Assigned Lawyers

12. If the aided person has nominated a lawyer, LAD does not reject that preference unless there are compelling reasons.

13. If the aided person does not make a nomination, LAD assigns a lawyer from the Legal Aid Panels, which comprise about 2,000 solicitors and 700 barristers.

Re-assignment of lawyer

14. Aided persons cannot discharge the assigned lawyer without the leave of DLA. If an aided person wishes to change the assigned lawyer, LAD has to consider whether the request is reasonable.

Monitoring of Cases

15. LAD defines its duty for monitoring assigned lawyers by reference to:

- (a) the case of *Ngao To-ki v Attorney General*¹, in which the Court of Appeal decided in 1981 that DLA's primary duty is to administer the legal aid scheme competently with due regard to the public purse. He is "under no duty to invigilating the performance of the assigned lawyers"; and
- (b) regulation 12 of the Legal Aid Regulations, which provides that the conduct of proceedings by the assigned lawyer is, under certain circumstances, subject to DLA's scrutiny.

"Bring up" Mechanism and Progress Reports

16. LAD officers are to bring up all case files for review at least every three months and decide whether to ask the assigned lawyers for progress reports. If requests or reminders for progress reports are ignored or not adequately responded to, LAD officers are to send a personal letter to the assigned lawyer. If two reminders and one personal letter are ignored, the LAD officer has to alert his section head, who would then issue a warning letter. If the assigned lawyer still fails to respond, the LAD officer, his section head and an Assistant Director or Deputy Director will discuss the case and consider re-assignment and reporting to the Departmental Monitoring

¹ In *Ngao To-ki v Attorney General (Civil Appeal No. 67 of 1980)* [1981] HKLR 259-297, the plaintiff claimed to have suffered damage due to the negligence of the assigned lawyer and DLA. The claim against DLA was dismissed.

Committee (“DMC”).

Evaluation

17. LAD officers are required to complete an evaluation report on the performance of assigned lawyers for their first assignment, when their performance is considered unsatisfactory or if they are on LAD’s records for unsatisfactory past performance. The evaluation reports will be considered by DMC.

Departmental Monitoring Committee

18. Chaired by DLA, DMC comprises a Deputy Director, two Assistant Directors, three Assistant Principal Legal Aid Counsel and a representative from the Corruption Prevention Department of the Independent Commission Against Corruption. In the past three years, DMC had considered 28 unsatisfactory evaluation reports:

Year	Unsatisfactory reports	Follow-up Action					
		None ²	Warning letter	Record of Unsatisfactory Performance /Conduct	Removal from Panel at lawyer’s request	Removal from Panel by LAD	Pending
2002/2003	14	3	2	8	1	0	0
2003/2004	7	1	1	4	0	0	1
2004/2005	7	0	2	3	0	1 ³	1
Total	28	4	5	15	1	1	2

Source: LAD

Case Studies

19. We have studied a number of cases with the aided persons’ consent. Our findings are summarised as follows:

Case 1

LAD staff was not fully acquainted with the experience of the Panel lawyer nominated for assignment.

[LAD response: Assignment history is now readily retrievable from the Case Management and Case Accounting System.]

Case 2

The need was highlighted for LAD or the assigned lawyer to explain clearly in layman terms to aided persons or to remind them of the implications of the first charge to avoid raising false hopes in them.

[LAD response: The assigned lawyer had on numerous occasions explained the first charge to the aided person.]

² LAD is satisfied with lawyers’ explanation.

³ Case also referred to the Law Society.

Cases 3

LAD did not intervene even when the assigned lawyer had not responded to ten requests or reminders for progress over a period of two years. Subsequent intervention shows that LAD could take proactive control of a case.

[LAD response: No major step in proceedings could be taken until medical conditions of the aided person had stabilised.]

Cases 4

LAD did not intervene even when the assigned lawyer had not responded to 15 requests or reminders for progress over a period of three years. LAD did not take early and firm action against the assigned lawyer in accordance with its Operation Manual.

[LAD response: The assigned lawyer was subsequently placed on the Record of Unsatisfactory Performance.]

Case 5

LAD did not take action even when the assigned lawyer continued to ignore its repeated requests for reports and despite the threat for referral to DMC.

[LAD response: An evaluation report on the assigned lawyer's unsatisfactory performance had been made.]

Case 6

LAD allowed the assigned lawyer over a year to finalise and clear accounts after settlement. It did not spark even on the assigned lawyer's indication of financial difficulties, resulting in the aided person not benefiting from the legal proceeding.

[LAD response: No panel lawyer had practised fraud on LAD and absconded before.]

Case 7

LAD wrote off the amount due from the opposite party, who was ordered by the court to pay legal costs. It was reluctant to take legal action to enforce judgment.

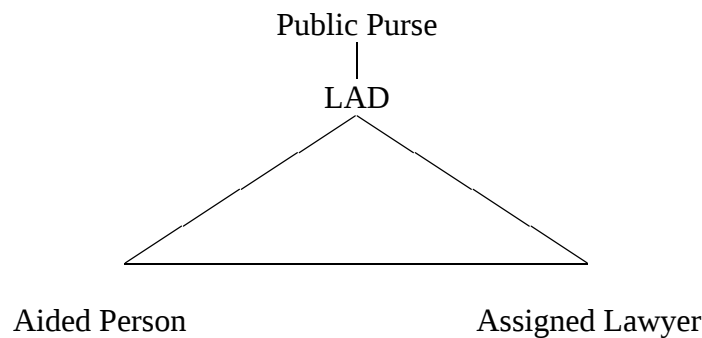
[LAD response: It was not cost-effective to take enforcement proceedings as amount overdue was small.]

20. These case studies show that LAD guidelines, though well formulated in theory and on paper, are not always followed in practice. Clearly, in these cases, LAD's guidelines and actions have failed to protect the aided persons' interests or the public purse. DMC also seems ineffective as a deterrent to incompetent or ineffectual assigned lawyers.

Observations and Opinions

21. We are well aware of the judgment in the *Ngao To-ki* case (para. 15). However, this investigation does not examine the legal or professional duty of LAD to aided persons. Our focus is on LAD's duty in its administration of the legal aid services. We consider LAD to have **administrative accountability** for the efficient and cost-effective operation of the legal aid schemes.

22. We see a tripartite relationship among LAD, the aided person and the assigned lawyer.



As with any other Government department, LAD provides service, specifically to aided persons.

First Charge

23. Many aided persons are unaware of or have difficulty understanding the first charge and its implications. Somehow, aided persons should be helped to understand better the operation of the first charge and its implications.

Monitoring of Cases

24. LAD has placed undue emphasis on the *Ngao To-ki* judgment in limiting its duties to the letter of the law. As a Government department, it has a duty not just to ensure value for public funds, but also to provide quality service to aided persons as well. A poor performing assigned lawyer cannot be good value for public money or effective advocate for an aided person.

25. Government departments may contract out their services, but not the accountability for the quality, efficiency and effectiveness of such services.

“Bring up” Mechanism and Progress Reports

26. It is good practice to ensure that all cases receive timely attention. However, after reviewing case files, individual officers have a great deal of latitude in deciding whether or not to call for progress reports. In one case, the assigned lawyer simply ignored all 15 reminders and letters over almost three years. Far more positive and disciplined action by LAD appears to be in order.

Evaluation and Appraisal of Assigned Lawyers

27. LAD has an evaluation proforma for assessing unsatisfactory performance of assigned lawyers. We consider this arrangement commendable. However, the description of and criteria for unsatisfactory performance are too vague. Defined **trigger points** would help to identify possible problems and ensure a clearer and more consistent approach in evaluation.

28. At present, unsatisfactory evaluation reports are few and far between in proportion to the volume of assigned-out cases (paras 11 and 18). There is a need for more stringent standards in such evaluation. The current “negative” evaluation should be supplemented by some appraisal

system under the supervision of DMC for an overall grading of individual assigned lawyers on conclusion of a case. To avoid burdening LAD, it should be effective and efficient yet simple.

Intervention by LAD

29. In one case where the assigned lawyer first hinted his cash flow problem in April 2003, LAD chose to be sympathetic and did not act. In the event, the assigned lawyer absconded in January 2005. It was both an unfair blow to the aided person, who was then unable to recover anything, and a sheer waste of public funds.

30. In case of professional misconduct, LAD may report to the two legal professional bodies. However, only one report has been made in the past three years. We consider the current guidelines too vague and LAD practice too lax.

Enforcement of Judgments

31. LAD should be ready to take firm action to enforce judgments. In particular, it should institute legal proceedings after due warning has been given. Otherwise, not only does the aided person not get his due, the credibility of Government and indeed the judicial system could be placed at stake.

Views from Legal Aid Services Council

32. Problems in LAD's monitoring system were first identified by an inter-departmental Working Group to Review the Monitoring of Assigned-out Cases set up by the Administration in December 1997. It recommended numerous improvement measures, many of which were medium to long-term. In October 1998, LASC set up a working party to follow up the measures. In January 2003, an interest group of LASC recommended that LAD should draw up checklists for use by assigned lawyers. Regrettably, despite earnest supervision for almost a decade, efforts by LASC seemed to have made little impact on the monitoring of assigned lawyers.

Concluding Remarks

33. Legal aid ensures access to justice for those who cannot afford the legal costs. Once granted legal aid, the aided person is protected from liability for legal costs in case he loses the case. However, LAD's present operation of the schemes does not assure compensation to aided persons even with a favourable judgment.

34. Case 6, where the aided person did not benefit at all, raises questions:

- (a) Should public funds be used to finance litigation where the aided person does not benefit at all?
- (b) Should an assigned lawyer be allowed to drag out a case for higher legal costs?

35. Given the thousands of cases assigned out every year, we accept that it is unreasonable and unrealistic to expect LAD to monitor each and every case closely. We also take LAD's point about leaving matter to the assigned lawyer's professional processing. However, that

must not mean leaving matters to the assigned lawyer only. Realistic standards and consistent criteria for monitoring should be put in place **and** in practice. The current monitoring mechanism verges on being a paper exercise.

Recommendations

36. A fundamental change is needed in LAD's concept of and approach to monitoring of legal aid cases. The Ombudsman has made the following recommendations to the Director of Legal Aid:

First Charge

- (1) to explain clearly in simple layman terms to legal aid applicants the operation and implications of the first charge and then, direct or via assigned lawyers, from time to time of the implications;

Monitoring

- (2) to review and re-orientate the mentality in monitoring the performance of assigned lawyers;
- (3) to consider a more formal "contractual" arrangement to facilitate LAD's effective monitoring of assigned lawyers' performance in discharging their duties;

Progress Reports

- (4) to remind staff not just to make timely issue of requests and reminders for progress reports but also to set reasonable limits for such reminders with a view to escalating supervisory action;
- (5) to develop more effective means to ensure assigned lawyers' timely delivery of progress reports and early conclusion of cases;
- (6) to revise procedures to ensure timely completion of post-judgment action;
- (7) to review procedures to make for effective and flexible sanction against unresponsive and irresponsible lawyers instead of making empty threats of referral to DMC;

Evaluation and Appraisal of Assigned Lawyers

- (8) to identify trigger points for evaluation of unsatisfactory performance of an assigned lawyer;
- (9) to supplement this by an effective and efficient yet simple appraisal

system under the supervision of DMC (e.g. award of an overall grade to assigned lawyers upon conclusion of cases);

Intervention by LAD

(10) to review guidelines to specify the circumstances under which officers should intervene or re-assign cases;

(11) to review guidelines to specify the circumstances under which officers should refer cases to the two professional bodies for further investigation;

Enforcement of Judgments

(12) to strengthen the current arrangements to enforce judgments and to institute legal proceedings for contempt after warning has been given;

Checklist

(13) to re-consider the checklist arrangements proposed by the Interest Group of LASC;

Administration of Legal Aid Services

(14) to consider ways to enhance the effectiveness of LASC with effective monitoring.

Comments from LAD

37. LAD has provided us with a very detailed response to our observations, comments and recommendations. It points out that a balance must be struck between the need to monitor assigned-out cases and to sanction under-performance, and the need to entrust the assigned lawyers with the responsibility and latitude to conduct the cases according to their professional judgment.

Comments from LASC

38. LASC appreciates our concern over effective monitoring of assigned-out cases and will continue to make efforts to improve governance.

Final Remarks from The Ombudsman

39. The Ombudsman recognises the need of LAD to strike a balance. However, the question is where and when to draw the line. For a monitoring system to be efficient and effective, there must be some points in the conduct of the assigned lawyer to trigger possible intervention and

perhaps even sanction.

40. The Ombudsman maintains that LAD has a responsibility to ensure appropriate service to aided persons as well as efficient and cost-effective utilization of public funds. This duty is succinctly stated by the Chief Justice in his address at the Opening of the Legal Year 2006 on 9 January 2006:

“The Legal Aid Department has a duty to ensure that [legal aid] funds are well spent and value for money is obtained. In particular, it has to exercise sound judgment in assigning cases so that counsel and solicitors of appropriate competence are instructed”.

The Ombudsman shares this view.

41. In conclusion, The Ombudsman thanks DLA and his staff for assistance throughout this investigation. She also thanks LASC for its views.

FOOD FOR THOUGHT

42. Apart from highlighting the inadequacies in LAD’s monitoring of assigned-out cases, this exercise has also identified the apparent lack of monitoring over the professional standard of the legal professions. In some of the cases we studied, certain steps taken, or missed, by lawyers in the proceedings were clearly not in the best interests of their clients. Unless such practices amount to professional misconduct, the only course of action available to such clients is to bring a lawsuit for professional negligence. This is a costly option which is not without risks. In essence, the client would have to find another lawyer who is prepared to accept his case and risk the high costs of litigation. It is perhaps no accident that such lawsuits are far and few between.

43. The Chief Justice has recently raised the question of “appropriate competence” among counsel and solicitors (para. 40). In this context, The Ombudsman notes that the two legal professional bodies refer in their code of conduct to their members having “a duty to be competent” in their professional services. However, it is not obvious to those outside the legal professions how current arrangements for monitoring professional competence work. There is, therefore, a need for the two legal professional bodies to explore, perhaps in consultation with the Administration, how best to promote awareness, and enhance the effectiveness, of such mechanism.

Office of The Ombudsman
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