

**For discussion
on 18 October 2021**

Legal Aid Services Council

Proposed Enhancement Measures to the Legal Aid System in Hong Kong

INTRODUCTION

This paper proposes a package of enhancement measures to the administration of the legal aid system, with a view to strengthening the prevention of potential abuse, enhancing transparency and thereby the public's understanding of the work of the Legal Aid Department ("LAD") and confidence in the system, and strengthening case management.

BACKGROUND

2. "Rule of law" is a core value of Hong Kong and a cornerstone of its success. 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. The legal aid system in Hong Kong has been playing this important role. Owing to the professionalism and excellent work accomplished by LAD over the past 50 years, Hong Kong has an internationally acclaimed and comprehensive legal aid system. The Court of Final Appeal expressed in a judgment in May 2018 that "Hong Kong's relatively generous system of legal aid (compared with many other jurisdictions) has ensured that most cases of public importance have over the years been determined by the courts¹". That judgment also mentioned that legal aid has, particularly since 1997, played a significant part in the vast majority of public interest litigation cases.

3. At the Legislative Council Question and Answer session on 2 June 2021, the Chief Executive announced that the Chief Secretary for Administration's Office ("CSO") and the LAD would examine the operational details such as administration, distribution of cases and selection of lawyers regarding legal aid applications.

¹ Extracted from paragraph 27(5) of the Court of Final Appeal's judgment dated 15 May 2018 in *Designing Hong Kong Limited v The Town Planning Board and Secretary for Justice* [2018] HKCFA 16.

Recent Concerns and Current Review

4. There have 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 non-refoulement claimants). There are 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 LAD to assign them as legal aid lawyers. There are also concerns whether some criminal legal aid cases and JR-related legal aid cases are 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.

5. Given the importance of the legal aid system in upholding the rule of law in Hong Kong, it is essential to maintain public’s confidence in the system, and ensure that the system can continue to meet the aspirations of the community.

6. Along the above direction, the current review aims 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) enlarging 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.

PROPOSED MEASURES

Nomination of Lawyers by APs and Assignment of Cases

7. By the end of 2020, there were 2 474 solicitors and 1 161 counsel on the Legal Aid Panel (“Panel”)². Of which, LAD has assigned legal aid cases to 1 026 solicitors (41% of all on the Panel) and 478 counsel (41%) in 2020³. Given the very different expertise required, most solicitors or counsel would specialise themselves in either civil or criminal cases and prefer not to practise in both. In 2020, 932 solicitors (38%) and 218 counsel (19%) took up civil legal aid cases, while 408 solicitors (16%) and 312 counsel (27%) took up criminal legal aid cases.

JR-related cases

8. There were 177 solicitors and 225 counsel on the Panel qualified for taking up JR-related cases in end 2020⁴. In 2020, 82 out of 87 JR-related legal aid cases assigned in that year were handled by 15 solicitors (8.5% of all qualified solicitors) and 37 counsel (16% of all qualified counsel), thus suggestive of a high concentration of cases among these solicitors and counsel.

9. To ease the public’s concern on overconcentration of cases among certain solicitors and counsel, while striking a balance between distributing cases more evenly to equally qualified lawyers and allowing APs to nominate their lawyers, it is proposed that new assignment limits be imposed on JR-related legal aid cases among the overall limit for all civil legal aid cases, namely five for each solicitor and three for each counsel. This would increase the number of solicitors and counsel involved in JR-related cases. Given JR cases’ relative rarity and complexity, having more solicitors and counsel who have such experience will in the long run be beneficial to both the APs and the legal aid system.

² Under Section 4(3) of the Legal Aid Ordinance, any counsel and solicitor shall be entitled to have his/her name included on the Panel unless DLA is satisfied that there is good reason for excluding him/her by reason of his/her conduct when acting or assigned to act for persons receiving legal aid or of his/her professional conduct generally.

³ While there is no statutory experience requirement for a counsel/solicitor to join the Panel, in practice LAD would take into account the nature and complexity of the cases concerned, the counsel’s/solicitor’s experience, specialties, past performance in other legal aid cases and disciplinary record, etc. A counsel/solicitor must have met certain experience requirement and has normally handled a certain number of relevant cases before he or she would be assigned for a particular category of cases.

⁴ For counsel or solicitors to be qualified for taking up JR-related legal aid cases, they must have at least 3 years of working experience in the profession, and have handled at least 5 relevant cases in the past 3 years.

10. After the imposition of the new assignment limits and based on the number and pattern of cases in 2020, it is expected that for each year an additional 37 cases (43% of all JR cases assigned in the year) shall become available for assignment to other qualified solicitors on the Panel, while 27 cases (38% of all JR cases assigned in the year) shall be available for assignment to other qualified counsel. Assuming each case would be assigned to one solicitor and one counsel, as many as 37 other solicitors (around 21% of those qualified on the Panel) and 27 counsel (around 12% of those qualified on the Panel) may be assigned with JR-related legal aid cases each year.

Other civil cases

11. For non-JR-related civil legal aid cases, while we do not observe similar high concentration of assignment amongst solicitors and counsel, to forestall possible over-concentration to ease public concern, we believe there is room for adjustment of the overall assignment limits from 35 to 30 for solicitors and from 20 to 15⁵ for counsel. In the long run, the new limits will also facilitate the creation of a wider pool of qualified/experienced lawyers on the Panel.

12. In fact, the majority of civil legal aid cases have all along been non-JR related and concern people’s livelihood, e.g., matrimonial and personal injuries cases. We therefore intend to maintain status quo with regards to lawyer nomination, i.e. the APs’ nominations will still be subject to DLA’s consideration. Allowing nomination for these cases recognises the fiduciary nature of the relationship between APs and their lawyers, who may have already represented them at the early stage of the proceedings or in the lower courts, and hence save the time, effort and in turn legal costs arising from having to familiarise with the case details. In particular, in cases where property or damages are successfully recovered or preserved for the APs in the proceedings, they are required to reimburse the Government the legal costs incurred out of the property or damages recovered or preserved. It is hence considered not unreasonable to allow for nomination for such cases.

⁵ Current assignment limits (effective since January 2018):

Solicitor	Civil : 35 cases in the past 12 months
	Criminal : 25 cases or \$750,000 legal aid fees (whichever occurs first) in the past 12 months
Counsel	Civil : 20 cases in the past 12 months
	Criminal : 25 cases or \$1.5 million legal aid fees (whichever occurs first) in the past 12 months

13. In addition, the arrangement of nomination has been provided for under the law. Section 13(1) of the Legal Aid Ordinance, Cap. 91, provides that –

*“Where a legal aid certificate is granted, the Director may act for the aided person in any proceedings, or part of any proceedings, and the Director may assign counsel or solicitor, **to be selected by the aided person**, if he so desires, or otherwise selected by the Director, and the Director shall endorse on the legal aid certificate the name of any counsel or solicitor assigned.”*
(emphasis added)

14. Previous legal advice reaffirms that the Director of Legal Aid (“DLA”) has a discretion as to whether to assign the solicitor or counsel chosen by the AP (for example, if the counsel chosen lacks experience or is too senior for the matter, the solicitor is overloaded or not possessing the necessary expertise). However, the choice by an AP must be **given sufficient weight** so that, for example, if the solicitor or counsel is appropriate for the task, not overloaded and there is no other objection, effect should be given to the wishes of the aided person.

Criminal Cases

15. In 2020, 407 solicitors have taken up a total of 2 695 criminal legal aid cases and 308 counsel have taken up 2 738 criminal legal aid cases. The top 20 solicitors and the top 20 counsel (in terms of the number of such cases handled) have handled 504 (19%) and 549 (20%) cases respectively. Meanwhile, five solicitors and six counsel have reached their case assignment caps (footnote 5 refers).

16. Unlike civil legal aid cases which are covered by the LAO, nomination of lawyers for criminal cases is not provided for under the Legal Aid in Criminal Cases Rules (Cap. 221D). However, the practice over the years is that APs for criminal cases used to nominate a lawyer and LAD would consider such nominations in a similar manner as that in civil cases. Although DLA would decide on whether the AP’s nomination should be acceded to after taking into account a number of factors, this practice has given some APs and members of the public a misconception that the nomination of lawyers for criminal cases is a statutory “right” of the APs.

17. To avoid such misconception and to allow LAD to build up a larger pool of Panel lawyers with experience in handling criminal legal aid

cases, we propose that the standard practice should be for DLA to assign lawyers to APs. DLA should only accept nomination of lawyers under exceptional circumstances, such as the nominated lawyer having represented the AP in lower court(s).

18. LAD will set up registers of lawyers on the Panel for cases of different nature and at different courts, having regard to the expertise and experiences of the lawyers. LAD will consider devising rosters for some of the registers. Nonetheless, DLA will make the final decision on the assignment.

19. Like the new limits for JR cases and lower assignment limits for civil legal aid cases, this measure should help create larger pools of qualified legal aid lawyers on the Panel for different types of cases and in turn benefit the APs in the longer term.

Enhancing transparency of LAD's work

20. It appears that many of the recent concerns in the community towards LAD stem from certain misunderstanding and misconception of LAD's work. Often, LAD may not be able to clarify its stance or case details in a quick manner as it is bound by legal professional privilege and certain privacy restrictions. It is proposed that LAD shall request legal aid applicants (may start with JR-related ones) to **give their written consent** to LAD for **disclosing the result and/or the reason for granting or refusing their applications** whenever DLA considers appropriate.

21. Without compromising any court proceedings and relevant privacy restrictions, LAD will also regularly release relevant legal aid statistics for various types of cases (including JR cases) on its website, such as the following –

- (a) Number of successful applications;
- (b) Number of refused applications;
- (c) Number of refused applications which do not pass means/merits test;
- (d) Number of counsel involved;
- (e) Number of solicitors involved;

- (f) Number of cases handled by the top five/ten solicitors/counsel;
- (g) Legal aid expenditure involved;
- (h) Number and percentage of cases with favourable outcome;
- (i) Amount of legal costs recovered;
- (j) Number of suspected champerty cases reported to the Police;
- (k) Number of “Regulation 11 Orders”⁶ issued for banning individuals who have abused the legal aid system from making legal aid applications within a specified period of time; and
- (l) Number of occasions where DLA exercises discretion under section 5AA of LAO for waiving the financial eligibility limit for cases involving Bill of Rights and/or International Covenant on Civil and Political Rights issues and legal aid applicants whose financial resources have exceeded the specified limit.

22. LAD will also set out clearly the criteria and factors taken into account in its conduct of the merits test and the criteria adopted in the assignment of legal aid cases, such as the manpower and resource of individual law firms and how to assess them, performance records of the assigned lawyers in the firm, and whether there has been delay in progress in legal aid cases, etc. for reference of the public and the legal profession.

23. The enhancement shall help the public better understand the rationale of DLA’s decisions and avoid misunderstanding. This shall also complement the publicity programme being carried out hand-in-hand by the Legal Aid Services Council (“LASC”) and LAD.

⁶ Regulation 11 of the Legal Aid Regulations, Cap. 91A, stipulates that –

- (1) Where a person has applied for and been refused a certificate -
 - (a) on 2 or more occasions where the applications relate to substantially the same cause or matter; or
 - (b) in any other case, on 4 or more occasions,
 and it appears to the Director that his conduct has amounted to an abuse of the facilities provided by the Ordinance, the Director may order that no consideration shall be given to any future application by that person.
- (2) No such direction shall—
 - (a) apply to any application by that person on behalf of an infant; or
 - (b) remain in force for a period longer than 3 years.

Strengthening Case Management

24. To better manage assigned legal aid cases, we propose introducing the following improvement measures:

- (a) LAD will impose a duty on assigned lawyers to inform LAD timely if it is foreseeable that they will not be able to perform their duties, such as in situations where the assigned lawyer has been arrested or charged for a criminal offence. There will be consequences for failure to timely inform LAD;
- (b) LAD will build in a mechanism to reassign a case to other lawyers where the originally assigned lawyers are perceived to have conflict of interests or under situations which render them unsuitable/unavailable for representing the APs;
- (c) LAD will discharge legal aid (or reassign lawyers) when the AP (or the assigned lawyers) engages additional private lawyers (albeit on a pro bono basis or eventually rejected by the Court) without LAD's prior agreement;
- (d) LAD will ask APs to declare alternative source(s) of financial aid for their cases before and after the legal aid application has been approved;
- (e) LAD will set up a dedicated internal JR Monitoring Committee, to be chaired by DLA, to oversee the administration of assignments to lawyers for JR-related cases;
- (f) LAD shall regularly report to the LASC on its handling of JR applications and management of relevant approved cases where necessary;
- (g) LAD will strengthen its liaison with the insurance sector and investigate referred cases where there was evidence to suggest that there were improper touting⁷ and case conduct by lawyers, in particular for traffic-related injuries claims legal aid cases and, for substantiated cases, consider not assigning legal aid cases to the solicitors/counsel concerned for a certain period of time.

⁷ There has been recent concerns that the legal aid system has been abused by lawyers who touted victims of traffic accidents to seek legal aid assistance, thereby leading to substantial increase in insurance premium.

25. These proposed measures shall bring about stronger prevention against potential abuse of the legal aid system and thereby help ensure the efficient use of public funds. Interests of APs can also be upheld through better management of assigned cases.

Strengthening Processing of Legal Aid Applications for JR-related Cases

26. For JR-related cases, we propose strengthening LAD’s gate-keeping role through the following –

- (a) While continuing to apply stringent merits test and only grant legal aid to JR-related applications with reasonable grounds, LAD will issue limited legal aid certificates by stages such that LAD will vigilantly monitor merits of these cases at various stages of proceedings (for example, to extend the legal aid certificates on the condition that leave for JR is granted). LAD will discharge those which cease to have reasonable grounds to proceed;
- (b) LAD will critically examine legal aid applications that involve multiple JR proceedings seeking the same or substantially the same outcome and grant legal aid only to the application which involves the most substantive grounds for JR; and
- (c) LAD will continue to exercise its authority to issue statutory order (i.e., the abovementioned “Regulation 11 Orders”) that no application from a person would be processed for up to a period of three years if that person abuses legal aid services, e.g., through numerous applications made without sufficient grounds and repeated refusal.

ADVICE SOUGHT

27. Views on the above proposed enhancement measures are invited.

**Chief Secretary for Administration’s Office
Legal Aid Department
October 2021**