

**For discussion on
27 February 2006**

**Paper for LegCo Panel on
Administration of Justice and Legal Services**

**Monitoring of Assigned-Out Cases
by Legal Aid Department**

PURPOSE

The paper provides the Panel with the information requested on 23 January 2006 regarding the Ombudsman's investigation of Legal Aid Department (LAD)'s monitoring of assigned-out cases.

BACKGROUND

2. On 7 April 2005, the Ombudsman announced that she would initiate a direct investigation on LAD's administrative arrangements for assigning out legal aid cases; mechanism for monitoring progress of assigned-out legal aid cases and evaluation system of assigned lawyers. The investigation was completed on 15 December 2005. During the investigation, the Ombudsman has, with the consent of the aided persons concerned, looked at 36 cases which took over 5 years to complete and commented on 7 of the cases in her Investigation Report (the Report) which was published on 19 January 2006. LAD's response to the various matters and recommendations raised in the Report are set out in Chapter 7 of the Report, a copy of which is reproduced for Members' information at **Appendix A**.

3. Before going into the specific information requested by the Panel, we would like to stress that LAD is committed to serving and safeguarding the interest of the aided persons. We note that the Report has not revealed major deficiency in LAD's established system and procedures for monitoring legal aid cases, although there are areas where there is room for improvement. LAD has endeavoured, and will continue to improve the monitoring of assigned-out cases, whilst striking a careful balance to minimize adverse costs implications for the aided persons and the public purse. We also need to mention that according to the questionnaires returned by aided persons in our customer service surveys in the past three years, about 90% of the aided persons are either satisfied or very satisfied with the performance of assigned lawyers.

INFORMATION REQUESTED BY THE PANEL

(1) An account of the cases referred to in the Ombudsman's comments

4. An account of the 7 cases is set out in **Appendix B**. Members may also wish to see LAD's detailed response in paragraphs 7 to 39 of Appendix A. A gist of the cases is set out below.

Case 1: Information regarding panel lawyers' experience

- The case happened in 1999. With the setting up of the Case Management and Case Accounting System (CMCAS) in late 2002, the assignment history of lawyers on the Legal Aid Panel can be readily retrieved now. This is indicative of LAD's effort to strive for continuous improvements.

Case 2: Aided persons' understanding of the mechanism of first charge and time taken for the assigned lawyer to prepare the bill of costs

- LAD and the assigned lawyer had on numerous occasions explained to the aided person, in verbal and written form, the operation, effect and status of the first charge.
- Notwithstanding this extensive effort, LAD will review, as an on-going process, to identify room for further improvements in this process.

This is by no means a simple divorce case, it involved injunction and numerous court hearings. Costs matters were very complicated and the assigned lawyer attempted negotiations on costs with the opposite party before he submitted the bill of costs. This explained the longer than usual time taken by the assigned lawyer to submit a bill of costs.

Case 3: Assigned lawyer's lack of response to ten reminders for progress reports in two years

- This is a personal injury case. No major step in proceedings was expected at the material time since the medical condition of the aided person needed time to stabilize. The assigned lawyer restored the court hearing as soon as the medical condition of the aided person had stabilized. The assigned lawyer had also confirmed over the phone with LAD that he had kept under review the progress of the aided person's medical condition throughout.

- With hindsight, a few of LAD's requests for progress reports could have been dispensed with. LAD has reminded staff on the appropriate issue of requests and reminders for progress reports.

Case 4: Assigned lawyer's delay in finalizing accounts despite fifteen reminders over almost three years

- LAD accepts that the assigned lawyer's performance is not satisfactory. He was subsequently placed on the Record of Unsatisfactory Performance.
- LAD will review the relevant procedures to look for room to enhance timely completion of progress reports and post-judgment actions.

Case 5: Assigned lawyer's delay in the conduct of proceedings

- The assigned lawyer's performance was not satisfactory. LAD has repeatedly asked the aided person to consider re-assignment to another lawyer. But the aided person did not agree.
- In any case, the LAD staff concerned had made an evaluation report for submission to the Departmental Monitoring Committee (DMC) for consideration. By then, the assigned lawyer had been placed on the Record of Unsatisfactory Performance arising from another case, and his practice had been taken over by the Law Society.

Case 6: Abscondment of the assigned lawyer

- The assigned lawyer had performed reasonably well throughout the proceedings until after the taxation of costs and LAD had monitored the case progress closely throughout.
- It is LAD's practice to make interim payment to assigned lawyers. When the lawyer in question subsequently proposed to refund to LAD costs recovered from the opposite party by three instalments, the LAD staff concerned considered it pragmatic to accept the proposal. Indeed, the lawyer duly paid two instalments.

- No assigned lawyer had practised fraud on LAD and absconded before. Absconding in this case for a fairly insubstantial sum of money could not have been reasonably foreseen.
- Notwithstanding the above, LAD has instructed staff to be more alert and sensitive to such situations in future, and required staff to escalate matter to the directorate officers as soon as possible and to reject all future proposals by assigned lawyers to pay by instalments outright. We will also report the matter to the Law Society if full payment is not made forthwith.
- For the case itself, with the approval of Financial Services and the Treasury Bureau an ex-gratia payment was made to the aided person in January 2006.

Case 7: Enforcement proceedings

- Taking into account the amount of overdue costs involved (about \$35,000), the opposite party's financial position (a casual construction site worker with an unstable monthly income of about \$7,000), the opposite party's undertaking to pay by instalments, and the potential costs involved in taking enforcement proceedings (at least a several thousand dollars), LAD considered it not cost-effective to take enforcement proceedings.

(2) The present procedures and criteria of assigning lawyers

5. The paramount consideration in the choice of lawyers is the aided person's interest. Under Section 13 of the Legal Aid Ordinance (LAO), the Director of Legal Aid (DLA) may act for an aided person in any civil proceedings or assign counsel or solicitor on the Legal Aid Panel, to be selected by the aided person, if he so desires, or otherwise selected by the DLA.

6. As required under the LAO, the DLA maintains separate panels of counsel and solicitors who are willing to act for the aided persons. Any counsel or solicitor holding a current practicing certificate is entitled to join the panel unless the DLA has good reason to exclude him because of his conduct when acting or assigned to act for an aided person or because of his professional conduct generally.

7. Having regard to the interests of aided persons and the type and complexity of the cases in question, LAD assigns counsel or solicitors on the Legal Aid Panel in the absence of nominations by aided persons taking into account factors such as the practitioner's past performance record, his experience in the relevant area of law and the number of assignments in the past 12 months.

(3) **The number of cases assigned over the last 3 years to lawyers in private practice together with the maximum number of cases assigned to a law firm**

8. In the past 3 years, a total of 18 948 civil cases were assigned out to 1 548 solicitors in the private practice. Since legal aid assignments are made to lawyers on an individual basis LAD does not capture assignment statistics on law firm/chamber basis in its computer system.

(4) **The system of supervision**

9. Once cases are assigned out, the assigned lawyers are responsible for the conduct of the cases and the conventional solicitor-client relationship begins. It is not the design of the LAD set-up nor is it the intent of the LAO for LAD to intervene or interfere with the conduct of the case by the assigned lawyers. However, good administration of the legal aid schemes dictates that it is of equal importance to protect the public fund and to serve and safeguard the interest of aided persons through monitoring the progress of the assigned-out cases as well as the performance of the lawyers.

10. LAO provides that an assigned solicitor should seek prior approval from the DLA before taking such steps as obtaining expert reports under the circumstances stipulated in the Legal Aid Regulations, committing any unusually large expenditure or taking any unusual course of action, and should report to the DLA on certain matters, for instance, where the aided person requires the proceedings to be conducted or continued in an unusual manner or in a manner which will result in unjustifiable expense. An assigned solicitor must also seek the DLA's approval to extend a limited legal aid certificate, so as to provide the DLA an opportunity to review the merits for continuing legal aid.

11. LAD has put in place an elaborate system of monitoring legal aid assignments to lawyers. During the lifespan of a case, LAD has in place a bring-up system of case files to assist departmental lawyers to check on the progress of cases. Under the system, all assigned out cases are brought to the attention of the responsible departmental lawyers every three months for review of progress. Cases are also brought up to the relevant directorate officers for review two years from the date of the legal aid certificate and thereafter every 6 months. Apart from the standard bring-ups and depending on the circumstances and progress of a case, ad-hoc requests to bring up files can be made by the departmental lawyers or the directorate.

12. At the conclusion of a case, departmental lawyers are required to complete a performance evaluation report on a counsel/solicitor whose performance is considered unsatisfactory. The counsel/solicitor may be subject to disciplinary action by the Department that includes the issue of warning letters, entry into the record of unsatisfactory performance and in appropriate cases, removal from the Legal Aid Panel.

13. It must be emphasized that a balance has to be drawn between the need to monitor assigned out cases and sanction the under-performed, and the need to allow the assigned lawyers to conduct the cases according to their professional knowledge and judgment.

(5) The number of complaints received over the last 3 years, their nature and any action taken/sanctions applied

14. There were 20 complaints against assigned lawyers received by LAD over the last 3 years, while the total number of assigned-out civil cases totalled at 18 948 during this period. The matters under complaint include matters on costs, advices of the assigned lawyers, delay in litigating cases, delay in taxation of costs, lack of communication between the aided persons and the assigned lawyers and manner of assigned lawyers' staff. After thorough investigations, all the complaints were found unsubstantiated.

15. As said in paragraph 3 above, according to the returned customer surveys in the past 3 years, about 90% of the aided persons are either satisfied or very satisfied with the overall performance of the assigned lawyers.

(6) The date of the last review of the systems of assignment and supervision respectively, and any changes resulting from it

Review of assignment system

16. In 1996, LAD has revised the system which was endorsed by the Legal Aid Services Council (LASC) later that year, which also suggested that the system should be reviewed from time to time. In brief, the major features of the revised system included:

- Prescribing general guidelines under which a legal aid case should be assigned out;
- Setting general guidelines for selecting solicitors/counsel; and
- Setting a limit on the number of assignments and/or on costs and fees paid or payable for such work and the minimum level of experience.

17. In 1999, with the endorsement of the LASC and in consultation with the professional bodies, LAD reviewed the then assignment criteria. As a result of the review, the minimum experience requirements in certain types of cases were relaxed, an upper limit on the number of legal aid assignments was set and two new criteria were added, namely, assigned solicitors undertaking legal aid work should have the necessary support and facility afforded by his firm to ensure that the work was handled competently and expeditiously. The other was that solicitors handling legal aid matrimonial cases should be willing to elect fixed costs prescribed in the District Court (Fixed Costs in Matrimonial Causes) Rules.

18. In late 2002, LAD has improved on the assignment arrangements through the implementation of the computerized system, namely CMCAS, which has enabled the experience of individual lawyers, as provided by the lawyers concerned, to be captured for facilitating the matching with the assignment criteria. The CMCAS also captures the cases assigned to any one lawyer on the Panel as from late 2002.

Review of monitoring system

19. The Performance Evaluation System of assigned lawyers' performance was introduced in 1997 and has since been reviewed continuously for improvement. The system is a negative reporting system of evaluating the performance of assigned lawyers. Under the system, departmental lawyers are required to submit a report in all cases where the performance of the assigned lawyer is considered unsatisfactory. If it is considered that there is unsatisfactory performance and subject to the advice of the DMC, LAD will write to the assigned lawyer in question for a written explanation of his unsatisfactory performance. Where the explanation is considered unacceptable, consideration would be given to placing him on the Record of Unsatisfactory Performance; or if the case is sufficiently serious, removing him from the Legal Aid Panel. In case where there is professional misconduct, a referral will also be made to the professional body to which he belongs. Where there is the professional negligence involved, legal aid may also be granted to aided person to sue the assigned lawyer for professional negligence.

20. In late 1997, an Interdepartmental Working Group (the Working Group), was set up to study how cases could be more effectively monitored. The Working Group's recommendations included the wider use of limited certificates, the updating and maintenance of accurate records of assignments and Legal Aid Panel, issue of Guidance Notes for lawyers on the Legal Aid Panel and guidelines for departmental lawyers responsible for monitoring of assigned-out cases to enhance monitoring. These measures have since been implemented.

21. The Performance Evaluation System of assigned lawyers was reviewed in 2001. Following the review, directives regarding assignment and monitoring of cases to lawyers whose name is on the Record of Unsatisfactory Performance were issued to staff. These directives included:

- (a) Assignment to the lawyer requires approval of directorate officer;
- (b) In considering future legal aid assignment to the lawyer, departmental lawyers should take into account the aspects of the lawyer's performance which have been regarded as unsatisfactory, the nature and seriousness of the misconduct, its relevance to the legal aid assignment being under consideration and the complexity of the case to be assigned;

- (c) Departmental lawyers should closely monitor those cases that have been assigned to the lawyer;
- (d) Performance evaluation report should be completed for each case handled by the lawyer at the conclusion of the case;
- (e) The DMC may on its own initiative or upon the request of the lawyer whose name has been included in the Record for not less than 6 months review whether the lawyer's name should be removed from the Record. If the lawyer receives 2 consecutive satisfactory reports, subject to the advice of the DMC, his or her name will be removed from the Record.

22. In 2005, the LASC conducted a study on Legal Aid Practice on Cost Control and Monitoring of Case Progress of Legal Aid Cases and LAD has been assisting the LASC to consider the various recommendations.

(7) Other relevant information

23. The Ombudsman's report has not revealed major deficiency in LAD's established system and procedures for monitoring legal aid cases. Notwithstanding that, LAD accepts that in some of the cases studied, even though they were isolated incidents, there are areas for improvement. We have identified those areas and are in the process of implementing the improvement measures. LAD will continue to, as an on-going process, review the systems in place and introduce improvements where appropriate to improve our service to the public.

Legal Aid Department

Date : 20 February 2006

Ref. : LA/ADM/70/17 (C)

**Legal Aid Department's Response
to the Ombudsman's Investigation Report on
Monitoring of Assigned-Out Cases**

GENERAL RESPONSE

The Director of Legal Aid (DLA) is grateful to The Ombudsman for completing the investigation and the Report. The Legal Aid Department (LAD)'s vision is to be a cornerstone of the rule of law in Hong Kong by delivering quality legal aid services. We are committed to ensuring that no one who qualifies for legal aid is denied access to justice because of a lack of means; to maintaining the highest standards of professional excellence and ethic; working in partnership with the legal profession to reach our vision, and anticipating and meeting the ever-changing needs of the society. We have endeavoured to make continuous improvements to the delivery of our service, including through the monitoring of assigned-out cases and we will continue to do so.

2. In the case of Ngao To-ki vs. The Attorney General (the Ngao case), Mr. Ngao, an aided person, sued his assigned solicitors as well as the DLA for negligence. As against the DLA, Mr. Ngao's allegations included:

The DLA owed him a contractual duty and/or fiduciary duty and/or a general duty of care in respect of the continuation and conduct of the proceedings in the action.

The DLA was in breach of those duties in that he, amongst other things, had allowed the assigned solicitors unreasonably to delay the conduct of the proceedings.

At the first instance, the trial judge dismissed Mr. Ngao's claim against the DLA. Mr. Ngao appealed against that decision and his appeal was dismissed by the Court of Appeal unanimously.

3. While the Court of Appeal's decision in the Ngao case has clarified that the principal duty cast upon the Director by the Legal Aid Ordinance "is to see that the legal aid scheme is competently managed so that public funds are not wasted", we have to emphasize that LAD attaches equal importance to serving and safeguarding the interest of the aided persons. To meet these objectives, we have in place an elaborate system for allocating and monitoring legal aid assignments to lawyers, including the introduction of procedures to consider reports of unsatisfactory performance of assigned lawyers, and the necessary measures needed in response to the reports by the Departmental Monitoring Committee (DMC) [since 1997]. Actions including the issue of warning letters, entry into the Record of Unsatisfactory Performance/Conduct, removal from the relevant Legal Aid Panel, and

re-assignment of cases to other lawyers etc are taken depending on the circumstances of individual cases (there were 27 cases in the past 3 years in which LAD has reassigned the cases to other lawyers as a result of the assigned lawyers' delay or unresponsiveness). We have in the past even granted legal aid to aided persons to sue the assigned lawyers for professional negligence. As with all systems, we recognize that there may be room for improvement in response to changing times. LAD will continue to, as an on-going process, review the system and introduce improvements where appropriate.

4. Notwithstanding the above, it is incumbent upon us to point out that a balance has to be drawn 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. The balance is a fine and delicate one and the following factors are of particular importance:

- a) Once a case is assigned, the assigned lawyer is responsible for the conduct of the case and the conventional solicitor-client relationship begins. In the litigation arena, there are different tactics employed by litigators that may vary from person to person and from case to case depending on the professional judgment of the lawyer. The assigned lawyer is professionally qualified and his own conduct and discipline are governed by code of practice and guidelines of the professional body he belongs. Those whose performance falls below the standard of a reasonably competent lawyer may have to face professional negligence claims filed by their clients;
- b) It is not the design of the LAD set-up nor is it the intent of the Legal Aid Ordinance for LAD to intervene or interfere with the conduct of the case by the assigned lawyer. It is neither proper nor appropriate for LAD to intervene in the conduct of the case when it does not have at hand all its facts and documentation. There are costs implications for both the public purse and the aided persons if the assigned lawyers were asked to copy to LAD all documents involved and if LAD duplicates the efforts to monitor the proceedings or conduct of the assigned-out cases all the way;
- c) The frequency and extent of progress reporting by assigned lawyers may vary according to the nature, complexity and actual progress of each case. Excessive or tedious reporting by assigned lawyers will lead to undue increase in the legal costs which may have to be borne by the aided persons;
- d) A decision on re-assignment of lawyer due to unsatisfactory performance should not be taken lightly. LAD needs to give careful consideration to such important factors as the nature and gravity of the conduct under complaint, the stage of proceedings

reached at the time (e.g. it would not be appropriate to re-assign the case when the proceedings have been concluded and the only outstanding matter is the finalization of accounts), all possible prejudice to the aided person, e.g. additional costs and time likely to be occasioned by the re-assignment and whether the aided person would consent to the re-assignment; and

- (e) On possible report to the 2 legal professional bodies, LAD would need to be satisfied that the unsatisfactory performance amounts to professional misconduct on the part of the assigned lawyer, and that the aided person also consents to such a referral or report being made.

5. Against our basic premises as set out above, our specific comments on individual cases quoted in the Report are set out in the following section.

SPECIFIC COMMENTS

Chapter 3 Assigning Out **MONITORING OF CASES**

Duty to Monitor

Paragraph 3.15

6. In line with the principle as laid down in the *Ngao* case, LAD's duty is to ensure that the aided proceedings are in progress, there are continued merits in the aided litigation, and to approve unusual expenses before they are incurred. To enable LAD to perform its duty, it requires, amongst other things, assigned solicitors to submit progress reports at appropriate intervals and to seek its prior approval on unusual expenses. Further to the above, as we have emphasized in paragraph 3 above, LAD attaches equal importance to serving and safeguarding the interest of the aided persons, and has accordingly put in place an elaborate system for allocating and monitoring legal aid assignments to lawyers. That said, a fine balance has to be drawn between the need to monitor assigned-out cases and sanction the under-perform, and the need to allow the assigned lawyer to conduct the cases relying on his professional judgment.

Chapter 4 Case Studies

Case 1 (paragraph 4.3)

7. The case is about the administrative arrangements for assigning out legal aid cases.

8. Lawyers applying to join the Legal Aid Panel are required to advise LAD of their experience in terms of post admission legal practice as well as number and types of cases handled. LAD captures information on Panel Lawyers' experience in its computerized information system based on information provided by Panel Lawyers themselves, and the database enables LAD staff to verify if a particular lawyer has met the assignment criteria before making an assignment.

9. Experience of Panel Lawyers may improve over time and it is the responsibility of the lawyers to provide LAD with updated information that may make them become eligible for assignments. LAD reminds Panel Lawyers to provide it with updated information on their profile from time to time, in our Newsletter issued in 2002, on LAD's website and most recently by letters to the lawyers in 2005. If, notwithstanding the reminders, the lawyer does not update his experience with LAD, LAD can only assign cases based on the information already provided. Since the setting up of the CMACS in 2002, the assignment history of lawyers on the Legal Aid Panel can be retrieved readily.

10. Before the setting up of the Case Management and Case Accounting System (CMCAS) in 2002, LAD's old computer system could not capture information on assignments made before the preceding 12 months. In this case, contrary to the Ombudsman's observation, LAD staff did check the record to see if the counsel proposed by the assigned lawyer met the assignment criteria; and the record showed that for that particular case, neither met the criteria. LAD thus made further enquiry with the assigned lawyer as to the second counsel's experience and upon receiving confirmation that the counsel's experience met LAD's assignment criteria, LAD assigned him as counsel of the case.

Case 2 (paragraphs 4.4 to 4.6)

11. The aided person was granted legal aid in February 2000 to seek divorce, custody and ancillary relief. The opposite party was also later granted legal aid to defend the parts of the proceedings relating to custody and ancillary relief at nil contribution. As regards the divorce itself, and an injunction taken out by the first aided person to restrain the opposite party from disposing of the proceeds of the former matrimonial home, the opposite party was not legally aided.

12. LAD and the assigned lawyer have taken the following steps to inform, explain and draw the aided person's attention to the DLA's first charge, its operation and implications:

- The First Charge Pamphlet was sent to the aided person at the time when legal aid was offered to the aided person;
- The Offer of Legal Aid contained a clause relating to first charge;

- The aided person signed the Acceptance of Offer of Legal Aid to signify her acceptance of the terms of Offer, including the clause relating to the first charge;
- At the first interview, the assigned lawyer explained to the aided person the first charge and its implications;
- In May 2001, the assigned lawyer wrote to the aided person, reminding her of the first charge and explaining to her that any costs not recovered from the opposite party formed part of the first charge. The assigned lawyer also gave her an estimate of the legal costs already incurred;
- In December 2001, the assigned lawyer advised the aided person over the telephone of the first charge and an estimate of the legal costs already incurred;
- At a pre-trial conference in February 2002, the assigned lawyer advised the aided person of the costs incurred;
- At a hearing in February 2002, the assigned lawyer informed the Court of the amount of costs incurred in the presence of the aided person;
- In February 2004, LAD staff wrote to the aided person, reminding her that the assigned lawyer's costs would be deducted from the lump sum awarded to her;
- In March 2004, LAD staff explained to the aided person over the telephone the first charge and the costs involved.

13. It can be seen from above that LAD and the assigned solicitor have on numerous occasions explained, through written and verbal advice, to the aided person the operation, effect and status of the first charge, to avoid raising any false hope on the part of the aided person. Throughout the proceedings, there was no indication that the aided person did not understand the first charge. She had not made any complaint concerning the first charge or the amount of costs involved. She did not give her written consent to the amount of costs immediately, since, as we understand it, she wished to defer her consent until after LAD had dealt with her application to extend her legal aid certificate to cover variation of the custody order.

14. The information and explanation on first charge are already expressed in simple layman language. Nevertheless, we will continue to use our best endeavours to inform the legal aid applicants and aided persons of the first charge and its implications through various means, and in different stages of the proceedings. LAD will examine whether there is room for further improvements in this process.

15. We note The Ombudsman's observation as separately stated in paragraph 5.12 that reminders to the assigned lawyers to submit draft bill of costs had been delayed. LAD would like to explain that when legal proceedings are concluded, it is normal for the parties to attempt to negotiate for an agreement on costs in a bid to save substantial costs on taxation. A bill of costs should not be drawn up until such attempts or negotiations have concluded.

16. This case in question is by no means a simple divorce case, there are many issues arising from the divorce and hence numerous court hearings. While the time taken by the assigned lawyer in drawing up the bill of costs was longer than usual, it should be noted that during the period between the making of the lump sum order in May 2002 and the submission of the bill, the assigned lawyer had actively engaged in negotiations with the opposite party on the issues of costs and the discharge of the injunction. LAD would like to point out that the aided person's interest has not been prejudiced because of the time taken. It should be noted that the costs were non-recoverable from the opposite party anyway as the opposite party was also on legal aid.

Case 3 (paragraphs 4.7 to 4.11)

17. Whilst we accept that the assigned lawyer had on occasions failed to render written response to LAD's requests, there was no delay in the progress of the case itself and the interest of the aided person was not affected. The assigned lawyer did not move the case forward before 2002 because the aided person's medical condition had not yet stabilized. To proceed with the hearing of the assessment of damages before this would be premature and prejudicial to the aided person's interest and amount to negligence. Proceedings were restored in 2002 as soon as the medical condition of the aided person had stabilized.

18. In January 2001, the assigned lawyer reported to LAD that the rehabilitation program had been completed. It was apparent that the aided person needed time to adjust to his new prosthesis and major steps in the legal proceedings would not be expected for some time. Subsequent telephone conversations with the assigned lawyer also confirmed that the assigned lawyer had kept under review the progress of the aided person's medical condition throughout. In a telephone conversation in October 2001, the assigned lawyer informed LAD staff that the aided person's medical condition had not stabilized. In September 2002, the assigned lawyer reported to LAD staff over the telephone that he would be in a position to restore the court hearing shortly.

19. Since from the facts of the case, it was reasonable for LAD to expect that no major step in the proceedings would be taken until the medical condition of the aided person had stabilized, LAD staff did not consider it necessary and appropriate to take action against the assigned lawyer, or to re-assign the case to another lawyer mid-stream. LAD would certainly have acted differently if there was unexplained delay in the proceedings or the aided person's interest would be adversely affected.

20. With hindsight, it is accepted that a few of LAD's requests for progress reports, especially those issued in 2001, could have been dispensed with, since it was not expected that the proceedings could be taken forward then. To enhance LAD's performance in this regard, LAD has recently conducted a briefing as to when it is appropriate to issue requests for progress reports, for example, where there are reasons to expect progress in the proceedings should have been made.

Case 4 (paragraphs 4.12 to 4.14)

21. We accept that there was delay on the part of the assigned solicitor in the post judgment stage, namely in resolving the costs and disbursements, thereby affecting the timing of the aided person's receipt of the final payment. The delay was mainly caused by some of the counsel and medical experts engaged in the case, who wanted to seek a review of the taxation made by the Master in taxation and who were therefore reluctant to refund the amount overpaid, despite repeated requests.

22. The assigned solicitor could have been more proactive in chasing for the refund. The performance of the assigned solicitor cannot be regarded as satisfactory. He was subsequently placed on the Record of Unsatisfactory Performance.

23. LAD, whilst recognizing the practical difficulties in recovering refund due from assigned lawyers and experts in this isolated case, would consider general ways and means to prevent undue delay by the assigned lawyers in dealing with matters concerning finalization of accounts.

Case 5 (paragraphs 4.15 to 4.18)

24. During the proceedings, because of the assigned solicitor's under-performance, LAD has repeatedly made suggestions to the aided person to consider re-assignment to another lawyer. However, the aided person responded that she wished to continue to be represented by the assigned lawyer, even as late as in July 2003. LAD respected the wish of the aided person and therefore did not re-assign the case unilaterally.

25. The aided person did not change her mind until August 2003 although she was informed earlier that the assigned lawyer's practice had been taken over by the Law Society. Her case was therefore assigned to the lawyer appointed to act as the Law Society's agent.

26. With regard to The Ombudsman's comments that LAD did not take earlier and firmer action against the assigned lawyer, we wish to clarify that LAD staff concerned had in fact made an evaluation report regarding the assigned lawyer's unsatisfactory performance in this case for submission to the

DMC for consideration. By then, the assigned lawyer's practice had been taken over by the Law Society and he was already on the Record of Unsatisfactory Performance arising from another case.

Case 6 (paragraphs 4.19 to 4.24)

27. The assigned lawyer had performed reasonably well throughout the proceedings until after taxation of costs and LAD staff had monitored the case progress closely throughout. This case concerns an unprecedented situation in which the assigned lawyer had set out to practise a fraud on LAD.

28. We wish to clarify that it is LAD's practice pursuant to the relevant Legal Aid Regulations to make an interim payment to the assigned lawyer. This practice is considered reasonable as a litigation case can take years to conclude. At the time when LAD made the interim payment to the assigned lawyer in question, there was no reason to believe that he would practise a fraud. Indeed, in the preceding month, the assigned lawyer had paid the entire sum of the damages he received from the opposite party to LAD. Prior to this case, there has not been any case in which a Panel Lawyer has practised a fraud on LAD and subsequently absconded. Absconding for a fairly insubstantial sum of money as in the case in question could not have been reasonably foreseen, as the act is a drastic one which not only would tarnish the concerned lawyer's reputation, but would also ruin his long term career altogether.

29. When the assigned lawyer subsequently proposed to refund to LAD costs recovered from the opposite party by 3 monthly instalments, it appeared to the LAD staff that it was a pragmatic proposal. The lawyer had attached a cheque for the first instalment payment along with his proposal and there was no reason at the time to believe that the assigned lawyer would not pay up the rest as promised. Indeed, in the following month, the assigned lawyer duly paid the second instalment.

30. It is regrettable that the assigned lawyer has set out to practise a fraud on LAD and chosen to abscond. However, the decisions that LAD took during the process of this case were not unreasonable based on the information available and the circumstances at the material time. We are doubtful if other options, such as reporting the matter to the DMC or the Law Society when the assigned lawyer proposed to pay by instalments would have helped LAD to recover the sum due, as the move could hasten the assigned lawyer's abscondment or bankruptcy. In any event, LAD has after the lawyer's abscondment, reported the matter to the Police and the Law Society promptly and had removed the assigned lawyer from the Legal Aid Panel.

31. Whilst this is an unforeseeable and unfortunate event, LAD has learnt important lessons. LAD staff have since been instructed to be more alert and sensitive to such situations in future. LAD has also enhanced communication amongst staff and instructed staff to escalate matter to the directorate officers of any suspicious circumstances, e.g. where the assigned

lawyers fail or delay in remitting monies to LAD or where there are indications that the assigned lawyers might be in financial difficulty. Directorate officers would then consider appropriate actions to safeguard the public fund and the aided persons' interest. Also, staff has been instructed to reject all future proposals by assigned lawyers to pay by instalments outright and to report the matter to the Law Society if full payment is not made forthwith. That said, this is an extremely rare and isolated case. We have confidence that the legal profession in Hong Kong on the whole is professional and ethical.

32. LAD is using its best endeavours to explore ways to see that the aided person would receive the damages due to her in this case.

Case 7 (paragraphs 4.25 to 4.28)

33. The issue in this case does not concern the monitoring of assigned lawyers' performance but the recovery of costs due from the opposite party.

34. Enforcement proceedings entail costs. Where the costs so involved cannot be recovered from the opposite party, they would have to be borne by the aided person (where there is first charge or contribution paid or payable by the aided person) or the public fund. Hence, in deciding whether to take enforcement proceedings, LAD has to consider such factors as the amount of costs due, prospects of success of the enforcement proceedings, whether the opposite party has made any proposal for payment by instalments, the reasonableness of the proposal, and the financial position of the opposite party. If LAD insists on embarking on enforcement proceedings notwithstanding that there is a reasonable offer of settlement from the opposite party, LAD's action is likely to be viewed by the court as being oppressive and may amount to an abuse of the process of court. In this connection, it is worth noting that many of the judgment debtors in aided matrimonial cases are not in any better financial situation than the aided persons. Most are either unemployed or manual workers on meager income. We do not propose to go for enforcement proceedings indiscriminately, without taking into account the judgment debtors' financial capability to pay up.

35. In this case, taking into account the amount of overdue costs involved (about \$35,000), the opposite party's financial position (a casual construction site worker with an unstable monthly income of about \$7,000), the opposite party's undertaking to pay by instalments, and the potential costs involved in taking enforcement proceedings (at least a several thousand dollars), LAD considered that it not cost-effective to take enforcement proceedings.

36. As a result of the staff's conscientious efforts and perseverance, LAD succeeded in recovering about \$15,000 from the opposite party which was the best achievable result in the given circumstances, set against the other option of having to write off the entire sum of about \$35,000 at the outset.

37. As seen from above, it is not a case that “LAD was reluctant to take legal action to enforce judgment”. LAD did not make “empty threats”, rather what LAD did in this case was employing a litigation tactic to try to recover the money due. If the report is presented in its present form, it may cause loss to the government revenue as the public may view threats made by LAD as empty threats.

General Observations (paragraph 4.29)

38. With the explanation to the specific cases above, LAD hopes that one would appreciate that there are reasonable explanations for the decisions/actions taken at the material time by LAD staff, given the circumstances and information available at the time. The Ombudsman has observed delay or under-performance on the part of the assigned lawyer in cases 2, 3, 4, 5 and 6. For cases 2 and 3, LAD considered that there were justifiable reasons for the time taken and the aided persons’ interest was not jeopardized in the cases. For cases 4, 5, and 6, the lawyers concerned have been placed on the Record of Unsatisfactory Performance or even removed from the Legal Aid Panel subsequently. We hence feel disheartened at The Ombudsman’s observations that LAD did not enforce the guidelines in practice, that LAD’s guidelines and actions failed to protect the aided persons’ interest, and that LAD is apparently reluctant to take firm action. As regards the observation that the DMC seems unable to act as a deterrent to incompetent and/or ineffectual assigned lawyers, one would appreciate that no single system could be full proof against incompetent or ineffectual member in the profession. We would also like to add that according to the Questionnaires returned by aided persons in our Customer Service Surveys from 2003 to June 2005, an average of 89% of the aided persons are either satisfied or very satisfied with the overall performance of assigned solicitors.

39. Notwithstanding the above, we accept that in some of the cases studied, there are lessons to be learnt, and room for consideration of making further improvement. As stated in paragraphs 20, 23 and 31 above, we have identified areas for improvements or are in the process of implementing them.

Chapter 5 Observations and Opinions

A TRIPARTITE RELATIONSHIP (Paragraphs 5.1 to 5.4)

40. We agree entirely with The Ombudsman that LAD has administrative accountability for the efficient and effective operation of the legal aid schemes. Good administration of the legal aid schemes carries with it such essential functions as monitoring of progress of assigned-out cases and review for improvements. LAD takes case monitoring and the performance of assigned lawyers seriously. As explained in paragraphs 3 to 4 above, we have in place an elaborate system for allocating and monitoring legal aid assignments. A delicate balance, however, has to be struck between the need to monitor assigned-out cases and sanction under-performance, and the need to

entrust the assigned lawyer with the responsibility and latitude to conduct the cases according to their professional judgment. The question is hence the extent and degree of monitoring that is appropriate and reasonable in each case.

41. We also have to supplement that, on accepting the assignment, the assigned lawyer has, in addition to the duties and obligations he has towards the aided person as his legal representative, taken on certain duties as set out in the Legal Aid Ordinance and its subsidiary legislation, as well as Guidance Notes for Solicitors Handling Civil Cases (the Guidance Notes). These duties include to report on progress, to seek DLA's approval on unusual expenses and to advise the aided person of the operation and implications of first charge. These duties are designed and imposed to protect the public fund as well as the interest of aided persons.

42. We may perhaps add that apart from being subject to monitoring by LAD, an assigned lawyer is bound by the code of practice and guidelines issued by the professional body to which he belongs. In recent years, the Judiciary has assumed greater management and control of the actual progress of court proceedings. For certain types of cases, such as personal injury cases and matrimonial cases, the bulk of which are legally aided, the Judiciary has issued very specific practice directions to which lawyers have to adhere.

FIRST CHARGE (paragraphs 5.5 to 5.6)

43. The Ombudsman may be aware that it is already LAD's existing practice to inform and explain to the applicants/aided persons the operation and implications of DLA's first charge through various means and at different stages of the proceedings. They include:

- (a) **Posters** on "Legal Aid Is Not Free" - These posters, in both the English and Chinese Languages, are displayed in conspicuous places at the entrance of and inside LAD's offices. A photocopy of the poster is also given to the applicants at the same time as the application form. The poster also features as part of the application form. A set of these posters is enclosed (*Appendix 1*);
- (b) **Video** on legal aid services including the operation of the first charge which is played continuously at the reception areas of LAD's offices;
- (c) **Pamphlets** - a number of different pamphlets in simple layman terms in both languages are available for members of the public, they include:
 - "Guide to Legal Aid Services in Hong Kong";
 - "How to Apply";
 - "Contribution towards Costs of Legal Aid Case and Director of Legal Aid's First Charge" (First Charge Pamphlet). This

pamphlet is particularly comprehensive as it sets out, for instance, how the first charge operates under 7 sample case scenarios, which in turn seek to cover all possible situations relating to the operation of the first charge;

- “How Your Financial Resources and Contribution are Calculated”; and
- “Important Notice for Legally-Aided Persons” (Important Notice).

As one could see from the set of the publications enclosed, information on the first charge is provided in simple layman language. Aided persons should not have difficulties in understanding these publications.

- (d) Advice/explanations given by LAD staff to the legal aid applicants and aided persons at different stages of the proceedings as follows:-

(i) **Pre-certificate Stage :-**

- During the application stage, LAD staff explains to applicants the meaning, the operation and the implications of the first charge.
- During the first interview with the applicant, LAD staff explains the meaning, the operation and the implications of the first charge to the applicant and thereafter the applicant will be asked to confirm their understanding of the first charge and its implications by signing on a form “C10” or “C10(a)”. A sample form each of C10 and C10(a) is enclosed for your easy reference (*Appendix 2*).
- After an applicant has passed the means and merits tests, LAD will send him a Form of Offer and Acceptance of Offer of Legal Aid Certificate (the Form) (which contains a clause relating to first charge), together with the First Charge Pamphlet. If an applicant accepts the terms of the Offer, which include his agreement to the first charge arrangement, he has to indicate his acceptance of those terms by signing the Form. A copy of the Form is enclosed (*Appendix 3*). Upon receipt of the applicant’s signed Acceptance, LAD will issue to the applicant a Legal Aid Certificate together with a copy of the “Important Notice”.

(ii) **Post-certificate stage :-**

- It is clearly set out in the Guidance Notes that in cases where property is likely to be recovered or preserved in the proceedings, the assigned solicitors have the duty to explain

the operation and implications of the first charge fully to the aided persons at the first interview. Thereafter the assigned solicitors are also under a duty to remind the aided persons that the money recovered on their behalf may be reduced by the costs which are not recovered or recoverable from the opposite party. Furthermore, as required by the Guidance Notes, the assigned solicitors are to keep the aided persons informed on an appropriately regular basis of the costs incurred and likely to be incurred in respect of the legal proceedings;

- where during the progress of a case, it appears that first charge may apply, LAD staff will send a reminder to the assigned solicitor of his duties to advise the aided person of the first charge. In the event that the assigned solicitor fails to render such advice to the aided person and thereby resulting in any loss to the aided person or LAD, LAD will report the matter to the Departmental Monitoring Committee and look to him for recompense.

44. The measures taken by LAD as set out above are much more comprehensive than those adopted by our counterparts in other common law jurisdictions. In addition, The Ombudsman may wish to note there were very few complaints made by aided persons regarding first charge over the past years. In the past 5 years, among the 486 first charge cases created, there were only 25 complaints about first charge and all were found unsubstantiated following thorough investigation.

45. In light of our above comments, we would like to invite The Ombudsman to reconsider the observations she made on the aspect of the first charge. That said, as we have indicated in paragraph 14 above, we will examine whether there is room for further improvements in our process of informing and explaining to the legal aid applicants and aided persons the operation and implications of first charge, in order to further enhance their awareness and understanding of this important feature of the legal aid services.

MONITORING OF CASES

Duty to Monitor (Paragraphs 5.7 to 5.9)

46. Our views on the monitoring of progress of assigned-out cases and the performance of assigned lawyers are set out in paragraphs 3 to 4. As we have explained, it is not our intention to place emphasis only on the judgment in the *Ngao* case. Instead, we consider it of equal importance to protect the public fund and to serve and safeguard the interest of aided persons, through monitoring the performance of assigned lawyers. While there is no contractual relationship between LAD and the assigned lawyers, it does not affect our ability to monitor the progress of assigned-out cases and the

performance of the assigned lawyers, given the relevant statutory provisions and the administrative monitoring system we have in place.

“Bring-up” Mechanism and Progress Report (Paragraphs 5.10 to 5.15)

Paragraphs 5.10 to 5.14

47. In the past 3 years, LAD, on average, monitored over 17,000 assigned-out civil cases each year and as observed by The Ombudsman, LAD has formulated detailed guidelines for bringing up cases for monitoring purposes.

48. We note The Ombudsman’s further comments on cases 2, 3 4, 5 and 6. For case 2 and 3, as explained in paragraph 15 to 16 and 17 to 19, LAD considers that there were justifiable reasons for the time taken; for cases 4, 5 and 6, the lawyers concerned have been placed on Record of Unsatisfactory Performance or even removed from the Legal Aid Panel subsequently.

49. While noting that the nature and the circumstances of each case differ, and the degree of monitoring by professional officers of LAD may hence also vary to some extent, we will consider ways and means to prevent undue delay by the assigned lawyers in dealing with post-judgment follow-up process and will see to it that the relevant systems and procedures already in place on both monitoring and post judgment actions will continue to be followed closely by all staff.

50. We also wish to mention that in most cases, communication with assigned lawyers by letter or telephone is very effective, particularly where an immediate or urgent response or discussion with assigned lawyers is required.

Paragraph 5.15

51. We need to bring out the observation that the number of replacements made is not an indicator to gauge whether LAD staff has adhered to the Operation Manual or Guidelines or taken firm actions against the under-performed. The legal practitioners in Hong Kong on the whole are professional and ethical. LAD’s Customer Service Surveys also show that a large majority of the aided persons are either satisfied or very satisfied with the overall performance of their assigned lawyers. Moreover, as explained in paragraph 4, many important factors have to be considered before making a decision to replace or re-assign lawyers. In any event, where LAD makes known its consideration of replacement, LAD takes it seriously and would in practice replace those assigned lawyers who are unresponsive, or have delayed matters unnecessarily. During the past 3 years, there were 27 cases of re-assignment as a result of the assigned lawyers’ delay or unresponsiveness.

Evaluation and Appraisal of Assigned Lawyers (Paragraphs 5.16 to 5.22)

52. On assignment of cases (paragraphs 5.19 and 5.20), we wish to reiterate that all legal aid assignments are effected in accordance with the criteria endorsed by the LASC, save and except for those instances where the aided persons insist on having their cases assigned to the lawyers they themselves selected. LAD takes the Judiciary's remarks on performance of assigned lawyers, whether expressed in court or quoted by the media, very seriously. We note Mr. Justice Seagroatt's comments as quoted in the Report. As explained in paragraphs 7 to 10 on case 1, LAD has improved on the arrangements of making assignments through the implementation of the computerized CMCAS in late 2002, which has enabled the experience of individual lawyers, as provided by the lawyers concerned, to be captured to facilitate the matching with the assignment criteria.

53. On the need for more specific description of and criteria for unsatisfactory performance (paragraph 5.16), we feel obliged to explain that since the facts and circumstances differ from case to case, it is for the subject officers of LAD, in reliance of their professional experience and judgment, to determine in what manner and degree certain performance of the assigned lawyer is considered unsatisfactory, having regard to the nature and specific circumstances of the case. There is no easy formula per se. For instance, one single "failure" in seeking a costs order in favour of the aided person is often considered more serious than "repeated failures" in rendering a progress report whilst the case in fact is proceeding normally. Notwithstanding that, LAD would consider ways and means, including holding experience-sharing sessions, to enhance staff's common understanding of the various scenarios and considerations and to facilitate a consistent approach in evaluating the assigned lawyers' performance. On the proposal to use definite trigger points to identify possible problems, LAD has in fact in recent years put in place checklists for major litigation categories to facilitate the monitoring of assigned out cases.

54. The Ombudsman observes that the number of unsatisfactory evaluation reports, removals from the panel and cases reported to the Law Society is small (paragraph 5.17), and that the small number of unsatisfactory evaluation reports suggests a need for more stringent standards in the evaluation of assigned lawyers (paragraph 5.21). As mentioned in paragraph 51 above, the small number is not indicative of the quality of the LAD's monitoring. On the whole the legal practitioners in Hong Kong are professional and ethical and most aided persons are satisfied with the assigned lawyers' performance. Particularly in respect of referral to the professional bodies, we would like to explain that the professional bodies only deal with referrals involving professional misconduct. In general, professional misconduct, save for those which are criminal in nature, refers to a case where the lawyer's conduct renders him unfit to be an officer of the Court or his conduct is dishonourable in the course of his employment towards his client, the Court or third persons. Instances of professional misconduct include

inexcusable negligence, gross betrayal of his client's confidence, and deceiving the Court. From our experience, the incidents of professional misconduct in legal aid cases are rare. "Unsatisfactory performance" in the estimation of aided person or LAD, such as failure to report progress of cases, would not oblige the professional body to treat the case as "professional misconduct". Also, aided persons' prior consent has to be obtained to refer a specific case to the legal professional bodies. If the consent is not forthcoming, LAD has to respect the aided persons' decision and cannot refer the case to the professional bodies for follow up investigation.

55. In this connection, we have reservations about instituting a system of giving simple overall grading of individual assigned lawyers on conclusion of a case. The objective of LAD's assignment and monitoring system should be to ensure assignment of competent lawyers and to appropriately sanction the under-performed. To this end, it suffices to have a comprehensive tool to identify the under-performed by paying due regard to different relevant factors, rather than to generalize the performance of individual performing lawyers by awarding each with a single grading. On a practical level, applying a grading system to professional performance is fraught with difficulties. Not only is there a need to develop a transparent and objective system with an appeal channel, sensitive questions like what are the suitable and objective criteria, and who are the suitable persons to judge lawyers' performance in different cases will arise. In this context, we note that not even the two legal professional bodies or other professional bodies, such as the Medical Council, have found it practical or practicable to put in place such a grading system for their members. We understand that the Law Society has in the past considered introducing an accreditation system, which is in some ways similar to the grading system. However, it was not pursued because of the complications involved. In any case, we note that the LASC is looking into similar suggestions and we will closely liaise with LASC and assist in its deliberations.

Intervention by LAD (Paragraphs 5.23 to 5.27)

56. As mentioned in paragraphs 3 to 4, we take a decision to re-assign a case to another lawyer due to unsatisfactory performance very seriously. Careful consideration has to be given to various important factors depending on the circumstances of the case. Re-assignment should only be done in extreme cases. The Ombudsman has further referred to cases 5 and 6. For case 5, the aided person did not agree to re-assign her case to another lawyer despite our suggestion. For case 6, as explained in paragraphs 28 to 30, it is reasonable and is LAD's practice to make interim payments to assigned lawyers and there was no reason to believe that the assigned lawyer in question would practise a fraud for an insubstantial sum of money. When the assigned lawyer proposed to refund to LAD the costs recovered by monthly instalments, LAD considered it a pragmatic way out. That said, as mentioned in paragraph 31, LAD has recently introduced measures to deal with cases in which assigned lawyers show signs of financial difficulties. LAD will review and improve, where appropriate, the relevant guidelines regarding circumstances and factors

to be taken into account when considering the need to intervene or re-assign a case.

57. As regards the small number of cases referred to the two legal professional bodies, please see our comments in paragraph 54.

Enforcement of Judgments (paragraph 5.28)

58. Our views are explained under case 7 under paragraphs 33 to 37.

VIEWS FROM THE LEGAL AID SERVICES COUNCIL (Paragraphs 5.29 to 5.31)

59. We note The Ombudsman's observation that once a case is assigned, the conduct of the proceedings is left entirely to the assigned lawyers and that the reality (as illustrated by the case studies) is that experienced lawyers may not know how to monitor the progress of cases. As we have explained at the outset, LAD, as a responsible government agency, places a great deal of importance on its monitoring role. On the other hand, however, there is a need to entrust the assigned lawyers with the responsibility and latitude to conduct the cases according to their professional judgment. While some of the case studies show that the performance of the assigned lawyers has not been satisfactory, this should not distract from the fact that on the whole lawyers in Hong Kong are professional and ethical.

60. As regards the checklist proposed by the Interest Group (IG) of the LASC in 2003 to help assigned lawyers to monitor progress of the aided cases and for reporting to LAD, LAD readily responded that it would not object to an assigned solicitor adopting the proposed draft checklist for his own use. LAD, however, pointed out that to require the proposed checklist to be completed and submitted to LAD in each and every assigned-out case would not only add to the work of the assigned lawyer but also increase the costs of the aided proceedings which would be borne by either the aided person or the public fund as such costs would not be recoverable from the opposite party. Moreover, as the matters which require reporting are set out in the Legal Aid Ordinance and its subsidiary legislation and the Guidance Notes and that as the nature and circumstances of the cases are different, the degree of monitoring and hence reporting might vary from case to case and it would be difficult to design a mandatory checklist for use by all assigned lawyers. In view of the observations made by LAD above, the IG agreed not to pursue the proposed checklist.

61. Notwithstanding the above, LAD has in recent years put in place its own checklists in major types of cases to facilitate staff in monitoring the progress of the aided proceedings. All staff are required to complete these checklists in the assigned-out cases concerned.

CONCLUDING REMARKS (paragraphs 5.32 to 5.34)

62. We are disheartened at the Ombudsman's observation that LAD's present operation of the legal aid schemes do not assure justice or compensation to aided persons even with a favourable judgment. As explained earlier, case 6 is an unprecedented case not seen in the past 35 years of LAD's operation and there were no reasons to believe at the material time that the lawyer in question would practise a fraud for the insubstantial amount of money involved. We have to stress that even in private cases, non-recovery of damages from opposite party could also occur. As mentioned in paragraph 32, LAD is using its best endeavours to explore ways to see that the aided person in that case would receive the damages. For case 7, we have explained that taking enforcement proceedings in the case was not cost-effective. The financial situation of the opposite party is always an important factor, whether in legal aid or private cases.

63. It is never LAD's intention to leave matters to the assigned lawyers only and to make monitoring a paper exercise. At the risk of repeating ourselves, a delicate balance however has to be drawn 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.

Chapter 6 Recommendations

64. We wish to reiterate that in addition to protecting the public fund, we attach equal importance to serving and safeguarding the interest of the aided persons. We will continue to use our best endeavours to improve the system of monitoring the performance of assigned lawyers.

65. Our specific response to The Ombudsman's recommendations is set out below.

First Charge

- (1) As explained in paragraphs 43 to 44, it is already LAD's existing practice to inform and explain to the applicants/aided persons the operation and implications of DLA's first charge through various means and at different stages of the proceedings. LAD will continue with the existing arrangements, and will also review, as an on-going process, to identify room for further improvements in this process.

Duty to Monitor

- (2) As discussed in paragraphs 3 to 4, we place equal importance to protecting the public fund as well as serving and safeguarding the interest of aided persons, through case monitoring and the

performance of assigned lawyers. We take this very seriously. We will review, and where appropriate, to improve our Operation Manual in this regard.

- (3) While there is no contractual relationship between LAD and the assigned lawyers, it does not affect LAD's ability to monitor the progress of assigned-out cases and the performance of the assigned lawyers, given the relevant statutory provisions and the administrative monitoring system we have in place. In this regard, we have reservations about the effectiveness of a "formal contractual arrangement" with the assigned lawyers.

Progress Reports

- (4) We have already reminded staff not only to make timely and appropriate issue of requests and reminders for progress reports but also to escalate problematic cases to the attention of directorate supervisors timely. We will continue, from time to time, to remind staff to do so.
- (5) to (7) For the case studies in question, we consider that there are justifiable reasons for the time taken by the assigned lawyers in cases 2 and 3, while in respect of cases 4, 5 and 6, the lawyers have been referred to the DMC and have subsequently been placed on the Record of Unsatisfactory Performance or even removed from the Legal Aid Panel.

Notwithstanding this, we will review, in consultation with the LASC, the relevant procedures to look for room to enhance timely completion of progress reports and post-judgment actions by assigned lawyers and that sanctions against unresponsive and irresponsible lawyers are effective and flexible.

Evaluation and Appraisal of Assigned Lawyers

- (8) We are given to understand that the proposed triggers are events that will help prompt officers to identify possible problems. In this regard, LAD has indeed in recent years introduced checklists for major types of cases for use by its own staff to facilitate the monitoring of the progress of proceedings.
- (9) As explained in paragraph 55, the present system, whereby the under-performed are identified, is an effective and efficient tool to ensure assignment of competent lawyers and to appropriately sanction the under-performed. Awarding an overall grade to each assigned lawyer upon conclusion of each case may create problems and is practically difficult to introduce as shown by the experience of the Law Society.

Intervention by LAD

- (10) As explained in paragraph 4, a decision to intervene or to re-assign a case to another lawyer should not be taken lightly. Careful consideration has to be given to various important factors depending on the circumstances of the case. Nevertheless, LAD will review and, where appropriate, improve the relevant guidelines regarding circumstances and factors to be considered at times of possible intervention or re-assignment of a case.
- (11) The small number of referral to the legal professional bodies is not indicative of the quality of the LAD's monitoring. Our reasons are explained in paragraph 54. Nevertheless, we agree to review the relevant guidelines to identify room for improvement;

Enforcement of Judgments

- (12) Our views on enforcement proceedings are set out in paragraph 34. LAD will continue its best endeavours to enforce judgments when the circumstances so warrant. Indeed, LAD has a unit specialized in enforcement actions. Nevertheless, we are also duty-bound to consider whether the taking of enforcement proceedings in a particular case is cost-effective and in the interest of the aided person, having regard to all the circumstances of the case.

Checklist

- (13) The mandatory use of checklist by assigned lawyers in each case would increase the costs of the aided proceedings which would be borne by either the aided person or the public fund. Moreover, it would be difficult to design a checklist for all assigned-out cases because the nature and circumstances of the cases are different. Notwithstanding that, LAD has in recent years introduced checklists for major types of cases for use by its own staff to facilitate case monitoring.

Administration of Legal Aid Services

- (14) LAD has always worked closely with the LASC, providing it with the necessary assistance that it requires. This will continue to be done.

Legal Aid Department
Ref. : LA/ADM/70/17 (C)
Date : 20 February 2006

COPY

Legal Aid Is NOT Free

When you get or keep money or property with the help of legal aid, the Department will take back from such money or property all the expenses paid, including the costs which your opponent is ordered to pay but fails to do so.

The Department would pay the fees of your lawyers and all other expenses when your case is being litigated. In doing so, the Department is merely providing you with a loan for the purpose of litigation. In the end, it is you who will pay for such fees and expenses out of the money or property that you get or keep.

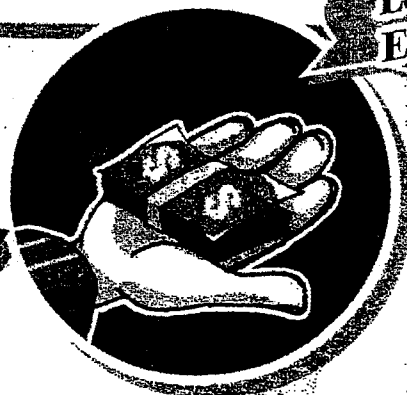
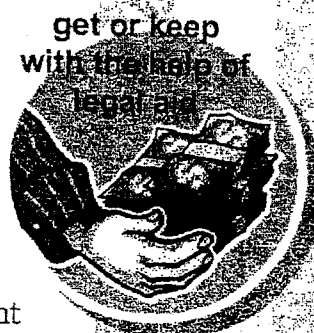
In this circumstance, your financial position is the same as a litigant using his own money to litigate.

To ensure that you will benefit from the aided proceedings, you must pay special attention to and consult your assigned lawyer on the following matters:

- the costs of the aided proceedings
- the value of the money or property that you wish to get or keep
- whether the court would order your opponent to pay your costs and expenses
- whether your opponent has the ability to pay



Legal Aid Department



(Translation)

Ref. No.: LA/

/

Re: _____

I, _____, hereby acknowledge and confirm that an officer of the Legal Aid Department has clearly explained to me that if legal aid is granted to me, and if as a result of any court order / judgement or any agreement reached between me and the opposite party by means of an out of court settlement (regardless of whether my legal aid certificate has been discharged at the time when the judgement or agreement is made) that I:-

1. should receive a sum of money (regardless of the amount); or
2. should recover any property or premises ('the said property'); or
3. shall have my interest preserved in any property or premises ('the said property');

Under the Legal Aid Ordinance, the Director of Legal Aid (DLA) is entitled to deduct all costs and expenses thus incurred including the opposite party's costs, if any, from any moneys, property or interest in the premises that I have recovered or preserved (DLA's 1st charge). In addition, the DLA may also register the 1st charge against the said property with the Land Registry. If the said property is used by me or my dependants as a home, and the DLA decides to exercise his discretion to defer the enforcement of the charge by postponing the sale of the said property, I shall pay the costs of the registration of the said first charge, as well as simple interest at the rate of 10% p.a. on all moneys paid by the Legal Aid Department in relation to my case.

Dated the _____ day of _____, _____.

Signed: _____

Witnessed by: _____

檔案號碼： LA/

有關：_____

我 _____ 確認並證實法律援助署職員已清楚向我解釋：如我的法律援助申請獲得批准，而我可以就法庭在我的案件中所作的判決或我與對方庭外和解而達成的協議(不論該判決或協議作出時我的法律援助證書已否被取消)：

1. 獲得一筆款項，不論數目多少；或
2. 獲得任何財產或樓宇（簡稱「該物業」）；或
3. 獲得保留任何財產或樓宇（簡稱「該物業」）的利益，

根據《法律援助條例》的規定，法律援助署署長有權從我所獲得或保留的款項、財產或樓宇價值中扣除所支付的一切費用包括對方的訟費(如有的話)(簡稱「第一押記」)。此外，法律援助署署長也有權將「第一押記」在土地註冊處登記在該物業上。如該物業是用作我或我受養人的居所，而法律援助署署長決定行使其酌情權不立即執行押記而延遲出售該物業，則我必須另須繳付有關登記該第一押記所涉及的費用，以及法律援助署就我的案件支付的一切款項所衍生的利息。利息以單利率計算，息率是年息十釐。

年 月 日

簽署：_____

見證人：_____

(Translation)

Ref. No.: LA/MAT /

Re: _____

I, _____, hereby acknowledge and confirm that an officer of the Legal Aid Department has clearly explained to me that if legal aid is granted to me, and if as a result of any court order / judgement or any agreement reached between me and the opposite party by means of an out of court settlement (regardless of whether my legal aid certificate has been discharged at the time when the judgement or agreement is made) that I:-

1. should receive a lump sum (regardless of the amount); or
2. should receive maintenance payment for an amount per month over \$4,800.00; or
3. should recover any property or premises ('the said property'); or
4. should have my interest preserved in any property or premises ('the said property').

Under the Legal Aid Ordinance, the Director of Legal Aid (DLA) is entitled to deduct all costs and expenses thus incurred including the opposite party's costs, if any, from any *moneys, property or interest in the premises that I have recovered or preserved (DLA's 1st charge). In addition, the DLA may also register the 1st charge against the said property with the Land Registry. If the said property is used by me or my dependants as a home, and the DLA decides to exercise his discretion to defer the enforcement of the charge by postponing the sale of the said property, I shall pay the costs of the registration of the said first charge, as well as simple interest at the rate of 10% p.a. on all moneys paid by the Legal Aid Department in relation to my case.

Dated the _____ day of _____, _____.

Signed: _____

Witnessed by: _____

* The first \$4,800 will be exempted if the monthly maintenance exceeds \$4,800.

檔案號碼： LA/MAT /

有關： _____

我 _____ 確認並證實法律援助署職員已清楚向我解釋：如我的法律援助申請獲得批准，而我可以就法庭在我的案件中所作的判決或我與對方庭外和解而達成的協議(不論該判決或協議作出時我的法律援助證書已否被取消)：

1. 獲得一筆款項，不論數目多少；或
2. 獲得贍養費每月超過 4,800.00 元；或
3. 獲得任何財產或樓宇（簡稱「該物業」）；或
4. 獲得保留任何財產或樓宇（簡稱「該物業」）的利益。

根據《法律援助條例》的規定，法律援助署署長有權從我所獲得或保留的款項*、財產或樓宇價值中扣除所支付的一切費用包括對方的訟費(如有的話)(簡稱「第一押記」)。此外，法律援助署署長也有權將「第一押記」在土地註冊處登記在該物業上。如該物業是用作我或我受養人的居所，而法律援助署署長決定行使其酌情權不立即執行押記而延遲出售該物業，則我必須另須繳付有關登記該第一押記所涉及的費用，以及法律援助署就我的案件支付的一切款項所衍生的利息。利息以單利率計算，息率是年息十釐。

年 月 日

簽署： _____

見證人： _____

*如贍養費每月超過 4,800 元，首 4,800 元不算在內。

香港法例第 91 章

《法律援助條例》

LEGAL AID ORDINANCE (Chapter 91)

提供法律援助及同意接受法律援助證書表格

FORM OF OFFER AND ACCEPTANCE OF OFFER OF A LEGAL AID CERTIFICATE

提供法律援助證書

OFFER OF A LEGAL AID CERTIFICATE

致：_____先生/女士_____

To: Mr/Madam_____

法律援助署署長經考慮你的申請後，現根據《法律援助條例》及其附屬規例的規定，向你提供法律援助，限制及條件如下：

The Director of Legal Aid having considered your application, hereby offers you Legal Aid subject to the limitations and conditions listed below and the provisions of the Legal Aid Ordinance and its subsidiary regulations:

(1) 法律援助證書範圍

(1) Scope of Legal Aid Certificate

(2) 你須負擔的分擔費：-

(2) Contribution to be paid by you:-

(a) 金額為_____元

(a) Amount \$ _____

(b) 付款時間表

(b) Payment schedule

(i) _____元，須於接受法律援助時繳付。

(i) \$ _____ upon acceptance of offer

(ii) 在往後每月的第_____天繳付_____元，為期_____個月。

(ii) \$ _____ on _____ day of each ensuing month for _____ month(s).

(iii) 餘數共_____元，將由法律援助署署長另行通知你這項繳費的時間及規定。

(iii) \$ _____, to be paid at such time and on such terms to be notified by the Director of Legal Aid.

(3) 如你獲得法律援助提出有關僱員補償及疏忽賠償的訴訟，你只須繳交一筆分擔費，而你已繳付或應繳付的分擔費會用以支付上述兩項或其中一項訴訟的訟費*。

(3) You are required to pay only one amount of contributions in respect of both proceedings for employees' compensation and common law damages. However, the amount of contributions paid or payable by you will be used towards payment of the costs in respect of either or both proceedings*.

(4) 如你因法律援助證書提出的訴訟或在相關的法援訴訟中，取回或保留任何財產（包括金錢賠償），該筆財產即須受法律援助署署長第一押記的規管（詳見載於背頁的重要資料）。

(4) Any property (including damages) that may be recovered or preserved on your behalf in the proceedings to which the legal aid certificate relates or in any substantially related proceedings in which you are legally aided will be subject to the Director's first charge (see Important Information overleaf).

日期：_____年_____月_____日

Dated this _____ day of _____

法律援助署署長
() 代行)

()
for Director of Legal Aid

同意接受法律援助證書

1. 本人_____居於_____

已詳閱載於下列的重要資料，並同意接受法律援助署署長按照上文訂明的限制和條件，以及《法律援助條例》及其附屬規例的規定，向本人發出的法律援助證書。

2. 本人並證實已收到「法律援助訴訟的分擔費及法律援助署署長的第一押記」小冊子。
3. 本人現按上述條件第 2 段的規定，附上一張面額_____元的支票*。

日期：_____年_____月_____日

簽署

- * 親身繳交款項者，請刪去此項。
* 請將不適用者刪去。

有關法律援助的重要資料

- 如你的經濟狀況有變，請立即通知本署（除非你與配偶已經離異或在有關訴訟中你倆為對訟雙方，否則你亦必須把配偶的經濟狀況轉變報通知本署）。如你的配偶的經濟狀況有變，本署會重新審核你的財務資源。
- 請留意背頁「提供法律援助表格」上列明的限制及條件。
- 如你從獲得法律援助辦理的訴訟或其他相關的訴訟中取回或保留任何財產，就有可能要在案件審結時向法律援助署繳付一筆費用，以符合法律援助署署長第一押記的要求。換言之，你透過法律援助取回的任何金錢或財產將會首先付予法律援助署，用以償還已替你支付的部分或全部法律費用，而餘款則歸你所有。此外，如你能保留對方向你申索的任何金錢或財產，以上規定亦同樣適用。如欲了解詳情，請參閱「法律援助訴訟的分擔費及法律援助署署長的第一押記」小冊子。
- 如你不繳付分擔費，法律援助署署長有權取消已向你發出的法律援助證書。同時，署長亦有權根據《法律援助條例》及其附屬規例所訂明的情況，取消或撤回你的法律援助。
- 如你對法律援助有任何疑問，請與處理你個案的本署職員聯絡（有關職員的姓名及電話號碼已印在申請卡上）。查詢時，請說明檔案號碼。

ACCEPTANCE OF OFFER OF
LEGAL AID CERTIFICATE

1. I, _____
of _____

having read the Important Information below accept the offer by the Director of Legal Aid to issue to me a Legal Aid Certificate subject to the limitations and conditions listed above and the provisions of the Legal Aid Ordinance and its subsidiary regulations.

2. I further acknowledge receipt of the booklet on "Contribution towards Costs of Legal Aid Case and Director of Legal Aid's First Charge".
3. I enclose a cheque* for \$ _____ as required by paragraph 2 of the Terms and Conditions above.

Date _____

Signature

- * Delete if payment is made in person
* Delete as appropriate

Important Information about your Legal Aid

- You must tell the Legal Aid Department if your financial circumstances change (including those of your spouse unless your spouse is separated from you or has a contrary interest in the proceedings). If you or your spouse's means change, we will then reassess your means.
- You should note the limitations and conditions stated in the Offer Form overleaf.
- You may have to pay the Legal Aid Department some money at the end of the case because of the Director of Legal Aid's first charge in the event that property is recovered or preserved on your behalf in the proceedings or in any substantially related proceedings in which you are legally aided. This means that any money or property you receive with the help of legal aid will be used first to repay some or all of your legal costs to the Legal Aid Department. You will receive the money that is left over. The same applies if you succeed in holding on to any money or property which your opponent was claiming. For more information, please refer to the Booklet on "Contribution towards Costs of Legal Aid Case and Director of Legal Aid's First Charge".
- The Director may discharge the Legal Aid Certificate if you fail to pay the contribution and may discharge or revoke your legal aid in the other circumstances prescribed by the Legal Aid Ordinance and its subsidiary regulations.
- If you have any questions about your legal aid, you should contact the staff looking after your case, whose name and telephone number can be found on the application card. Please quote your reference number when making enquiries.

An account of the cases referred to in the Ombudsman's Report

Case 1

1. In late January 1999, the applicant was granted legal aid to pursue damages for personal injuries sustained in an accident. In August 1999, the assigned solicitor sought LAD's approval for assignment of counsel (the 1st Counsel). Based on the data captured in LAD's computer system then in use, the 1st Counsel did not meet the selection criteria. LAD therefore requested the assigned solicitor to nominate another counsel (the 2nd counsel) which he did. LAD checked the experience of the 2nd counsel against the record kept by LAD on its computer system and found that the 2nd counsel had not provided LAD with information regarding his experience.. LAD then informed the assigned solicitor of this. The assigned solicitor later on informed LAD that he had checked with the 2nd Counsel who had the requisite experience in personal injuries cases. The 2nd counsel then provided LAD with his experience. which showed that he met LAD's selection criteria. He was therefore assigned the case.

Case 2

2. The aided person was granted legal aid in February 2000 for divorce, custody and ancillary relief. Subsequently the opposite party was also granted legal aid to defend the proceedings limited to custody and ancillary relief.

3. From the time when the aided person applied for legal aid up to the grant of legal aid, LAD staff had explained the meaning and the implications of the DLA's first charge to the aided person. Both LAD and the assigned solicitor continued to draw the aided person's attention to the first charge, its operation and implications and kept her informed of this from time to time throughout the proceedings.

4. The case turned out to be very complicated. There were serious disputes over custody and ancillary relief. The aided person also had to take out injunction proceedings to restrain the opposite party from disposing the sale proceeds of the former matrimonial home.

5. The marriage between the parties was dissolved by the Court in May 2002. The assigned lawyer was reminded to negotiate costs with the opposite party and failing agreement, to proceed to taxation. In June 2003, the assigned solicitor submitted to LAD a bill of costs of more than 70 pages and his costs were subsequently agreed with the aided person's consent.

Case 3

6. The aided person was granted legal aid in 1996 to claim damages for serious injuries he sustained in an accident, including an amputated leg.

7. In June 1999, judgment on liability was entered against the opposite parties with damages to be assessed. Because of the aided person's amputated leg, a prosthesis had to be fixed. The first prosthesis was fixed in 1999 but was found unsatisfactory. In November 2000 a new prosthesis was fixed and thereafter the aided person had to undergo a rehabilitation programme. In January 2001, the assigned lawyer reported that the rehabilitation programme was completed and also confirmed in subsequent telephone conversations with LAD that he had all along kept under review the progress of the aided person's medical condition. In October 2001, the assigned lawyer informed LAD that the aided person's medical condition had not yet stabilized. In September 2002, the assigned lawyer reported to LAD over the telephone that he would be in a position to restore the court hearing shortly. In November 2002, the assigned lawyer informed LAD that the hearing had been restored in October 2002. The case was finally settled in May 2004.

Case 4

8. In November 1994, the aided person was granted legal aid to claim damages for personal injuries. The case was settled in December 1999. In February 2000, the assigned lawyer submitted a bill of costs for taxation and in August 2000 the costs were taxed and a Certificate of Costs was issued by the Court a month later.

9. Counsel's fees and medical experts' fees were taxed down or off by the Court. LAD had to look to them via the assigned lawyer for a refund of the fees over-paid but they refused or reluctant to do so. Exchanges between the assigned lawyer and the counsel/experts, between LAD and the assigned lawyer, and between LAD and the counsel and expert on costs or refund thereof ensued. In February 2001, the assigned lawyer reported to LAD that a couple of medical experts wished to apply for a review of the taxation which one subsequently did. It was only until July 2004 that LAD received the last refund. Thereafter LAD had to resolve some matters with the assigned lawyer before the accounts of the case could be finalized.

Case 5

10. In October 1997, legal aid was granted to the aided person to take divorce proceedings. The case turned out to be very complicated involving a number of interlocutory hearings and the need for calling social investigation reports. In September 1999, the opposite party took out an application restraining the aided person from removing the child of the family from his custody and LAD extended the aided person's legal aid certificate to defend the application. In the same month, the Court dismissed the application and made an interim order awarding the care and control of the child to the aided person with reasonable access to the opposite party.

11. In March 2000, the court granted a decree nisi of divorce and awarded joint custody of the child to the parties. In May 2000, the marriage was formally dissolved. In September 2000, the Court awarded care and control of the child to the aided person with reasonable access to the opposite party. In August 2001, by consent the court ordered nominal maintenance to the aided person. In October 2001 the court ordered that there be no order as to costs in respect of the divorce suit.

12. During the proceedings, the assigned lawyer had on occasions failed to report to LAD on the progress of the case and to deal with LAD's enquiries promptly and properly. Because of the assigned solicitor's under-performance, LAD had repeatedly suggested to the aided person to consider re-assigning her case to another lawyer. However, the aided person responded that she wished to continue to be represented by the assigned lawyer. In January 2002, the assigned lawyer's practice was taken over by the Law Society. In August 2003, the aided person finally changed her mind and her case was therefore assigned to the lawyer appointed to act as the Law Society's agent.

Case 6

13. The deceased was granted legal aid in October 1999 to claim damages for personal injuries sustained in an accident. The assigned solicitor instituted court proceedings in June 2001. In the same month, the deceased passed away. In August 2001 the deceased's sister applied for and was granted legal aid to continue the proceedings.

14. At end October 2002 the claim was settled with the opposite party with costs to be taxed if not agreed. By April 2003 all the damages were remitted by the assigned solicitor to LAD. Later on in the same month, the assigned solicitor submitted a bill of costs for taxation and requested LAD to make part payment for work done which LAD did.

15. The costs were taxed in late January 2004. During the period from March to October 2004, LAD followed up the matter on costs and remittance thereof with the assigned solicitor closely. In October 2004, the assigned lawyer wrote to LAD offering to reimburse LAD the disbursements incurred by LAD by 3 monthly instalments, and enclosing a cheque for payment of the first instalment. LAD's staff at that time adopted a pragmatic approach and accepted the offer, in the belief that that the assigned lawyer would honour his promise and would pay off the remaining sum in full in 2 months time.

16. Unfortunately, although the assigned lawyer paid the first 2 instalments as promised, he defaulted in the third instalment. LAD's staff promptly followed this up and chased after the assigned solicitor for payment of the outstanding instalment. In December 2004, the assigned lawyer promised to pay the amount outstanding in January 2005, but failed to do so. Later on LAD discovered that the assigned lawyer had absconded. LAD then promptly reported the matter to the police and the Law Society and removed the assigned lawyer from the Legal Aid Panel.

Case 7

17. The aided person was granted legal aid in 1997 to seek a divorce and custody of her children. The marriage was dissolved in October 1998 and the aided person was awarded costs of the proceedings against the opposite party. Costs were taxed in 1999 at \$35,000 odd.

18. At first the opposite party's whereabouts were unknown. With the efforts and perseverance of LAD staff the opposite party was finally located in August 1999. The opposite party then told LAD that he was a casual construction site worker earning about \$7,000 per month and he had financial difficulties to pay up the costs in full in one go. He offered to pay the costs by monthly instalments of \$500 each.

19. After having considered the opposite party's financial position, his capability to pay and other factors such as the costs of enforcement proceedings to be incurred, LAD decided that his proposal in the circumstances was not unreasonable and therefore accepted the same. After having paid \$15,500 the opposite party defaulted in payment. LAD then made repeated attempts to locate him. By October 2004 when it became clear that the opposite party could not be located and there was no way to enforce the costs order against him, the outstanding costs were written off.

Legal Aid Department

Date : 20 February 2006

Ref. : LA/ADM/70/17 (C)