

**LEGCO PANEL ON THE ADMINISTRATION OF JUSTICE
AND LEGAL SERVICES**

**FIVE YEARLY REVIEW OF CRITERIA FOR ASSESSMENT OF FINANCIAL
ELIGIBILITY OF LEGAL AID APPLICANTS**

COMMENTS BY THE LAW SOCIETY OF HONG KONG

The Law Society Legal Aid Committee has considered the papers submitted by the Administration (LC Paper CB(2)2581/02-03(02)), the Hong Kong Bar Association (LC Paper CB(2)644/03-04(01) and the Legal Aid Services Council (LASC D/P 56/03 [R]. Since we are in broad agreement with the comments made by the Legal Aid Services Council we have adopted the paragraph numbering utilized by the Council by reference to the Administration's paper in making the following comments.

Paragraph 14 Assessment of Financial Capacity

We accept the views of both the Administration and the LASC that the current approach should be maintained since it appears to be working satisfactorily.

Paragraph 16 Income

Again we accept the views of the Administration and the LASC that the loss or reduction of future income when corroborated by evidence to the satisfaction of the DLA should be taken into account when assessing an applicant's disposable income.

Paragraph 19 Dependants' care

We take the view that in calculating disposable income deduction should be allowed in respect of all payments made for the provision of care for dependants irrespective of whether or not they are living with the applicant. It is no longer the situation that extended families live under one roof. Frequently a family is divided into two separate units for male

and female. Eligibility for the allowance should be determined not by their whereabouts but by the fact that provision is made for dependants.

Paragraph 21 Maintenance Payments

Whilst we agree with the LASC that the scope of deductions should be extended to all court ordered periodical payments in relation to those made voluntarily the deduction should be limited to the actual amount paid or the amount of the limit of such statutory allowance whichever is the less.

Paragraph 23 Median Household Expenditure approach

For the same reasons as those set out in the LASC paper we support the suggestion that the appropriate benchmark to calculate allowable expenditure should be median household expenditure in the same way that median household income should be utilized in defining that class of persons who should have priority for the grant of legal aid in Hong Kong. We also agree that CPI (A) is a more appropriate yardstick in that it covers more of the Administration's target group for eligibility for legal aid.

We do not accept, however, that the provision of legal aid should be limited to "the lower middle class and below". Access to justice is increasingly difficult to attain. The number of unrepresented applicants is witness to this growing problem. If citizens have to resort to means other than court litigation to resolve their differences a breakdown in social order may well result.

In our view the provision of legal aid should be substantially expanded with a sliding scale of contributions which at the top end of the scale would reflect the total likely cost of the proceedings but which would render more persons eligible provided they made substantial contribution towards their costs. Currently the income for the Legal Aid Department from the payment of contributions is not high. If the legal aid "net" were to be extended those from a higher financial capacity would benefit and the LAD would receive significantly more revenue.

The recent introduction of Financial Dispute Resolution in the Family Court will result in a greater awareness of the relative costs positions of the parties from the outset of proceedings. The Court will be empowered to require one party to contribute to the legal aid costs of the other party by instalments from the commencement of the proceedings. Given that much of legal aid expenditure is incurred in proceedings in the Family Court it would be prudent to take advantage of all opportunities to reduce that expenditure by the collection of more contributions both in terms of numbers and amounts. Rather than adopting a somewhat defensive policy of restricting legal aid to the "lower middle class and below" the opportunity should be taken at this review to look into methods whereby more people benefit and at the same time more people contribute to the scheme. By bringing more people into the legal aid scheme there will be a reduction in the need for publicly funded bodies such as the Resource Centre for Unrepresented Litigants.

Paragraph 29 Insurance Compensation as disposable capital

The Law Society does not agree with either the Administration or the LASC on this issue. Our understanding is that the policy has been for the insurance monies recovered by an applicant to be disregarded in assessing disposable capital where the Legal Aid Certificate or Certificates relate to the same cause of action. The most obvious example is the award of employees' compensation to a legal aid applicant/recipient who then pursues a common law claim against either the same employer or a third party. It would be unconscionable to refuse legal aid for the common law claim on the grounds that the applicant has recovered employees' compensation for which he will have to give credit in the common law claim. Regulation 15 of the Legal Aid (Assessment of Resources & Contributions) Regulations provides relief by requiring only one contribution to be made thus tacitly accepting that there is only one substantive claim.

The Administration's proposal appears to go against the existing practice and only give allowance in respect of future treatment, equipment, care and attention as certified by a medical practitioner. Quite apart from the fact that this appears to be a departure from the existing commonsense approach applied by the LAD it will also involve

additional expenditure in assessment by a doctor of the likely future cost of care and attention.

Although the Administration's paper does not specifically indicate as such we are led to believe that the calculation of future care and attention to be set off against insurance monies received will be limited to cases where the applicant has benefited from a personal accident policy which he has taken out. We do not consider it reasonable to include such insurance monies in the financial resources of the applicant even if the cost of future care and attention is deductible. For the reason set out above we consider the method of calculation and certification of the cost of future care and attention to be unduly bureaucratic and costly for a legal aid applicant and thus should not be pursued.

We agree with LASC that damages awarded for future loss of income including employees' compensation awarded in respect of the employee's reduced future earning capacity should be excluded from calculation of disposable capital but we do not agree that MPF retirement benefits should be excluded as they represent capital in the hands of the applicant.

Paragraph 31-32 Borrowed money

Whilst we agree that cash in the bank must be included in the calculation of disposable capital we do not agree that borrowed money should automatically also be included unless the amount of the outstanding balance is included by way of set-off. We are of the view that properly documented loans should be deducted.

Paragraph 38 Resources of a spouse

We agree that aggregation should continue.

Paragraph 43 Resources of an infant applicant

We agree such resources should not be aggregated with those of the parent/guardian.

Paragraph 56 SLAS

We wish to see the adoption of a sliding scale of contributions significantly expanding the scope of SLAS as mentioned in relation to paragraph 23 above. At the same time we would like to see the opportunity taken of building on the success of SLAS in increasing the scope of coverage of the scheme and we would be keen to participate in discussions as to how this might be done.

Paragraph 60 Contribution rate for SLAS

We do not agree that the contribution rate should be reduced but that the present levels should be maintained. This will better enable the scope of cover to be expanded.

Paragraph 61 Sliding scale

A flat rate should be maintained unless the proposal is agreed to expand the scope by raising the limits of eligibility and contributions in which event there will have to be a sliding scale.

Paragraph 62 Payment of contributions by instalments

We agree the present practice should continue.

Paragraph 67 Enlarging the scope of SLAS

We believe that legal aid policy should be to expand the scope of both OLAS and SLAS to enable more people to benefit from the provision of legal aid and that this should take priority over the expansion of legal aid to other areas of dispute.