

**CHAPTER 9**

**THE GOVERNMENT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**GENERAL REVENUE ACCOUNT**

**GOVERNMENT SECRETARIAT**

**Chief Secretary for Administration's Office  
Administration Wing**

**GOVERNMENT DEPARTMENT**

**Legal Aid Department**

**Provision of legal aid services**

# PROVISION OF LEGAL AID SERVICES

## Contents

	Paragraphs
<b>SUMMARY AND KEY FINDINGS</b>	
<b>PART 1: INTRODUCTION</b>	1.1 – 1.3
Legal aid for civil proceedings	1.4 – 1.9
Legal aid in criminal cases	1.10 – 1.12
Legal aid certificates	1.13 – 1.14
Legal Aid Services Council	1.15
The role of the Director of Administration	1.16
Audit review	1.17
<b>PART 2: INCREASING COSTS OF LEGAL AID SERVICES</b>	2.1
OLAS incurred deficits from 1993-94 to 2000-01	2.2
<i>Audit observations on     the increasing costs of legal aid services</i>	2.3
Legal Aid Policy Review of 1997	2.4 – 2.8
<i>Audit recommendations on     containing the costs of legal aid services</i>	2.9
<i>Response from the Administration</i>	2.10 – 2.11
<b>PART 3: SOME MEASURES TO CONTAIN THE COSTS OF LEGAL AID</b>	3.1
Legal aid for matrimonial cases	3.2 – 3.9

	<b>Paragraphs</b>
<i>Audit observations on legal aid for matrimonial cases</i>	3.10 – 3.11
<i>Audit recommendations on legal aid for matrimonial cases</i>	3.12
<i>Response from the Administration</i>	3.13 – 3.15
<b>Assigning out of legal aid cases</b>	3.16 – 3.21
<i>Audit observations on assigning out of legal aid cases</i>	3.22
<i>Audit recommendation on assigning out of legal aid cases</i>	3.23
<i>Response from the Administration</i>	3.24
<b>Problems of monitoring of assigned-out cases</b>	3.25 – 3.26
<b>Franchising and contracting scheme</b>	3.27 – 3.31
<i>Audit observations and recommendation on franchising and contracting scheme</i>	3.32 – 3.33
<i>Response from the Administration</i>	3.34 – 3.35
<b>Conditional fees arrangements in UK</b>	3.36 – 3.38
<b>Introducing conditional fees arrangements into Hong Kong</b>	3.39
<i>Audit observations on conditional fees arrangements</i>	3.40
<i>Audit recommendation on conditional fees arrangements</i>	3.41
<i>Response from the Administration</i>	3.42
<b>PART 4: MEANS TEST AND MERITS TEST</b>	4.1
<b>Means test</b>	4.2 – 4.8
<b>Audit case studies</b>	4.9 – 4.23
<i>Audit recommendations on audit case studies</i>	4.24
<i>Response from the Administration</i>	4.25
<b>A case involving an infant</b>	4.26 – 4.28
<i>Audit observations on a case involving an infant</i>	4.29 – 4.30

	<b>Paragraphs</b>
<i>Audit recommendation on cases involving infants</i>	4.31
<i>Response from the Administration</i>	4.32 – 4.33
<b>Merits test</b>	4.34
<b>Documentation of merits testing</b>	4.35 – 4.37
<i>Audit recommendation on documentation of merits testing</i>	4.38
<i>Response from the Administration</i>	4.39
<b>PART 5: PERFORMANCE INDICATORS AND STRATEGIC PLANNING</b>	5.1
<b>Performance indicators</b>	5.2 – 5.3
<i>Audit observations on performance indicators</i>	5.4 – 5.5
<i>Audit recommendations on performance indicators</i>	5.6
<i>Response from the Administration</i>	5.7
<b>An overarching strategic plan</b>	5.8
<i>Audit observations on an overarching strategic plan</i>	5.9 – 5.11
<i>Audit recommendations on an overarching strategic plan</i>	5.12
<i>Response from the Administration</i>	5.13 – 5.14

Appendix: Acronyms and abbreviations



# PROVISION OF LEGAL AID SERVICES

## Summary and key findings

A. **Introduction.** The Legal Aid Department (LAD) provides legal aid services to any person, regardless of his residency status or years of residence in Hong Kong, who satisfies the criteria for legal aid to pursue civil and criminal proceedings. The objective of legal aid is to ensure that any person who has reasonable grounds for taking or defending a legal action is not prevented from doing so by lack of means. Legal aid for civil proceedings is provided under the Legal Aid Ordinance (Cap. 91) through either the Ordinary Legal Aid Scheme (OLAS), or the Supplementary Legal Aid Scheme (SLAS). Legal aid is also provided to defendants in certain criminal cases (paras. 1.2 to 1.12).

B. In 2000-01, the LAD spent a net amount of \$413 million on legal aid cases through the OLAS. The SLAS is a self-financing scheme which made a surplus of \$8.6 million in the financial year ended 30 September 2000 (paras. 1.13 and 1.14).

C. **Audit review.** Audit has recently conducted a review of the legal aid services provided by the LAD. The audit findings are summarised in paragraphs D to N below.

D. **Increasing costs of legal aid services.** The deficit (i.e. legal aid costs less costs recovered) of the OLAS increased (in real terms) by 280% from \$25.9 million in 1993-94 to \$122 million in 2000-01. Audit considers that there is a need to limit the deficit by adopting more cost control measures to contain the legal aid expenditure of the OLAS (paras. 2.2 to 2.8).

E. Audit has found that the overall expenditure on legal aid may be reduced by introducing measures to contain the costs of legal aid (see paras. F to I below), and by implementing more stringent means testing procedures (see para. J below).

F. **Legal aid for matrimonial cases.** In 2000-01, 36%, or \$144 million, of the civil legal aid costs was incurred for matrimonial cases. Court proceedings are not necessarily cost-effective in resolving family disputes. The Judiciary has provided a family mediation service under a three-year pilot scheme. The Judiciary considers that the mediation service has the advantage of resolving disputes efficiently and cost-effectively, and outside of the litigation process. Under the pilot scheme, agreement had been reached in over 61% of the completed cases. Audit considers that if more people use the mediation service, the LAD's matrimonial caseload and the cost of legal aid for such cases can be reduced (paras. 3.2 to 3.11).

G. **Assigning out of legal aid cases.** In 1998, an Inter-departmental Working Group (IWG) of legal aid completed a review on the monitoring of assigned-out cases. The IWG concluded that there was a case for the LAD to consider undertaking more litigation in-house, in particular general litigation, in order to ensure greater benefit to legal aid clients and provide for professional development and expansion of experience of in-house lawyers. However, Audit noted that the nature and number of cases that could be handled by the LAD is limited by the number of staff, their level of experience and expertise (paras. 3.16 to 3.22).

H. **Franchising and contracting scheme.** The IWG noted that the UK was experiencing a new development in franchising and contracting legal aid services, and recommended that this development should be kept in view. Since April 2001, the UK has applied franchising and contracting to all civil cases to reinforce monitoring of assigned-out cases with the objective of keeping legal aid costs down. In order to obtain a franchise, lawyers have to pass stringent checks set by the legal aid authority. Only those lawyers who have obtained franchises would be allowed to receive legal aid work. Operating in tandem with franchising is the contracting system. Under the contracting system, franchised lawyers have to compete for legal aid work. This drives down the cost of legal aid. In the UK, it is reported that the system of franchising and contracting has the benefits of enhancing the quality of legal aid services, encouraging price competition among lawyers, and improving the accountability of lawyers to the aided persons. In Audit's view, the viability of introducing franchising and contracting into Hong Kong is worth considering as a measure to keep legal aid costs down (paras. 3.27 to 3.32).

I. **Conditional fees arrangements.** Conditional fees arrangements (also known as "*no-win-no-fee*" arrangements) were first introduced in the UK in 1995. Under the conditional fees arrangements, a lawyer who loses a case will not charge fees for his services. However, if the lawyer wins the case, he will receive a success fee from his client on top of his normal fee. Through the conditional fees arrangements, litigants who do not qualify for legal aid, but are not rich enough to pay for the entire costs of the litigation on their own, may obtain affordable legal services on a private basis. In 1998, the IWG recommended that the Department of Justice should be asked to review the issue of conditional fees arrangements at the appropriate time. Audit observes that the conditional fees arrangements have replaced legal aid as a means of financing litigation in personal injuries cases (except medical negligence cases) and money claims in the UK. Audit considers that the viability of introducing conditional fees arrangements into Hong Kong should now be examined (paras. 3.36 to 3.40).

J. **Means test.** The means test aims to ensure that legal aid services are provided only to those who cannot afford the costs of conducting litigation on a private basis. Audit noted from the 82 cases studied that there were many aspects of the means testing procedures which should be tightened up. For example, the LAD should conduct home visits and take further actions to verify the incomes of those applicants who were unable to produce income proof. Audit also found that there were two cases where the applicants claimed to have held assets on behalf of others. In these two cases, the applicants supported their claims by providing the LAD with brief notes signed by their friends declaring that their friends actually owned the assets. The LAD accepted the brief notes as

proof of the applicants' claims. As the value of the assets in question had been excluded from the applicants' financial resources, both applicants passed the means test. Audit considers that such brief notes could not be regarded as substantive evidence that the assets in question were not owned by the applicants (paras. 4.2 to 4.23).

K. **A case involving an infant.** According to the relevant Legal Aid Regulation, when an infant (legally defined as an unmarried person who has not attained the age of 18 years) applies for legal aid, the financial resources of the parents are not included in the computation of the infant's financial resources. Audit noted a case which revealed an anomaly that public money is available to provide legal aid to an infant of financially well-off parents who can afford and are willing to conduct litigation on a private basis (paras. 4.26 to 4.30).

L. **Merits test.** The merits test helps to ensure that legal aid is provided only to people who have reasonable grounds for taking legal action. In the 72 civil cases reviewed by Audit, there were no detailed records as to how the merits tests were conducted (paras. 4.34 to 4.37).

M. **Performance indicators.** The LAD's performance indicators largely focus on reporting operational activities and output. The LAD needs to adopt more performance indicators to assess the efficiency and effectiveness of the LAD's services (paras. 5.2 to 5.5).

N. **Strategic planning.** To determine how its objective can best be achieved and how it could face new challenges and changes, there is a need for the LAD to formulate an overarching strategic plan. The legal aid authorities in advanced countries such as Australia and the UK have strategic plans detailing how legal aid services will achieve the objectives, and how they will continue to make improvements in the provision of publicly-funded legal aid services (paras. 5.8 to 5.11).

O. **Audit recommendations.** Audit has made the following major recommendations that the Director of Legal Aid should:

- (a) in consultation with the Director of Administration, consider adopting more cost control measures to contain legal aid expenditure of the OLAS (para. 2.9(a));
- (b) in consultation with the Director of Administration and the Judiciary Administrator, consider the viability of requiring applicants in matrimonial cases to use the family mediation service, where appropriate, to resolve the disputes, before legal aid is granted (para. 3.12(a));
- (c) provide for more comprehensive professional development of in-house lawyers so as to enable them to handle more litigation in-house, in particular general litigation, and to deal with cases of different nature (para. 3.23);



- (d) in consultation with the Director of Administration, consider the viability of introducing franchising and contracting into Hong Kong (para. 3.33);
- (e) in consultation with the Secretary for Justice, examine the viability of introducing conditional fees arrangements into Hong Kong (para. 3.41);
- (f) take measures to tighten up means testing procedures, including making home visits and taking further actions to verify the incomes of applicants who are unable to produce income proof (para. 4.24);
- (g) in consultation with the Director of Administration, critically review the relevant Legal Aid Regulation which prescribes the method of assessing the means of an infant applicant, in particular to determine whether the resources of parents should be included in the assessment (para. 4.31);
- (h) in cases where the estimated legal aid costs are significant, ensure that the justifications for the grant of legal aid for litigation in such cases are properly documented (para. 4.38);
- (i) identify and develop more efficiency and effectiveness indicators and performance targets to assess the LAD's performance (para. 5.6(a) and (b)); and
- (j) in consultation with the Director of Administration, develop an overarching strategic plan to better achieve the objective of legal aid (para. 5.12(a)).

P. **Response from the Administration.** The Director of Legal Aid has generally accepted or agreed to consider Audit's recommendations. The Director of Administration shares the views of the Director of Legal Aid.

## **PART 1: INTRODUCTION**

1.1 This PART describes the background to the provision of legal aid services in Hong Kong and the objectives of the audit review.

1.2 The Legal Aid Department (LAD) provides legal aid services to any person, regardless of his residency status or years of residence in Hong Kong, who satisfies the criteria for legal aid to pursue civil and criminal proceedings in Hong Kong. Legal aid services are mainly funded by the Government. The objective of legal aid is to ensure that any person who has reasonable grounds for taking or defending a legal action is not prevented from doing so by lack of means. In the annual estimates, the provision for legal aid costs is not cash-limited; supplementary provision may be sought if necessary.

1.3 Legal aid is a means by which those who satisfy the eligibility criteria could obtain the services of a solicitor and, if necessary, a barrister to represent him in court. Legal aid is available for civil and criminal proceedings; details are in paragraphs 1.4 to 1.12 below.

### **Legal aid for civil proceedings**

1.4 Legal aid for civil proceedings is provided under the Legal Aid Ordinance (LAO — Cap. 91):

- (a) through the Ordinary Legal Aid Scheme (OLAS) ; or
- (b) through the Supplementary Legal Aid Scheme (SLAS).

1.5 *Ordinary Legal Aid Scheme for civil proceedings.* The OLAS is available for representation in civil proceedings at the District Court level and above. It is also available for tenancy matters under Part II of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) in the Lands Tribunal, cases of great public concern in the Coroner's Court, and cases of the Mental Health Review Tribunal. The cases covered include matrimonial disputes, personal injury claims, employment disputes, tenancy disputes, contractual disputes, immigration matters and professional negligence claims. Admiralty, bankruptcy and company winding-up proceedings are also undertaken and most of these cases pertain to claims of employees' wages and severance pay.

1.6 To ensure that publicly-funded legal aid services are provided only to those who are in need of them, the LAD has to conduct a means test and a merits test before granting legal aid to an applicant, as follows:

**Means test.** The applicant must show that his financial resources, which are based on his annual disposable income and total capital assets after deduction of certain statutory allowances, do not exceed \$169,700. The Director of Legal Aid may waive the upper financial eligibility limit of \$169,700 and provide legal aid in proceedings in which a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue; and

**Merits test.** The applicant must satisfy the Director of Legal Aid that he has reasonable grounds for bringing or defending the proceedings.

Depending on the financial resources of the legally aided person, he may have to pay a contribution ranging from \$1,000 to \$42,425. He may also have to reimburse the LAD the costs of the proceedings in the event that property has been recovered or preserved on his behalf.

1.7 An applicant who is refused legal aid may appeal to the Registrar of the High Court, or in Court of Final Appeal cases, to a Review Committee (Note 1). Their decision in either case is final.

1.8 **Supplementary Legal Aid Scheme for civil proceedings.** The SLAS provides legal assistance to applicants whose financial resources are above \$169,700 but do not exceed \$471,600. Legal aid is available to cases of personal injury and claims under the Employees' Compensation Ordinance (Cap. 282). It also covers medical, dental and legal professional negligence claims. As in the case of the OLAS, applicants have to pass both the means test and the merits test.

1.9 The SLAS is **self-financing** and is funded by contributions from damages recovered. Applicants are required to pay an application fee of \$1,000 and a fixed contribution of \$42,425 upon acceptance of legal aid. If the proceedings are successful, the aided person has to pay, out of the damages recovered, all the legal costs incurred on his behalf together with 12% of the damages recovered. If the case is settled prior to delivery of briefs to counsel, the aided person is required to pay 6% of the damages recovered.

## **Legal aid in criminal cases**

1.10 In criminal cases, legal aid is provided under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance (Cap. 221). For proceedings in the Court of First Instance and

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**Note 1:** *The Review Committee is composed of (a) the Registrar of the High Court, who shall be the chairman; (b) a barrister qualified to practise in Hong Kong who is eligible to be appointed as a judge of the High Court and who is appointed by the Chairman of the Hong Kong Bar Association; and (c) a solicitor qualified to practise in Hong Kong who has practised as a solicitor for not less than ten years in a common law jurisdiction and who is appointed by the President of the Law Society of Hong Kong.*

the District Court, and in committal proceedings in the Magistrates' Courts, legal aid is granted provided that the Director of Legal Aid is satisfied with the following two conditions:

- (a) the financial resources of the accused person do not exceed \$169,700; and
- (b) legal aid is desirable in the interests of justice.

### **Legal aid provided to appellants**

1.11 Legal aid is also provided to an appellant in appeals to the Court of First Instance, the Court of Appeal and the Court of Final Appeal after the Director of Legal Aid has considered:

- (a) the two conditions mentioned in paragraph 1.10(a) and (b) above; and
- (b) whether or not the appellant has reasonable grounds for an appeal against his conviction or sentence or both (this is also referred to as the "merits test").

For legal aid in capital appeal cases (i.e. involving a charge of murder, treason or piracy with violence), the Director does not need to apply the merits test. The powers of the Director to grant legal aid in capital cases may also be exercised by a judge.

1.12 For cases other than appeals to the Court of Final Appeal, if the Director of Legal Aid refuses to grant the accused person legal aid, he shall file in the appropriate court a notice of his refusal. In this connection, a judge may grant legal aid to an accused person appearing before him. However, where the Director is satisfied that the financial resources of the accused person exceed \$169,700, the refusal of the Director of the application for legal aid shall be final and may not be disturbed. For the Court of Final Appeal cases, an appellant who has been refused legal aid for making an appeal to the Court of Final Appeal may request the Review Committee referred to in paragraph 1.7 above to review the Director's decision.

### **Legal aid certificates**

1.13 An applicant who is offered legal aid will be granted a legal aid certificate, which entitles him to obtain legal aid services. In 2000, some 26,000 applications for legal aid for civil and criminal proceedings were received, and about 12,000 legal aid certificates were granted. In 2000-01, the LAD spent a net amount of \$413 million for the provision of legal aid. Details of the expenditure are shown in Table 1 below.

**Table 1**

**Legal aid expenditure in 2000-01**

	(\$ million)
Legal aid costs (including costs of assigning-out cases to lawyers in private practice and costs paid to winning parties)	473
Personal emoluments and other expenditure of the LAD	233
	<hr/>
	706
Less: Fees and charges recovered (including costs recovered from opposite parties and contributions from legally aided persons)	(293)
	<hr/>
Net legal aid expenditure in 2000-01	<u><u>413</u></u>

*Source: LAD's records*

1.14 As regards the SLAS, there were 286 applications of which 248 legal aid certificates were granted in the financial year ended 30 September 2000. Being a self-financing scheme, the SLAS keeps a separate set of accounts and made a surplus of \$8.6 million in that financial year.

### **Legal Aid Services Council**

1.15 In order to reinforce the independence of legal aid services, in 1996 an independent statutory Legal Aid Services Council was established to oversee the provision of legal aid services by the LAD (but without interfering with its day-to-day operation), and to advise the Government on legal aid policy and funding requirements. The Council is a corporate body independent of the Government. Its chairman, who is not a government official, is independent of the Government and the legal profession. Its members include lawyers and distinguished lay members, and the Director of Legal Aid.

### **The role of the Director of Administration**

1.16 The Director of Administration coordinates legal aid policy matters including reviewing the law, policy and practice relating to the provision of publicly-funded legal aid services.

## **Audit review**

1.17 Audit has recently conducted a review of the legal aid services provided by the LAD. In the review, Audit has examined the following areas and has noted that improvements can be made in their administration:

- (a) increasing costs of legal aid services (PART 2);
- (b) legal aid for matrimonial cases and assigning out of legal aid cases (PART 3);
- (c) means test and merits test (PART 4); and
- (d) performance indicators and strategic planning (PART 5).

## **PART 2: INCREASING COSTS OF LEGAL AID SERVICES**

2.1 This PART reports the increasing legal aid costs and cost control measures that can be adopted.

### **OLAS incurred deficits from 1993-94 to 2000-01**

2.2 In the eight years (Note 2) from 1993-94 to 2000-01, the OLAS incurred deficits every year. As indicated in Table 2 below, during this period, the deficit has increased by 280% (after adjustment for inflation or deflation) from \$25.9 million to \$122 million.

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**Note 2:** *Only the records of these eight years were available in the LAD.*

Table 2

Financial condition of the Ordinary Legal Aid Scheme  
for the period 1993-94 to 2000-01

Year	Legal aid costs (Note 1)	Costs recovered (Note 2)	Percentage of costs recovered	Deficit	Increase of deficit in real terms since 1993-94 (Note 3)
	(a)	(b)	(c) = $\frac{(b)}{(a)} \times 100\%$	(d) = (a) - (b)	
	(\$'000)	(\$'000)		(\$'000)	
1993-1994	91,450	65,526	72%	<b>25,924</b>	-
1994-1995	113,374	77,090	68%	36,284	28%
1995-1996	168,936	87,837	52%	81,099	164%
1996-1997	244,811	120,649	49%	124,162	281%
1997-1998	313,659	188,358	60%	125,301	265%
1998-1999	406,804	213,880	53%	192,924	455%
1999-2000	488,835	310,441	64%	178,394	439%
2000-2001	400,269	278,140	69%	<b>122,129</b>	<b>280%</b>

Source: Audit's analysis of LAD's records

Note 1: The legal aid costs include costs paid for assigning out cases to lawyers in private practice and costs paid to opposite parties upon losing the cases. They do not include the costs of cases handled by in-house lawyers of the LAD as relevant cost data are not kept.

Note 2: Costs recovered include costs received from opposite parties upon winning the cases and contributions paid by legally aided persons.

Note 3: The increase in real terms is the increase adjusted for inflation or deflation using the Composite Consumer Price Index (CCPI). The real increase in a year is calculated as follows:

$$\left[ \left( \text{Deficit in a particular year} \times \frac{\text{Average CCPI in 1993-94}}{\text{Average CCPI in that particular year}} \right) - \text{Deficit in 1993-94} \right] \times 100\%$$

Deficit in 1993-94



## Audit observations on the increasing costs of legal aid services

2.3 As indicated in Table 2 above, the deficit of the OLAS in real terms increased by 280% from \$25.9 million in 1993-94 to \$122 million in 2000-01. The actual deficit was in fact larger. This is because some costing information of the LAD's in-house lawyers and departmental expenses was not included in the legal aid costs (Note 3). Audit considers that there is a need to limit the deficit by containing the size of legal aid expenditure.

### Legal Aid Policy Review of 1997

2.4 Audit noted that the report on Legal Aid Policy Review of 1997 had stated that at that time, no ceiling on the spending on each publicly-funded legal aid case was imposed. The Review Panel considered that this practice should be maintained, because to impose a cap on the spending on a legal aid case would prejudice its conduct and might eventually affect the prospect of success. This was clearly not in the interests of justice and of the legally aided person. Whilst the LAD had already put in place arrangements to monitor the progress of its cases, the Review report also stated that:

- (a) measures to further enhance the cost control and monitoring of case progress should be explored, given the need to ensure that public money should be properly spent;
- (b) the LAD would, in consultation with the Legal Aid Services Council, examine further ways and means to enhance the cost control and monitoring of case progress, taking into account the relevant practice in other jurisdictions; and
- (c) the Government would welcome views on how to enhance the cost-effectiveness of legal aid services in Hong Kong.

2.5 Audit also noted that the LAD had taken some measures to contain the legal aid expenditure (see para. 3.26 below). Nevertheless, the LAD should consider doing more to control the legal aid costs.

2.6 Audit conducted research of overseas legal aid practices. The research has indicated that legal aid authorities of some advanced countries, notably in the State of Victoria of Australia, the Province of Ontario of Canada and the UK, have adopted cost control measures to contain the expenditure on legal aid. These measures include:

- (a) *Ceilings on legal aid expenses.* Ceilings on legal expenses are put on different types of legal aid cases. Once the ceiling is reached, the legal aid authority may not pay further costs; and

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**Note 3:** *Costing information for in-house lawyers and departmental expenses has not been fully captured in the LAD's present system. Upon the implementation of the Information Systems Strategy in the LAD by mid-2002, this problem will likely be solved.*

- (b) ***Limiting the hours spent in proceedings.*** The maximum hours that can be spent by legal professionals on different legal aid services are stipulated. These maximum hours must be observed except in special circumstances which warrant the legal aid authority to exercise its discretion to pay beyond the set limits.

2.7 Audit also noted that an Inter-departmental Working Group (IWG — Note 4) was set up in 1997 to study how the monitoring of legal aid costs should be further enhanced to ensure that public money was properly spent. The IWG recommended that the use of prescribed rates (Note 5) for remunerating lawyers to whom cases had been assigned should be explored.

2.8 In Hong Kong, as legal aid is available to any person who satisfies the criteria for legal aid, the expenditure on legal aid could escalate. In Audit's view, adopting some of the cost control measures used by some advanced countries (see para. 2.6 above), introducing measures to contain the costs of legal aid (see PART 3 below), and implementing more stringent means testing procedures (see PART 4 below) can reduce the overall expenditure on legal aid.

### **Audit recommendations on containing the costs of legal aid services**

2.9 **Audit has recommended that the Director of Legal Aid should, in consultation with the Director of Administration:**

- (a) **consider adopting more cost control measures (taking also into account the audit recommendations in PART 3) to contain legal aid expenditure of the OLAS; and**
- (b) **in devising new cost control measures, consider:**
- (i) **assessing the viability of introducing into Hong Kong cost control measures similar to those adopted by advanced countries; and**
- (ii) **introducing prescribed hourly rates for the fees payable to lawyers to whom legal aid cases have been assigned.**

### **Response from the Administration**

2.10 **The Director of Legal Aid** has said that:

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**Note 4:** *The IWG was chaired by the Director of Legal Aid. Its members included senior officers of the LAD and officers representing the Director of Administration and the Secretary for the Treasury.*

**Note 5:** *The idea of prescribed rates comes from England, Australia and New Zealand. For example in England, remuneration to legal aid practitioners in civil cases, where the legal aid authority is paying the bill, is fixed by either an hourly rate or a rate for each item of work done.*

- (a) the expansion of the scope of legal aid and raising of the financial eligibility limit over the years have largely contributed to the increase in legal aid applications and expenditure;
- (b) by its nature, the OLAS covers cases where there is no or little prospect of cost recovery, i.e. cases which do not involve money claims or cases where order for cost is rarely made by the court;
- (c) the LAD has taken measures to enhance the control of legal aid costs (see para. 3.26 below for measures taken);
- (d) he will explore various measures, including the use of prescribed hourly rates, to ensure that legal aid services are provided cost-effectively; and
- (e) the feasibility of setting a ceiling on legal aid expenses or limiting the hours spent in individual proceedings was considered in the Legal Aid Policy Review of 1997. He remains of the view, as concluded in the Policy Review, that it would not be in the interests of justice or the legally aided person to do so, as it would prejudice the conduct of proceedings and might eventually affect the prospect of success of the case.

2.11 The **Director of Administration** has said that:

- (a) notwithstanding the legal aid policy, which is to ensure that no one is prevented from seeking justice because of a lack of means, he attaches great importance to the cost-effectiveness of legal aid services so as to ensure that public funds are properly spent; and
- (b) he shares the view of the Director of Legal Aid on the issue of setting a ceiling on legal aid expenses or limiting the hours spent in individual proceedings.

### **PART 3: SOME MEASURES TO CONTAIN THE COSTS OF LEGAL AID**

3.1 This PART shows that there is room for improvement in legal aid for matrimonial cases, assigning out of legal aid cases and monitoring of assigned-out cases. By making improvements in these areas, there is the potential for the LAD to reduce the costs of legal aid.

#### **Legal aid for matrimonial cases**

3.2 In 2000-01, \$144 million (or 36%) of the civil legal aid costs was spent on more than 5,000 matrimonial cases (see Table 3 below for details).

**Table 3**

#### **Legal aid costs in 2000-01**

<b>Type of case</b>	<b>Costs</b>	
	<b>(\$ million)</b>	<b>(Percentage)</b>
Matrimonial	<b>144</b>	<b>36%</b>
Road accident claims	52	13%
Employees' compensation	25	6%
Miscellaneous personal injury	95	24%
Landlords and tenants	4	1%
Wages claims	9	2%
Immigration matters	13	3%
Others	59	15%
	<hr/> <b>401</b> <hr/>	<hr/> <b>100%</b> <hr/>

*Source: LAD's records*

3.3 Over the years, the LAD has continuously been handling a large number of matrimonial cases. In doing so, the LAD has asked applicants for legal aid to consider using the family mediation service proffered by the Judiciary.

3.4 The family mediation service is a three-year pilot scheme which began operation in May 2000. The Judiciary has set aside \$7.5 million for the service. The service is a problem-solving process designed to help couples who intend to be separated or divorced to reach their own mutually acceptable agreements regarding future arrangements for their children and/or resolution of financial matters. The service may not be appropriate for resolving all matrimonial disputes, such as those involving child abuse and domestic violence.

3.5 People who wish to use the service can select a mediator from a pool of 54 mediators (which includes two social workers from the Child Custody Services Unit of the Social Welfare Department and 52 mediators from Non-Government Organisations (NGO) and in private practice). Some of these mediators have qualifications in law, psychology, social work or social science. They are specially trained and have to meet the accreditation requirements covering knowledge and skills in negotiation and dispute resolution. The remuneration received by an NGO mediator and a private mediator is \$600 per hour. During the period May 2000 to July 2001, the Judiciary handled 450 mediation cases. As at 31 July 2001, of these 450 cases, 349 cases had been completed. The Judiciary expects that the service will be provided to at least 1,000 couples during the three-year pilot scheme.

3.6 The mediation process includes information sessions, intake interviews and a maximum of 15 hours of mediation sessions, which are provided free of charge. For cases that exceed the 15-hour limit, the special approval of the Mediation Coordinator of the Judiciary is required. Audit's enquiries of the Judiciary have indicated that of the 349 cases abovementioned, over 90% were completed within the 15-hour limit, and agreement had been reached in over 61% of the cases. The Judiciary considers that the service has the advantages of avoiding the tension and conflict in an adversarial litigation system, and saving the time and money of couples seeking divorce because they do not have to contest matters in court.

3.7 Although the LAD asks legal aid applicants in matrimonial cases to consider using the family mediation service, mediation cannot be made a pre-condition for the grant of legal aid under the existing LAO. Legal aid will not be denied merely because an aided person has refused to use the mediation service.

#### **Use of mediation in matrimonial cases by legal aid authorities of advanced countries**

3.8 Audit's research of the practices of legal aid authorities of advanced countries has indicated that they require the use of mediation before granting of legal aid. As an example, in the UK the aided persons are normally required to assess whether mediation is suitable for them before

receiving legal aid to use court proceedings. Exemptions from this requirement are, for example, where it is in the interests of justice that legal representation be granted as a matter of urgency, or where a mediator is satisfied that mediation is not suitable to resolve the dispute.

3.9 As a further example, the legal aid authority of the State of Victoria of Australia also requires applicants for legal aid to use mediation before assistance for court proceedings is granted.

### **Audit observations on legal aid for matrimonial cases**

3.10 Matrimonial cases accounted for a third of the civil legal aid costs in 2000-01. Court proceedings are not necessarily cost-effective in resolving family disputes. Under the present statutory regime, the LAD can only ask applicants for legal aid to consider using the family mediation service currently provided by the Judiciary under a three-year pilot scheme. However, the LAD has no power to make it a pre-condition for granting of legal aid.

3.11 **The Judiciary considers that the mediation service has the advantage of resolving disputes efficiently and cost-effectively, and outside of the litigation process. Under the pilot scheme, agreement had been reached in over 61% of the completed cases. In addition, mediation could reduce the conflict between the parties concerned and could avoid protracted litigation. Audit considers that if more people use the mediation service, the LAD's matrimonial caseload and the cost of legal aid for such cases can be reduced.**

### **Audit recommendations on legal aid for matrimonial cases**

3.12 **Audit has recommended that the Director of Legal Aid should, in consultation with the Director of Administration and the Judiciary Administrator:**

- (a) **consider the viability of requiring applicants in matrimonial cases to use the family mediation service, where appropriate, to resolve the disputes, before legal aid is granted; and**
- (b) **identify the exceptional circumstances under which the use of mediation is regarded as not suitable in resolving a matrimonial dispute.**

### **Response from the Administration**

3.13 The **Director of Legal Aid** has said that he would closely monitor the operation of the pilot scheme and keep in view Audit's recommendations. If effectiveness of the pilot scheme is established, he would consider Audit's recommendations with the Director of Administration.

3.14 The **Director of Administration** has said that he will keep in view the operation of the pilot scheme and its impact on legal aid services, with a view to facilitating an evaluation and review towards the end of the pilot scheme.

3.15 The **Judiciary Administrator** has said that the Judiciary has commissioned a tertiary institution in Hong Kong to conduct an evaluation of the effectiveness of the family mediation service.

## **Assigning out of legal aid cases**

### **Reasons for assigning out**

3.16 As at 1 March 2001, there were some 4,800 solicitors and about 750 barristers practising in Hong Kong. The names of 1,862 solicitors and 604 barristers were included on the lists of Legal Aid Panels. The LAD assigns cases to solicitors or barristers on the lists to act for legally aided persons.

3.17 Upon granting of legal aid, an aided person's case can either be assigned to an in-house lawyer or a lawyer in private practice. The main reasons for assigning out civil cases are as follows:

- (a) both parties to the proceedings are legally aided. In such a case one of the parties must be represented by a lawyer in private practice in accordance with section 12 of the LAO;
- (b) a conflict of interest exists (e.g. legal action is brought against the Government or the LAD);
- (c) in the course of proceedings, a private litigant encounters financial difficulty and applies for legal aid. The case will most probably be assigned to the lawyer in private practice who has been handling the case;
- (d) for cases which are connected (e.g. many employees seeking compensation from a common employer), it is considered more appropriate to brief them out to the same lawyer in private practice;
- (e) the capacity and workload of the LAD do not permit it to take on new cases; and
- (f) in-house expertise to handle the case is not available.

3.18 It is stipulated under section 3(3) of the LAO that in-house lawyers of the LAD have the right to advocate in court in civil cases. However, they do not advocate in court in criminal cases because of the apparent conflict of interest in representing the defendant against the Government. As a result, in respect of District Court criminal cases, all cases are assigned out. In High Court criminal cases and criminal appeal cases, in-house lawyers act as the instructing solicitor. Barristers in private practice are assigned to advocate in these cases.

#### **Caseload and expenditure on assigning out**

3.19 The LAD assigned around 70% of its civil cases to lawyers in private practice in each of the past seven years (Note 6). In 1997, because there were some 3,000 Vietnamese boat people cases and 1,000 Mainland-born children right of abode cases, assigned-out civil cases increased to 84%. The figures are shown in Table 4 below.

**Table 4**  
**Number of in-house and assigned-out civil cases**  
**for the period 1994 to 2000**

<b>Year</b>	<b>No. of in-house cases</b>	<b>Percentage</b>	<b>No. of assigned-out cases</b>	<b>Percentage</b>
1994	1,452	21%	5,516	79%
1995	2,276	30%	5,240	70%
1996	2,332	26%	6,802	74%
1997	2,380	16%	12,693	84%
1998	3,311	34%	6,539	66%
1999	3,212	32%	6,863	68%
2000	2,718	30%	6,285	70%

*Source: LAD's records*

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**Note 6:** *In LAD, only the records of these seven years are available.*



3.20 Table 5 below shows the expenditure on assigning out legal aid cases in the seven financial years from 1994-95 to 2000-01.

**Table 5**

**Expenditure on assigned-out cases for the period 1994-95 to 2000-01**

Year	Expenditure on civil cases	Percentage	Expenditure on criminal cases	Percentage	Total expenditure (e) = (a) + (c)
	(a) (\$ million)	(b)	(c) (\$ million)	(d)	
1994-1995	90	47%	102	53%	192
1995-1996	144	64%	80	36%	224
1996-1997	206	74%	71	26%	277
1997-1998	264	80%	65	20%	329
1998-1999	359	82%	80	18%	439
1999-2000	440	87%	63	13%	503
2000-2001	364	87%	53	13%	417
<b>Total</b>	<b>1,867</b>	<b>78%</b>	<b>514</b>	<b>22%</b>	<b>2,381</b>

Source: LAD's records

**The review of the Inter-departmental Working Group on assigning out**

3.21 In view of the substantial amount of public money spent on assigned-out cases each year and in the light of rising public expectations on the quality of legal aid services, the IWG (see para. 2.7 above) reviewed the monitoring of assigned-out cases. The review was completed in 1998. The review report stated, among other things, that:

- (a) according to the experience of other overseas jurisdictions, in-house lawyers were more cost-effective. The costs per case were lower while the quality of legal aid services was similar;
- (b) the established supervisory structure in the LAD enabled cases conducted in-house to be effectively monitored in terms of progress and cost control; and

- (c) the nature and number of cases that could be conducted by the LAD was limited by the number of staff, their level of experience and the expertise available. The expertise of in-house lawyers had been confined mainly to matrimonial and personal injury litigation.

### **Audit observations on assigning out of legal aid cases**

3.22 The IWG in its 1998 review report concluded that there was a case for the LAD to consider undertaking more in-house litigation, in particular general litigation, in order to ensure greater benefit to legal aid clients and to provide for professional development and expansion of experience of in-house lawyers. **However, Audit's enquiries of senior officers of the LAD have confirmed that the nature and number of cases that could be handled by the LAD is still limited by the number of staff, their level of experience and expertise.**

### **Audit recommendation on assigning out of legal aid cases**

3.23 **Audit has recommended that the Director of Legal Aid should provide for more comprehensive professional development of in-house lawyers so as to enable them to handle more litigation in-house, in particular general litigation, and to deal with cases of different nature.**

### **Response from the Administration**

3.24 The **Director of Legal Aid** has said that he agrees to consider the Audit recommendation.

### **Problems of monitoring of assigned-out cases**

3.25 It was mentioned in the IWG's report of 1998 that assigning out of cases to lawyers in private practice had brought about the following major monitoring problems:

- (a) ***Lack of reports on legal costs during the proceedings.*** Lawyers in private practice were not required to keep the legally aided persons and the LAD regularly informed of the costs incurred, and their cost estimations at various stages of a case, except where prior approval had to be obtained from the Director of Legal Aid before committing certain unusual expenses or steps. Costs were to be negotiated or taxed after the conclusion of the case when the bills were drawn up for agreement or taxation. Since these lawyers got paid in any event, there might be less incentive for some of them to conduct the legal proceedings in the most cost-effective manner. Some lawyers in private practice tended not to treat the aided persons whom they represented in the same way as they treated their private clients. They did not pay sufficient attention to the cost-benefit of continuing the proceedings for the aided person;
- (b) ***Justifications for the continuation or termination of legal aid.*** According to the LAO, legal aid should be discharged in those cases which are no longer meritorious or where

the aided person has acted unreasonably. The problem with the existing system was that no clear obligation was placed on the lawyer, to whom an aided person had been assigned, to report to the LAD when there were no more reasonable grounds for continuing the proceedings; and

- (c) *Inflated billings.* Some solicitors tended to charge for all correspondence with the LAD. There were also instances where lawyers inflated their interim bills so as to obtain larger advance payments of their fees from the LAD.

### **Action taken to enhance monitoring of assigned-out cases**

3.26 Having identified the problems mentioned in paragraph 3.25 above, in 1998 the IWG recommended measures to improve the monitoring of assigned-out cases and enhance cost control. Since then, the LAD has taken the following measures to improve progress monitoring and cost control:

- (a) a Steering Committee set up in 1999 continues to oversee the implementation of the recommendations put forward by the IWG;
- (b) guidance notes to solicitors were revised and guidance notes were drawn up for counsel. Checklists on monitoring the progress of matrimonial, employees' compensation and personal injury cases were issued to in-house lawyers;
- (c) wider use of limited legal aid certificates so that extension of legal aid will be given only if continuance of legal aid is justified in terms of merits and costs. Where appropriate, costs conditions are also imposed in the assignment letter issued to solicitors. If solicitors wish to incur legal costs exceeding the specified limits, they have to obtain the LAD's approval;
- (d) the new scale of fixed costs for matrimonial cases, which was revised in March 2000, has been put into effect. Over 95% of Legal Aid Panel solicitors indicated their willingness to elect fixed costs in handling legally aided matrimonial cases;
- (e) under the performance evaluation system, assigned lawyers who bill the LAD excessively or are engaged in cost-building exercise in the course of litigation will receive adverse reports on their performance and, upon determination by the Departmental Monitoring Committee, further legal aid assignments to them shall be subject to the specific approval of a Section Head of the LAD; and
- (f) a SLAS monitoring committee has been set up to monitor closely the progress of all in-house and assigned-out SLAS cases, in particular all high costs and high-risk cases. In addition, quarterly reports are issued to senior officers of the LAD on all high costs cases under both schemes in order to alert LAD staff litigating or monitoring these cases.

## Franchising and contracting scheme

3.27 In 1998, the IWG noted that the UK was experiencing a new development in the provision of legal aid services, i.e. the franchising and contracting scheme. The IWG also recommended that this development should be kept in view and consideration should be given to introducing the scheme into Hong Kong in due course.

## Franchising and contracting in UK

3.28 Audit noted that the UK had adopted franchising and contracting as a device to reinforce monitoring of assigned-out cases and to keep costs down. Franchising and contracting have been applied to all civil cases in the UK with effect from April 2001.

3.29 In the UK, the legal aid authority encourages lawyers in private practice to apply for a franchise to provide legal aid in different categories of litigation (e.g. family, personal injury, immigration, clinical negligence) where they are able to demonstrate a level of experience and depth of knowledge sufficient to meet the quality assurance standard set by the authority. In order to obtain a franchise, lawyers have to pass stringent checks set by the legal aid authority, and should have demonstrated a strong commitment to quality. Only those lawyers who have obtained franchises would be allowed to receive legal aid work.

3.30 Operating in tandem with franchising is the contracting system. Under the contracting system, franchised lawyers have to compete for legal aid contracts. In order to obtain a contract, a franchised lawyer must excel in managing and controlling costs. The quality assurance provided by franchising ensures that pressure on costs in a contractual regime does not result in a deterioration in the quality of service provided.

## Benefits of franchising and contracting in UK

3.31 In the UK, it is reported that franchising and contracting have the following major benefits:

- (a) ***Enhancing quality.*** The stringent quality standards used by the legal aid authority in the selection process have enabled the building up of a pool of franchised lawyers who can provide quality legal aid services;
- (b) ***Encouraging price competition.*** In order to secure a contract of legal aid work, franchised lawyers need to offer services at competitive prices. This drives down the cost of legal aid work; and
- (c) ***Accountability and continuous improvement.*** Under the system of franchising and contracting, franchised lawyers should show consistently good performance to secure

their legal aid work contracts. The legal aid authority conducts regular post-franchise audits on the work performed by the franchised lawyers to ensure that the quality standards are being achieved and maintained. As a result, franchised lawyers become more accountable to the legal aid authority and the aided persons.

### **Audit observations and recommendation on franchising and contracting scheme**

3.32 As pointed out in paragraph 3.27 above, in 1998 the IWG considered that the development of the franchising and contracting scheme in the UK should be kept in view and consideration should be given to introducing the scheme into Hong Kong in due course.

3.33 **Based upon the UK's experience, Audit has recommended that the Director of Legal Aid should, in consultation with the Director of Administration, keep in view and consider the viability of introducing franchising and contracting into Hong Kong as a measure to help keep legal aid costs down.**

### **Response from the Administration**

3.34 The **Director of Legal Aid** has said that the option of franchising and contracting was considered by the IWG which concluded that as contracting was still at an experimenting stage, it was premature to consider whether to adopt a similar scheme in Hong Kong. He has also said that the matter will be explored in the light of the practical experience of the scheme in the UK.

3.35 The **Director of Administration** has said that up till now, legal aid work has still remained more a matter of personal interest for individual solicitors. Therefore, he has reservation on the practicality of introducing the scheme now.

### **Conditional fees arrangements in UK**

3.36 Conditional fees arrangements (also known as “*no-win-no-fee*” arrangements) were first introduced in the UK in 1995. A lawyer who takes up a case under the conditional fees arrangements will not charge fees for his services if he loses. However, if the lawyer wins the case, he will receive a success fee from his client on top of his normal fee. Through the conditional fees arrangements, litigants who do not qualify for legal aid, but are not rich enough to pay for the entire costs of the litigation on their own, may obtain affordable legal services on a private basis. Conditional fees arrangements have been extended to cover all civil non-family proceedings in the UK (except medical negligence cases) with effect from 1998.

3.37 According to a consultation paper on conditional fees published by the Lord Chancellor's Department in 1998, the use of conditional fees has brought about the following main benefits in the UK:

- (a) **Rendering justice more accessible to the public.** For people who are excluded (especially those who are marginally excluded) from the legal aid system, the costs of

taking legal actions could be prohibitive. Although they are considered to have possessed excessive means and therefore not eligible for legal aid, their resources might still not be enough to allow them to litigate on a private basis. Conditional fees arrangements provide an avenue for them to pursue claims at affordable prices, as they are not required to pay the lawyer's fees if they lose the case (Note 7);

- (b) ***Directing legal aid services to areas of greatest need.*** As more people are prepared to pursue their claims on conditional fees basis, legal aid can be refocused by removing those cases which can be financed by conditional fees (e.g. cases involving claims for money or damages). By directing the legal aid budget to priority areas (e.g. cases affecting basic rights or cases involving issues of wider public interest), access to justice for the needy is also provided; and
- (c) ***Lawyers made more accountable to their clients.*** Since lawyers have to share the risks of litigation (they do not get paid unless they win) under the conditional fees arrangements, they are better placed to know the strength of a case and how to deliver the most successful outcome.

3.38 In its concluding remarks about its experience of conditional fees arrangements, the UK Government stated that:

*“The introduction of conditional fees in 1995 and their extension in 1998 to all civil non-family proceedings has enabled many thousands of people to bring claims which previously they could not have afforded to do.”* (Note 8)

### **Introducing conditional fees arrangements into Hong Kong**

3.39 In 1998, the IWG noted that the UK Government had been using conditional fees arrangements in litigation. It was stated in the IWG's report of 1998 that the then Attorney General's Chambers had published a consultation paper proposing the introduction of conditional fees in certain types of proceedings, and that in a public survey on the issue conducted a few years ago, about 57% of the respondents welcomed the introduction of conditional fees into Hong Kong. **The IWG recommended that the Department of Justice should be asked to review the issue of conditional fees at the appropriate time and to consider the desirability and feasibility of resuscitating the conditional fees arrangements proposal in the light of public opinion and further development in the UK.**

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**Note 7:** *Although these litigants are not required to pay the lawyer's fees, they may be required to bear the costs of the opposite party. In the UK, the Law Society runs an insurance scheme whereby litigants could insure the risk of paying out the opposite parties' costs.*

**Note 8:** *The UK Government's conclusions following consultations on the Consultation Paper: “Conditional Fees: Sharing the Risks of Litigation” Lord Chancellor's Department, February 2000.*

## **Audit observations on conditional fees arrangements**

3.40 The IWG in 1998 recommended that the Department of Justice should be asked to review the issue of conditional fees arrangements at the appropriate time. Audit observes that the conditional fees arrangements have been in operation in the UK since 1995 and have now replaced legal aid as a means of financing litigation in personal injuries cases (except medical negligence cases) and money claims. In the light of the developments in the UK, Audit considers that it is now opportune to review the issue of conditional fees arrangements.

## **Audit recommendation on conditional fees arrangements**

3.41 **Audit has *recommended* that the Director of Legal Aid should, in consultation with the Secretary for Justice, examine the viability of introducing conditional fees arrangements into Hong Kong, as another measure to help keep legal aid costs down.**

## **Response from the Administration**

3.42 The **Director of Legal Aid** has said that:

- (a) the effectiveness of the conditional fees arrangements in the Hong Kong scene has yet to be assessed in the light of the practical experience of the working of the arrangements and recent developments in the UK;
- (b) the conditional fees arrangements were previously proposed by the Department of Justice but the proposal was shelved; and
- (c) he would liaise further with the Department of Justice on this issue.

## PART 4: MEANS TEST AND MERITS TEST

4.1 This PART examines the adequacy of the means and merits testing procedures of the LAD. These testing procedures, if properly carried out, will ensure that legal aid is only provided to those who are entitled to receive it. This will also help to contain the costs of legal aid.

### Means test

4.2 Section 10 of the LAO has laid down two requirements which have to be met before a legal aid certificate is granted. The means test is one requirement (the other requirement is the merits test which is discussed in paras. 4.34 to 4.39 below). The test aims to ensure that publicly-funded legal aid services are provided only to people who cannot afford the costs of conducting litigation on a private basis.

### Assessment of applicant's financial resources

4.3 Using the means test, the LAD assesses an applicant's **financial resources**, taking into account the sum of his annual disposable income and disposable capital, as follows:

- (a) **Disposable income.** This is the applicant's total income from all sources (e.g. salary and wages from employment, income from trade or business) during a period of 12 months (Note 9), less the following allowable deductions:
  - (i) an amount for the care of any dependant infant living with the applicant while he is at work;
  - (ii) contribution to a pension or retirement scheme;
  - (iii) salaries tax;
  - (iv) rent, mortgage payment, rates, management fees of his main or only dwelling, provided that the deduction does not exceed 50% of his income; and

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**Note 9:** *According to the Legal Aid (Assessment of Resources and Contributions) Regulations, the period of 12 months means the 12 months next ensuing from the date of the application for legal aid, or such other period of 12 months as in the particular circumstances of any case the Director of Legal Aid may consider to be appropriate.*



- (v) a statutory personal allowance for the living expenses of the applicant and his dependants, as shown below:

No. of persons in applicant's household, including dependants	Statutory personal allowance per year (Note 10)
	(\$)
1	35,280
2	77,520
3	107,400
4	127,680
5	145,320
6	175,800
7 or more	204,840

- (b) **Disposable capital.** This is the value of an applicant's resources of a capital nature (e.g. cash, bank savings, jewellery, antiques, stocks and shares) ascertained as at the date of the application for legal aid. Some assets are not regarded as resources of a capital nature — examples are:

- (i) household furniture and effects;
- (ii) articles of personal clothing;
- (iii) personal tools and equipment of the applicant's trade; and
- (iv) the value of any interest in the only or main dwelling where the applicant resides.

4.4 In computing the financial resources of an applicant, the financial resources of the applicant's spouse is also taken into account, unless the spouse is the opposite party in respect of the application for legal aid, or unless the applicant and his spouse are separated.

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**Note 10:** *According to the Legal Aid (Assessment of Resources and Contributions) Regulations, these allowances are set equal to the amount of the "35-percentile household expenditure". "Household expenditure" means the level of expenditure of households of a particular size, excluding expenditure on rent, as obtained in the five-yearly Household Expenditure Survey conducted by the Census and Statistics Department. The "35-percentile" means 35% of the households of that size have household expenditure below that level.*

4.5 The financial eligibility limits for legal aid are stated in paragraphs 1.6, 1.8 and 1.10(a) above.

### **Means testing mechanism**

4.6 The LAD has issued guidelines to its staff to carry out the means test, in the form of an operation manual and circulars.

4.7 Under the present means testing procedures, a Law Clerk of the LAD interviews the applicant and assists him to complete a Means Investigation Report (MIR). The MIR keeps records of the applicant's financial resources, deductions allowed and contribution towards legal costs, and special observations noted by the Law Clerk during the interview. The MIR will then be checked by a professional legal aid officer to ensure that it has been properly prepared. If further investigation is required (e.g. enquiries with banks, land search), the LAD will seek the consent of the applicant to carry out such work.

4.8 Applicants under the OLAS and the SLAS are subject to the same means testing procedures.

### **Audit case studies**

4.9 Audit conducted case studies to examine the procedures for the means test. With the help of the LAD, Audit obtained the consent of the aided persons of 82 cases (Note 11), comprising 72 civil cases and ten criminal appeal cases. These cases were completed in 1999 and 2000.

### **Results of audit case studies**

4.10 **Audit noted from the 82 cases studied that there were aspects of the means testing procedures which should be tightened up. The audit observations are detailed in paragraphs 4.11 to 4.23 below.**

4.11 ***Home visits.*** Home visits are routinely carried out by government departments providing other forms of social benefits (e.g. the Social Welfare Department, the Housing Department, the Student Financial Assistance Agency) to verify the means of their applicants and to detect abuse of services. However, Audit noted that officers of the LAD seldom made home visits to verify the financial resources of legal aid applicants. No home visits had been conducted in the 82 cases studied.

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**Note 11:** *There is a requirement in the LAO that details of cases cannot be disclosed without the consent of aided persons. Audit requested more than 82 cases for examination. However, consent was only received in 82 cases.*

4.12 Home visits are an effective means to verify the authenticity of legal aid applicants' declarations of their means. In particular, home visits would:

- (a) enable the LAD to ascertain if the living standards of the applicants are consistent with the information provided in the applications; and
- (b) deter applicants from understating their financial resources in order to pass the means test.

4.13 **Audit appreciates that it may not be cost-effective to conduct home visits in all cases. Nevertheless, it would be useful for home visits to be made on a random basis, and on those applications of a doubtful nature (see para. 4.22 below).**

4.14 *Documentary proof of income from employment.* When an applicant applies for legal aid, he has to produce documentary evidence of income proof (e.g. an employer's certificate of salary paid and wages receipts). Of the 82 cases examined, there were 31 cases where the applicants had indicated they had income from employment. Of these 31 cases, eight applicants (say one in four) were not able to produce any income proof. These applicants claimed to have occupations such as secretary, technician and electronic worker, and they told the LAD that they could not provide any documentary proof of their incomes. Without income proof, the LAD resorted to assessing the reasonableness of the incomes of these applicants by reference to other ancillary evidence such as bank statements or savings passbooks. However, these bank statements or passbooks did not show any entries of income.

4.15 **As one applicant in four who had employment could not produce income proof, Audit considers that the LAD should have taken further steps to verify the incomes of applicants. For example, the LAD could contact the applicants' employers for information and verification.**

4.16 *Financial statements of applicants' businesses.* If an applicant is operating a business, the LAD requires him to produce a balance sheet and a profit and loss account in respect of the business for the purpose of assessing his income and capital.

4.17 Of the 82 cases examined, there were three cases where the applicants were sole proprietors of businesses. Of these three cases, two applicants did not produce financial statements in respect of their businesses. In these two cases, the LAD assessed the reasonableness of the profits and worth of the businesses by making verbal enquiries with the applicants and referring to their bank statements, which apparently could not provide sufficient information on the financial condition of the businesses.

4.18 Without financial statements, the LAD could not ascertain accurately the financial resources of the applicants and it becomes questionable whether they were really financially eligible for legal aid. However, there is a requirement under the Inland Revenue Ordinance (Cap. 112) that

a sole proprietor has to keep a balance sheet and a profit and loss account for taxation purposes. **Audit considers the LAD could have requested all applicants operating a business to at least produce copies of the financial statements to support their applications for legal aid. If an applicant fails to provide even copies of the financial statements, his declaration of means should be considered very doubtful.**

4.19 *Assets held on behalf of others.* In applying for legal aid, an applicant has to disclose all his financial resources (and those of his spouse) to the LAD for means assessment. Where an applicant has assets such as bank deposits and shares, but claims that a part of these assets is held on behalf of another person other than his spouse, he will be required to substantiate his claim. Otherwise, the value of the assets which the applicant has claimed as belonging to another person will be considered the applicant's own capital.

4.20 Of the 82 cases examined, there were two cases where the applicants claimed to have held assets on behalf of others. In these two cases, the applicants supported their claims by providing the LAD with brief notes signed by their friends declaring that their friends actually owned the assets. Without other substantive evidence, the LAD accepted the brief notes as proof of the applicants' claims. As the value of the assets in question had been excluded from the applicants' financial resources, both applicants passed the means test. A case summary of one of the two cases is given below.

#### Case summary

##### **The applicant claimed he held assets on behalf of his friend**

*In 1997 the applicant applied for legal aid to defend his case in the District Court. He did not pass the means test as his financial resources exceeded the eligibility limit.*

*Five months later, he made another application for the same case. At the interview, he told the LAD that he had shares that were worth about \$217,000. However, he said that he owned only \$33,000 worth of those shares. The remaining worth of shares of \$184,000 was held on behalf of his friend. He gave the LAD a brief note signed by his friend, showing that his friend owned those shares.*

*The LAD accepted the brief note as proof of his friend's ownership of those shares worth \$184,000. As a result, \$184,000 was excluded from the calculation of the financial resources of the applicant. He passed the means test and was granted legal aid without the need to pay any contribution towards legal costs.*

Source: LAD's records

4.21 **Audit considers that the LAD should not have accepted the brief notes from the applicants as proof of disclaiming their ownership of part of their assets. Such brief notes alone should not be regarded as substantive evidence that the assets in question were not owned by the applicants.**

4.22 *Applicants with no income from employment or other sources.* Of the 82 cases reviewed by Audit, there were seven cases where applicants declared that they did not have any income from employment or any other sources. In these seven cases, the LAD only made verbal enquiries but did not carry out any further investigations (such as home visits and enquiries with banks) to ascertain if there was non-disclosure or understatement of financial resources. **Audit considers that the LAD should have conducted more in-depth investigations to ascertain the true financial resources of those applicants who had declared that they did not have income from employment or other sources. A case summary of one of these seven cases is provided below.**

#### Case summary

##### **The applicant claimed that he had no income from employment or other sources**

*In 1997 the thirty-year old applicant applied for legal aid to seek a judicial review. In the application, he declared that he had been unemployed for years and held no bank account or other assets. He said that he lived with his family but received no money from them. He also said that his daily expenses were met by the "Lai See" money of around \$1,000 a year that he had received, and that he had spent very little money because he ate at home and spent virtually nothing on clothing and travelling. Furthermore, he repeatedly reminded the LAD not to contact his family members or to let them know the case.*

*Nevertheless, the applicant rented a post office box (costing hundreds of dollars a year) to handle his correspondence with the LAD. LAD officers did not perform home visits to verify the applicant's statements. In the event, he passed the means test and was granted legal aid without having to pay any contribution towards legal costs.*

Source: LAD's records

4.23 *Applicants' financial resources outside Hong Kong.* As mentioned in paragraph 4.7 above, the MIR keeps records of the financial resources of an applicant. According to the LAD's guidelines on means testing, the financial resources of an applicant should include his income and capital in Hong Kong, and outside Hong Kong. **Audit noted from the case studies that there was nothing in the MIR which reminded the LAD interviewing officer that an applicant should be asked to disclose his financial resources (if any) kept outside Hong Kong. There is a risk that applicants do not fully inform the LAD their financial resources kept outside Hong Kong.**

#### **Audit recommendations on audit case studies**

4.24 To deter fraudulent applications and to ensure that legal aid services are only provided to people who really cannot afford the costs of conducting litigations on a private basis, *Audit has recommended* that the Director of Legal Aid should:

- (a) **perform home visits on a random basis and on all doubtful cases so as to verify the financial information provided by legal aid applicants;**
- (b) **in cases where the applicants are unable to produce income proof, take further actions to verify their incomes. Such actions may include:**
  - (i) **making enquiries of the applicants' employers about their earnings and other benefits;**
  - (ii) **paying visits to the applicants' places of work; and**
  - (iii) **requesting applicants to provide copies of their tax returns and tax demand notes issued by the Inland Revenue Department;**
- (c) **request applicants operating a business to produce proper financial statements to support their applications;**
- (d) **disregard applicants' claims that they are holding assets on behalf of others, unless substantive evidence is produced;**
- (e) **conduct more in-depth investigations (such as making home visits, making enquiries with banks and searching public property records) into cases where the applicants claim that they have no income from employment or other sources; and**
- (f) **require applicants to disclose in the MIR all their financial resources, including assets kept outside Hong Kong.**

## **Response from the Administration**

4.25 The **Director of Legal Aid** has said that generally there is no problem with the existing means testing procedures. However, the standard of proof of some applicants' means could be made more stringent in some circumstances. He will consider Audit's recommendations and issue clearer guidelines and provide more training to the staff concerned.

### **A case involving an infant**

4.26 In this audit review, Audit noted a case involving an infant. Details of this case are provided in paragraphs 4.27 to 4.30 below.

4.27 An "infant" is defined in the LAO as an unmarried person who has not attained the age of 18 years. According to the relevant Legal Aid Regulation, where an application is made on behalf of an infant for the grant of legal aid, the infant's resources shall include any sum payable under an order of the court or under any instrument to any person for the maintenance of the infant. In practice, the financial resources of the parents are not taken into account. It was stated in the Legal Aid Policy Review of 1997 report that there had been criticisms of this assessment method. Firstly, it was considered anomalous that an infant was treated as a separate entity whereas two adults (e.g. an applicant and his spouse) were treated as a single economic unit. Secondly, public money would be used to provide legal aid to the infants of financially well-off parents.

4.28 In view of the criticisms, the method of assessing the financial resources of infant applicants was reviewed in the Legal Aid Policy Review of 1997. It was concluded that the prevailing way of assessing the financial eligibility of infant applicants should be retained. This was for the following reasons:

- (a) if the financial resources of the parents were also taken into account in assessing the financial eligibility of an infant applicant, the parents might be less willing to pursue the case on behalf of the infant, since they would be required to contribute to the legal costs incurred by the LAD. The interests of the infant would therefore be jeopardised; and
- (b) as any damages recovered for, or on behalf of, the infant would be paid or otherwise dealt with in accordance with the direction of the court for the benefit of the infant and not the parents, it would be unfair to include the financial resources of the parents in the assessment.

### **Audit observations on a case involving an infant**

4.29 **The following case noted by Audit shows that the justifications for maintaining the present method of only assessing the financial resources of the infant, as stated in the Legal Aid Policy Review of 1997, should be critically reviewed. The case is summarised below.**

## Case summary

### An infant with wealthy parents

*In this case the father of the infant was a wealthy person who owned companies with total assets worth over \$10 million. His personal bank accounts had millions in deposits. At first, the father hired a lawyer in private practice to conduct the litigation in the High Court for the infant. He was advised that the infant could be eligible for legal aid.*

*In 1998, upon application legal aid was granted to the infant. In the means assessment the financial resources of the parents were not taken into account. The father was also not required to pay any contribution towards the legal costs.*

*In the event, the infant won the case. The Judge made no order as to costs. The LAD (instead of the infant's father) incurred legal costs of some \$220,000.*

*Source: LAD's records*

4.30 As can be seen from the above case, the father of the infant was a wealthy person who could afford to hire a lawyer in private practice to conduct the litigation. This case illustrates an anomaly that public money is available to provide legal aid to the infants of financially well-off parents who are willing and can afford to conduct litigation on a private basis.

### Audit recommendation on cases involving infants

4.31 **Audit has recommended that the Director of Legal Aid should, in consultation with the Director of Administration, critically review the relevant Legal Aid Regulation which prescribes the method of assessing the means of an infant applicant, in particular to determine whether the resources of parents should be included in the assessment.**

### Response from the Administration

4.32 The **Director of Legal Aid** has said that:

- (a) to assess the parents' financial resources in legal aid application by an infant would represent a policy change and necessitate legislative amendment and consultation with the Legal Aid Services Council; and
- (b) he will consider Audit's recommendation as part of an on-going review to improve the quality and cost-effectiveness of the legal aid services.



4.33 The **Director of Administration** has said that while he considers the rationale for the current assessment method for infant applicant still stands, the matter, as other aspects of the legal aid services, will continue to be subject to on-going review.

### **Merits test**

4.34 Merits test helps to ensure that legal aid is provided only to people who have reasonable grounds for taking legal action, or be a party thereto.

### **Documentation of merits testing**

4.35 Audit carried out case studies of the merits tests of 72 civil cases and ten criminal appeal cases (see Note 11 to para. 4.9 above). In the ten criminal appeal cases studied by Audit, LAD's professional officers recorded on files the merits of each case. The records gave a detailed account of the grounds for appeal and the relevant factors that the professional officers had taken into consideration in performing the merits tests. However, as regards the 72 civil cases, although they were endorsed by a Senior Legal Aid Counsel/directorate officer, there were no detailed records as to how the merits tests were conducted. Without such detailed records, it is not known as to whether the LAD case officers had adequately considered the merits of each case.

4.36 Apart from ensuring that the statutory requirements are met, proper documentation also has the following benefits:

- (a) it gives a better indication of the quality of decisions to grant legal aid on merits grounds;
- (b) it provides a basis for assessing the consistency of decision-making; and
- (c) it facilitates future review of cases to identify further scope for improvement.

4.37 Audit therefore considers that it is essential for the LAD to keep proper and adequate records of the merits tests.

### **Audit recommendation on documentation of merits testing**

4.38 **Audit has recommended that the Director of Legal Aid should, in cases where the estimated legal aid costs are significant, ensure that the justifications for the grant of legal aid for litigation in such cases are properly documented.**

### **Response from the Administration**

4.39 The **Director of Legal Aid** has said that he will consider preparing a checklist on matters relevant for use in the merits test.

## PART 5: PERFORMANCE INDICATORS AND STRATEGIC PLANNING

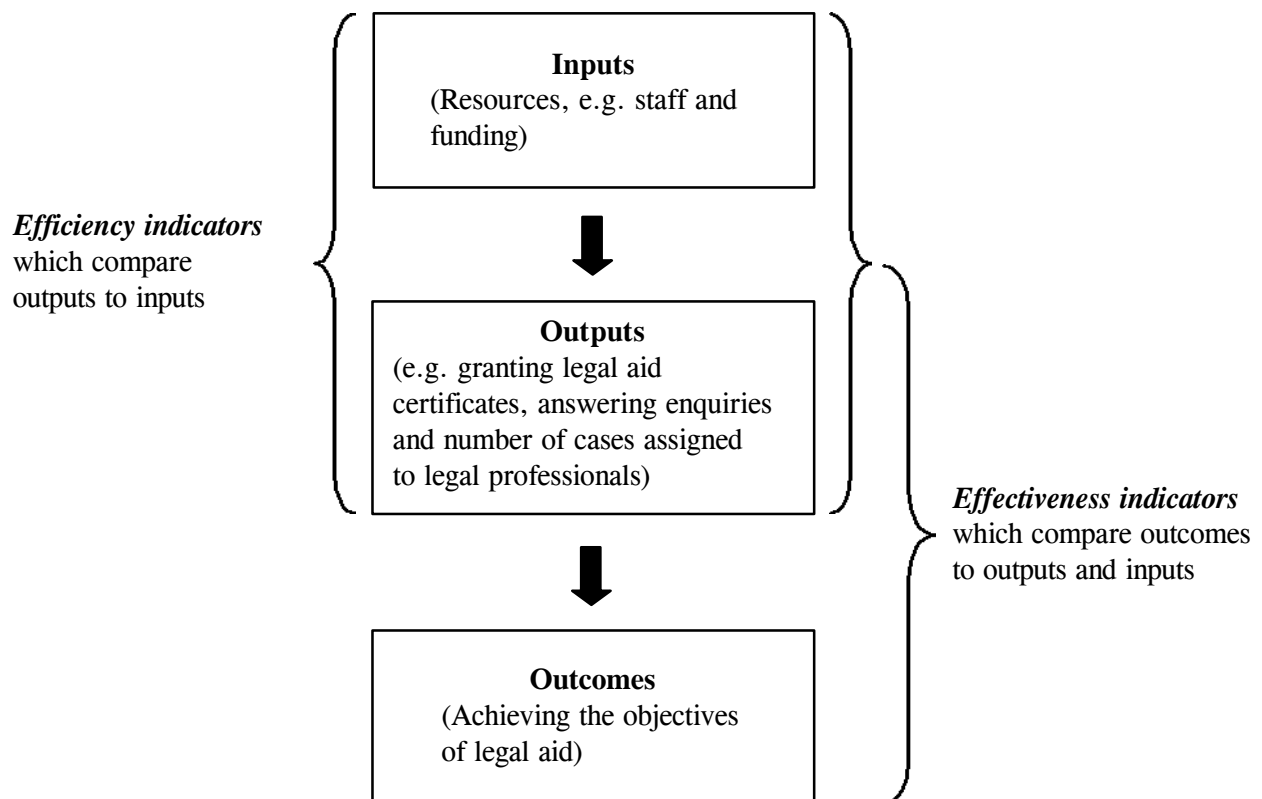
5.1 This PART observes that improvements can be made to LAD's performance indicators and strategic planning.

### Performance indicators

5.2 Performance indicators provide a means to measure how well an organisation has performed. In developing performance indicators, an organisation should, in addition to reporting operational activities and throughput, also report efficiency and effectiveness. Efficiency indicators relate the resources (i.e. inputs) used by an organisation to produce its outputs. Effectiveness indicators relate an organisation's inputs and outputs to the outcomes of its activities. Figure 1 below shows, using the LAD as an example, the inputs, outputs and outcomes, and the related efficiency and effectiveness indicators.

Figure 1

#### Inputs, outputs, outcomes and performance indicators



Source: Audit's research

## Performance indicators used by the LAD

5.3 The LAD compiles performance indicators to measure the performance of its programme activities. These indicators are published in the Controlling Officer's Report in the LAD's annual estimates. Table 6 below shows examples of the performance indicators used by the LAD.

**Table 6**

### Examples of performance indicators used by the LAD

<b>Programme area</b>	<b>Performance indicator for operational activities and output</b>	<b>Efficiency and effectiveness performance indicator</b>
Processing of legal aid applications	<ul style="list-style-type: none"> <li>— the number of:               <ul style="list-style-type: none"> <li>• enquiries received</li> <li>• appointments made</li> <li>• applications received</li> <li>• legal aid certificates granted</li> <li>• applications refused on means</li> <li>• applications refused on merits</li> <li>• legal aid certificates concluded/discharged</li> <li>• appeals heard against the LAD's decisions</li> <li>• appeals allowed against the LAD's decisions</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>— percentage of applications processed within the targeted processing time</li> <li>— number of appeals (against refusal of legal aid) heard versus number of appeals allowed by Master in Court</li> </ul>
Litigation services	<ul style="list-style-type: none"> <li>— the number of:               <ul style="list-style-type: none"> <li>• new cases assigned</li> <li>• cases closed/discharged</li> <li>• active cases as at end of year</li> </ul> </li> <li>— the amount of damages recovered</li> <li>— the amount of costs recovered</li> </ul>	

Source: 2000-01 Estimates

## Audit observations on performance indicators

5.4 As can be seen from Table 6 above, the LAD's performance indicators largely focus on reporting operational activities and output. The LAD should consider adopting other performance indicators to assess the efficiency and effectiveness of the LAD's services.

5.5 Audit's research has found that efficiency and effectiveness indicators are used by the legal aid authorities in advanced countries like Australia, Canada, the UK and the USA. Table 7 below gives examples of the efficiency and effectiveness indicators used by these authorities.

**Table 7**

**Examples of efficiency and effectiveness indicators  
used by the legal aid authorities of some advanced countries**

<i>Efficiency indicators</i>		<b>Remarks</b>
• average expenditure per client		—
• proportion of high cost cases	no. of high cost cases as a proportion of total no. of cases	
• administration cost as proportion of total costs	cost of administration as a proportion of total costs of legal aid services	
• staff productivity	average client service provided per staff	
 <i>Effectiveness indicators</i>		
• take-up rate for legal aid services	no. of accepted legal aid cases as a proportion of total no. of applications	
• refusal rate	no. of refusal cases as a proportion of total no. of applications	
• no. of unrepresented litigants in court		—
• alternative dispute resolution rate	no. of cases that have used alternative dispute resolution as a proportion of no. of cases potentially suitable for alternative dispute resolution	
• satisfaction rate	percentage of legal aid clients who are very satisfied with the legal aid services as revealed by client survey	

Source: Audit's research

## **Audit recommendations on performance indicators**

5.6 **Audit has recommended that the Director of Legal Aid should:**

- (a) **taking into consideration the practice of advanced countries, identify and develop more efficiency and effectiveness indicators to assess the LAD's performance; and**
- (b) **for the efficiency and effectiveness indicators developed, set performance targets where appropriate so that the LAD will know whether, in the process of implementation, the targets are being achieved.**

## **Response from the Administration**

5.7 The **Director of Legal Aid** has said that the LAD has efficiency and effectiveness performance indicators such as processing of legal aid applications and payments. He will develop more efficiency and effectiveness performance indicators based on the experience overseas. He will, where appropriate, also set performance targets for the efficiency and effectiveness indicators developed.

## **An overarching strategic plan**

5.8 In 2000-01, the LAD spent a net amount of \$413 million in providing legal aid services. The LAD states that the objective of legal aid is to ensure that any person who has reasonable grounds for taking or defending a legal action is not prevented from doing so by lack of means. The LAD is facing many challenges in a rapidly changing environment. These challenges arise from:

- economic change;
- social change;
- legal change; and
- technological change.

To determine how its objective can best be achieved and how it intends to meet the challenges of a changing environment, the LAD needs to formulate an overarching strategic plan.

## **Audit observations on an overarching strategic plan**

5.9 An overarching strategic plan helps an organisation to decide how best to achieve its objectives, and provides a more rational basis on which priorities are determined. It also ensures that resources are well targeted and used efficiently.

5.10 Audit notes that the legal aid authorities in advanced countries such as Australia and the UK have strategic/corporate plans detailing how legal aid services will achieve the objectives, and how they will continue to make improvements in the provision of publicly-funded legal aid services.

5.11 An overarching strategic plan of the LAD should include:

- a mission statement;
- long-term goals (three to five years);
- short-term objectives;
- priorities to be determined to achieve the goals;
- ways to improve continuously the quality, efficiency and value for money of the legal aid services; and
- a planned approach to monitoring and evaluation of outcomes to enable the measurement of performance against predetermined benchmarks, and making of adjustments to the plan.

## **Audit recommendations on an overarching strategic plan**

5.12 **Audit has *recommended* that the Director of Legal Aid should, in consultation with the Director of Administration:**

- (a) **develop an overarching strategic plan to better achieve the objectives of legal aid;**
- (b) **in developing the strategic plan, take into consideration the other audit findings and recommendations of this audit report; and**

- (c) **monitor the implementation of the strategic plan and update it where necessary to ensure that it helps the LAD rise to the challenge of a changing environment.**

### **Response from the Administration**

5.13 The **Director of Legal Aid** has said that:

- (a) the LAD has strategic planning. Its strategic plans (Note 12) are made in consultation with the office of the Director of Administration and are announced in the Chief Executive's Policy Address and published each year in the "Policy Objective Booklet of the Administration Wing of the Chief Secretary for Administration's Office" or reflected in the annual Controlling Officer's Report and the Legal Aid Services Council's annual report. In addition, the LAD conducts reviews on different aspects of legal aid services from time to time. Based on the results of such review, the LAD formulates strategies to improve the quality of legal aid services; and
- (b) the LAD would, in consultation with the Director of Administration, continue to devise appropriate departmental plans taking into account changes in circumstances and findings in the audit report, where appropriate, to better achieve the objectives of legal aid.

5.14 The **Director of Administration** has said that he shares Audit's views that developing strategic plans are important to assist the LAD to achieve the overall objective to provide efficient legal aid services. He has worked closely with the LAD and a number of plans were developed so as to ensure a high degree of public satisfaction in respect of legal aid services. As committed, he would conduct reviews on different aspects of legal aid services from time to time and continue to develop new initiatives with the LAD and monitor the progress of plans already developed.

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**Note 12:** *At the time of consultation meeting with the senior staff of the LAD in August 2001, the LAD was unable to produce a proper strategic plan containing the essential elements described in paragraph 5.11 above.*

## Appendix

### Acronyms and abbreviations

CCPI	Composite Consumer Price Index
IWG	Inter-departmental Working Group
LAD	Legal Aid Department
LAO	Legal Aid Ordinance
MIR	Means Investigation Report
NGO	Non-Government Organisations
OLAS	Ordinary Legal Aid Scheme
SLAS	Supplementary Legal Aid Scheme