APPENDIX I

Items 9 and 10 of Article 4 of Law no. 10/2000 of 14th August (*Organizational Law of the Commission Against Corruption of Macao SAR*) stipulate that:

"The Commission Against Corruption is entitled to:

(…)

9) With regard to any shortcomings it finds in any legal provisions, specially those which may affect rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. Where, however, the Legislative Assembly is the competent entity to legislate, it shall merely inform the Chief Executive in writing on its position;

10) Propose to the Chief Executive the enacting of normative acts which may improve the work of the public institutions and enhance the respect for legality in the administration, particularly by eliminating factors which may facilitate corruption and illicit practice or ethically reproachable practice;

(...)"

In 2010, the CCAC submitted a number of commentary reports to the Chief Executive, with the aim to enhance system building and administrative efficiency, exerting the Commission's functions in implementing the policy plan. It also provides useful reference for decision-making departments. Below is one of the reports excerpted for the public's reference.

BILL OF "JUDICIAL AIDS DUE TO EXECUTION OF PUBLIC DUTIES": A COMMENTARY REPORT

Under the Chief Executive's instruction and Item 9 of Article 4 of Law no. 10/2000 of 14th August (*Organizational Law of the Commission Against Corruption of Macao SAR*)[4], the report on the issue stated in the title is made for the Chief Executive for reference.

Part I: Introduction

1. Since the Bill "Judicial Aids due to Execution of Public Duties" (hereinafter designated as "the Bill" or "Judicial Aids") aroused public attention when it was discussed in the Legislative Assembly. Opinions and views were expressed in various ways. There were also criticisms. The views can be summarized as follows:

   1) To request the government to withdraw "the Bill" and re-consider the content and objectives of the legislation;

   2) To revise "the Bill", in particular, to withdraw the system of paying the litigation expense for public servants by using public funds;

   3) Some criticisms indicated that the government intends to restrict criticizing opinions and thus hampers the freedom of press and speech. Therefore "the Bill" is a way to suppress criticism;

   4) Some opinions, however, are for "the Bill", indicating that it implements the principle of equality (because "the Bill" is applicable to all public servants). Especially, it will provide larger protection for the frontline public servants, because, in reality, there are cases in which public servants were sued (esp. civil lawsuit) due to execution of public duties. In this case, public servants

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4 The item states that: "The Commission Against Corruption is entitled to: (…) 9) with regard to any shortcomings it finds in any legal provisions, specially those which may affect rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. Where, however, the Legislative Assembly is the competent entity to legislate, it shall merely inform the Chief Executive in writing on its position; (…)"

became helpless as they have to hire lawyers on their own to defend for themselves, making people feel that the situation is unfair.

5) Some scholars and public voices believed that "the Bill" violates the principle of equality under Article 25 of the *Basic Law* because it provides a kind of "privilege" for public servants, which is, to pay for their litigation expenses by using public funds.

We do not intend to analyse and discuss the aforementioned viewpoints as this is not the purpose of making this report. We only analyse the content of "the Bill" and provide suggestions.

2. **To withdraw "the Bill" and re-consider the legislative rationale is, to a large extent, a political decision, which is beyond the competence of the CCAC.** However, as far as the overall situation and legislative concept are concerned, this can be a compromise. If the government decided to withdraw "the Bill" and reset the legislative mindset, the utility of this report as a reference would be much less.

3. If "the Bill" is still adopted, it is discovered after preliminary analysis that there are many points which need improvement. The points involve **decision of legislative policies** as well as **legislative technical problems.** Therefore, our commentary focuses on these two aspects.

4. The description of reasons in "the Bill" indicates that:

"1. In order to improve the protection for staff of public service in execution of duties, the Bill aims to provide them with judicial aids applicable to the judicial litigations stemming from execution of their public duties.

2. The measures proposed by "the Bill" are for the people facing litigations caused by their execution of public duties or social service. Therefore, the measures are for public interests, because it is of the justice to guarantee that these people enjoy protection when facing judicial litigations stemming from execution of public duties.

(...)"

According to the meaning of the above paragraphs, the basic concept of the legislation is: to establish an ordinary system[5] through "the Bill", instead of regulating the act of using public funds for legal proceedings as an exceptional or special case.[6] Therefore, it brings some questions worth thinking:

1) Are there adequate conditions for the legislation under the current political, social and cultural status and historical background?

2) Is there any other approach or way which can achieve the same effects but can avoid misunderstandings and intensifying social instability?

3) If "the Bill" is approved, can the mechanism it has established achieve the expected result? Will any other negative influence emerge, such as an increase of litigations?

4) How to co-ordinate and deal with the relationship between the government, the court, the beneficiary of judicial aids and the lawyer in the future?

5. We choose to answer these questions in an indirect way. In other words, we try to conduct a comprehensive and in-depth analysis on "the Bill", in the hopes of contributing to the improvement of "the Bill".

6. To conclude the information and our analysis on the current situation, the CCAC's current stance is that: if a political decision to legislate for the "Judiciary Aid System" is made, it is necessary to thoroughly consider and analyse the content of "the Bill" and the issues it involves. We suggest legislating in a simple and direct way which can match up other regimes and systems. Only adopting this way can it have the expected effect.

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[5] Regarding the difference between exceptional norms and special norms, see Article 10 of the *Civil Code* and also José FALCÃO, Fernando CASAL, Sarmento OLIVEIRA and Paulo FERREIRA DA CUNHA, *Introduction to Civil Law* I, 1993, P. 11 and subsequent pages.

[6] Ibid.

Part II: Simple Explanation of Part of "the Bill" and Related Problems

I. Article 1 of "the Bill" states that:

"Article 1
Objective and scope

1. The law regulates that the following people who are prosecuted or file litigation due to the facts occurred or acts carried out in execution of public duties should be entitled to judicial aids in litigation process:

1) The Chief Executive and principal officials;

2) Staff of public services, including those employed under private regimes;

3) Judges and prosecutors.

2. For the effect of this law, the public departments refer to the institutions and departments of the Public Administration, including the Cabinet of the Chief Executive, the Offices and supportive administrative departments of principle officials, autonomous funds, public legal persons, the Assistance Office of the Legislative Assembly, the Office of the President of the Court of Final Appeal and the Office of the Prosecutor General.

3. Regardless of the result of the litigation, judicial aids will continue to be provided for the relevant appeals and applicable to all proceedings attached to the dossier of the aided judicial litigation process.

4. Judicial aids remain effective in the execution based on the verdict of the aided litigation.

5. The judicial aids, provided to the public servants due to the acts they carried out or the facts occurred in execution of public duties, remain effective when the public servants resign, are pending for retirement and after retirement.

6. In case the beneficiary has deceased, the judicial aids prescribed by this law are applicable to the parties who have the legal legitimacy to initiate or proceed the litigation.

7. The judicial aids in any of the forms prescribed by this law are not applicable to administrative litigations and litigious proceedings about labour affairs, except those related to extra-contractual civil liabilities."

1. **In terms of legislative theory,** we have the following suggestions:

   1) To establish an ordinary system applicable to the cases where public servants *(Note: The term "public servants" we use here refers to staff of public services in general, i.e. the people mentioned in items 1-2 of Article 1 of "the Bill")* become defendants due to execution of public duties. In other words, to adopt "the Bill" (certainly, revision is needed for many points). To make it simple, the requirements of approval are less demanding, since public servants who face the litigations are in passive positions (being listed as defendants).

   2) In reality, the cases where public servants are listed as defendants are common, because, under the related regulations in the civil law and the civil litigation law, in case the plaintiff wants to demand for the public servant's personal responsibilities, the latter shall be listed as the defendant (the public servant and the government are liable jointly). Only in this case, the verdict for the plaintiff will have the effect of execution against the public servant.

   3) For the cases where the public servant intends to file a litigation as the plaintiff due to infringement upon his rights and interests in execution of public duties, a **special regime** (even an exceptional regime) shall be set up. The establishment will involve formulation of strict assessment requirements because very complicated situations may be involved. The situations include:

      a) Which person or institute suffers from the infringement (or both), resulting in adequate reasoning for the litigation?

b) Which reasoning and criteria is adopted to determine to what extent of the infringement upon these rights and interests shall a judicial procedure be commenced for protection, so that there is sufficient reasoning for using public funds to initiate the litigious mechanism?

c) Is there any possibility of abuse of this mechanism? How to effectively prevent it?

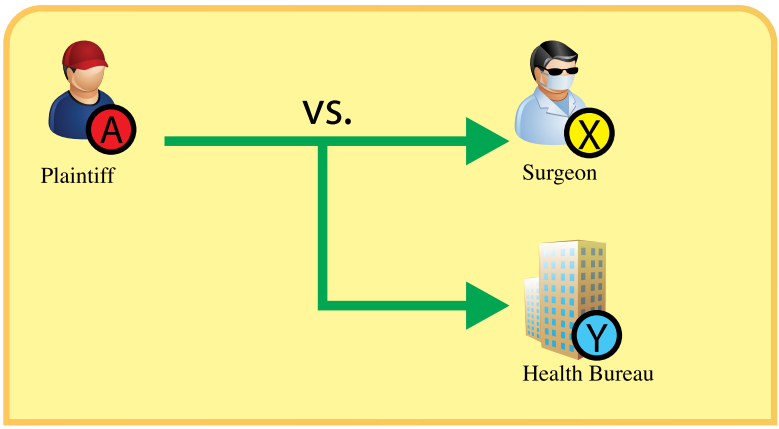
Since this mechanism involves political options, more in-depth analysis is not able to be conducted currently. It is because it is much more difficult to give comments on revision of a fully developed bill than to formulate and submit a new one. Therefore, this issue is put aside.

* * *

2. The expression of this aricle is not comprehensive. A simple example can be used to explain this.

1) Under normal circumstances, if a patient files litigation against a doctor, the Health Bureau and the doctor (considered as one of the liable persons) will be listed as codefendants.

Let's suppose that a medical incident has occurred in Hospital Conde de S. Januário (CHCSJ). The victim, A, took civil action against X, the surgeon and the CHCSJ (However, the Health Bureau Y should be the



defendant instead of the CHCSJ, as the Health Bureau, which possesses legal personality, is the representative for external relations. The CHCSJ is only one of the institutions within the Health Bureau. In the sense, the Health Bureau is liable in the aspect of external relations.).

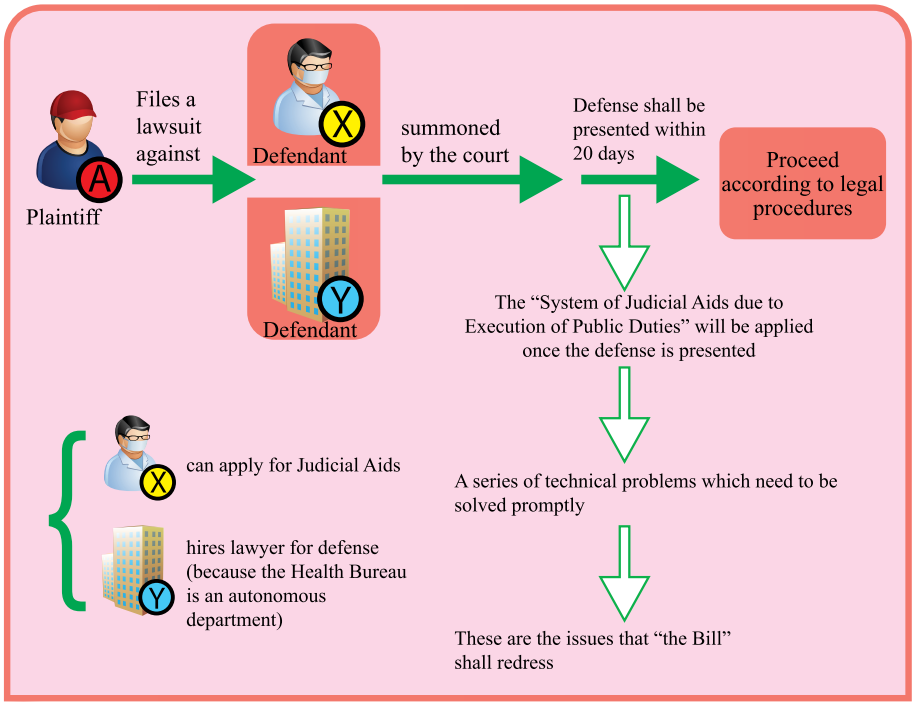
Cause of action:

- Surgeon, X, did not fulfil his responsibilities during the surgery and thus was guilty, which refers to a functionary recklessness (*culpa funcional*). S/He is therefore demanded for civil responsibilities for his/her functionary recklessness.

- Moreover, X is employed by Y, the Health Bureau, that has never set up an effective management system and whose amenities were too old. These factors have led to the faults in the medical treatment and thus infringed upon the plaintiff's rights and interests. Therefore, the Health Bureau is demanded for joint responsibilities.

Petition: X and Y are demanded for joint civil compensation for A (Ex.: MOP2,000,000)

Once the indictment is submitted to the court, the first half of the litigious process is:



2) The expression "*the facts occurred or acts carried out in execution of public duties*" is adopted in Article 1 of "the Bill", while Paragraph 1, item c of Article 15 stipulates that "….*illicit acts carried out* ***deliberately*** *or due to* ***serious recklessness***" (public servants who have carried out such acts shall be liable personally and repay all fees for judicial aids approved beforehand). In this sense, the facts or acts mentioned in Article 1 refer to:

   a) Acts carried out due to recklessness (*mera culpa*) or negligence (*negligência*);
   b) Civil responsibilities for risk (*responsabilidade pelo risco*).

However, some other problems also exist: In case that the court cannot confirm the actor's recklessness and thus the case can only be dealt with as

a case of civil responsibilities for risk (when other statutory requirements are fulfilled), **shall the government or the relevant department be liable instead of the public servant? It seems so.**

3) Let's see another situation: a driver of a government department has been listed as a **co-defendant** in a case of a traffic accident. That means the victim claims for a **compensation** of which **the amount** is over the maximum amount[7] covered by the insurance for damage to third party caused by vehicle, so the insurance company as well as the liable party are listed as codefendants. In this case, the driver applies for the "judicial aids" (the defense is presented by the lawyer and the fees for the litigious proceedings are paid first). The final results may be:

   a) The driver is not liable because the court rules that there is no personal recklessness. Therefore, the fees for hiring lawyer and litigation are paid by the government;

   b) The driver is liable because he was reckless.

   In the latter case, the government still has to pay the lawyer charge and the litigation costs first and subsequently claims for personal liability against the driver (execution of the right to claim for compensation) under item c, Paragraph 1 of Article 15 of "the Bill". However, it should be done through another lawsuit.

   This case may lead to another kind of conflict – between the driver and the government, because the driver is demanded for personal responsibilities.

4) In case the government executes the right to claim for compensation, can the accused public servant apply for judicial aids again? "The Bill" does not mention this issue. This apparently is a loophole!

[7] Under Article 45 of Decree Law no. 57/94/M, if the claimed amount is less than the maximum amount covered by the insurance for damage to third party caused by vehicle, the plaintiff can only take action against the insurance company. The latter can request the liable party (e.g. the driver or the car owner) to participate in the litigation as the co-defendant. Currently, the maximum amount is MOP1,000,000.

5) Here is another problem: ordinary judicial aids regime is looser than the regime of judicial aids for public servants, because the former does not require that the beneficiary shall be liable personally if s/he is reckless. However, the latter contains this requirement.

Ordinary Judicial Aids Regime refers to Decree Law no. 41/94/M of 1st August, of which Article 10 stipulates the situations where the judicial aids are repealed:

"1. The judge shall repeal judicial aids in the following cases:

a) The beneficiary possesses sufficient assets to rid oneself of the judicial aids;

b) There are documents which prove that the reason for offering the judicial aids is no longer valid;

c) The documents which serves as the basis for judicial aids are judged to be false;

d) The beneficiary is judged to be malicious litigator;

e) The beneficiary has received a sum sufficient to pay for the costs of the judicial proceedings in a lawsuit for temporary alimony.

2. In case of Item a) of the preceding paragraph, the beneficiary shall immediately declare that judicial aids are not needed. Otherwise, s/he will be liable for punishment for malicious litigation.

3. Judicial aids shall be repealed based on the application by the Public Prosecutions Office, the counter party or the agent at court.

4. The application for repeal of judicial aids shall be enclosed with all proof. The beneficiary's opinion shall be obtained in case s/he does not take the initiative to give up."

The above regulation does not require the beneficiary to take personal responsibilities for his/her own recklessness, because the main purpose of ordinary judicial aids system is to ease the financial burden on the beneficiary as well as to ensure the protection for the beneficiary in the course of the litigation (the lawyer charge and litigation cost are paid by the government).

6) Moreover, "the Bill" does not stipulate that even though the public servant is reckless (but the recklessness is very slight), the entity competent for assessment shall exercise discretion to exempt the public servant from personal liabilities. Nor does it regulate any mechanism to allow public servants to repay the government by installment.

3. As far as **legislative technique** is concerned, we suggest dividing Article 1 into **two separate articles** as well as adding Paragraphs 3 and 4 in Article 1 (as showed in the following), so that the article will not be too long. Moreover, the content of the two articles are not duplicates. Our suggestions are as follows:

Article 1
Objective and Targets

1. (...) [original text]

2. (...) [original text]

3. The provision under Paragraph 1 does not obstruct the reconvention filed by the beneficiary of judicial aids during the litigation.

4. The scope stated in Paragraph 1 refers to the plaintiff, the defendant or the participant in a civil case, or the complainant of semi-public crime, the complainant of private crime or the suspect in a procedure of criminal inquiry or trial.

Article 2
Scope of Application

1. Regardless of the result of the litigation, judicial aids will continue to be provided for the relevant appeals and applicable to all proceedings attached to the dossier of the aided judicial litigation process.

2. (...) [Paragraph 4 of the original text]

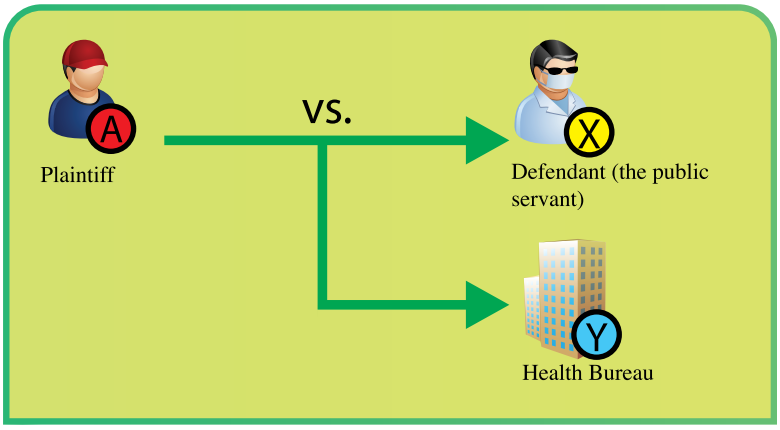
3. (...) [Paragraph 5 of the original text]

4. (...) [Paragraph 6 of the original text]

5. (...) [Paragraph 7 of the original text]

* * *

4. If "the Bill" includes a revision that allows public servants to apply for judicial aids only when they are prosecuted, they cannot initiate litigation as plaintiffs. In this case, it is necessary to consider another situation in practice. Therefore, it is also necessary to introduce new rules to solve these problems. See the following example:



- (X) and (Y) filed a reconvention *(reconvenção)* when presenting defence.
- After presenting the proof, the court rules that the petition submitted by (A) lacks reasoning. Therefore, (A) loses the lawsuit.
- At the same time, the court rules that the reasoning of (X) and (Y) 's reconvention is valid.

Final result: Plaintiff (A) → loses
Defendants/ counterclaimants (X) and (Y) → win

In this case, (X) uses public money to present defence and file a reconvention and finally wins. Will the related interests come to the public servant (X) or the Macao SAR Government? (Since the litigation costs have been paid by the government). "The Bill" does not foresee or solve this problem.

1. When exploring "the Bill", many people, especially the media, compared it with the relevant regulations of Taiwan. They believed that the political appointees and elected public officials in Taiwan do not enjoy aids for litigation. However, this is misinterpretation.

2. In Taiwan, there is ***Civil Service Protection Act*** (promulgated on 28th May 2003), of which Article 22 states that:

"When a civil servant is involved in a lawsuit while performing duties in accordance with laws, the government agency he/she serves shall retain lawyers to defend him/her and provide legal assistance.

If the lawsuit in the preceding Paragraph is caused by the intentionality or gross negligence of the civil servant, the agency where he/she serves shall claim for reimbursement against him/her.

The regulation with respect to the assistance to a civil servant against whom an action is initiated for performing duties shall be promulgated jointly by the Examination Yuan and the Executive Yuan."

3. Later, the Examination Yuan and the Executive Yuan formulated the ***Regulations Governing Litigation Aid for Civil Service for Performing Duties*** (promulgated on 19th December 2003), of which Article 21 states that:

"These Regulations shall apply mutatis mutandis to the following persons who perform their duties and an action is initiated against them:

1. ***Political appointees;***

2. ***Elected public officials;***

3. *Educators who are appointed but not within the scope of Article 2 of the Educators Appointment Act;*

4. *Other persons and military servants who serves in government bodies, public schools, or government-owned enterprises in accordance with laws."*

This shows that political appointees as well as elected public officials enjoy litigation aids and assistance, contrary to what some of the local media have reported. If political appointees and elected public officials are excluded, the principle of impartiality will be violated. The focus of the issue should be: what are the requirements for approval of judicial aids? Also, a period of time should be set up regardless of the result of application. All of these are necessary points in the content of "the Bill".

* * *

II. Article 2 of "the Bill" states that:

"Article 2
Forms

1. The forms of judicial aids include:

1) Exemption from litigation cost and prepayment;

2) Payment of litigation cost and prepayment;

3) Payment of agency fees for the court.

2. Judicial aids in form of exemption from litigation and prepayment do not require application by the interested party.

3. Judicial aids in form of payment of agency fee for the court can be offered together with other forms of judicial aids."

There are many doubts in the content, including:

1. The legal terms are inconsistent. The term used in Article 2 and Paragraph 2 of Article 13 is **"interested party"** (*interessado*), but it becomes **"applicant"** (*requerente*) in Paragraph 4 of Article 15. Which one is correct? It seems that "applicant" is a better expression. An "applicant" may not be an "interested party". For example, if the person applies for judicial aids as an inheritor, s/he is, strictly speaking, only an applicant, because in the relevant litigation s/he is not the interested party.

2. Paragraph 2 stipulates that "*Judicial aids in form of exemption from litigation cost and prepayment do not require application by the interested party.*" Paragraph 3 stipulates that "*Judicial aids in form of payment of agency fee for the court can be offered together with other forms of judicial aids*."

   According to the expression of Paragraphs 2 and 3, upon the approval of judicial aids, *the prepayment (preparos) and the litigation cost (custas) will surely be exempted* (even against the applicant's will).

In this sense, it is difficult to understand the real function of Paragraph 3. Since there is no need to submit any application for exemption from litigation cost, it only refers to application for government's payment of lawyer fee. In this sense, what is the real purpose of Paragraph 3? There is only one possibility, which is to apply for **partial exemption of the prepayment and litigation cost**. However, in general, there is no such application.

It is difficult to understand its logic: now that full exemption does not require application, why should "partial exemption" from litigation cost require application?

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III. Article 3 of "the Bill" states that:

"Article 3
Exemption from Litigation Cost and Prepayment

1. When a litigation is filed against the people mentioned in this law due to execution of their public duties, they are exempted from litigation cost and prepayment regardless of the forms of the litigation.

2. In case any of the abovementioned people are declared to be the losing party in the litigation, the reimbursement for the winning party in the form of the losing party's litigation cost is considered judicial expense, without any effect to the application of Article 15."

Regarding this article, we have no comments.

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IV. Article 4 of "the Bill" states that:

"Article 4
Payment of Litigation Cost and Prepayment

1. The people mentioned in this law who file civil or penal litigation against the third person with properly explained reason can be offered judicial aids in the form of payment of litigation cost and prepayment without any effect to other exemption stipulated by law.

2. The properly explained reason mentioned in the preceding paragraph especially refers to cases when the applicants who are, as shown by strong and apparent signs, victims of menacing or revengeful criminal acts. In addition, the acts have infringed upon their life, physical integrity, freedom, reputation or ***properties of significant value****."*

1. The expression is not appropriate. What does filing litigation against the third person in penal procedure refer to? What is the meaning of **the third person** in criminal sense?

2. There was a huge controversy over the content of Paragraph 2. In fact, improvement is needed as far as expression and legislative technique are concerned. According to Article 74 of the *Code of Penal Litigation*, victims of criminal acts can be parties to civil suits under Articles 60-66 of the code. Only the time matters. In other words, they have to participate in the relevant penal litigation procedures in the right time according to law.

   Article 74 of the *Code of Penal Litigation* stipulates that:

"1. In case no claim for compensation of civil damage is filed in relevant penal proceedings or through independent civil litigation under Articles 60 and 61, ***under any of the following circumstances, the judge shall determine an amount of compensation for the damage in the judgment even if no guilt is found****:*

   a) The amount is determined for reasonable protection for the victim's interests;

b) The victim does not object to the amount; and

c) Sufficient evidence is gathered in the trial to duly justify the prerequisite of the judgment of the compensation based on civil regulations and the amount of the compensation.

2. Under the circumstances mentioned in the previous clause, as for investigation of evidence, the judge shall ensure the respect for the principle of defence.

3. The previous article is correspondently applicable to the verdicts of relevant compensation. "

3. Moreover, Paragraph 2 of Article 4 of "the Bill" indicates a few examples (but judicial aids can be applied for in the criminal cases not mentioned in the article):

- The acts have **infringed upon their life, physical integrity, freedom, reputation** (the government stated that this aspect will be deleted) or properties of significant value**.**

  1) The illegal acts that have **infringed upon life, physical integrity and freedom** basically refer to the crimes prescribed by Chapter 1 to Chapter 5 of Book II (Articles 128-173) of the *Penal Code*.

  2) The illegal acts that have **infringed upon reputation** refers to what Chapter 6 of Book II (Article 174-183) of the *Penal Code* indicates, however, it has been excluded from the cases where judicial aids are applicable. It is difficult to understand its rationale.

  3) The illegal acts that have **infringed upon properties** stated in Article 196 to 228 of the *Penal Code*.

  4) For illegal acts that have infringed upon properties of **significant value**, it is a new concept introduced by "the Bill". What is **significant value (*valor considerável*)**?

Article 196 of the *Penal Code* defines:

a) ***Huge amount*** *(valor elevado)*: an amount over MOP30,000 when the act is carried out;

b) ***Considerably huge amount*** *(valor consideravelmente elevado)*: an amount over MOP15,000 when the act is carried out;

c) ***Small amount:*** an amount under MOP500 when the act is carried out**.**

Since the new concept **"properties of significant value"** is adopted in "the Bill", the difficulty of judicial litigation and chance of argument are expected to increase, bringing troubles to the court.

Example: **A** (the actor) has assaulted physician **X** and damaged light vehicle driver **Y's** watch (a driver employed by government who was also at the site where the case occurred and was coincidentally involved; the value of the watch is, for example, MOP5,000). **Is it a property of significant value?** If the court forgets the damage to **Y** when hearing this criminal case and thus does not rule that **Y** will get compensation, can **Y** claim for compensation with judicial aids for public servants in execution of public duties?

4. There are almost 100 kinds of different criminal offences and crimes defined by the *Penal Code*. Why "the Bill" only indicates these? Since there are examples, it will be better not to mention them. As far as the original purpose of establishment of "the Bill" is concerned (strengthening the protection to public servants), does it confuse the essentials and bring counter effect? If yes, it is necessary to re-consider the content.

5. According to the information obtained by the CCAC, the government will delete the term **"reputation"** in Article 4 of "the Bill". However, the legally protected interests of public servants which are infringed upon the easiest are image and reputation. **Apparently** such legally protected interests are excluded from the scope of protection under "the Bill", however, **in fact**, the acts that will infringe upon "reputation" are still included, because Paragraph 2 of Article 4 only lists examples.

6. In addition, it is also difficult to understand another part of the article: infringement upon properties of significant value. The doubt is: is the purpose

of "the Bill" for the protection of proprietary interest or personal interest? Why is "properties of significant value"? It is possible that the cost of litigation is even more expensive than the compensation.

Example: a public servant was assaulted when exercising his/her duties (slight injury), but s/he only claims for MOP1 as mental compensation and gives up the claim for compensation for proprietary damage. It is because his/her purpose is to let the defendant and the society know that public institutions and public servants should be respected when they are fulfilling their duties and violence against them is not allowed. Why is this public servant not allowed to apply for judicial aids?

* * *

V. Article 5 of "the Bill" states that :

"Article 5
Payment of Agency Fees for the Court

1. In the cases prescribed by Paragraph 1 of Article 3 and Paragraph 1 of the previous article, the judicial aids in the form of payment of agency fees for the court can also be obtained.

2. The judicial aids in the form of payment of agency fees for the court include payment for lawyer's service fee, expenditure and charges.

3. The maximum amount of lawyer's service fee is determined case by case by the Chief Executive through an order (despacho) and the current service charge table of the Macao Lawyers Association and the type of litigious acts within the scope of services shall take as reference."

The term "type of litigious acts" in Paragraph 3 should be revised as "**according to the level of complexity of the case**". Otherwise, it is difficult to understand what the "type of litigious acts" refers to. It is necessary to note that a case tried by summary procedure can be very complicated. On the contrary, a case tried under normal litigation procedure can be very simple.

* * *

VI. Article 6 of "the Bill" states that:

"Article 6
Charges

The charges caused by the situations prescribed by Paragraph 2 of Article 3, Article 4, Article 5 and Article 10 are paid from the Special Payment of the Budget of the Macao SAR."

Regarding this Article, we do not have any suggestion or comment.

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VII. Article 7 of "the Bill" states that:

"Article 7
Receipt of Reimbursement

The beneficiary of the judicial aids prescribed by this law who has been declared as the winning party in the litigation proceedings shall return the money s/he has been given as the payment of litigation cost and lawyer's fee of the interested party to the Macao SAR, but the amount of the reimbursement shall be no more than the payment by the Macao SAR under this law."

Regarding this Article, we do not have any suggestion or comment.

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VIII. Article 8 of "the Bill" states that:

"Article 8
Decision-Making Competence

1. The Chief Executive has the competence to make decision on approval of judicial aids under this law.

2. The competence mentioned in the previous paragraph shall not be delegated."

In fact, we think that such decision should not be made by the Chief Executive solely without going through any assessment beforehand. Therefore, we suggest introducing an assessment committee.

"The Bill", which is being deliberated by the Legislative Assembly now, stipulates that only the Chief Executive has the power to assess and approve applications for judicial aids (the Chief Executive himself may be an applicant). **One of the doubts caused by this point is that:** is it appropriate to set up this mechanism? Is there any other option in terms of legislative policies?

Due to time constraint, we have a brief analysis on the issues mentioned above:

1. Paragraph 1 of Article 1 and Article 8 clearly show **the possibility that the Chief Executive may approve his own application**. The key question is: is this mechanism appropriate?

2. Paragraph 2 of Article 8 of "the Bill" is related to this question. It states that: "the competence mentioned in the previous paragraph shall not be delegated." In other words, in case the Chief Executive becomes an applicant for judicial aids, he will face this situation: **on one hand, the competence shall not be delegated to other people while on the other, he shall assess and approve his**

own application. How should that be done?

3. Article 16 of "the Bill" states that:

"The provisions under the Code of Administrative Procedure are applicable to the administrative procedures of granting judicial aids, in exception of the cases regulated by special stipulations under this law."

In this case, it seems that the recusal system under Articles 46-53 of the *Code of Administrative Procedure* can be adopted. According to these regulations, the Chief Executive shall not approve his own application. Therefore, the decision shall be made by his legal substitute, a Secretary. However, **this method may invert the logic**, because such system has (permanently) designated a subordinate to make the decision. In other words, if the Chief Executive intends to exercise the right to apply for judicial aids, his application shall be followed up by one of the Secretaries. From the **political and legal** viewpoint, such legislation is not encouraged.

4. It is worth noting that: **"the competence shall not be delegated to another person" and "the responsibility to make the decision is passed to another person for the reason of recusal" are issues that are totally different**.

5. For such mechanism under "the Bill" – that **all applications shall be assessed and approved by the Chief Executive – we remain reserved**. We think that applications for judicial aids should be submitted to a professional committee for analysis and the committee should **submit binding comments** to the Chief Executive, who subsequently makes the decision based on these suggestions. (For example, if the committee thinks that **the application should not be approved, then the Chief Executive cannot approve it**. However, if the committee thinks that it can be approved, the Chief Executive can approve or disapprove it based on public interests.) We suggest that: **if the application analysed by the committee is submitted by the Chief Executive, the decision should be entirely made by the committee and they should not just render comments. In this sense, establishment of such mechanism can reduce the Chief Executive's responsibilities and the burden of risk, both politically and legally**.

The revision we suggest is as follows:

Article 8
Competence and Procedure of Assessment and Approval

1. Based on the opinions given by the special committee comprising three to five members, the Chief Executive shall decide whether to approve or disapprove the application of judicial aids with reason stated.

2. The competence mentioned in the previous paragraph shall not be delegated. (Original text)

3. The committee mentioned in Paragraph 1 shall make a commentary report within 10 days starting from the day when the relevant application is received. The commentary report is binding on the Chief Executive.

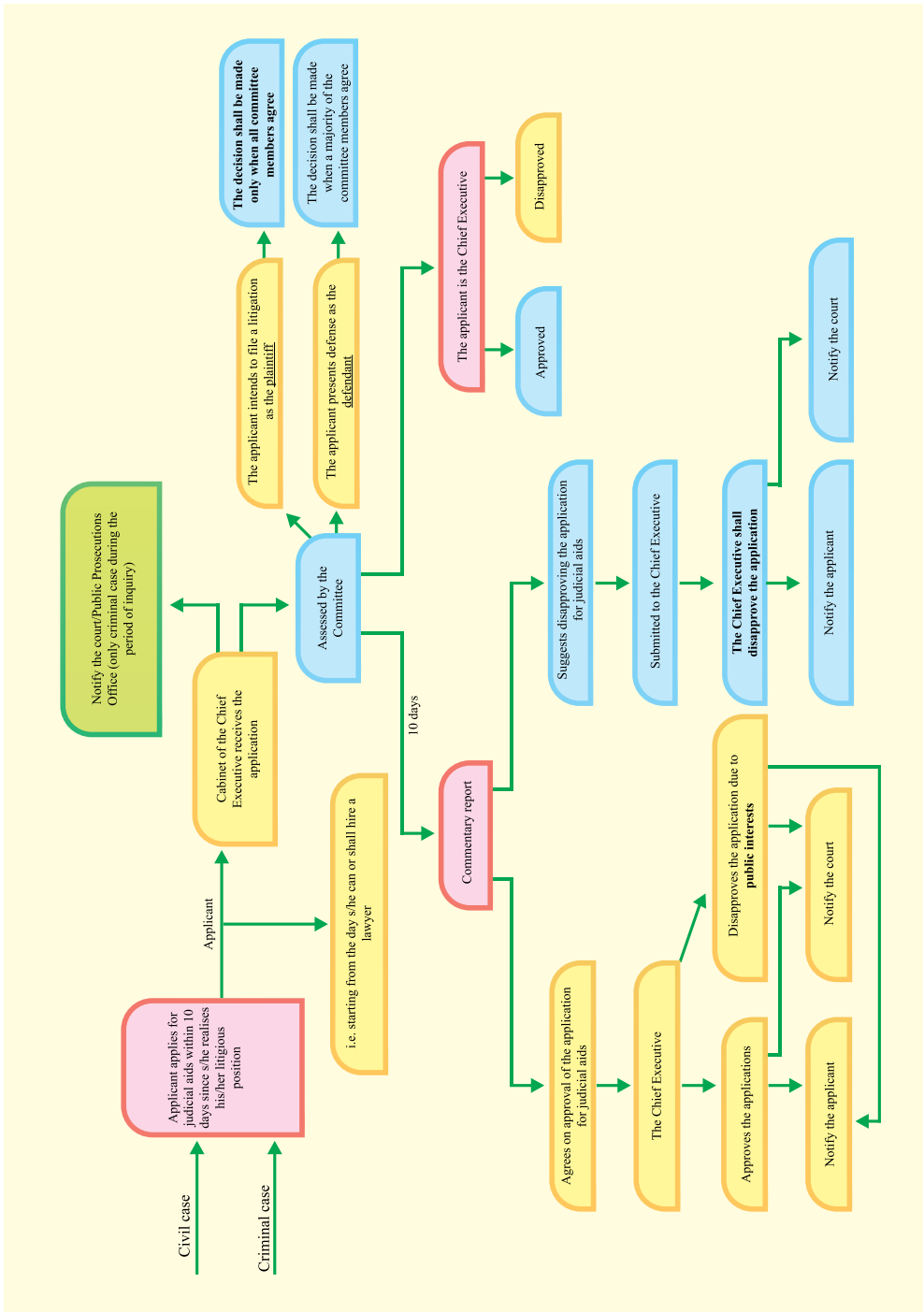
4. In case the comments mentioned in the previous paragraph are for the approval, the Chief Executive still can disapprove the relevant application for the sake of public interests.

5. If the application for judicial aids is from the Chief Executive, the committee mentioned in Paragraph 1 has the competence to make the decision directly.

6. The establishment and operation of the committee mentioned in Paragraph 1 are regulated by the Chief Executive through an order *(despacho)*.

* * *

Below is the flow-chart:



IX. Article 9 of "the Bill" states that:

"Article 9
Application for Judicial Aids

1. The application for judicial aids in the forms of payment of litigation cost and prepayment and payment of agency fees for the court shall be submitted before the first participation in the relevant litigation proceedings.

2. The applicant shall submit the special application form for judicial aids enclosed with necessary proof. "

1. Paragraph 2 requires the applicant to submit proof. What does the word "proof" here refer to?

1) To prove that the litigation is related to execution of public duties? Only the court can judge it after trial.

2) Or prove that the application did not commit the fault intentionally when executing his/her duties and there was no severe negligence also?

3) Or prove that the applicant has fulfilled the requirements about position provided by Article 1?

2. The revision we suggest is as follows:

Article 9
Application for Judicial Aids

1. Applicant shall submit the special application form for judicial aids enclosed with copies of all the documents that were submitted to him/her when s/he was notified or summoned by judiciary entities.

2. If the information submitted by the applicant is not sufficient for assessment of his/her application for judicial aids, the Chief Executive can require the applicant to submit supplementary documents within 10 days. In case of disobedience, the application will be rejected immediately except that a rational reason is stated and is

accepted by the Chief Executive.

3. Due to disapproval mentioned in the previous paragraph, the applicant cannot submit another application in the same litigation.

Moreover, we suggest inserting a new article:

Article 9 –A (or Article 10)
Obligation of Notification

1. The Cabinet of the Chief Executive shall notify the Public Prosecutions Office or the court which handles the case of the relevant facts within three days since the application for judicial aids is received.

2. The notification mentioned above has the effect of suspending the proceedings for no more than 60 days.

3. Assessment and decision on application for judicial aids shall be made within 60 days.

4. Decision on application for judicial aids shall be notified to the relevant judiciary entities within five days.

5. The previous paragraph is complementarily applicable to the case of applicant's withdrawal of judicial aids.

* * *

X. Regarding to Articles 10, 11 and 12 of "the Bill", <u>we do not have any suggestion or comment</u>.

* * *

XI. Article 13 of "the Bill" states that:

"Article 13
Independence of the Procedure

1. Compared with the relevant litigation, the procedure of application for judicial aids is independent and does not affect the progress of the litigation.

2. When participating in the relevant litigation procedure for the first time, the interested party shall attach the certification of the decision on the grant of judicial aids to the file of litigation procedure. In case the application or the judicial controversy on the relevant decision is pending, the relevant certification documents shall be attached to the file of litigation procedure."

The revision we suggest is as follows:

Article 13
Independence of the Procedure

1. Judicial aids procedure is independent from the proceedings of the relevant case, in exception of the cases regulated by other laws.

2. When participating in the relevant litigation procedure for the first time, the interested party or his/her lawyer shall attach the certification of the decision on the grant of judicial aids to the file of litigation procedure. In case the application or judicial controversy on the relevant decision is pending, the relevant certification documents shall be attached to the file of litigation procedure.

Moreover, we suggest inserting a new article:

Article 13-A
Employment of Lawyer

1. In case the application for judicial aids is approved, the government can designate a lawyer for the applicant when the applicant agrees on the choice; except for some justified reasons that the applicant's agreement cannot be obtained.

2. The government can revoke the judicial aids in case the beneficiary's uncooperative attitude has caused failure of normal execution of the lawyer's duties. In this case, Paragraph 1 of Article 18 is effective.

* * *

XII. Article 14 of "the Bill" states that:

"Article 14
Other Exemptions

1. The taxes, charges and other surcharges on the application form, certifications and other documents necessary for application are exempted.

2. Prepayment for raising controversy over the disapproval of application for judicial aids is exempted."

The revision we suggest is as follows:

Article 14
Other Exemptions

1. The taxes, charges and other surcharges on the application form, certifications and other documents necessary for application are exempted.

2. Prepayment for raising controversy over the disapproval of application for judicial aids is exempted. In this case, the *Framework Law of Judicial Organization* and the *Code of Civil Litigation* are complementarily applicable.

3. The litigation costs and lawyer's fee for the relevant lawsuit resulted from the winning of the controversy mentioned in Paragraph 2 are paid by the government under Article 6 of this law.

* * *

The following article needs to be inserted in "the Bill" in order to regulate the relevant matters in a clear and detailed way.

Article 15-A
Refusal of Judicial Aids

The people mentioned in Paragraph 1 shall not be granted judicial aids in case the litigation is against government institutions.

* * *

Part III: Conclusion

1. Written based on the rationales adopted by "the Bill", this commentary report, as mentioned above, focuses on the current legislative mindset and techniques. Therefore, it is under large constraints.

2. In case of significant change of legislative policies, such as adoption of another legislative mode, new analysis and consideration are needed.

3. In fact, "the Bill" does not establish rules about the relationship and association between the government and the court in the course of handling judicial aids applications. Such rules must affect the operation of judiciary entities.

4. We can foresee that when the system established by "the Bill" is adopted, the relevant proceedings must be slowed down by the "incidental matters" of the judicial aids.

5. "The Bill" does not clearly stipulate the time limit for handling application for judicial aids. This may be its Achilles' heel. Another shortcoming is that it is not consistent with other laws and procedural norms in many aspects.

6. Due to time constraints, limited political and strategic information we have obtained and some other factors, we can only make this report for the Chief Executive as reference.

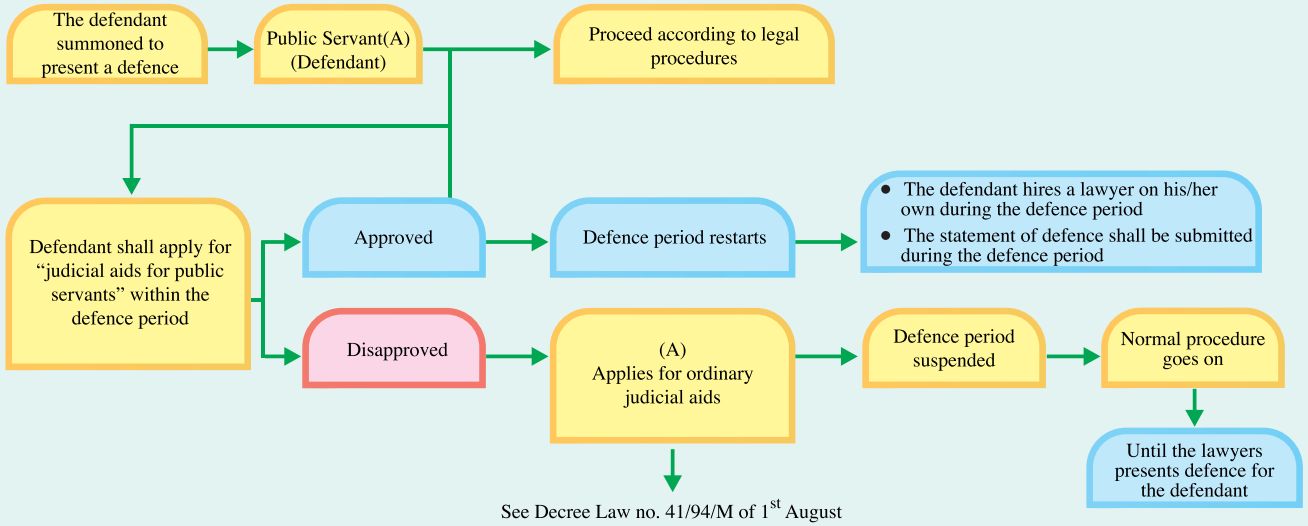
* * *

Commission Against Corruption, 13th September 2010.

The Commissioner Against Corruption
Fong Man Chong

Annex 1

Example – Civil Lawsuit:



- The government notifies the court of receipt of application for judicial aids through an official letter
- This notification has the effect of suspending the defence period
- The assessment shall be completed within 30 days since the application is submitted. In case the applicant fails to cooperate and thus does not submit the documents, the court shall be notified. In case of lack of required documents, the applicant will be disqualified for judicial aids. In either one of these cases, the defence period starts
- The government notifies the court of the decision of approval/disapproval through an official letter