

LCQ12: Legal aid services

Following is a question by the Hon Paul Tse and a written reply by the Chief Secretary for Administration, Mr Matthew Cheung Kin-chung, in the Legislative Council today (January 13):

Question:

Under the Legal Aid Ordinance (Cap. 91), a person granted legal aid by the Director of Legal Aid (aided person) may nominate a solicitor/counsel of his/her own choice to act on his/her behalf. As the Legal Aid Department (LAD) acts in accordance with the principle that an aided person's interest is of paramount importance, it fully respects and will not reject any nomination unless there are compelling reasons to do so. In addition, even if a nominee does not meet the requirements concerning year of service and case-handling experience in respect of the relevant type of cases as set out in the Manual for Legal Aid Practitioners, the LAD will still make the assignment according to the will of the aided person. There have been comments that such a practice is unfair to other solicitors/counselors with considerable experience, and fuels the formation of specific economic circles in the legal profession. On the other hand, there have all along been comments from the community querying the excessively lenient criteria adopted by the LAD for vetting and approving legal aid applications, and the excessively high average legal aid expenses of each case. Some members of the public are of the view that the authorities should take measures to improve the legal aid system, with a view to allocating legal aid services that are funded by public money to the needy in a fairer manner. In this connection, will the Government inform this Council:

(1) whether the LAD has stipulated a cap on the legal aid expenses for each case; if so, of the relevant policies and criteria adopted, as well as how such policies and criteria compare with those adopted by other common law jurisdictions (e.g. the United Kingdom, Australia, Canada and Singapore); if not, whether the LAD will, by drawing reference from the practices of such jurisdictions, stipulate the relevant cap;

(2) how the policies under which an aided person (including aided persons of torture claims and judicial review cases) is entitled to nominate a solicitor/counsel of his/her own choice to act on his/her behalf compare with the relevant policies of the aforesaid jurisdictions; whether it has assessed if Hong Kong's relevant policies are overly lenient;

(3) whether there was a phenomenon in the past three years in which legal aid cases of a particular type (e.g. torture claims and judicial review cases) were assigned to several certain solicitors/counselors in an unduly concentrated manner; if so, whether it can set out, by name of such solicitors/counselors, the number of legal aid cases they handled and the total amount of legal fees charged;

(4) among the cases for which legal aid was granted by the LAD in each of the past three years, of the number and percentage of those in which the solicitors/counsels assigned did not meet the aforesaid requirements concerning year of service and case-handling experience; how such figures compare with those of the aforesaid jurisdictions; and

(5) given that currently the LAD will, in vetting and approving legal aid applications, entrust the solicitors/counsels assigned to make an assessment on whether the cases or defences concerned meet the requirement of having a reasonable chance of success, whether the Government has assessed if such a practice constitutes potential conflict of interests; if it has assessed, of the outcome; if not, whether it will conduct an assessment expeditiously?

Reply:

President,

All along, the Government's policy objective of legal aid is to ensure that no one with reasonable grounds for taking or defending a legal action is denied access to justice because of lack of means. The Legal Aid Ordinance (Cap. 91) (LAO) provides that legal aid will only be granted to applicants who satisfy both the merits test and the means test. In assessing the merits of an application, the Legal Aid Department (LAD) will carefully look into and consider the facts of the case, evidence available and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted.

The LAO provides that the Director of Legal Aid (DLA) may act for an aided person through in-house professional lawyer or assign any lawyer in private practice selected from the Legal Aid Panel (the Panel) by either the DLA or the aided person. When an aided person nominates a lawyer pursuant to LAO by himself/herself, having regard to the interest of an aided person, the LAD normally gives weight to such a nomination. However, the LAD may also reject the nomination if the lawyer nominated by the aided person is considered not appropriate on grounds such as having previous records of unsatisfactory performance, disciplinary actions taken against the nominated lawyer by a regulatory body, or language requirements of the proceedings which are likely to undermine the aided person's interest in the proceedings; or the aided person has made repeated or late requests for change of lawyer without reasonable grounds. Apart from the nomination made by the aided person, the LAD will, having regard to the principle of protecting the interest of the aided person, consider a series of relevant factors and assign the legal aid case to a suitable lawyer on the Panel. Therefore, instead of assigning cases evenly to lawyers on the Panel, the LAD will, after taking into account the experience and expertise of the lawyers, nature and complexity of the cases, select lawyers from the Panel in accordance with the established guidelines and criteria, including the minimum experience requirements, performance record in handling previous cases, and whether the lawyer has exceeded the limit on assignments of legal aid work.

In general, counsel or solicitors who were assigned legal aid cases

should at least have three years of experience in the legal sector, and should have handled a minimum number of civil or criminal cases in the relevant area of work in the past three years. As regards criminal cases, the LAD has different requirements on the seniority of solicitors/counsel for cases corresponding to the levels of courts concerned. However, under certain special circumstances, such as some cases of exceptional complexity, involving difficult points of law or arguments or of importance, the DLA may, apart from assigning a more senior counsel to handle such cases, exercise discretion to assign another solicitor/counsel on the Panel who has not met the experience requirement to assist in handling such cases. As for cases of special or rare nature, if the LAD has difficulties in identifying a solicitor/counsel from the Panel who had handled sufficient number of relevant cases in the past three years, it may also exercise discretion to assign the case to a solicitor/counsel who is considered competent enough yet has not fully satisfied the abovementioned requirements.

My reply to the questions is as follows:

(1) As some legal aid cases involve very complicated facts of the case and longer trial, to ensure that eligible aided persons will not be denied access to justice because of financial difficulties, the LAD currently has not stipulated a cap on the legal aid expenses for each case. However, the LAD attaches great importance to and closely monitors the performance of assigned lawyers to ensure prudent use of public funds and safeguard of the interests of aided persons. The LAD requires all solicitors and counsel on the Panel to adhere to the Manual for Legal Aid Practitioners, which, inter alia, specify the statutory provisions, the requirements of the LAD and the basis of fees charged by lawyers in handling legal aid cases. Subject to the circumstances of individual cases, the Departmental Monitoring Committee chaired by the DLA will take actions against the assigned lawyers with unsatisfactory performance, which include issuance of warning letter, placing a lawyer on the Record of Unsatisfactory Performance/Conduct, removing a lawyer from the Panel, or/and re-assigning cases to other lawyers.

The LAD does not have the corresponding information of other common law jurisdictions about setting a cap on the legal aid expenses for each case for comparison.

(2) Legal aid policies and coverage vary in different common law jurisdictions, among which the arrangement of allowing the aided persons to select lawyers by himself/herself differs. Thus, it is difficult to have a direct comparison. As far as the LAD understands, a certain degree of freedom is allowed for the aided persons to select lawyers in the United Kingdom and New Zealand. In view of the principle that the aided person's interest is important, as well as the fact that the LAD has an effective mechanism in place to prevent the abuse of services as mentioned above, we do not consider the relevant policies in Hong Kong are overly lenient.

(3) The aided persons tend to select solicitors/counsel with abundant experience and expertise in handling relevant cases as their legal representatives when nominating a lawyer. The LAD's assignment criteria set

the limit on the number of assignments for each lawyer. Specifically, the limits on assignments of legal aid work for each solicitor are 35 civil cases, and 25 criminal cases or costs received for criminal cases reaching \$750,000 in the past 12 months (whichever occurs first); while for each counsel, the limits on assignment are 20 civil cases, and 25 criminal cases or costs received for criminal cases reaching \$1.5 million in the past 12 months (whichever occurs first). The LAD will consider the nominations made by the aided persons in accordance with the relevant criteria. In 2019, a total of 518 counsel and 1 046 solicitors were assigned legal aid cases. Among them, about 80 per cent of counsel and about 85 per cent of solicitors have attained 10 years of experience or more. The LAD does not consider that legal aid cases of particular type were assigned to several certain solicitors/counsel in an unduly concentrated manner.

As a matter of fact, the percentages of granting legal aid to applications concerning non-refoulement claims and judicial review are quite low. From 2017 to 2019, the successful rates for these two types of applications were 3.9 per cent and 5 per cent respectively. They respectively constituted 0.63 per cent and 0.96 per cent of all successful civil legal aid applications.

(4) As abovementioned, the LAD only assigns legal aid cases to solicitors/counsel who have not fully met the experience criteria under some special circumstances. In the past three years (from 2018 to 2020), among the cases which legal aid was granted, the number and percentage of those in which the solicitors/counsel assigned did not satisfy the minimum requirements concerning years of experience and case-handling experience for each year are set out below. All of them were solicitors/counsel assigned by the LAD to assist the more senior counsel in handling the cases.

Year	No. of cases assigned by the LAD	No. of cases where the solicitor/counsel assigned has not met the minimum requirements concerning year of service and case-handling experience	Percentage
2018	11 907	13	0.11 per cent
2019	11 745	36	0.31 per cent
2020	11 497	16	0.14 per cent

The LAD does not have the corresponding figures of other common law jurisdictions for comparison.

(5) All legal aid applications are vetted by professional lawyers employed in the LAD to assess if applicants satisfy both the means test and merits test

and be granted legal aid. After legal aid has been approved, the LAD may assign solicitors/counsel in private practice to handle the cases, which means the LAD does not entrust the solicitors/counsel in private practice already assigned with the cases to assess the chance of success. On the other hand, if complicated legal issues are involved in the application, the LAD may seek independent legal opinion from counsel in private practice on the merits of the application under section 9 of the LAO (section 9 opinion) to help the LAD determine whether legal aid should be granted. To enable a counsel to give unbiased and impartial advice and avoid conflict of interest, if a counsel's section 9 opinion considers that the LAD should grant legal aid to an applicant, the counsel concerned normally will not be assigned to handle the relevant case. Therefore, the current vetting mechanism for legal aid applications does not constitute any potential conflict of interest.