

**The Administration's responses to the comments
by the Law Society of Hong Kong on**

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

The Law Society of Hong Kong ("Law Society") has provided the LegCo Panel on Administration of Justice and Legal Services ("AJLS Panel") with its comments on the Administration's proposals arising from the five-yearly review. We note that the Law Society is in broad agreement with the comments made by the Legal Aid Services Council ("LASC") in December 2003. As undertaken at the AJLS Panel at its meeting on 29 January 2004, the Administration's position on the issues raised by the Law Society is set out below: -

Recommendation

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

2. The Law Society agrees to the proposal.

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]

3. The Law Society 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 dependant(s), 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]

4. The Law Society takes the view that the deduction should be allowed irrespective of whether or not the dependant(s) are living with the applicant.

5. 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.

6. 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).

7. 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 dependant(s) 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]

8. The Law Society agrees to the view of the LASC that the scope of the proposal should be extended to further cover other periodical payments ordered by the court.

9. 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.

10. 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]***

11. The Law Society agrees to the view of the LASC, for the same reasons given in the LASC's paper, that the "median household expenditure" should be adopted as the personal allowance deductible, and that, "median household income" should be used to define the class of persons who should have priority for the grant of legal aid.

12. We note that the LASC's suggestion as reflected in its paper of December 2003 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 LASC therefore proposes that the "median household expenditure" and "75-percentile household expenditure" should be adopted as the respective

personal allowance deductible for the Ordinary Legal Aid Scheme (“OLAS”) and the Supplementary Legal Aid Scheme (“SLAS”).

13. 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.

14. 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.

15. 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%

16. 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.

17. The LASC and the Law Society further propose that CPI(A) should be used to reflect price changes in respect of the financial eligibility limit of OLAS.

18. 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.

19. The Law Society further points out that the provision of legal aid should not be limited to the “lower middle class and below”. In its 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 contributions towards their costs.

20. The Law Society’s suggestion is tantamount to removing an absolute financial eligibility limit in respect of legal aid. Under the existing policy, public resources for legal aid are targeted at those who cannot afford the costs of conducting litigation on a private basis without suffering from undue hardships and therefore need publicly funded legal aid services. Determining the means of a legal aid applicant is accordingly one of the two cardinal criteria (the other being the merits test) for considering the grant of legal aid. Removing the financial eligibility limit for granting legal aid would imply that those who have sufficient means to pursue litigation in private would also get publicly assisted legal aid services, and this is something we cannot agree to or accept on legal aid policy ground.

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

21. On the coverage of legal aid services, though we do not have a target, we wish to point out that at present more than 55% of the total households in Hong Kong may be financially eligible for legal aid under the OLAS and some 70% in the case of SLAS. We understand that in England and Wales, and in Ontario, Canada, the comparable figure is around 40%. Seen in this light, the existing legal aid coverage should be reasonable.

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]

22. The Law Society clarified at the AJLS Panel meeting on 29 January 2004 that it agreed to the views of the LASC, 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.

23. 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 claim 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.

24. 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.

25. Separately, the Law Society disagrees with the LASC that the Mandatory Provident Fund (MPF) retirement benefits should be disregarded in computing disposable capital as they represent capital in the hands of the applicant. We agree with the Law Society's position.

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]

26. The Law Society considers that properly documented loans should be deducted in the calculation of disposable capital.

27. Our justifications are stated in paragraph 31 of the Administration's paper. As we see it, if a legal aid applicant has an outstanding loan and disposable capital, he can always use his financial resources to repay the loan before applying for legal aid. In this way, the need for an outstanding loan to count as a deductible item would not arise.

28. Our treatment of loans and 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]

29. The Law Society 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]

30. The Law Society 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]

31. The Law Society wishes to see the adoption of a sliding scale of contributions significantly expanding the scope of SLAS. At the same time, it would like to see the opportunity taken of building on the success of SLAS in increasing its scope of coverage. Our view has already been set out in paragraphs 20 to 21 above.

Recommendation

The contribution rate for SLAS should be reduced to 10%/6%.

32. We note that the Law Society does not agree that the contribution rate should be reduced, but the present level should be maintained, so as to enable the scope of SLAS to be expanded.

Recommendation

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

33. The Law Society agrees to the proposal, unless its proposal to expand the scope by raising the limits of eligibility is agreed. Our view on

the proposal of the Law Society has been set out in paragraphs 20 to 21 above.

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]

34. The Law Society 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]

35. The Law Society considers 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. Our view on the scope of legal aid has been set out in paragraph 21 above.

**Administration Wing
Chief Secretary for Administration's Office**

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.