

For Information

**Joint Subcommittee on Issues Relating to
Insurance Coverage for the Transport Sector**

Operation of the Legal Aid Scheme for Civil Cases

BACKGROUND

At the Joint Subcommittee meeting held on 12 April 2012, there was discussion on the underwriting loss of taxi and public light bus insurance business as a result of huge claims payments. There was a view at the meeting that the right of the legally aided person to select his/her own solicitor under the Legal Aid Ordinance (Cap.91) (the Ordinance) might be one of the contributory factors. The Joint Subcommittee therefore invited the Legal Aid Department (LAD) to send representative to attend the meeting on 26 April 2012. To facilitate discussion at the meeting, LAD is asked to prepare a paper on the operation of the legal aid scheme for civil cases.

OBJECTIVE OF LEGAL AID

2. The policy objective of legal aid is to ensure that no person with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means.

3. Pursuant to the aforementioned policy objective, the Legal Aid Department (LAD) provides legal aid in the form of legal representation by solicitors and if necessary counsel to eligible persons in Hong Kong, irrespective of their nationality and residence.

SCOPE OF LEGAL AID

4. Legal aid is available for civil proceedings in the District Court, the Court of First Instance and the Court of Appeal, and the Court of Final Appeal. It also covers proceedings in the Mental Health Review Tribunal and cases in the Coroner's Court if it is in the interests of public justice to do so.

ELIGIBILITY FOR LEGAL AID

5. To qualify for legal aid, a person is required by law to satisfy the means and merits tests.

Means Test

6. An applicant is eligible on means under the Ordinary Legal Aid Scheme (OLAS) if his financial resources do not exceed \$260,000 (Section 5 of the Ordinance).

7. An applicant is qualified on means under the Supplementary Legal Aid Scheme (SLAS) if his financial resources exceed \$260,000 but do not exceed \$1.3 million (Section 5A of the Ordinance).

8. An applicant is assessed to have passed the means test under the OLAS if his financial resources, i.e. the total of his disposable income and disposable capital, do not exceed \$260,000. An applicant whose financial resources are assessed as between \$20,000 and \$260,000 is required to pay a contribution on a sliding scale ranging from \$1,000 to \$65,000.

9. The Director has discretion to waive the upper financial eligibility limit in cases involving issues relating to the Hong Kong Bill of Rights or the International Covenant on Civil and Political Rights. For such cases, the amount of contribution payable varies from \$1,000 to an amount equal to 65% of the assessed financial resources if the financial resources do not exceed \$1,200,000, or 67% if the financial resources exceed \$1,200,000 [paragraph (c) of Part 1 of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations].

10. Under the SLAS, an applicant is assessed to have passed the means test if his financial resources exceed \$260,000 but do not exceed \$1.3 million. The rules for computing disposable income and disposable capital under the SLAS are the same as those under the OLAS.

11. An applicant eligible for legal aid under the SLAS is required to pay an interim contribution currently fixed at \$65,000 in addition to a fee of \$1,000

payable upon application. In case of successful litigation i.e. where compensation is recovered, the amount of the final contribution (equivalent to the costs paid or payable by the Director in respect of the proceedings and not recouped by the Director from sums recovered from the defendant plus a percentage deduction assessed at 10% of the compensation recovered or 6% if the claim is settled prior to delivery of a brief for attendance at trial to counsel) is payable by the aided person subject to deduction of the interim contribution and the application fee paid.

Merits Test

12. The merits test enables the Director to determine whether there are reasonable grounds for proceedings and whether it is reasonable for the applicant to receive legal aid. Under Section 10(3), legal aid must be refused if no reasonable grounds for proceedings are shown and may be refused if it is unreasonable that the applicant be granted legal aid in the particular circumstances of the case.

13. In order for the Director to consider the merits of the application, the applicant has to provide all the information relevant to his or her case.

14. To assess the merits of an application, the Department's professional officers have to investigate the case, make enquiries, interview the applicant and witnesses, obtain expert and general evidence and carry out research on any question of law arising out of the application.

15. In the course of assessing the merits of an application, the Director may obtain information from other sources, sometimes from the opposite parties in the case. For example, he may need transcripts of court proceedings, records of decisions or medical reports.

16. Before reaching a decision on merit of an application, the Director must consider all questions of law or facts arising out of the action, cause or matter. The Director will take into account the availability and strength of evidence to support the facts alleged and the likely difficulty in establishing those facts. Based on the facts put forward and the law relating to them, the Director must be satisfied that the case or defence has a reasonable chance of success.

APPEAL MECHANISM

17. Any applicant who feels aggrieved by the Director's decision is entitled to appeal to the Registrar of the High Court, or in the case of an application relating to proceedings in the Court of Final Appeal, to a Review Committee chaired by the Registrar of the High Court with a barrister and a solicitor appointed by the two professional bodies as the Committee members. The decision of the Registrar or the Review Committee is final.

LEGISLATIVE FRAMEWORK ON ASSIGNMENT OF LEGAL AID CASES

18. Section 13 of the Legal Aid Ordinance (LAO) provides that where a legal aid certificate is granted, the Director may act for the aided person through legal aid counsel or assign any lawyers in private practice who are on the Legal Aid Panel (the Panel) selected by either the aided person if he so desires, or the Director.

19. In brief, Section 13 of the LAO stipulates that when a legal aid certificate is granted, the Director has the choice whether to act as solicitor and for the aided person to be represented by a legal aid counsel or to assign the case to a solicitor on the Panel. If the Director decides not to act, he may assign a solicitor on the Panel selected by the aided person or the Director may assign a solicitor on the Panel if the aided person makes no selection.

20. Section 13 of the LAO does not therefore envisage the Director to act as solicitor in all legally aided cases.

POLICY AND CRITERIA ON ASSIGNMENT OF PRIVATE LAWYERS

21. When distributing legal aid work to lawyers in private practice, irrespective of the types of cases involved, the LAD will adhere to the fundamental principle that the aided person's interest is of paramount importance. The LAD's primary duty towards the aided person is to facilitate access to and attainment of justice through competent legal representation. To this end, the LAD has devised and published criteria on assignment of legal aid cases based on the experience and expertise of the lawyers. The criteria, which have been endorsed by the Legal Aid Services Council are available at LAD's website and contained in the Manual for Legal Aid Practitioners, seek to ensure that the Director fulfills his duty of

assigning competent lawyers to act for aided persons. They include features such as post qualification experience, experience on specific areas of law and imposition of a limit on the number of assignments.

NOMINATION OF LAWYERS BY AIDED PERSONS

22. When aided persons decide to nominate their own lawyers, the LAD takes the view that the effect of Section 13 of the LAO is such that the aided person's nominations should be given due weight and should not be rejected unless there are compelling reasons to do so. Compelling reasons are when the nomination is likely to undermine the aided person's interest in the proceedings and/or to jeopardise the legal aid fund on account of matters such as previous unsatisfactory performance, adverse disciplinary action by regulatory bodies of the two branches of the legal profession, language requirements of the proceedings, or the aided person has made repeated/late requests for change of lawyer without any good reasons in support and where the hearing date is imminent.

23. In the absence of any compelling reasons as those mentioned above, the LAD is of the view that it does not have any valid ground under the existing legal framework to decline or question the nomination of the aided person. By the same token, unless there is evidence to the contrary, it is improper for the Department and would be a slur on the character and professional integrity of the nominated lawyer for the LAD to enquire if the nomination is prompted by some kind of questionable conduct on the part of the lawyer concerned.

24. In the event that LAD rejects an AP's nomination of lawyer, the AP can, pursuant to section 26 of LAO, lodge an appeal against the decision of the Director to the Registrar of the High Court whose decision is final.

25. Recently, there has been public concern on potential touting practice in legal aid cases. To address this concern, the Department is now considering the suggestion of putting in place a "declaration system" to ensure that the aided person's choice of lawyers has not been affected by touting or other improper conduct on the part of the lawyers nominated. The Legal Aid Services Council will be consulted before any "declaration system" is put in place.