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Panel on Administration of Justice and Legal Services

Meeting on 22 May 2023

Background brief on the enhancement measures to the legal aid system in Hong Kong

Purpose

This paper provides background information and summarizes the past discussions of the Legislative Council Members on matters relating to enhancement measures to the legal aid system in Hong Kong implemented by the Administration in October 2021 (“the Enhancement Measures”).

Background

2. According to the Administration, to ensure that “All Hong Kong residents should be equal before the law” as provided for in Article 25 of the Basic Law, it is of vital importance that no one is denied access to justice because of lack of means. Hong Kong has an internationally-acclaimed and comprehensive legal aid system which has been playing this important role. Notwithstanding, there had been growing community concerns over the potential abuse in the nomination of lawyers by legally aided persons (“APs”), in particular for judicial review (“JR”) cases (including those related to nonrefoulement claimants).

3. There were suggestions that some lawyers with certain political inclination may, by offering assistance to the APs first on a “pro bono” basis, encourage them to initiate JR cases against the Government, and the APs concerned would then formally nominate these lawyers for the Legal Aid Department (“LAD”) to assign them as legal aid lawyers. There were also concerns on whether some criminal legal aid cases and JR-related legal aid cases had been concentrated in only a handful of lawyers, law firms or counsel chambers. Examples of other suggestions from the public include abolition of the current arrangement for APs to nominate legal aid lawyers, lowering of case limits and experience

requirements for certain types of cases, granting of legal aid for JR cases only if there is a high chance of success, etc.

4. Given the importance of the legal aid system in upholding the rule of law in Hong Kong, the Administration considered it essential to maintain public's confidence in the system, and ensure that the system can continue to meet the aspirations of the community. Along the above direction, the Chief Secretary for Administration's Office and LAD examined the operational details such as administration, distribution of cases and selection of lawyers regarding legal aid applications in a review which aimed to:

- (a) enhance the management of legal aid applications and cases to prevent potential abuse of the legal aid system;
- (b) enhance the transparency of LAD's work to raise the public's awareness and understanding of its work and confidence in the system; and
- (c) enlarge the pool of qualified lawyers to take up legal aid cases with a view to strengthening the prevention of overconcentration in assignment and benefitting the APs in the longer term.

5. At the meeting of the Panel on Administration of Justice and Legal Services ("the Panel") on 26 October 2021, the Administration outlined a package of enhancement measures to the administration of legal aid with a view to strengthening the prevention of potential abuse, strengthening case management as well as enhancing transparency and thereby the public's understanding of the work of the LAD and confidence in the system. The Enhancement Measures are set out in detail in the Administration's paper ([LC Paper No. CB\(4\)1677/20-21\(01\)](#)) and are classified into the following three categories:

- (a) nomination of lawyers by APs and assignment of cases;
- (b) strengthening case management; and
- (c) enhancing transparency.

Members' views and concerns

6. At the Panel meeting on 26 October 2021, members in general welcomed the Enhancement Measures and agreed that they would help prevent the potential abuse of the legal aid system without foregoing the rule of law, protection of those in need of legal aid and the prudent use of public resources. Some members

considered that while individual lawyers handling a lot of legal aid cases might be affected by the Enhancement Measures, these measures would benefit the legal profession as a whole.

7. However, there was a view that certain loopholes in the legal aid system, such as the mechanism to appeal against LAD's refusal to grant legal aid ("the appeal mechanism") which had been raised before, had not yet been addressed.

8. In response, the Administration explained that members of the public had expressed there being a pressing need to address a number of concerns regarding the legal aid system and the Enhancement Measures aimed to address those concerns. Furthermore, these measures would not involve any changes to the existing legal aid policies or legislative amendments but only changes to some existing practices or internal operational procedures of LAD.

9. In response to the view that an opponent to an AP faced a legal aid budget without a cap, the Administration stressed that while this was technically true, LAD had always attached great importance to its role as gatekeeper of the legal aid resources and would scrutinize all legal aid applications vigilantly. It was also reasonable and fully justified, therefore, for LAD to implement the proposed changes which could improve the legal aid system and ensure the prudent use of legal aid resources.

Nomination of lawyers by APs and assignment of cases;

Nomination of lawyers for criminal legal aid cases

10. Members considered that to adopt the standard practice for the Director of Legal Aid ("DLA") to assign lawyers to APs in criminal legal aid cases would prevent unreasonable delays and ensure access to justice. As legal aid was publicly funded resources, it was reasonable that the APs' choice of lawyers be subject to the balanced considerations of the relevant policy, procedures and prudent use of public resources. Also, in reality, the right to choice of lawyers might not be exercisable owing to various circumstances and reasons, e.g. the busy schedule of the counsel chosen and hence his/her availability, potential conflict of interests, etc.

11. Members reckoned that it might be due to its leniency that LAD had, in the past, allowed APs for criminal legal aid cases to nominate a lawyer and considered such nominations in a similar manner as that in civil legal aid cases, which led to the formation of the misconception that nomination of lawyers for criminal legal aid cases was APs' statutory "right". It was agreed that DLA should assign lawyers to APs in these cases and urged that the Administration should sternly rectify that misconception.

12. In response to members' views and concerns, the Administration advised that legal advice on the Enhancement Measures had been sought from the Department of Justice and it was clear that they were compliant with the Basic Law and the laws of Hong Kong. The Administration further explained that, while Article 35 of the Basic Law provides that Hong Kong residents shall have the right to, among other things, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies, this was by no means absolute and DLA had all along had the discretion to decide whether to assign the lawyers chosen by APs under Cap. 91. Furthermore, nomination of lawyers for criminal legal aid cases was not provided for under the Legal Aid in Criminal Cases Rules (Cap. 221D).

13. The Administration also stressed that when assigning lawyers for APs, LAD would closely monitor the performance of the legal aid lawyers and DLA would take into account the interests of APs and the efficient use of public funds when making the final decision. If appropriate, LAD would also consider the disciplinary actions or adverse comments previously made by the court on a legal aid lawyer, when deciding whether to assign a new case to him/her.

14. There was a concern among some barristers that, when assigning criminal legal aid cases to lawyers, it might not be fair if LAD merely looked at the number of cases handled by a lawyer without taking the number of court days into account. Some lawyers might be reluctant to take up simple cases in order to reserve opportunities for handling cases with longer trials, hence affecting APs' access to justice. In response, the Administration reiterated that under the Enhancement Measures, it would be the standard practice for DLA to assign lawyers to AP in criminal legal aid cases. Also, it had been the practice that, in assigning criminal legal aid cases to counsel, one of the assignment criteria was that the fees received by the same counsel should not generally exceed \$1.5 million within the past 12 months.

Nomination of lawyers by legally aided persons

15. An enquiry was raised on whether JR-related legal aid cases were classified as civil legal aid cases so that the nomination of lawyers by APs for those cases would be allowed. The Administration replied in the affirmative and stressed that the final decision would be subject to DLA's consideration and the new JR case limits.

16. In response to a concern that the Enhancement Measures might fail to eradicate the abuse of JR-related legal aid cases, the Administration advised that the new JR case limits had been proposed to address the problem raised. Furthermore, when processing legal aid applications, LAD would vigilantly monitor the merits of the applications, in particular JR-related ones, and would

continue to monitor at various stages of proceedings after legal aid had been granted. Legal aid would be discharged for those cases which ceased to have merits owing to changes in circumstances so that there was no case for further litigation.

Limits on the assignment of civil and judicial review-related legal aid cases

17. Some members considered that lowering the civil case limits and imposing the new JR case limits would ease public concerns about the overconcentration of legal aid cases in a handful of lawyers. The case limits would also help offer more opportunities for solicitors and barristers on the Legal Aid Panel (“the LA Panel”) to gain experience in the handling of civil and JR-related legal aid cases, so as to enlarge the pool of lawyers having the relevant expertise and experience ultimately. Lowering the civil case limits in general would ensure a more equitable distribution of legal aid cases to legal aid lawyers, which would also help prevent the activities of champerty.

18. Members considered that the civil and JR case limits could also benefit APs as lawyers taking up too many legal aid assignments could not possibly focus their efforts on all their assignments concurrently, which would jeopardize their performance and APs' access to justice.

Enlarging the pool of qualified lawyers to take up legal aid cases

19. Based on feedback from practising solicitors, some members were concerned that the minimum experience requirements for selecting lawyers to LA Panel had imposed a high threshold which prevented young barristers from joining it. Those lawyers who failed to meet the minimum requirements would not be selected to LA Panel but then they would have no chance to handle legal aid cases to accumulate that experience, and thus were caught in a vicious cycle. In this way, legal aid cases would still be monopolized by a handful of lawyers.

20. In response, the Administration clarified that both legally aided and non-legally aided cases handled by lawyers in relevant areas of work, e.g. divorced cases, would be counted as relevant for consideration by LAD. If LAD had doubts and queries about the truthfulness of experience claimed by lawyers who wanted to be selected to LA Panel, LAD would conduct verification, e.g. by checking details of the relevant court cases of the claimed experience if appropriate.

21. In response to an enquiry on whether the handling of cases assigned by the Duty Lawyer Service (“DLS”) (including the provision of legal advice) would be counted as relevant experience for consideration as legal aid lawyers, the Administration explained that since the scope of DLS cases was quite different

from that of legal aid cases which were handled at District Court or above, DLS experience was normally not counted as relevant at present. However, LAD would keep an open mind and see if the DLS cases handled were more complex in nature so that they could be recognized as relevant experience.

Strengthening Case Management

22. Members were pleased to note that one of the measures proposed for strengthening case management was to discharge legal aid (or reassign lawyers) when the AP (or the assigned lawyers) engaged additional private lawyers (albeit on a *pro bono* basis or eventually rejected by the Court) without LAD's prior agreement.

23. In response to an enquiry about the circumstance(s) under which LAD's prior agreement might be given for the engagement of additional private lawyers, the Administration stressed that under no circumstance would an AP be allowed to engage additional lawyer to represent him/her with own financial resources if a legal aid lawyer had been assigned.

Enhancing transparency of the legal aid system

24. It was noted that LAD would request the legal aid applicants to give written consent for disclosing the results and/or the reasons for granting or refusing their applications whenever DLA considered appropriate. Whilst agreeing that it was important to enhance transparency and the above measure would help remove misconception or misunderstanding about LAD's work, members enquired whether written consent was mandatory whenever a legal aid application was submitted or only when DLA considered it appropriate to do so. Also, members enquired what factors would be taken into account and whether an applicant's legal aid application would be considered if he/she refused to give the written consent.

25. In reply, the Administration agreed that the disclosure of LAD's decision in granting or refusing a legal aid application, the reasons of refusal, and the results of appeal in case the applicants appealed against LAD's decision to refuse would certainly help enhance the transparency of the legal aid system. With respect to the common misconception that LAD's decisions of rejecting a legal aid application were frequently overruled on appeal by the applicants, the Administration clarified that LAD was indeed successful in maintaining over 95% of its decisions under appeal.

Judicial review-related legal aid cases

26. Members mentioned about a number of JR cases dismissed by the courts and various comments of the courts that the cases were not arguable, that the plaintiffs had no locus standi in lodging the applications, or the poor performance of lawyers in certain cases. While the Administration had advised previously that the annual costs incurred by JR-related legal aid cases only accounted for a small percentage of LAD's annual budget, LAD should be more stringent in screening JR-related legal aid applications. It was pointed out that the upsurge in the number of JR cases in the past had unnecessarily increased the workload of judges and thus delayed justice.

27. In reply, the Administration indicated that the annual costs incurred for JR-related legal aid cases accounted for about 3-4% of LAD's annual expenditure, i.e. around \$20 million on average per year, and the number of such cases constituted a small number of cases for LAD (23 cases in 2018, 18 cases in 2019 and 21 cases in 2020). In addition, a decreasing trend was observed. Members opined that while the figures might seem modest, the social cost borne by society in just one JR case (e.g. one which seriously delayed an infrastructural project) could be enormous. LAD should remain vigilant in processing the applications.

28. Noting that there had been a serious backlog of JR cases relating to non-refoulement ("NR") claims in the Judiciary, there was a grave concern about the legal aid granted to NR claimants which would add to the serious burden. In reply, the Administration explained that NR cases in which legal aid was granted was rare, with only 63 in 2019, 61 in 2020 and 52 in 2021 (up to October 2021) respectively. The majority of JR cases relating to NR claims were proceeded with without legal aid.

29. There was a view that while it was true that the JR mechanism could be abused, JR remained an important and effective judicial process to check against the Administration's acts. Members expressed their hope that, with the introduction of the Enhancement Measures, public confidence in the legal aid system and the JR mechanism could be restored, and interests of APs could also be upheld through better management of assigned cases.

Latest position

30. The Enhancement Measures were fully implemented by the end of 2021. The Administration will report to the Panel on the implementation of the Enhancement Measures at the meeting to be held on 22 May 2023.

Relevant papers

31. A list of relevant papers is in **Appendix**.

Council Business Division 4
Legislative Council Secretariat
18 May 2023

**Background brief on the enhancement measures
to the legal aid system in Hong Kong**

List of relevant papers

Meeting	Date	References
Panel on Administration of Justice and Legal Services	26 October 2021	Paper from the Administration Minutes

Council Business Division 4
Legislative Council Secretariat
18 May 2023