

For discussion

Panel on Administration of Justice and Legal Services

**Five-yearly Review of the Criteria for
Assessing Financial Eligibility of Legal Aid Applicants**

PURPOSE

The Administration has completed the five-yearly review of the criteria used to assess the financial eligibility of legal aid applicants. This paper reports on the outcome of the review.

BACKGROUND

2. Our legal aid policy objective is to ensure that no one with reasonable grounds for taking legal action in the Hong Kong court is prevented from doing so because of a lack of means. To ensure that publicly-funded legal aid services are provided to those who are financially in need, the Legal Aid Department (“LAD”) has to conduct means tests on legal aid applicants.

3. The means of an individual is relative. It comprises the total financial resources of that individual, i.e. his income and capital. We take the view that if an individual is faced with the need for legal proceedings, he is expected to draw on his financial resources to meet his legal costs, to the extent that he would not in so doing suffer undue hardship. In assessing eligibility for legal aid therefore, the means of an individual should be measured.

4. The LAD adopts a “financial capacity” approach in assessing the means of legal aid applicants. Under this approach, a person’s financial capacity is determined by reference to the aggregate of his yearly disposable income and his disposable capital. A person whose “financial resources” does not exceed a certain level (currently specified at \$169,700 for the Ordinary Legal Aid Scheme (“OLAS”) and \$471,600 for the Supplementary Legal Aid Scheme (“SLAS”) in the Legal Aid Ordinance) is financially eligible for legal aid. The rules for determining an applicant’s disposable income and disposable capital are specified in Schedules 1 and 2 to the Legal Aid (Assessment of Resources and Contributions) Regulations.

5. Generally speaking, a person’s **disposable income** is his gross income minus his standard personal allowances (the level of which is currently pegged

to the 35-percentile household expenditure), rent or mortgage payments and salaries tax payment. A person's **disposable capital** is defined as the sum of his credit balance, the market value of non-money resources (e.g. shares) and the value of business or share in a company. The value of any interest in the only or main dwelling in which the applicant resides is, however, disregarded in computing the amount of his disposable capital.

6. As one of the recommendations arising from the 1992 legal aid policy review, the Administration undertakes to review once every five years whether any changes should be made to the way in which the LAD assesses the financial eligibility of applicants for the legal aid services it provides. Measures that were implemented subsequent to the 1997 legal aid policy review regarding the criteria for assessing financial eligibility were :

- (a) maintaining the "financial capacity" approach to assess the means of legal aid applicants;
- (b) adopting the 35-percentile household expenditure, instead of the previous Comprehensive Social Security Assistance ("CSSA") rate, as the yardstick for determining the statutory allowances deductible in calculating the disposable income of an applicant;
- (c) maintaining the status quo of not considering the resources of parents or guardians of an infant applicant in assessing his/her financial resources.

7. In accordance with the review timetable, we have now completed another five-yearly review on the criteria for assessing the financial eligibility of legal aid applicants.

APPROACH AND SCOPE OF THE REVIEW

8. In conducting the current review, we have revisited the rationale for the existing approach for assessing financial capacity. We have also compared our approach with practices of some overseas legal aid regimes, in considering whether further adjustments should be introduced to our methodology of means assessment.

9. Throughout the review, we are conscious that any proposed adjustment arising from the review should seek to achieve, rather than detract from, the objective of targeting persons of limited means as our target group for publicly funded legal aid services. It should be stressed that it is not our policy intention, for instance, to review the overall approach in such a way as to make legal aid commonly available to even the better-off litigants in Hong Kong.

10. At the same time, in the light of the present economic downturn and tight budget situation, we have kept at the forefront of our consideration the need to carefully assess the financial implications of any proposed change to the overall approach, to establish the priority, and the affordability of possible adjustments in light of the extreme financial stringency the Administration is facing, in taking a view as to how far these measures should be taken on board. It is against these important guiding principles that we have conducted this five-yearly review.

11. As to the scope of the review, the issues relating to the assessment criteria for financial eligibility covered in the current review are broadly categorized as follows:

- approach for assessing financial capacity;
- method of computing disposable income and the deductibles; and
- method of computing disposable capital and the deductibles.

12. We have included in the review the following issues as raised by the LegCo Panel on Administration of Justice and Legal Services (“the Panel”), viz. treatment of -

- resources of a spouse in means assessment;
- resources of an applicant who is an infant in means assessment;
- applications in representative or fiduciary capacity.

As per the Panel’s request, we have also looked into possible changes to SLAS, though the subject is not directly related to the assessment criteria for financial eligibility, the object of the five-yearly review.

Details of our deliberations are set out in the following paragraphs.

REVIEW OF THE ASSESSMENT CRITERIA FOR FINANCIAL ELIGIBILITY

(1) Approach for Assessing Financial Capacity

13. To recap, at present, the LAD adopts a “financial capacity” approach to assess the means of legal aid applicants. The financial capacity of individual applicant refers to the aggregate of his yearly disposable income and his disposable capital.

14. Before 1992, a legal aid applicant was means tested separately on his capital and income, and he had to satisfy the criteria of both tests before he became eligible. The previous system worked to the disadvantage of persons having only income, or capital, and was tilted in favour of those having both. The current “financial capacity” approach was implemented through the passage of Legal Aid (Amendment) Bill 1991 to address this inequality, and to achieve a fairer system of eligibility assessment. This methodology has avoided the anomalies of having separate capital and income means tests. This approach was last re-affirmed in the context of the 1997 legal aid policy review, during the consultation exercise of which the Administration had received no opposing views to our recommendation to maintain the “financial capacity” approach for assessing financial eligibility of legal aid applicants. This same approach continues to date, and, according to the operational experience of LAD, is working satisfactorily. Against this background, we do not consider it necessary, or desirable, to make changes to a system that has been working well. ***We will maintain the current approach of aggregating an applicant’s yearly disposable income and his disposable capital in conducting the means test.***

(2) Method of Computing Disposable Income

(a) Income

15. Under Schedule 1 Part I of the Legal Aid (Assessment of Resources and Contributions) Regulations, the income of the person concerned from any source shall be taken to be the income which that person may reasonably expect to receive (in cash or in kind) during the period of computation. In the absence of other means of ascertaining it, the income of that person is taken to be the income received during the preceding year. Simply put, the LAD at present takes into account the sum of an applicant’s actual monthly disposable income at time of application, and multiply it by 12, in arriving at his yearly disposable income. The income so calculated is the anticipated yearly income of the applicant accruing over a period of twelve months from the date of application.

16. There is a suggestion from the Panel that aside from the actual income at time of application, any loss or reduction of future income of a legal aid applicant should be taken into account in arriving at his disposable income. We have considered the suggestion carefully and concluded that with the support of the necessary documentary proof, it is reasonable to take into account loss or reduction of an individual’s future income in conducting the means assessment. ***We propose that subject to proof of loss or reduction of future income to the satisfaction of the Director of Legal Aid (“DLA”), such loss or reduction would be taken into account in calculating an applicant’s disposable income.***

(b) Deductions in Computing Disposable Income

17. We expect that when a person is faced with legal proceedings, he should draw on both his income and capital to meet his legal costs, to the extent that he can do so without suffering undue hardship. On this policy premise, in assessing the financial capacity of an applicant, we would allow deductions of the appropriate allowances necessary for maintaining an acceptable standard of living of the applicant. In calculating disposable income, the allowances which could be deducted under Part II of Schedule 1 of the Legal Aid (Assessment of Resources and Contributions) Regulations are as follows:

- allowance equivalent to “35-percentile household expenditure”¹;
- rent or mortgage payment of an applicant’s main or only dwelling apartment;
- payment of salaries tax;
- contribution payment to a pension or retirement scheme; and
- amount to provide for the care of any dependant infant living with the applicant during the time that such person is absent from the home by reason of employment.

18. We have reviewed the appropriateness of the above deductible items and considered whether there are any possible additional items which should be made deductible from disposable income. Our findings are discussed below: -

(i) Amount to Provide for the Care of any Dependant Living with the Applicant during the time that Such Person is Absent from Home by Reason of Employment

19. At present, the amount to provide for the care of any dependant infant of the applicant is deductible if the applicant leaves the infant alone at home by reason of employment. By the same logic, *there is a case to build on the current provision and extend it to cover the amount incurred by the applicant to provide for the care of his other dependants, be them their parents, grandparents, or siblings, provided that they are living with the applicant and are unable to take care of themselves by reasons of age, or infirmity, mental or physical disabilities, and require care by the applicant.* The relevant regulation could be amended to cover the care of other dependants of the applicants, who are unable to take care of themselves, in addition to their infant

¹ “35-percentile household expenditure” is the standard deductible allowance in calculating disposable income of applicants. It is to reflect the expenditure of our target group for legal aid, i.e. households in the lower middle class and below.

dependants. This proposed change aside, this type of allowance is at present not available to self-employed applicants. ***We see a case to correct this anomaly by permitting self-employed applicants to benefit also from this as a deductible allowance from their disposable income.***

20. As regards the implementation details of this proposed improvement, the amount deductible could be a reasonable monthly amount the applicant pays for the care of the dependant. The DLA has to be satisfied that such care and attention is necessary. He would consider certificate of infirmities, mental or physical disabilities provided by a registered medical practitioner or a report of a social worker as acceptable proof. The amount will not be treated as deductible if the dependant concerned is already in receipt of an allowance for “care and attention” under CSSA². As with the existing infant care allowance, the inability of the applicant to look after the dependant who is unable to care for himself must be occasioned by reason of the applicant's employment.

(ii) Maintenance Payment

21. We note that in some overseas jurisdictions, for example, New South Wales of Australia, England and Wales, and Ontario of Canada, maintenance payment (whether made pursuant to court order or voluntarily) is deductible from disposable income. ***Since maintenance payment is either ordered by the court or made voluntarily by an applicant to support his/her ex-spouse and children, we consider that there is a case for deducting it in calculating the disposable income of a legal aid applicant.*** To be eligible for the deduction, the applicant should provide documentary proof of actual maintenance payment made. As regards the sum deductible in calculating disposable income, where the maintenance payment is made voluntarily by the applicant, the actual amount paid should be allowed provided it does not exceed the present statutory allowances for dependants³. No such limit should however be imposed if the maintenance payment is ordered by the court, in which case, the actual amount paid by the legal aid applicant would be deducted from his disposable income.

(iii) Median Household Expenditure Approach

22. There is a suggestion from the Panel that LAD should use the median monthly household expenditure as the standard personal allowance deductible for calculating the disposable income of applicants.

² The allowance will be granted to a family receiving CSSA if there is an elderly or disabled member or a member medically certified to be in ill health. The allowance is up to a maximum of \$4,296 per month subject to medical certification and a social worker's recommendation

³ The present statutory allowances for dependant are \$3,160 for one such dependant, \$5,790 for two, \$7,510 for three, \$9,630 for four, \$10,190 for five, and \$12,500 for six or more.

23. Members may recall that the previous method of calculating the allowance deductible was based on CSSA rates. Through legislative amendments in 2000, we have adopted instead the “35-percentile household expenditure” in calculating the allowance. The objective of adopting the “35-percentile household expenditure” is to reflect more realistically the expenditure level of our target group, i.e. households in the lower middle class and below, for legal aid. We do not agree with using the median household expenditure as the basis for calculating the deductible income because this level of expenditure will not be representative of that of our target group. Further raising the standard personal allowance will have significant financial implications. *We consider that our policy position remains valid today and shall therefore maintain the 35-percentile household expenditure as the standard personal allowance.*

(3) Method of Computing Disposable Capital

(a) Capital

24. Rules for computing disposable capital are set out in Schedule 2 of the Legal Aid (Assessment of Resources and Contributions) Regulations. The amount of the capital of the person concerned shall be the amount or value of his every resource of a capital nature ascertained as on the date of the application. Disposable capital consists of all assets of a capital nature, such as cash, bank savings, jewellery, antiques, shares, and property.

(b) Items Disregarded in Computing Disposable Capital

25. We consider that the value of those capital assets, which are regarded as basic necessities, should be disregarded in calculating “disposable capital”. Apart from basic necessities, statutory compensations received by an applicant are also disregarded in the calculation.

26. According to Schedule 2 to the Legal Aid (Assessment of Resources and Contributions) Regulations, the items which shall be disregarded in computing the disposable capital are as follows:

- value of the household furniture and effects of main or any dwelling house occupied by the applicant;
- value of personal clothing;
- value of the personal tools and equipment of his trade;
- value of the only or main dwelling apartment;
- value of capital assets the reduction of which would cause

hardship because the applicant relies upon them to provide the principal source of his income;

- compensation received under the Employees' Compensation Ordinance, the Pneumoconiosis (Compensation) Ordinance and the Occupational Deafness (Compensation) Ordinance where a legal aid application relates to a claim for damages arising from personal injuries to, or the death of, any person;
- payment from the assistance fund under the Traffic Accident Victims (Assistance Fund) Ordinance;
- interim payment in accordance with an order made under the Rules of the High Court or an agreement having the same effect as such an order; and
- value of a donation or gift received, as the DLA considers to be reasonable.

Under Regulation 5 of the Legal Aid (Assessment of Resources and Contributions) Regulations, disposal capital (and income) which is the subject of the legal proceedings is disregarded in computing the financial resources.

27. We note that the Panel has suggested some specific items for inclusion as deductible items in calculating disposable capital. They are discussed as follows: -

(i) Insurance compensation as disposable capital

28. There has been a suggestion that insurance monies for accidents received by an applicant should be disregarded because such monies are required to cover the loss of income of the individual due to incapability to work and to cover medical expenses and equipment need arising from the accidents.

29. We accept that insurance monies for accidents are paid out in the event of unfortunate incidents to help the victims meet their medical needs. *We therefore propose that in assessing disposable capital of an applicant to pursue an accident-related personal injury claim whether or not the accident arises from work, the DLA may disregard an amount of the insurance monies paid to the applicant in respect of his bodily injuries to which the claim relates, which the DLA considers reasonable to cover such future expenses on treatment, equipment and care and attention, as may be certified to be necessary by a registered medical practitioner as a result of the injury, subject to proof to the satisfaction of DLA.*

30. While the DLA should have the power to disregard the above amount of insurance monies in the assessment of disposable capital, the expenses

deductible must be reasonably likely to be incurred in the next 12 months or such longer period as may be certified by a registered medical practitioner, subject to a maximum period of 3 years from the date of application. The amount of expenses to be disregarded should be determined by DLA having regard to expenses, if any, actually incurred and paid by the applicant out of the insurance monies during the preceding 12 months.

(ii) Borrowed money and cash in bank as disposable capital

31. The Panel has suggested that we should review whether borrowed money and cash in bank should be excluded in calculating disposable capital of a legal aid applicant. We do not see any justification for not taking them into account since they are free for disposal by the applicants to meet expenses incurred in private litigations. Excluding borrowed money in calculating disposable capital in our legal aid regime will be a substantial departure from our existing practice. It would penalize those legal aid applicants who are financially prudent in managing their own resources, rather than resorting to borrowing, to support their livelihood. In addition, for those who have to maintain their basic living by borrowing money, they are unlikely to have financial resources exceeding the present financial eligibility limits and should be able to pass means test. *There is therefore no strong justification for excluding borrowed money in assessing financial resources.*

(iii) Debt and Negative Value of Capital Assets

32. The Panel has requested the Administration to take into account in the five-yearly review a recent High Court case (Shem Yin Fun case, HCAL183/2002) which decided that debt should not be taken into account in assessing the applicant's financial resources under the present law. Reference was made in the judgment of that case to the deliberations made in another case on whether negative value of capital assets should be considered in assessing disposable capital.

33. The reasons for not excluding borrowed money, as discussed in paragraph 31 above, are also applicable to the case for not including debt as a deductible item in the assessment of financial resources of legal aid applicants. As regards negative value of capital assets, it is most commonly related to a situation where the value of the property of a legal aid applicant is less than the outstanding balance of the loan secured upon it. In this regard, we would first like to point out that under the existing regulations, the value of an applicant's main dwelling apartment is disregarded in calculating his disposable capital. If the applicant has a second apartment, for the purpose of assessing his financial resources, the LAD calculates the value of that property in accordance with its loan capacity, i.e. with reference to the amount of money the applicant is able to

borrow with the apartment pledged as security. For property of negative value, the LAD will put a zero value on that property for assessing the applicant's disposable capital. In a recent legal aid appeal against DLA's refusal to grant legal aid on means (LAA No. 475 of 2002), the Deputy Registrar has confirmed that, in the case of an applicant's second property with negative equity, the loan capacity would be zero. She has also pointed out that when an applicant holds investment portfolio including landed property and chooses not to realize his loss, he is holding onto his investment as though he is a sole proprietor running his own business. The valuation of his investment portfolio should be by reference to the borrowing capacity of his investment portfolio. We note that LAD's treatment of an applicant's property other than his main dwelling in the means assessment is in line with the decision of the Deputy Registrar, which serves to reaffirm the existing practice.

(4) Resources of a Spouse

34. The Panel has suggested that we should review whether the resources of a spouse of a legal aid applicant should be taken into account in assessing means. We consider that without the requirement of aggregating the financial resources of an applicant and his/her spouse, there would be no safeguard against possible abuses such as the transfer of assets by an applicant to his spouse in order to get within the financial eligibility limit or to avoid paying a contribution.

35. In circumstances that the spouse has a contrary interest in the relevant dispute or that the applicant and the spouse are living separate and apart, a safeguard is provided under regulation 7 of the Legal Aid (Assessment of Resources and Contributions) Regulations that the financial resources of the spouse will not be treated as those of the applicant.

36. Hong Kong is not alone in having the requirement of aggregating the financial resources of an applicant and his/her spouse for determining the financial eligibility of an applicant for legal aid. In England & Wales and Ontario of Canada, the financial resources of the applicant's spouse or partner are taken into account for means testing except where there is a conflict of interest between the applicant and the spouse/partner.

37. In New South Wales of Australia, the means test takes into consideration the financial resources of the applicant and any financially associated persons. A financially associated person is any person from whom the applicant usually receives financial support or who would be likely to financially assist the applicant in obtaining legal services. Such person may, among others, include a spouse/partner.

38. ***We consider that the current policy of aggregating the financial resources of an applicant and his/her spouse should be maintained.***

(5) Resources of an applicant who is an infant

39. Another item which the Panel has raised for review is whether public money should be spent in providing legal aid to the infants of financially well-off parents who are willing and can afford to conduct litigation on a private basis.

40. The Administration's concern is that if the financial resources of the parents/guardians of an infant were also taken into account in assessing the financial eligibility of an infant applicant, the parents/guardians 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 or to use their own resources to pursue claims if their resources (when aggregated with that of the infant) would render them not eligible for legal aid. The interest of the infant would therefore be jeopardized. Furthermore, as any damages recovered for or on behalf of the infant will be paid or otherwise dealt with in accordance with the directions of the court for the benefit of the infant, but not the parents/guardians, it would be unfair to include the financial resources of the parents/guardians in the assessment.

41. This present arrangement of not aggregating the financial resources of an infant and his parents/guardians in determining the financial resources of the infant reflects the policy last reaffirmed in the legal aid policy review conducted in 1997. No opposing view was received in relation to the recommendation to keep separate the financial resources of an infant and his parents/guardians during the consultation process that took place from 1997 to 1999.

42. In his report No. 37 on the results of value for money audit, the Director of Audit considers that the Administration should critically review the regulations that financial resources of the parents are excluded in assessing the means of an infant applicant, so that public money should not be 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. We note that the Director of Audit has made this suggestion from the perspective of ensuring proper uses of public fund.

43. In the final analysis, it is all a matter of where the balance of considerations should lie, with our existing policy of tilting towards protection of an infant's interest or towards protection of public fund as suggested by the Director of Audit. ***We nevertheless consider that the existing policy should be maintained.***

(6) Application in representative or fiduciary capacity

44. The Panel has considered that the existing provision that the financial resources of any persons who might benefit from the outcome of the proceedings should be taken into account in determining the financial capacity of an applicant in a representative or fiduciary capacity may be unfair, and therefore suggested that the provision should be reviewed.

45. Regulation 6 of the Legal Aid (Assessment of Resources and Contributions) Regulations covers the situation where the person making the application for legal aid applies in a representative or fiduciary capacity as:

- next friend / guardian ad litem of a person under the age of 18 or a mental patient;
- trustee;
- personal representative (Administrator or Executor) of the estate of a deceased person; and
- attorney appointed pursuant to a duly executed power of attorney.

46. The effect of Regulation 6 is that for application made by a person acting in representative or fiduciary capacity, that person's means would not be taken into account for financial resources assessment unless he himself also stands to benefit from the aided proceedings. It is the means of the person who may benefit from the outcome of the intended proceedings that should be assessed.

47. Take, for example, if the next friend (e.g., a social worker) of a mental patient applies for legal aid to sue a driver for damages in respect of personal injuries caused to the patient in a traffic accident, the means of the social worker would be ignored since he is only applying as representative of the patient. Instead, financial resources assessment will be conducted on the means of the patient who is the person to benefit from a successful outcome of the intended proceedings.

48. On the other hand, if the widow of a deceased person in an accident applies for legal aid to claim for damages, her financial resources will be taken into account even if she applies to take the intended proceedings as the personal representative of the deceased's estate. This is because the widow herself as the surviving wife of the deceased may benefit from the outcome of the proceedings should damages be awarded to the estate and she therefore does not apply only in a representative capacity.

49. The purpose of Regulation 6 is simply to ensure that it is the person who has cause to take proceedings and who wishes to do so with the assistance of legal aid who will have his means assessed. This accords with the objective of the legal aid serves to assist only persons of limited means.

50. On this premise, we do not see any unfairness in the operation of Regulation 6. According to information to hand, similar requirements are imposed in England and Wales, New South Wales, Australia and Ontario, Canada.

SUPPLEMENTARY LEGAL AID SCHEME (“SLAS”)

Background of SLAS

51. The SLAS was introduced in 1984 to provide civil legal aid to those whose financial resources exceed the limit for the OLAS but are unable to meet the costs of conducting litigation on a private basis. It is self-financing in nature and covers initially claims for damages arising from accidents causing personal injury or death and later claims arising from medical, dental and legal professional negligence where the claim for damages is likely to exceed HK\$60,000. The Scheme also covers claims under the Employees’ Compensation Ordinance irrespective of the amount of claim. The balance of the SLAS fund⁴ is about \$82.2 million as at 31 December 2002.

Improvements to SLAS

52. Having noted that SLAS, as a self-financing scheme, is operating with a surplus, the Panel has suggested that the Administration should consider possible ways to improve access to SLAS and reduce rate of contributions from SLAS clients. Though the matters are not directly related to the assessment criteria of financial eligibility, the object of the 5-yearly review, we have also taken the opportunity to look into possible changes to SLAS by looking at the following matters:

- raising the financial eligibility limit for SLAS;
- reducing the contribution rate under SLAS;
- adopting a sliding scale for SLAS contribution rate;
- payment of SLAS contribution by instalment; and
- enlarging the scope of SLAS

⁴ The balance is made up of application fee of \$1,000; interim contribution of \$42,425 and contribution of 12% of the compensation recovered in a successful claim (reduced to 6% if the claim is settled before trial and the delivery of brief to counsel) paid by SLAS clients.

Our analysis is set out as follows.

(a) **Increasing the Financial Eligibility Limit for SLAS**

53. There have been suggestions that the financial eligibility limit for SLAS should be raised. For example, the Bar Association has suggested that it should be increased to \$1 million.

54. In assessing eligibility for legal aid, the means of an individual should be measured against the litigation cost of a case if that individual employs lawyers privately. The financial eligibility limits for legal aid scheme should be set to reflect the individual's affordability in taking up litigation on his own financial resources. Accordingly, the justification for adjusting the financial eligibility limits is to reflect the changes in litigation costs.

55. Previously, we reviewed the financial limits once every two years. In the absence of a consumer price index that reflects changes in litigation costs, we have been adopting the CPI(C) as the next best available indicator to conduct these reviews. Since 2000, we have revamped the review cycle, and the mechanism now is to review the financial limits annually to take account of inflation, and biennially to take account also of changes in litigation costs. The rationale behind is that once every two years, we should ascertain the actual changes in litigation costs during a reference period to countercheck the CPI(C) movements, and, where necessary, make appropriate adjustments to changes in financial limits.

56. From our separate paper to the Panel on the findings of our annual and biennial reviews, Members will note that, in our attempt to identify the movements in litigation costs between year 2000 and 2002, we have sought assistance from the two legal professional bodies on the actual fees/costs currently charged by the legal profession for criminal proceedings, and those for civil proceedings which fall within the scope of the legal aid services. We also invited the two professional bodies to advise us their observation about changes in litigation costs since July 2000. Neither the Law Society nor the Bar Association however has information on the actual fees/costs currently charged by the profession. Against these circumstances, we have relied on statistics compiled by the LAD in conducting the biennial review. Based on LAD cases in the past two years, there has only been a minor change to the median litigation costs, which remain well within the current limit for SLAS. With this finding, *we therefore do not see any justification for an increase in the financial eligibility limit for SLAS to \$1 million.* That said, we would stand ready to re-examine the financial limits, as and when we receive concrete data from the two professional bodies that could support changes in litigation costs.

(b) Reducing the contribution rate

57. At present, if a claim receiving assistance from SLAS is successful, 12% of the compensation recovered will be deducted for the benefit of the SLAS fund, unless the claim is settled before trial and the delivery of brief to counsel, in which case the rate of deduction should be reduced by half (i.e. 6%).

58. In considering whether there is room for reducing the current contribution rates of successful litigants further, one should bear in mind that the contribution rates were reduced from 15/7.5% to the current levels in July 2000. Consequently, the financial impact on the SLAS fund has yet to be fully assessed.

59. However, given the current financial state of SLAS fund (the balance is about \$82.2 million as at 31 December 2002), it is considered that there may be room to slightly reduce the current contribution rates of successful litigants under SLAS.

60. Having examined the likely financial impact, LAD considers that financially there should be no significant adverse effect on the financial viability of the fund should the rate be reduced from 12%/6% to 10%/6%. *The Administration therefore propose that the contribution rate should be reduced to 10%/6%.*

(c) Adopting a Sliding Scale for SLAS Contribution

61. The Panel has suggested that the Administration should consider the possibility of adopting a sliding scale for contribution under SLAS. The relative merits of an ascending sliding-scale contribution rate (with a higher rate for a larger amount of damage recovered) and a flat contribution rate have been considered. While the former ensures a greater percentage of contribution to the fund in “profitable” cases where the size of damage awards are large, it has the effect of penalizing those receiving large damage, and does not allow plaintiffs to retain an amount of the awards in proportion to the damages they have suffered as compared with the latter. We do not see strong justification for those who have “suffered” more and therefore receive more damages to contribute at a higher rate to the SLAS fund. Having a descending sliding scale (with a higher rate for a smaller amount of damage recovered) would be plainly unjust and problematic. A flat rate across the board is therefore more reasonable and fair. It is easier for legal aid clients to understand what they could retain after litigation. It is also simpler for the LAD to administer. *We therefore propose to retain a flat rate for SLAS contribution.*

(d) Payment of Contribution by Instalments

62. There is a concern that some SLAS clients may not be able to pay the interim contribution of \$42,425 upon acceptance of legal aid under SLAS. It is already *LAD's practice to allow applicants to make such payment by a maximum of 6 monthly instalments in appropriate circumstances to be decided by LAD on a case by case basis. Such a practice will be maintained and LAD will make this known to the applicants.*

(e) Enlarging the Scope of SLAS

63. There have been suggestions that the scope of SLAS should cover more types of proceedings, such as claims by flat buyers against property developers and claims against insurance companies. Before considering these proposals, we first need to recapitulate the history and nature of the SLAS. One major distinction between the SLAS and the OLAS is that the SLAS is self-financing in nature. The fundamental principle that the SLAS should be self-financing has been laid down since its establishment in 1984. To enable the SLAS to remain self-financing, the scope of SLAS is confined to cases: -

- (a) which deserve priority for public funding in the sense that significant injury or injustice to the individual is involved; and
- (b) which involve monetary claims and have a reasonably good chance of recovering damages.

64. Based on the above principle, the SLAS was limited initially to cover claims for damages for personal and fatal injuries. It was subsequently extended to cover employees' compensation claims in 1992 and medical, dental as well as legal professional negligence in 1995. Its current scope covers cases of personal injury & death, medical, dental and legal professional negligence where the claim for damages is likely to exceed HK\$60,000 and claims under the Employees' Compensation Ordinance irrespective of the amount of claim. The need to limit the scope of the SLAS is to ensure that the SLAS fund is able to build up a healthy balance collected from damages awarded to compensate aided persons whose lives were generally affected and in many cases devastated by the negligent acts of others.

65. A point worth noting is, that the current rate of recovery of compensation or damages for successful SLAS cases is satisfactory is primarily attributable to the fact that most SLAS applications relate to claims for damages for personal injuries or death arising from road traffic accidents and work-related accidents which are covered by insurance as required by law. Additional safeguard against non-recovery of damages is provided through the Motor Insurers' Bureau and the Employees Compensation Assistance Fund Board respectively. Claims for legal professional negligence can also be covered by a professional indemnity scheme as required by law. As regards medical and dental negligence, it is known that the majority, if not all of the medical practitioners, takes out insurance cover with the Medical Protection Society.

66. With the above background, as a matter of principle, we do not consider it justified using contributions recovered from the existing SLAS cases to subsidize other types of cases that do not satisfy the aforesaid principle, or do not provide certainty in the prospect of recovery to ensure that the overall financial viability of the SLAS will not be jeopardised.

67. *In sum, in order to maintain the financial viability of the SLAS, there should be no extension to the scope of the SLAS.*

WAY FORWARD

68. We propose that:

- (a) *The current approach of aggregating an applicant's yearly disposable income and his disposal capital in conducting the means test should be maintained;*
- (b) *Loss or reduction of future income should be taken into account in calculating an applicant's disposable income, subject to proof to the satisfaction of the Director of Legal Aid ("DLA");*
- (c) *In calculating disposable income, the present deductible item of the provision for care of dependant infant if the applicant has to leave the infant alone at home by reason of employment, should be extended to cover the amount incurred to provide for the care of the applicant's other dependants, be them their parents, grandparents, or siblings provided that they are living with him and are unable to take care of themselves by reasons of age, or*

infirmity, mental or physical disabilities, and require care by the applicant. We also propose to extend this allowance to self-employed applicants;

- (d) Maintenance payment, either ordered by the court or made voluntarily by an applicant to support the living of his/her ex-spouse and children, should be deducted in calculating the disposable income of a legal aid applicant, subject to documentary proof of actual maintenance payment made. The sum deductible where maintenance payment is made voluntarily by the applicant should be pegged to the limits of the present statutory allowances for dependants. No such limit should however be imposed if the maintenance payment is ordered by the court;*
- (e) The standard personal allowance deductible in calculating disposable income should maintain at 35-percentile household expenditure;*
- (f) The present practice of treating assets of negative equity as having no value in assessing disposable capital should be maintained;*
- (g) In assessing disposable capital of an applicant to pursue an accident-related personal injury claim whether or not the accident arises from work, the DLA should be able to disregard an amount of the insurance monies paid to the applicant in respect of his bodily injuries to which the claim relates, which the DLA considers reasonable to cover such future expenses on treatment, equipment and care and attention, as may be certified to be necessary by a registered medical practitioner as a result of the injury, subject to proof to the satisfaction of DLA;*
- (h) There is no justification to exclude borrowed money and cash in bank in calculating disposable capital;*
- (i) The present requirement of aggregating the financial resources of an applicant and his/her spouse should be maintained to safeguard against possible abuses;*
- (j) The present arrangement of not aggregating the financial resources of an infant and his parents/guardians in determining the financial resources of the infant should be maintained;*

- (k) There is no justification for an increase of the financial eligibility limit for SLAS to \$1 million;*
- (l) The contribution rate for SLAS should be reduced to 10%/6%;*
- (m) A flat rate for SLAS contribution should be retained;*
- (n) The present practice of allowing payment of interim contribution of \$45,425 by a maximum of 6 monthly instalments in appropriate circumstances on a case by case basis should be maintained; and the practice should be made known to applicant; and*
- (o) In order to maintain the financial viability of SLAS, there should be no extension to the scope of SLAS.*

Administration Wing
Chief Secretary for Administration's Office
June 2003