

CSO/ADM CR 3/3221/02(04)

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16 September 2004

Mr Li Tin Yiu
Secretary, Legal Aid Services Council
Room 1601, 16/F, Top Glory Tower
262 Gloucester Road
Causeway Bay,
Hong Kong

Dear Mr Li,

**Five-yearly Review of the Criteria for Assessing
Financial Eligibility of Legal Aid Applicants (“Five-yearly review”)**

Thank you for your letter of 6 December 2003, enclosing comments of the Legal Aid Services Council (“the Council”) on the Administration’s proposals arising from the five-yearly review. I set out below the Administration’s position on the issues raised.

Recommendation

The current “financial capacity” approach in conducting the means test should be maintained. [Paragraph 14 of the Administration’s paper of June 2003]

The Council agrees to the proposal. Members would like to know the criteria the Administration adopts in concluding that the current approach has been working satisfactorily.

The “financial capacity” approach was adopted in 1992. Before 1992, a legal aid applicant had to pass two separate tests, on his

capital and income respectively, before he became financially eligible for legal aid. 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 methodology has been implemented to address this inequality, and to achieve a fairer system of eligibility assessment.

The existing approach has proven to be effective in rectifying the anomaly identified in the previous system. Over the past decade or so since its operation, the Legal Aid Department (“LAD”) has not encountered any operational difficulty with this approach, or received any complaints from legal aid applicants (or others) against its continued operation. We note that the Law Society is also in support of this methodology.

Recommendation

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”). [Paragraph 16 of the Administration’s paper]

The Council agrees to the proposal.

Recommendation

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, infirmity, mental or physical disabilities, and require care by the applicant. This allowance is also proposed to be extended to self-employed applicants. [Paragraph 19 of the Administration’s paper]

The Council agrees to the proposal. It suggests that the condition for the dependant(s) to live with the applicant be relaxed.

We would like to set out the rationale behind our proposal. At present, in computing the disposable income of a legal aid applicant, the amount to provide for the care of any dependant infant(s) of the applicant, viz. the care allowance, is a deductible item. The care allowance recognizes that for reason of employment, an applicant and his/her spouse would be

unable to take personal care of their infant dependant(s) who live with them. The care allowance is hence included as deductible to enable the applicant and his/her spouse to continue to work, with their infant dependant(s) taken care of during their absence.

The care allowance is in addition to the personal allowance deductible, which the applicant may continue to claim, for supporting the living of himself and his dependant(s).

We consider that the same rationale for granting the infant care allowance as a deductible item should also apply to other dependant(s) of the applicant. The present arrangement, and the proposed extension, are designed to cater for the specific circumstances where the dependant(s) are living with the applicant and his/her spouse, and are unable to take care of themselves for specified reasons and thus require care and attention whilst the applicant and his/her spouse are at work. Given this premise and the possible difficulties in verifying claims of non-live in dependants, particularly if they may not reside in Hong Kong, we are of the view that the extension of the existing infant care allowance should be confined to the dependants who live with the applicant in the first instance.

Recommendation

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. [Paragraph 21 of the Administration's paper]

The Council agrees to the proposal. It suggests that the scope should be extended further to cover other periodical payments ordered by the court.

In proposing to include maintenance payment as a deductible item, we recognise that making such payment is the responsibility of the applicant to support the basic needs of his ex-spouse and children. It is similar in nature to the current personal allowance deductible we allow in the means assessment, for the applicant to support the living of his/her dependants.

As to other types of periodical payments that the court may order, they are generally to do with judgment debt payable by a judgment debtor by instalments, made pursuant to an application in court by the judgment debtor, to replace his liability to settle a judgment debt by one payment. Such other payments do not necessarily relate to supporting the livelihood of the applicant's dependants. It is not the policy intention to make all payments ordered by the court deductible items, without regard to the nature of a particular obligation. We are also not aware that other overseas jurisdictions include periodical payments ordered by the court as deductible in assessing the financial eligibility for legal aid.

Recommendation

The standard personal allowance deductible in calculating disposable income should maintain at 35-percentile household expenditure.
[Paragraph 23 of the Administration's paper]

The Council counter proposes that the "median household expenditure" should be adopted as the personal allowance deductible for the Ordinary Legal Aid Scheme ("OLAS") and the "75-percentile household expenditure" in respect of the Supplementary Legal Aid Scheme ("SLAS"). It further suggests that, in the longer term, the Administration should explore using "median household income" to define lower middle class and below, and define social class in terms of occupation, for the purpose of identifying the target group of legal aid.

We note that the Council's above suggestion is premised upon the findings of a social research which divides the working population in Hong Kong into different social classes on the basis of their occupation. Based on the results of the 2001 Population Census, the social research has estimated that 66.4%, 92.8% and 26.4% of the working population belong to the "lower middle class and below", the "upper middle class and below" and "sandwich class" respectively. The Council therefore proposes that the "median household expenditure" and "75-percentile household expenditure" should be adopted as the respective personal allowance deductible for OLAS and SLAS.

We should perhaps first clarify that the Administration does not have, as a matter of policy, a target coverage of legal aid services in terms of the percentage of eligible households or eligible individuals in Hong Kong. Second, given that legal aid should cater for all those in need

in the whole population, we have reservations to use the working population as the only basis for deriving the legal aid target group. In this regard, we note that according to the 2001 Population Census, the total working population in Hong Kong was 3,252,706, whilst the non-working population was 3,455,683. If we were to classify 66.4% of the working population as belonging to the “lower middle income class and below”, and accordingly classify them as the target group of legal aid, we could have missed out the remaining three million non-working population altogether. Also, we have difficulty in agreeing to adopt the “median household expenditure” as the personal allowance deductible under OLAS, or use an applicant’s occupation as the basis for assessing eligibility for legal aid. As noted from the relevant statistics obtained in the 2001 Population Census at Annex, an occupation class covers individuals with a wide range of monthly income. It would be difficult to explain or justify the proposed division and selection of a legal aid target group in this manner. In our view, eligibility for legal aid should be determined not by the occupation of an applicant, but directly by assessing the financial capability of that person.

We would like to turn to the rationale for adopting the “35-percentile household expenditure” as the personal allowance deductible for legal aid applicants. When a person is faced with legal proceedings, he is expected to draw on his own financial resources to meet the costs incurred as others do, to the extent that he does not suffer undue hardship. In conducting the means assessment on an applicant, we would therefore allow deduction of the appropriate allowances for the applicant to maintain an acceptable standard of living for himself and his dependants. The “35-percentile household expenditure” is currently adopted as the standard personal allowance deductible in order to reflect more realistically the **basic need** of our target group of legal aid, i.e. households in the lower middle class and below, in terms of the household expenditure level.

Indeed, prior to 2000, the Comprehensive Social Security Assistance (CSSA) rates were adopted as the personal allowance deductible. Members may note from the table of comparison below that following our adoption of the “35-percentile household expenditure” as the standard in 2000, there has been significant increases in the absolute level of the deductible ranging from some 60% to 140%, depending on the size of the household to which a particular applicant belongs. Many receive it as a substantial enhancement to our legal aid system. It should be noted that the “35-percentile household expenditure” excludes rental payment, as the

actual expenditure on rent/mortgage payment is deducted before we arrive at the disposable income of an applicant.

Household size	(a) CSSA Rates as personal allowance (HK\$)	(b) 35-percentile monthly household expenditure (excluding rent) (HK\$)	Comparison between (a) and (b) $\left[\frac{(b) - (a)}{(a)} \right]$
The person concerned with no dependant	1,605	3,780	135.5%
The person concerned with 1 dependant	2,860	6,880	140.6%
The person concerned with 2 dependants	4,290	9,460	120.5%
The person concerned with 3 dependants	5,720	11,150	94.9%
The person concerned with 4 dependants	7,150	13,230	85.0%
The person concerned with 5 dependants	8,580	13,790	60.7%
The person concerned with 6 or more dependants	10,010	16,060	60.4%

For reasons above, we do not agree to use the “median household expenditure” as the basis for calculating the personal allowance deductible. Besides, further raising the personal allowance deductible would have very significant financial implications on the public purse.

The Council also proposes a higher personal allowance deductible for applicants under SLAS. As in our letter of 8 October 2003, we have difficulty with the proposal; to do so is tantamount to accepting the notion that SLAS applicants should enjoy a higher standard of basic needs, in comparison with that of OLAS clients, for the purpose of financial eligibility assessment for legal aid. Our view remains that we should apply the same standard of basic needs, and hence the same level of personal allowance deductible, to legal aid applicants across the board, irrespective of the different legal aid schemes they may be pursuing.

The Council further proposes that CPI(A) and CPI(B) should be used to reflect price changes in respect of the financial eligibility limits of OLAS and SLAS respectively.

The financial eligibility limits of legal aid applicants should reflect the cost of pursuing litigation in private. Bear this in mind, the most suitable CPI indicator would be chosen to measure price changes and form the basis for adjusting the financial eligibility limits. CPI(A), CPI(B) and CPI(C) are compiled based on the expenditure patterns of some 50%, 30% and 10% of households in Hong Kong respectively. CPI(C) reflects the pattern of high household expenditure which covers approximately the top 10% of total households. It should be an appropriate indicator for the changes in litigation costs which are generally regarded as high level expenditure item. CPI(C) also has as its component the highest percentage of expenditure on “miscellaneous services”¹. In this context, the change in the cost for legal services, as one of the miscellaneous services, would be appropriately represented by CPI(C), as compared with the other two consumer price indices. As Members may recall, CPI(C) is also adopted by the Administration as the indicator in adjusting criminal legal aid fees.

Recommendation

In assessing disposable capital of an applicant to pursue an accident-related personal injury claim whether or not the accident arises from work, 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 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. [Paragraph 29 of the Administration’s paper]

The Council agrees to the proposal. It further suggests that compensation or insurance payment to the applicant arising from an incident not relating to his legal aid application should also be disregarded, if the payment/compensation is meant to compensate for the loss of future earning capacity of the applicant. Separately, as Mandatory Provident Fund (MPF) retirement benefits are meant to support the livelihood of the

¹ Other components include food, housing, electricity, gas and water, alcoholic drinks and tobacco, clothing and footwear, durable goods, miscellaneous goods and transport.

recipient when he is no longer employable, the Council considers that these benefits should be disregarded in computing disposable capital.

As a matter of policy, we consider that insurance monies should count towards an applicant's capital in the means assessment. We propose a limited inclusion of insurance monies in specified circumstances as deductible as outlined in the recommendation above, in response to representations made by a relevant NGO. It quoted a precedent case where an applicant hoping to pursue a work accident-related personal injury claim against his employer failed the means test on account of the insurance monies he had received in respect of his bodily injuries to which the claim related. In considering this proposal, we recognise that during the time when the applicant is pursuing an accident-related personal injury claims, and until he is actually awarded the damage, he has to rely on the insurance monies he receives in respect of his bodily injuries to meet the expenses on treatment, equipment and care and attention. We therefore recommend the additional deductible, which we believe should go some way towards addressing the problem.

If the insurance monies an applicant receives are not related to his claim, these monies should be no different from his other financial resources such as personal savings, that the applicant has at his disposal to pursue litigation in private. Similarly, as MPF benefits are free for the disposal of an individual to pursue private litigation, we do not see the justification for excluding these benefits in assessing the financial capability of a legal aid applicant. In this regard, we note that the Law Society has advised the LegCo AJLS Panel that it does not agree that such benefits should be excluded as they represent capital in the hands of the applicants.

Recommendation

There is no justification to exclude borrowed money and cash in bank in calculating disposable capital, and there is no justification to include debt as a deductible item in the assessment of financial resources of legal aid applicants. [Paragraphs 31 – 32 of the Administration's paper]

The Council considers that the rule should be refined so that debts to an authorized or licensed financial institution can be taken into

account, subject to the applicant making a declaration to disclose details of his debt for the LAD to consider.

Our justifications are set out in paragraph 31 of the Administration's paper. As we see it, if a legal aid applicant has an outstanding debt and disposable capital, he can always use his financial resources to repay the debt before applying for legal aid. In this way, the need for an outstanding debt to count as a deductible item would not arise. Furthermore, it would be difficult to justify why debts to an authorized or licensed financial institution should be treated differently as opposed to debts to, say, a relative or friend of the applicant.

Our treatment of debts in the means assessment of legal aid applicants is in line with practices adopted by many overseas jurisdictions where debts are not deducted from a legal aid applicant's financial resources. As we understand it, one of the reasons for the arrangement is that, in the view of the legal aid authorities concerned, a person who has the ability to borrow money also implies that he has the capacity to fund his litigation by other means.

Recommendation

The present requirement of aggregating the financial resources of an applicant and his/her spouse should be maintained to safeguard against possible abuses. [Paragraph 38 of the Administration's paper]

The Council agrees to the proposal.

Recommendation

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. [Paragraph 43 of the Administration's paper]

The Council agrees to the proposal.

Recommendation

There is no justification for an increase of the financial eligibility limit for SLAS to \$1 million. [Paragraph 56 of the Administration's paper]

The Council considers that the financial eligibility limit for SLAS should be increased from \$471,600 to \$672,000, to reflect price changes between 1984 when the Scheme was first introduced, and 1992 when the “financial capacity approach” was adopted.

When the financial eligibility limit for SLAS was revised from \$280,000 to \$400,000 in July 1995, the Administration had already taken into account the accumulated inflation since 1984, and the impact of the adoption in 1992 of the “financial capacity approach” to assess the financial resources of a legal aid applicant. The Administration estimated at the time that the new methodology alone had raised the limit by about \$100,000.

On further adjustments to the financial eligibility limits, as the Council is aware, we have, with effect from 2000, put in place a comprehensive system to review the limits regularly. It comprises an annual review to take into account changes in consumer prices and a biennial review to take into account changes in litigation costs. We shall adhere to the established adjustment mechanism and review cycle to ensure that the financial eligibility limits are keeping up with the times.

Recommendation

The contribution rate for SLAS should be reduced to 10%/6%. [Paragraph 60 of the Administration’s paper]

We note that the Council agrees to the proposed reduction if there is no expansion in SLAS. If SLAS takes on more cases, the Council considers that the existing contribution rate should be retained so that the scheme can benefit more people.

Recommendation

A flat rate for SLAS contribution should be retained. [Paragraph 61 of the Administration’s paper]

The Council agrees to the proposal.

Recommendation

The present practice of allowing payment of interim contribution of \$42,425 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. [Paragraph 62 of the Administration's paper]

The Council agrees to the proposal.

Recommendation

In order to maintain the financial viability of SLAS, there should be no extension to the scope of SLAS. [Paragraph 67 of the Administration's paper]

We note that the Council will, through its Working Party on the Scope of Legal Aid, continue to search for areas suitable to be included in SLAS. We would be happy to consider the views of the Council in due course.

Other Issues

DLA's Discretionary Power

The Council suggests the DLA to consider whether there are areas where discretion by the DLA can be introduced to deal with potential hardship or potential injustice created by existing rules, and to report to the Council when and if such areas are identified.

The LAD will take into account the suggestion in the context of the on-going review of the various aspects of legal aid services. Nevertheless, as legal aid is funded by public coffers, it is desirable to set out the assessment criteria clearly in statute.

Legal Aid for Owner's Corporation

The Council proposes that the relevant legislation be amended so that legal aid may be made available to office-bearers of owners' corporations, to enable them to commence legal action in their personal capacity for the effective enforcement of the Building Management Ordinance or Deed of Mutual Covenant on maintenance and repair of buildings. In the long term, the Council considers that the Legal Aid Ordinance should be amended to enable eligible owners' corporations to enforce the Building Management Ordinance or Deed of Mutual Covenant on maintenance and repair of buildings.

Notwithstanding the above, we note that a number of support measures are in place to help property owners ensure the proper upkeep of their properties. For instance, owners of private buildings are eligible to apply for the Building Safety Loan Scheme operated by the Buildings Department to carry out works to repair, or to improve the safety of the buildings and/or private slopes. There have been suggestions that an owners' corporation should be empowered to borrow from the Scheme on behalf of owners in order not to hold up the necessary repairs to the whole building. The Home Affairs Department is now working closely with relevant bureaux/departments on the operational details of the suggestions.

In addition, the four Building Management Resources Centres set up by the Home Affairs Department in the territory serve to provide necessary information and advice on building management. Free professional consultation by appointment is also available. Owners and members of owners' corporations may obtain free legal, accounting, surveying and engineering advice on various aspects of building management from the volunteer professionals on duty at the centres.

Should an owners' corporation wish to institute legal proceedings against individual owners for breach of the Building Management Ordinance or the Deed of Mutual Covenant, and the amount of claim is less than \$50,000, such proceeding can be instituted at the Small Claims Tribunal (and if necessary, the Lands Tribunal). Parties are not legally represented at the Small Claims Tribunal.

Furthermore, the Housing, Planning and Lands Bureau launched a public consultation exercise on building management and maintenance in December 2003, with a view to finding a long-term and sustainable solution to address the building neglect problem. The consultation paper seeks public views, among other things, on whether the existing remedies available for the recovery of outstanding contributions from individual owners should be strengthened and whether any new measures are required. The Administration will make a concerted effort to work out the way forward in the light of comments received.

In view of the measures in place to assist owners to upkeep their property, and the possible enhancement measures underway, we do not propose to amend the legislation and expand the scope of legal aid to cover owners' corporations for the time being.

I should be grateful if you would advise the Council of the Administration's position as set out above. I have also taken the liberty of making available our response to the Clerk to the LegCo AJLS Panel under separate cover in response to the request by the Panel early this year.

Yours sincerely,

(Mrs Alice Cheung)
for Director of Administration

2001 Population Census

Percentiles of monthly income from main employment of working Population (exclude unpaid family workers) by Occupation

Occupation	Monthly income from main employment (HK\$)		
	10 Percentile	Median	90 Percentile
Managers & administrators	10,000	26,000	75,000
Professionals	12,500	30,000	85,000
Associate professionals	8,000	16,000	35,000
Clerks	6,000	10,000	19,000
Service workers and shop sales workers	4,000	9,110	20,000
Craft and related workers	5,000	10,000	18,000
Plant & machine operators & assemblers	5,000	10,000	16,500
Elementary occupations	3,500	5,300	10,500
Skilled agricultural and fishery workers; and occupations not classifiable	1,000	7,000	21,250
Total	3,860	10,000	30,000

(a) Median monthly income from main employment is the average income from main employment so calculated that 50% of the working population, excluding unpaid family workers, had income above that figure and the other 50% had income below it.

(b) 10 percentile monthly income from main employment is the average income from main employment so calculated that 90% of the working population, excluding unpaid family workers, had income above that figure and the other 10% had income below it.

(c) 90 percentile monthly income from main employment is the average income from main employment so calculated that 10% of the working population, excluding unpaid family workers, had income above that figure and the other 90% had income below it.