

Report No. 45 of the Director of Audit — Chapter 7

RECOVERY OF LEGAL COSTS BY THE LEGAL AID DEPARTMENT

Summary

1. The Legal Aid Department (LAD) provides legal representation to eligible applicants by a solicitor and, if necessary, a barrister in civil or criminal proceedings. There are two legal aid schemes, namely Ordinary Legal Aid Scheme (OLAS) and Supplementary Legal Aid Scheme (SLAS). To qualify for legal aid under the OLAS, the financial resources of an applicant should not exceed the upper financial eligibility limit of \$155,800. The SLAS is self-financing and is operated under the Supplementary Legal Aid Fund. It provides legal assistance to people whose financial resources exceed the upper limit allowed under the OLAS, but not exceeding the upper financial eligibility limit of \$432,900. In its financial year ended 30 September 2004, the Supplementary Legal Aid Fund had a surplus of \$4.7 million.

2. A person receiving legal aid may be required to contribute towards the costs and expenses incurred by the LAD out of his financial resources and, in a civil legal aid case, out of the moneys and/or property recovered or preserved on his behalf. Furthermore, the LAD may recover from the opposite party the legal costs incurred. In 2004-05, the LAD incurred \$627.3 million in the provision of legal aid services and recovered \$195.5 million from aided persons and opposite parties.

Cost recovery of the legal aid schemes

3. *Disclosure of cost recovery information.* The Audit Commission (Audit) considers that the financial statements of the SLAS reflect more clearly the extent to which legal costs incurred in legal aid cases have been recovered than the financial information published in the Estimates and the LAD's annual reports for the OLAS. In order to disclose to the public the extent to which legal costs of pertinent cases (civil cases under the OLAS where the court has awarded an order for costs and damages to the aided person) have been recovered, Audit considers that the LAD should prepare, for these OLAS cases, income and expenditure statements, similar to those for the SLAS.

4. *Performance indicators on recovery of legal costs.* Audit notes that, based on the income and expenditure information of civil cases finalised in a year under the OLAS

where the court has awarded an order for costs and damages to the aided person, the LAD can calculate the cost recovery rates of these cases. Audit considers that the LAD should disclose such cost recovery rates because they provide useful information for enhancing public accountability of the LAD's legal aid services. *Audit has recommended that the Director of Legal Aid should explore ways and means to compile and disclose relevant and useful performance indicators for evaluating the efficiency and effectiveness of legal aid services.*

5. ***Legal costs paid by the LAD to the opposite party.*** The LAD paid \$16.9 million in 2003-04 and \$22.2 million in 2004-05 by way of legal costs to the opposite party in respect of cases where judgment was in his favour. For transparency and public accountability purposes, Audit considers that the LAD should disclose the amounts of legal costs paid by it to the opposite party in its annual reports and website.

6. ***Recording staff costs in legal aid cases.*** Audit notes that, for cases conducted by the LAD's in-house lawyers, the LAD prepares cost estimates including staff time costs, costs of preparing, filing and serving legal documents, and disbursements. These cost estimates are prepared manually using a standard form, recording the hours spent by the LAD's staff in conducting the litigation. *Audit has recommended that the Director of Legal Aid should introduce a computerised staff time-charging system for recording the staff time and staff costs incurred in each legal aid case.*

Planning and monitoring of the recovery of legal costs

7. ***LAD's officers/assigned lawyers did not seek costs in some cases.*** Of the total 173 case files examined by Audit, 143 (83%) were cases where the court judgment was in favour of the aided persons. Of these 143 cases, Audit notes that in 27 cases where the LAD's responsible officers/assigned lawyers did not take action to seek costs from the opposite party, they did not document the reasons, obtain written consent of the aided persons concerned, or obtain written approval of a senior officer of the LAD. *Audit has recommended that the Director of Legal Aid should, in respect of a case where the law allows but it is not justifiable to seek costs from the opposite party, require the LAD's responsible professional officer/assigned lawyer to clearly document the reasons, and where appropriate, seek the written consent of the aided person concerned and/or the approval of a senior officer of the LAD.*

Enforcement proceedings against judgment debtors

8. ***Finding judgment debtors' addresses.*** Subsequent to the fixing of the amount of costs to be paid by the opposite party in a legal aid case, the LAD will issue a demand letter to him. If the LAD does not have the opposite party (judgment debtor)'s address, it will seek assistance from some government departments. Audit's examination revealed that, in five cases where the judgment debtors' addresses were unknown, the LAD's responsible

officers did not conduct address searches at any government department. Furthermore, in conducting address searches for the other 18 cases, they did not approach some government departments mentioned in the LAD's training manual. *Audit has recommended that the Director of Legal Aid should, for judgment debtors whose whereabouts are unknown, request relevant government departments and the Hospital Authority to provide their addresses by sending them periodic requests by electronic means.*

9. ***Cases other than those with sufficient and clear reasons for write-off.*** Audit notes that, of the 59 write-off cases examined by it, the LAD applied for prohibition orders in two cases only. In another two cases, the judgment debtors made payment of the debts as a result of the prohibition orders served on them. Audit considers that a prohibition order is an effective means of compelling judgment debtors to pay their debts if they need to travel outside Hong Kong. *Audit has recommended that the Director of Legal Aid should, for judgment debts without sufficient and clear reasons for write-off, subject to the law, consider applying for prohibition orders on the judgment debtors, where appropriate, and consider conducting searches for assets and income of the judgment debtors at the Land Registry, Companies Registry, Business Registration Office and Transport Department.*

10. ***Enforcement proceedings taken.*** In its training manual, the LAD has laid down the following procedures for taking enforcement proceedings against judgment debtors if they do not respond to demand letters: (a) application for a judgment summons; (b) taking garnishee proceedings; (c) application for a charging order; (d) application for a prohibition order; (e) application for an attachment of income order; (f) application for an order for examination of debtor; and (g) application for a writ of Fieri Facias. Audit's examination of the 59 write-off cases revealed that, of the seven enforcement procedures available, the LAD applied for judgment summons and/or prohibition orders in three cases only. In order to ensure that the LAD's responsible officers have pursued all the applicable enforcement actions before writing off the debts, Audit considers that the LAD should prepare a checklist of enforcement actions to help them document the actions taken (together with the results) and the reasons for not pursuing certain courses of action.

11. ***Need to timely update the LAD's Case System.*** Audit notes that the LAD included one case in its half-yearly return on write-off covering the period 1 April 2004 to 30 September 2004 to the Financial Services and the Treasury Bureau, notwithstanding the judgment debtor had made payment of the outstanding debt before the return. The LAD applied to the court for a judgment summons and a prohibition order (which were subsequently granted by the court) on the judgment debtor of another case, who had in fact made full payment of the debt before the LAD's application. *Audit has recommended that the Director of Legal Aid should update in a timely manner payments received and actions taken in the LAD's Case System, and closely monitor the progress of debt recovery before applying to the court for a judgment summons or a prohibition order.*

Administration of outstanding and irrecoverable legal costs

12. *LAD's compliance with government requirements on outstanding debts.* In 2004-05, the LAD wrote off \$62.6 million in respect of irrecoverable legal costs. Audit notes that the LAD did not include in its annual returns of arrears of revenue under Standing Accounting Instruction (SAI) 1020 the following outstanding debts: (a) contributions due from the aided person; (b) costs incurred by the LAD in a case where there is an order for the opposite party to pay the costs incurred by the aided person; and (c) costs incurred by the LAD in a case which are recoverable from moneys and/or property recovered or preserved on behalf of the aided person in the proceedings. The Director of Accounting Services agrees with Audit that outstanding legal costs awarded to the aided person are, in substance, government revenue and therefore should be included in the annual return of arrears of revenue as laid down in SAI 1020. *Audit has recommended that the Director of Legal Aid should, in compliance with the requirements under SAI 1020, include in the LAD's annual returns of arrears of revenue the following items: (a) outstanding contributions due from the aided person; (b) outstanding legal costs awarded to the aided person and due from the opposite party; and (c) outstanding legal costs recoverable from moneys and/or property recovered or preserved on behalf of the aided person.*

The Audit Commission's access to legal aid case files

13. Since 28 March 2002, the LAD has introduced an arrangement under which each legal aid applicant is requested to sign on a form to indicate whether or not he consents to Audit's access to his case file. Subsequently, 8,749 (81%) of 10,773 successful legal aid applicants in 2003 and 10,308 (86%) of 12,045 successful legal aid applicants in 2004 gave consent to Audit's access to their case files. Of the 661 case files selected by Audit for examination, 155 (23%) had been destroyed because the cases had been closed for a period of time, and 333 (50%) the aided persons concerned did not give consent to Audit's access to their case files. Of these 333 cases, 303 (91%) were cases processed before 28 March 2002. Audit considers that the arrangement introduced by the LAD to request legal aid applicants to give consent to Audit's access to their case files for conducting audits on a voluntary basis is not entirely satisfactory. *Audit has recommended that the Director of Legal Aid should appoint a team of independent staff to conduct an examination of the 333 case files selected, but which could not be examined by Audit.*

Response from the Administration

14. The Administration generally agrees with the audit recommendations.

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