

**For discussion on
11 July 2005**

LC Paper No. CB(2)2213/04-05(01)

LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES

Support after the Tide-Over Grant (TOG) Period to NGOs Currently Receiving TOG

PURPOSE

This paper sets out the Administration's revised proposal of support after the Tide-Over Grant (TOG) period to non-governmental organisations (NGOs) currently receiving TOG. In response to the feedback and concerns collected, revisions have been made to the original proposal as contained in the Paper CB(2)1695/04-05(1) presented to the Panel on Welfare Services on 2 June 2005.

BACKGROUND

2. While it has been agreed with the welfare sector that the Government will only be prepared to consider further assistance for NGOs to meet contractual obligations to existing staff under "exceptional circumstances" on a case by case basis and that all relevant factors would have to be taken into account in totality before exceptional assistance could be justified, an across-the-board financial assistance scheme named Special One-off Grant (SOG), with allocation amount capped at two times of respective NGO's 2005-06 TOG level, has been proposed to provide greater flexibility and more time for NGO management in making whatever necessary adjustments to meet their financial and/or staff commitments in the long run. It is considered that this is a more pragmatic way to assist NGOs than a mere extension of TOG.

FURTHER CONSULTATIONS WITH THE SECTOR AND STAKEHOLDERS

3. The following main concerns pertaining to the SOG proposal have been raised :

- (a) There should be assistance to NGOs which, as a result of their unique circumstances, cannot achieve financial viability even with the assistance of SOG which is capped at two times of the 2005-06 TOG amount, and these NGOs should not be labelled as ineffective;

- (b) There should be more flexibility for utilising the SOG so that NGOs can make use of the grant to cover their anticipated operating deficits before they can operate with the Benchmark Salary;
- (c) The flexibility of mobilising the Lump Sum Grant (LSG) Reserve saved during 2004-05 to 2006-07 can be relaxed so that NGOs can deploy their savings before they achieve financial viability;
- (d) The proposal of allowing NGOs to save more than 25% between 2004-05 to 2006-07 may encourage NGOs to further cut staff costs;
- (e) The proposal of according priority to successful SOG (Scheme B) applicants in the allocation of new services during 2006-07 to 2007-08 should be reviewed;
- (f) The staff unions are concerned about the implication of implementing the proposed voluntary retirement (VR) scheme for the staff;
- (g) The SOG arrangement may contravene the Basic Law;
- (h) The Administration should conduct a review of the LSG subventions system; and
- (i) NGOs may still face financial problems after the SOG due to future efficiency savings (ES), if any.

4. Having regard to the concerns raised above, we note that the situation of individual NGOs varies greatly. At the same time, we note that the LSG Reserve held by NGOs amounts to about \$1.4 billion which some NGOs can make use of it to offset the operational deficits until they complete their re-engineering and restructuring measures and achieve a balance budget within the LSG provision. While NGOs have the ultimate responsibility to deal with the commitment to their Snapshot Staff and that there are already five years of financial support to NGOs through TOG as a transitional arrangement, we recognise that not all NGOs can complete the transition in 2006-07 and some require more time to make the necessary adjustments having regard to the enhanced productivity programme and ES they contributed in the last few years. In the light of the general understanding that there would be no extension of TOG and any further financial support from the Government should be time-limited and well justified, the Administration has carefully considered all

the comments expressed, and has come up with a revised financial support package as set out in paragraphs 5 to 9 below.

REVISED PROPOSAL

Special One-off Grant (SOG)

5. In the light of the comments/concerns made, a revised package has been worked out as follows. The package will comprise of two elements – the SOG and other facilitating measures. The SOG is available to NGOs currently receiving TOG. Application will be on a voluntary basis and NGOs are expected to apply for either Scheme A or B. Details of the Scheme are as follows:

Scheme A

(i) Objective

This Scheme aims at providing one-off further assistance to NGOs who need assistance in coping with the salary increment of and providing personal emolument (PE) above mid-points for the Snapshot Staff upon the TOG cessation in 2006-07. SOG (Scheme A) would allow NGOs to have more time, in accordance to their financial plan that should take into consideration all relevant factors specific to the NGO concerned, to undergo organisation restructuring and service re-engineering to achieve financial viability in a defined and reasonable period of time, including meeting their contractual commitments towards the Snapshot Staff.

(ii) Eligibility Criteria

For establishment of eligibility for SOG (Scheme A), NGO applicants should provide, with the endorsement of the management board, the following information regarding the period from 2000-01 to 2005-06:

- (a) A detailed account of the re-engineering and restructuring measures that they have taken since switching to LSG, and also the financial implications on the operational expenditure, in terms of annual savings;
- (b) The amount of new resources being allocated by SWD to the NGO in terms of new services or improvement of existing services;

- (c) The turnover of the Snapshot Staff, with details on posts and the salary at the point of departure, and financial implications of such staff turnover, either with or without replacement of the departing staff;
- (d) The amount of cumulated LSG Reserve;
- (e) A financial analysis report illustrating that they have problems in operating on the LSG amount after the TOG cessation in 2006-07 and beyond, taking into account the LSG Reserve accumulated in the TOG period; and for NGOs with LSG above the Benchmark, the report should take into account the amount to be reduced annually by 2% till reaching the benchmark in accordance with paragraph 2.6 (iv) of the LSG Manual (Edition 2), but with the starting year being postponed for two years as specified in paragraph 6 (c) below;
- (f) A financial plan showing how the NGO can achieve financial viability in a defined and reasonable period of time on the understanding that the SOG is a one-off provision; and
- (g) A pledge to furnish annual progress report within the SOG period on the implementation of the organisation restructuring and service re-engineering, and the financial plan in (f) above.

(iii) Ceiling Amount and Restriction

The amount of SOG (Scheme A) will be capped at two times of TOG for each respective eligible NGO at the 2005-06 TOG level. It should only be used for the PE expenditure of the Snapshot Staff or for the implementation of the VR scheme as detailed in paragraph 6(b) below.

(iv) Application

Invitation of application from NGOs is planned to be issued in July 2005. NGOs in need of SOG (Scheme A) should send in their applications, with supporting documents showing their current financial condition and plan for achieving financial viability together with the endorsement of their Board to SWD on or before 30 September 2005.

(v) Announcement of Application Result

NGOs will be informed of the application results before end of 2005.

(vi) Allocation Period

SOG (Scheme A) will be approved in a lump sum and allocated at the beginning of the financial years. The maximum amount allocated in each instalment will be capped at the 2005-06 TOG level of respective eligible NGO. Expenditure of the lump sum may last beyond 2007-08 but this has to tie in with the financial report of the NGO.

Scheme B

(i) Objective

As an incentive arrangement for those NGOs which do not require further assistance in coping with the salary increment of and providing personal emolument above mid-points for the Snapshot Staff upon the cessation of TOG, this Scheme aims at providing NGOs with financial resources to enhance their human resources practices. This arrangement will also assist them in providing further training to their staff for delivering quality care and services to the community, boosting staff morale and hence maintaining a stable work force, as the staff concerned have been working hard to face challenges brought about by the service re-engineering and organisation restructuring. SOG (Scheme B) will focus on initiatives that would benefit directly its staff, including both the Snapshot Staff and all other staff in subvented services. NGOs may put up agency-specific initiatives that will benefit their staff engaged in subvented welfare services.

(ii) Eligibility Criteria

NGOs currently receiving TOG but pledge that while continuing to honour their contractual commitment with the Snapshot Staff, they would not require further financial assistance in this particular aspect.

(iii) Ceiling Amount

SOG (Scheme B) will be provided at an amount not more than two times of the TOG provision at the 2005-06 level of the NGO applicant.

(iv) Application

Application for SOG (Scheme B) from NGOs has to be formal and accompanied by a signed declaration from the NGO Board that they will honour the contractual commitment with Snapshot Staff, but they no longer require any further financial assistance in this particular aspect. Invitation of application from NGOs is planned to be issued in July 2005. NGOs should send in their applications, with detailed plan and estimates for SOG (Scheme B), including detailed human resources plan to make use of the SOG, to SWD on or before 30 September 2005.

(v) Announcement of Application Result

NGOs will be informed of the application results before end of 2005.

(vi) Allocation Period

SOG (Scheme B) will be approved in a lump sum and allocated at the beginning of the financial years. The maximum amount allocated will be capped at two times of the 2005-06 TOG level of respective eligible NGO. Subject to SWD's approval on the NGO's application, the amount allocated can be spent beyond 2006-07.

Other Facilitating Measures for NGOs

6. The Administration also recommends implementing the following measures to facilitate NGOs concerned to achieve the financial viability more effectively:

- (a) to withhold the clawback of LSG Reserve above the 25% cap for three years for the financial years from 2004-05 to 2006-07 to be carried out in 2006-07 to 2008-09. The existing LSG Reserve kept in NGOs is mainly product of their organisation restructuring and service re-engineering. We understand that in most NGOs, the Reserve is meant, amongst other things, for covering their operating needs arising from the TOG cessation. The amount saved during these three years can be kept in a holding account. Nevertheless, NGO boards are advised to take into full consideration the impact on staff morale and service quality when they implement further saving measures, and to consult their staff before implementation. Moreover, when they consider using the Reserve, NGOs must

ensure that such will not affect their financial ability in honouring their contractual commitment with their Snapshot Staff. This is in line with the requirement of the LSG Manual that when a NGO considers using its Reserve, it must ensure that it will not encounter financial difficulties. NGOs requesting to extend the period of withholding of clawback for more than three years would need to provide detailed justifications for consideration by SWD on a case by case basis in accordance with the existing provision in the LSG Manual;

- (b) to allow NGOs to utilise their own resources or LSG Reserve or SOG to implement VR scheme for their staff to increase the efficiency of the organisation. NGO boards should also consult their staff before the implementation of any VR scheme. SWD will provide NGOs with some guiding principles, but flexibility would be allowed for NGOs to formulate a scheme that best suits their staffing and financial conditions; and
- (c) for NGOs with their salary portion above the benchmark salary, to postpone the planned annual 2% reduction of the salary portion of the LSG to the Benchmark Salary for two years to 2008-09. SWD will advise NGOs of their respective Benchmark Salary. NGOs requesting any special consideration will be considered by SWD under very exceptional circumstances on a case by case basis.

Choice of Options

7. Upon receiving applications of SOG Scheme A when NGOs are required to provide detailed plans and estimates on their financial position, we will be in a better position to scrutinise the merits of individual NGOs for additional financial assistance. As regards SOG Scheme B, we are conscious that it is more a kind of encouragement for their efforts made to complete the restructuring and re-engineering exercise under the backdrop of EPP and ES in last few years.

8. A choice between Scheme A and Scheme B is a management decision for individual NGOs taking into full account of their specific staffing and financial conditions and the views of their staff. Having regard to the provision of the SOG at two times of the 2005-06 TOG level; and the existing LSG Reserve held by NGOs (about \$1.4 billion) which may cover part of the PE expenditure above mid-point salary for the Snapshot Staff plus the three facilitating measures mentioned above, we believe that the SOG package is a reasonable measure to further assist those NGOs requiring assistance to cope with the salary increment of the Snapshot Staff after the TOG period in a defined and reasonable period of time. NGOs are expected to carry out in full swing

services re-engineering and reorganisation measures during the SOG period and to sustain their financial viability thereafter. If any NGOs face financial problems after the SOG because of future ES, if any, we are prepared to work with NGOs on measures to deal with such problems.

9. For NGOs choosing Scheme A but envisage that the SOG capped at two times of the 2005-06 TOG level will not be able to solve their financial difficulties for honouring their contractual commitment with the Snapshot Staff, SWD would be prepared to look into individual cases and work together with the NGO concerned on a feasible solution in a defined and reasonable period of time. Additional financial assistance on top of the SOG amount as specified in paragraph 5 above, with the objective to resolve the anticipated financial difficulty in honouring the NGO's contractual commitment to Snapshot Staff, will only be considered under very exceptional circumstances on a case by case basis after examining the financial position of the NGOs concerned in detail with stringent financial auditing. Individual cases where NGOs concerned cannot reach an agreement with SWD will be brought to the attention of the Lotteries Fund Advisory Committee (LFAC) for consideration. Independent accounting/audit advice may also be sought by SWD. Financial assistance under Scheme A will be released to the NGO, subject to the NGO's demonstration that it has made full efforts to carry out the plan for service re-engineering and reorganisation. Moreover, for those NGOs which require additional financial assistance on top of the provision as specified in paragraph 5 above, they should ensure that their LSG Reserve must be used only for PE expenditure above mid-point salary or VR scheme for their Snapshot Staff until the problem is solved. In assessing the need for additional financial assistance, due regard will be given to the conditions laid down when TOG was implemented in 2001¹.

FINANCIAL IMPLICATION

10. As the SOG is capped at the 2005-06 TOG level and set at 2 times provision of the 2005-06 TOG level, the potential commitment for this proposal, on a lump sum basis, would be about \$826 million. The LFAC has agreed in

¹ Only on very "exceptional circumstances" and after taking into account all relevant factors in totality on a case-by case basis, NGOs may warrant exceptional assistance if during the preceding TOG period-

- (a) they have been unable to obtain new services;
- (b) they have little or no staff turnover;
- (c) they have accumulated little reserves; and
- (d) they have made full efforts in service re-engineering but the results are still unsatisfactory.

principle to the SOG proposal and endorsed the financial commitment at its meeting held on 19 May 2005. It will be only under very exceptional circumstances that additional allocation would be sought and considered.

11. The financial implication for the two-year postponement of annual 2% reduction of the salary portion of LSG to align with the Benchmark Salary will be at a total of around \$191 million. On the LSG Reserve above the 25% cap, the amount to be clawed back for 2003-04 is in the region of \$50 million, but the financial implication for withholding the clawback from 2004-05 to 2006-07 would depend on the actual expenditure pattern of the NGOs concerned.

CONCERNS ON BASIC LAW

12. Concern has been raised by the deputations during the meeting on 2 June 2005 that the cessation of TOG under the LSG subventions system and the introduction of SOG might violate Article 144 of the Basic Law (BL). The Administration has sought legal advice from the Department of Justice. We have been advised that the guarantee for employment in clause 2 of BL 144 should be construed with BL 145, which provides for the development and improvement of the pre-1997 social welfare system. Considering that the LSG subventions system with voluntary participation has provided greater flexibility for NGOs in deploying resources to meet the changing service and community needs, that the SOG scheme provides further assistance to NGOs which require more time to complete the necessary adjustments, and that additional assistance outlined in paragraph 9 would be considered under exceptional circumstances on a case by case basis for NGOs demonstrating such need, the SOG proposal and the LSG subventions mode would not be in breach of the Basic Law. The relevant legal issues are explained in greater detail at **Annex**.

REVIEW OF LUMP SUM GRANT

13. The LSG subventions system has been put in place with effect from 1 January 2001 as part and parcel of the subventions reform to replace the Model Cost System and Modified Standard Cost System, both of which have been criticised as inflexible, complex and bureaucratic. Under LSG, SWD no longer rigidly imposes input controls on staffing structures, level of pay and individual items of expenditure. NGOs are given flexibility in the deployment of resources to meet the changing service and community needs. Switching to the LSG subventions mode is a conscious and voluntary decision of respective NGOs. The increasing number of NGOs joining the LSG subventions system, i.e. from 96 in 2000-01 to 164 in 2005-06, has proved its wide acceptance by NGOs. As resources are finite, it is incumbent upon the Administration to see that public resources are used in a most cost-effective manner. The

Administration believes that the LSG subventions system is the best vehicle to achieve this. Since the concern on protecting the interests of Snapshot Staff has been addressed by the enhanced measures of the latest SOG proposal, the Government considers that there is no explicit and urgent need to conduct a comprehensive review on this subventions system at the present stage. However, the Government will continue to work closely with the welfare sector to put forward continuous improvements to the system.

ADVICE SOUGHT

14. Members are invited to give their views on the Administration's revised proposal as elaborated in paragraphs 5 to 9 above.

**Health, Welfare and Food Bureau/Social Welfare Department
July 2005**

BASIC LAW IMPLICATIONS

There are claims that the cessation of TOG under the LSG subventions system and the introduction of SOG may violate Article 144 of the Basic Law (BL 144¹) because the Government will not provide sufficient funding for NGOs to honour their contractual agreement to provide salary increments to the Snapshot Staff, and hence affect the continual employment of those staff appointed before the reunification.

2. The guarantee of employment in clause 2 of BL 144 is “in accordance with the previous system” and only applicable to “[s]taff members previously serving in subvented organizations in Hong Kong”. “[T]he previous system” includes the relevant contractual arrangements and labour legislation. The guarantee is therefore not absolute but subject to relevant terms of employment and relevant provisions of labour legislation. Under contractual principles, the employers and employees of NGOs may, by mutual agreement, vary the terms of employment. The Government does not have a direct role to play in the labour disputes between the employers and employees of NGOs so long as the agreement between them is in accordance with the labour legislation.

3. The guarantee for employment in clause 2 of BL 144 should also be construed with BL 145² which provides for the development and improvement of the pre-1997 social welfare system. It is the duty of the Government to continue to develop and improve the social welfare system. The decision of the Court of First Instance (CFI) in *Cheung Man Wai Florence v Director of Social Welfare*, HCAL 25/1999 summarized in [2000] 1 HKLRD A15 is of particular relevance to the present issue. In that case, Cheung Man Wai Florence (“Cheung”) sought judicial review of the decision of the Director of Social Welfare to advise all subvented NGOs to ensure that all staff in the Social Work Officer and Social Work Assistant

¹ Article 144: The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.

² Article 145: On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.

grades were registered social workers pursuant to the Social Workers Registration Ordinance (Cap 505). Cheung refused to register and argued that, inter alia, the provisions of Cap 505 which required social workers to register were inconsistent with BL 144(2). Following her failure to apply for registration, Cheung's employment as a social work assistant in a subvented voluntary social service organization was terminated.

4. The CFI held that Cheung's argument failed to pay due regard to the specific provisions of BL 142 and BL 145. The Court further held that, pursuant to BL 145, viz:

“On the basis of the previous social welfare system, the Government of the Hong Kong SAR shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs”

the Government had the duty and was obliged to develop and improve the social welfare system as Hong Kong society required and BL 144(2) could not stultify this requirement given that the legislation complained of fell squarely within the area of the development of the social welfare system.

5. In view of the above CFI decision, BL 144(2) should not be construed in isolation and should instead be read together with the constitutional obligation of the SARG to develop and improve the social welfare system under BL 145.

6. The duty of the government to develop and improve the social welfare system is further evidenced when Chapter VI of the Basic Law is considered. When addressing the NPC on 28 March 1990, Mr Ji Pengfei, Chairman of the Basic Law Drafting Committee, commented that:

“Chapter VI of the draft Basic Law carries stipulation on the maintenance and development of Hong Kong's current systems and policies concerning education, science, culture, sports, religion, labour and social services. These stipulations involve the interests of Hong Kong residents in many aspects of public life and are important for social stability and development.”

7. Mr Ji Pengfei's speech of 28 March 1990 has been accepted by the CFA as an aid to interpretation of the Basic Law (see *Chong Fung Yuen v Director of Immigration* [2001] 2 HKLRD 533 at 546J).

8. The voluntary LSG subventions system introduced in 2001, as part and parcel of the subventions reform which was initiated in 1994, has provided greater flexibility for NGOs in the deployment of resources to meet the changing service and community needs. The 5-year TOG scheme enables NGOs to fulfill their contractual commitments of their Snapshot Staff while undertaking organization restructuring and service re-engineering during the transitional period. The fact that there is an increasing number of NGOs joining the LSG subventions mode on a voluntary basis has proved the wide acceptance of the system. NGOs should also fully appreciate the full implications of the acceptance of LSG, including its implications of their staff, when they decide to join the LSG mode.

9. The present SOG scheme provides further assistance to those NGOs who might require more time to complete the necessary adjustments. It is regarded as a reasonable measure to further assist NGOs in need. Besides, for those NGOs joining the SOG Scheme A but envisage that they might require a longer time to complete the transition, SWD is prepared to look into individual cases and consider providing additional financial assistance to them under very exceptional circumstances on a case by case basis. The SOG package provides reasonable facilitating measures for NGOs to complete the transition to operate under the LSG subventions system and meet their contractual obligations and hence it is conducive to the development and improvement of the social welfare system of the Hong Kong Special Administrative Region (HKSAR).

10. In view of the above, the SOG proposal would not be in breach of the Basic Law when the guarantee to relevant NGO staff of employment "in accordance with the previous system" under the second paragraph of BL 144 is read together with BL 145 which requires the Government of HKSAR to develop and improve the pre-97 social welfare system.
