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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 28 February 2011**

**Legislative amendments to implement the proposals arising from the
five-yearly review of the criteria for assessing the financial eligibility
of legal aid applicants**

Purpose

This paper provides background information and summarizes the discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on issues relating to the proposed legislative amendments arising from the current five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants ("five-yearly review").

Government's policy objective

2. According to Article 35 of the Basic Law, Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR") guarantees all individuals the right to a fair hearing in both criminal and civil proceedings. Article 14(3) further provides that a person charged with criminal offence shall be entitled to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it." The Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO") incorporates into Hong Kong law the provisions of ICCPR as applied to Hong Kong.

3. The Government's policy objective on legal aid is to ensure that no one with reasonable grounds for taking legal action in the Hong Kong courts is prevented from doing so because of a lack of means.

The Legal Aid System

Legal aid framework

4. The Legal Aid Ordinance (Cap. 91) ("LAO"), enacted in 1967, sets out the legal framework for the administration of legal aid. Legal aid is provided by the Legal Aid Department ("LAD") under the Ordinary Legal Aid Scheme ("OLAS") and the Supplementary Legal Aid Scheme ("SLAS"). Legal aid will be granted to applicants who satisfy the means test and the merits test.

5. The Legal Aid Services Council ("LASC") was set up on 1 September 1996 under the Legal Aid Services Council Ordinance (Cap. 489) to supervise the provision of legal aid services provided by LAD and to advise the Government on legal aid policy.

OLAS

6. To qualify for legal aid for civil proceedings under OLAS, an applicant's financial resources must not exceed \$175,800. An aided person may be required to make a contribution towards the cost of legal representation if, on a determination of his financial resources, he should be able to do so. The Director of Legal Aid ("DLA") may waive the limit in meritorious cases involving a possible breach of HKBORO or an inconsistency with ICCPR.

7. To qualify for legal aid in criminal cases, an applicant's financial resources should not exceed \$175,800. An applicant charged with murder, treason or piracy with violence may apply to a judge for exemption of means test and of payment of contribution. DLA has the discretion to grant legal aid in criminal cases to an applicant whose financial resources exceed \$175,800 if he is satisfied that it is desirable in the interests of justice to do so subject to payment of a contribution, if required.

8. The maximum contribution rate payable under OLAS is 25% of the financial resources possessed by an aided person, with the maximum amount of contribution capped at \$43,950.

SLAS

9. SLAS is a self-financing scheme introduced in 1984. The scheme was limited initially to cover claims for damages for personal and fatal injuries. It was subsequently extended to cover employees' compensation claims in 1992 and medical, dental as well as legal professional negligence in 1995. Its current scope covers cases of personal injury or death, medical, dental and legal

professional negligence where the claim is likely to exceed \$60,000. It also covers claims under the Employees' Compensation Ordinance (Cap. 282) irrespective of the amount of claim.

10. The scheme is available to those whose financial resources exceed \$175,800 but do not exceed \$488,400. The costs of the scheme are met from the Supplementary Legal Aid Fund, which is financed by contributions from damages or compensation recovered by successful legal aid persons. The contribution rates were reduced twice, in 2000 and 2006, to the present 6% for cases settled before delivery of brief to counsel and 10% for other cases.

Relevant Panel discussions

Legislative amendments arising from the current five-yearly review

11. The Panel was consulted on the proposed scope of the current five-yearly review at its meeting on 26 March 2007 and further received progress reports on the review in May 2008 and March 2009. Upon completion of the review, the Administration reported to the Panel on its proposals arising therefrom at the meeting on 29 March 2010. After further discussions with the Panel and relevant organizations at the meetings on 24 May and 21 July 2010, the Administration reported to the Panel at its meeting on 30 September 2010 that having considered the views expressed by the various stakeholders, the Administration had revised some of its proposals and would introduce legislative amendments to implement the following package of improvement measures -

- (a) the median monthly household expenditure be used to replace the 35-percentile household expenditure as a deductible component in calculating disposable income;
- (b) the financial eligibility limit ("FEL") for OLAS be raised from the present \$175,800 to \$260,000 and that for SLAS from \$488,400 to \$1.3 million; and
- (c) an amount equivalent to the FEL for OLAS be disregarded from the savings of the elderly legal aid applicants who had reached the age of 60, irrespective of their employment status, when calculating their disposable capital.

Relevant discussions recently held by the Panel relating to the above proposals are summarized in the following paragraphs.

Level of and basis for setting FELs

12. Members had long held the view that the existing FELs under OLAS and SLAS were too low and should be reviewed. Members had also expressed the view that the appropriateness of having a one-line FEL for all types of cases should be reviewed, having regard to the policy objective that no one with reasonable grounds for taking or defending legal action in court was prevented from doing so because of a lack of means. They considered that the Administration should adopt a more flexible and holistic approach in reviewing the legal aid system to ensure access to justice.

13. At the meeting on 29 March 2010, the Administration advised the Panel of its proposal of raising the FEL for OLAS from \$175,800 to \$260,000 and that for SLAS from \$488,400 to \$1 million. While members generally welcomed the proposal, they considered the extent of the proposed increase inadequate. Members had previously proposed raising the FEL of OLAS to somewhere between \$500,000 and \$1 million, and that for SLAS to \$1 million to \$3 million. Members requested the Administration to explain the basis for arriving at the proposed FELs, as well as the reasons for not adopting LASC's proposal of raising the FEL for SLAS to \$1.3 million which was put forward on the basis that the average legal costs of a SLAS case that actually went to trial was \$1.297 million. Members noted the Hong Kong Bar Association's ("Bar Association") view that the FEL for OLAS should be raised by at least 100% to \$350,000 in line with the proposed 100% increase for SLAS, and that for SLAS to the region of \$3 million to reflect the full costs of legal proceedings which might include liability to pay for the opponent's costs should the action fail.

14. Members also noted the Bar Association's view that it was important to adopt a principled approach in determining the appropriate level of FELs as the benchmarks for future reviews. Both the Bar Association and the Law Society of Hong Kong ("Law Society") also took the view that the underlying principle in determining financial eligibility for legal aid should be that as laid down in the Scott Report of 1986^{*}, i.e. a person should have access to legal representation without suffering undue financial hardship having regard to the costs of litigation and his total financial resources. The Law Society considered that a study into the true cost of legal proceedings should be conducted to provide the proper basis for determining the appropriate levels of FELs.

15. On the basis for setting the proposed FELs, the Administration explained that when FELs were first introduced in 1992, no formula was used to arrive at

* The Scott Report was issued in 1986 by the Legal Aid Working Party which was appointed by the Administration to conduct a thorough examination of legal aid policy

the figures and there was no quantitative elaboration behind them. The setting of FELs was based on the principle that when a person faced legal proceedings, he was expected to draw on both his income and capital to meet the legal costs to the extent that he could do so without suffering undue hardship. In considering the revised FELs, the Administration had taken into account various factors including the percentage of cases with litigation costs below the revised FELs, the levels of financial resources of the prospective applicants eligible for legal aid and the financial implications arising from the adjustments.

16. At the meeting on 30 September 2010, the Administration advised members that having considered the views of the Panel, LASC and relevant stakeholders, it proposed to further increase the suggested FEL for SLAS from \$1 million to \$1.3 million. The Administration explained that as the existing SLAS case coverage provided a greater assurance of damages and cost recovery, there was more room for raising the FEL for SLAS without compromising the financial viability of the scheme. Some members urged the Administration to also consider further increasing the FEL for OLAS. Dr Hon Priscilla LEUNG proposed that the FEL for OLAS be further increased from the proposed \$260,000 to \$500,000.

17. On members' proposal of setting different FELs for different types of cases, the Administration advised the Panel that an "across-the-board" FEL would facilitate the upholding of a more simplified legal aid application vetting process, save administrative costs, be clear to understand and more user-friendly for legal aid applicants. The Administration considered that such an approach was preferable to setting different limits for different types of cases/clients which would not only be discriminatory but would also render the means testing process more complicated and burdensome for all concerned.

Contribution required to be paid by aided persons

18. Members noted with concern that some applicants had turned down the grant of legal aid and represented themselves in court as they could not afford the contributions required to be paid. Some members expressed the view that the contribution fees under the existing OLAS and SLAS should be lowered so that more people could benefit from the extended ambit of legal aid. Members sought clarification on whether any adjustments would be made to the contribution rates under the two legal aid schemes following the adjustments of FELs.

19. The Administration advised that it was studying the impact of the proposed increases of FELs on contribution payable under OLAS and SLAS and had not yet decided whether any adjustments should be made to the rates of contribution. The Administration also advised that under the existing law, DLA did not have

the discretion to waive the payment of contribution. Aided persons with financial difficulties could, however, have their contributions paid in instalments.

20. Some members considered that DLA should be given the discretion to waive the payment of contribution in cases where the aided persons had financial difficulties in making such payment. They also suggested that consideration be given to setting different contribution rates for different types of cases, for instance, a lower contribution rate could apply to appeals relating to Labour Tribunal awards. Members also noted the Bar Association's view that higher contribution rates could be set for the new types of cases to be covered under the expanded scope of SLAS. The Administration was requested to revert to the Panel on its consideration of the various issues relating to contribution raised by members. LAD was also requested to provide information on the number of cases where applicants for legal aid had turned down the grant of legal aid due to the amount of contribution required to be paid and the amount of contribution involved in such cases.

Methods of computing disposable income and disposable capital

21. LAD currently adopts a "financial capacity" approach in assessing the means of legal aid applicants. Under this approach, an applicant's financial capacity is determined by reference to the aggregate of his yearly disposable income and disposable capital. A person whose financial capacity does not exceed FEL is eligible for legal aid. According to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B), a person's disposable income is the income that person may reasonably expect to receive during the period of computation. It is calculated by his income minus a number of statutory deductible items, such as payment of salaries tax and maintenance payments. One deductible item is an allowance equivalent to the 35-percentile household expenditure excluding rent. According to the Administration, the allowance reflects the general expenditure of a household in maintaining an acceptable standard of living.

22. In accordance with the statutory requirements, a person's disposable capital is the value of his/her resource of a capital nature, disregarding a number of items including the value of any interest in the only or main dwelling, and insurance money received in respect of the injuries to which the person's personal injury claim relates, to cover his/her future medical needs.

23. In the course of the discussions on the current five-yearly review, members and deputations had expressed the following views relating to the computation of disposable income and capital -

- (a) the 35-percentile household expenditure in calculating disposable income of applicants should be increased; and
- (b) relevant factors such as age, health and earning power should be taken into account in assessing the financial eligibility of a legal aid applicant. For example, the savings, the property and rental income arising therefrom of legal aid applicants who were very old, about to retire or those with severe disability should be disregarded in computing their disposable capital and disposable income respectively. Asset which was the only means of livelihood of a legal aid applicant should also be disregarded.

24. At the meeting on 30 March 2010, the Administration advised the Panel that it would implement the following improvement measures –

- (a) raising the level of personal allowance by replacing the present 35-percentile household expenditure with the median household expenditure; and
- (b) disregarding part of the savings of elderly applicants who had reached the age of 65 in calculating their disposable capital. The amount of savings recommended to be disregarded was an amount equivalent to the FEL for OLAS.

25. The Panel generally welcomed the Administration's proposal of replacing the 35-percentile household expenditure with the median household expenditure as the deductible allowance in calculating disposable income. Members also noted the Bar Association's view that, on the basis of the expert advice from Dr WONG Hung obtained by LASC in 2003, the deductible personal allowance for OLAS and SLAS should be set at 66-percentile and 75-percentile of monthly household expenditure respectively which was considered more fair and consistent with the Administration's declared policy objectives that OLAS was intended for lower middle class and below, and SLAS for the middle class.

26. While supporting in principle the Administration's proposal of exempting part of the savings of elderly applicants when calculating their disposable capital, members and deputations were of the view that the age requirement should be relaxed, as many people in their 50's had built some retirement assets and it would cause them undue hardship to risk their retirement savings on litigation, bearing in mind that it might be difficult for them to rebuild those assets once they were lost. Members noted the Bar Association's view that the age requirement should be lowered to 50. Dr Hon Margaret NG and Hon TAM Yiu-chung considered that the age requirement should be relaxed to at least age 60, which was the general retirement age. Hon TAM Yiu-chung also suggested that the proposed exemption be extended to cover those who were chronically ill.

27. The Administration explained that the age requirement was set at 65 as it was a generally accepted definition of "elderly". In deciding where to draw the line for the age requirement, it was important to strike a proper balance between public affordability and provision of services to those in genuine need of assistance. At the meeting on 30 September 2010, the Administration informed members that after considering the views of the Panel and relevant stakeholders, it proposed to lower the age requirement from 65 to 60

Legislative timetable

28. Members urged the Administration to implement as early as practicable the improvement measures relating to legal aid including the revised FELs so that the public could benefit from the improved measures as soon as possible. In its paper submitted to the Panel in December 2010 (LC Paper No. CB(2)638/10-11(01)), the Administration advised that the legislative amendments relating to the proposals of raising the level of deductible allowance and disregarding part of the savings of the elderly in assessing financial eligibility would be subject to the negative vetting procedure while those for effecting the adjustments in FELs would be subject to the positive vetting procedure. The Administration also advised that it aimed to submit the relevant legislative amendments to the Legislative Council ("LegCo") in March 2011. Subject to the views of Members during their scrutiny by LegCo, the legislative amendments were expected to be put into effect in April/May 2011.

Latest position

29. The Administration will brief Members on the legislative amendments for effecting the proposals stated in paragraph 11 above at the upcoming Panel meeting on 28 February 2011. Members may wish to note that the Administration is scheduled to report to the Panel on its proposals concerning the expansion of the scope of SLAS at the meeting to be held on 28 March 2011.

Relevant papers

30. A list of the relevant papers which are available on the LegCo website is in the **Appendix**.

Relevant documents on legislative amendments to implement the proposals arising from the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants

Meeting	Date of meeting	Paper
Panel on Administration of Justice and Legal Services ("AJLS Panel")	26 March 2007	<p>Background brief on "Provision of legal aid services" prepared by the Legislative Council ("LegCo") Secretariat [LC Paper No. CB(2)1395/06-07(01)]</p> <p>Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)1395/06-07(02)]</p> <p>The Legal Aid Services Council's letter dated 26 March 2007 [LC Paper No. CB(2)1472/06-07(01)] <i>(Chinese version only)</i></p> <p>Submission dated 26 March 2007 from the 1st Step Association [LC Paper No. CB(2)1472/06-07(02)] <i>(Chinese version only)</i></p> <p>Information note from the LegCo Office of Hon Margaret NG [LC Paper No. CB(2)1472/06-07(03)] <i>(Chinese version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)1966/06-07]</p>
	--	<p>Administration's letter dated 15 November 2007 on "2007 Annual Review of Financial Eligibility Limits of Legal Aid Applicants" [LC Paper No. CB(2)367/07-08(01)]</p>
	26 May 2008	<p>Background Brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)2010/07-08(01)]</p>

Meeting	Date of meeting	Paper
		<p>Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)2011/07-08(04)]</p> <p>Submission dated 26 May 2008 from Law Society of Hong Kong [LC Paper No. CB(2)2090/07-08(01)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2818/07-08]</p>
Legislative Council	2 July 2008	<p>Official Record of Proceedings of the Council on a written question raised by Hon James TO on "Inclusion of cash values of insurance policies in the calculation of capital assets in assets tests"</p>
AJLS Panel	24 November 2008	<p>Information Note prepared by the Research and Library Services Division on "Scope and expenditure of legal aid services in selected places" [IN03/08-09]</p> <p>Background Brief on "Review of the provision of legal aid services" prepared by the LegCo Secretariat [LC Paper No. CB(2)309/08-09(07)]</p> <p>Administration's paper on "Provision of legal aid services" [LC Paper No. CB(2)309/08-09(08)]</p> <p>Submission from the Society for Community Organization on "Review of the provision of legal aid services" [LC Paper No. CB(2)335/08-09(01)] <i>(Chinese version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)584/08-09]</p>

Meeting	Date of meeting	Paper
		<p><u>Follow-up paper</u></p> <p>Administration's response on review of the provision of legal aid services [LC Paper No. CB(2)2011/08-09(01)]</p>
Legislative Council	17 December 2008	<p><u>Official Record of Proceedings of the Council on an oral question raised by Dr Hon Margaret NG on "Free Legal Advice Scheme and Duty Lawyer Service"</u></p>
	11 February 2009	<p><u>Official Record of Proceedings of the Council on the motion moved by Dr Hon Priscilla LEUNG Mei-fun on "Relaxing the eligibility criteria for legal aid"</u></p>
AJLS Panel	30 March 2009	<p>Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)1152/08-09(04)]</p> <p>Background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)1152/08-09(05)]</p> <p>Law Society of Hong Kong's letter dated 27 March 2009 [LC Paper No. CB(2)1215/08-09(01)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)1603/08-09]</p>
	--	<p>Research report on "Legal aid systems in selected places" prepared by the LegCo Secretariat (June 2009) [RP01/08-09]</p> <p>Supplementary information on income level, number of legal aid applications</p>

Meeting	Date of meeting	Paper
		<p>received and granted, and updated figures of legal aid expenditure in Hong Kong and the selected places prepared by the LegCo Secretariat (as at 22 March 2010) [IN01/09-10]</p> <p>Supplementary table on client contributions, costs received and legal aid expenditure in Hong Kong and the selected places prepared by the LegCo Secretariat (as at 15 January 2010) [FS05/09-10]</p>
<p>Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91)</p>	<p>4 May 2009</p>	<p>Minutes of meeting [LC Paper No. CB(2)2124/08-09]</p>
<p>AJLS Panel</p>	<p>22 October 2009</p>	<p>Minutes of meeting [LC Paper No. CB(2)506/09-10]</p>
<p>Legislative Council</p>	<p>6 January 2010</p>	<p>Official Record of Proceedings of the Council on a written question raised by Dr Hon Priscilla LEUNG Mei-fun on "Five-yearly Review of Criteria for Assessing Financial Eligibility of Legal Aid Applicants"</p>
<p>AJLS Panel</p>	<p>29 March 2010</p>	<p>Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)1148/09-10(01)]</p> <p>Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)1156/09-10(06)]</p>

Meeting	Date of meeting	Paper
		<p>Minutes of meeting [LC Paper No. CB(2)1581/09-10]</p> <p><u>Follow-up papers</u></p> <p>Submission from the Society for Community Organization [LC Paper No. CB(2)1192/09-10(01)] <i>(Chinese version only)</i></p> <p>Letter from the Chairman of the Legal Aid Services Council to the Administration which sets out the Council's views on the Administration's proposals arising from the recently completed Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applicants [LC Paper No. CB(2)1200/09-10(01)] <i>(English version only)</i></p> <p>Administration's paper on the basis for arriving at the proposed financial eligibility limits for the two legal aid schemes [LC Paper No. CB(2)1364/09-10(01)]</p>
	24 May 2010	<p>Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)1583/09-10(04)]</p> <p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)1601/09-10(01)] <i>(English version only)</i></p> <p>Submission from the Hong Kong Federation of Trade Unions Rights & Benefits Committee [LC Paper No. CB(2)1600/09-10(01)] <i>(Chinese version only)</i></p>

Meeting	Date of meeting	Paper
		<p>Submission from Hong Kong Human Rights Monitor [LC Paper No. CB(2)1654/09-10(01)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2134/09-10]</p>
	21 July 2010	<p>Paper provided by the Administration in response to issues raised by members at the meeting on 24 May 2010 concerning the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants [LC Paper No. CB(2)2076/09-10(01)]</p> <p>Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)2081/09-10(01)]</p> <p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)2105/09-10(01)] <i>(English version only)</i> http://www.legco.gov.hk/yr09-10/chinese/panels/ajls/papers/aj0721cb2-2105-1-ec.pdf</p> <p>Submission from the Law Society of Hong Kong [LC Paper No. CB(2)2103/09-10(01)] <i>(English version only)</i></p> <p>Submission from the Hong Kong Federation of Trade Unions Rights & Benefits Committee [LC Paper No. CB(2)2105/09-10(02)] <i>(Chinese version only)</i></p>

Meeting	Date of meeting	Paper
		Submission from the Federation of Hong Kong and Kowloon Labour Unions [LC Paper No. CB(2)2099/09-10(01)] <i>(Chinese version only)</i>
	30 September 2010	Paper provided by the Administration on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" [LC Paper No. CB(2)2298/09-10(01)] Updated background brief on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants" prepared by the LegCo Secretariat [LC Paper No. CB(2)2304/09-10(01)] Submission from the Hong Kong Bar Association [LC Paper No. CB(2)2327/09-10(01)] <i>(English version only)</i> Submission from the Law Society of Hong Kong [LC Paper No. CB(2)2329/09-10(01)] <i>(English version only)</i>
	22 October 2010	Paper provided by the Administration on the new policy initiatives concerning legal aid under the Home Affairs Bureau [LC Paper No. CB(2)36/10-11(02)] Minutes of meeting [LC Paper No. CB(2)589/10-11]
	22 November 2010	Submission from the Hong Kong Bar Association [LC Paper No. CB(2)357/10-11(01)] <i>(English version only)</i>

Meeting	Date of meeting	Paper
		Minutes of meeting [LC Paper No. CB(2)848/10-11]
	21 December 2010	Submission from the Hong Kong Bar Association [LC Paper No. CB(2)638/10-11(02)] <i>(English version only)</i> Information note on "Scope of legal aid services in selected places" prepared by the Research Division of the LegCo Secretariat [IN02/10-11]

Council Business Division 2
Legislative Council Secretariat
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