

立法會
Legislative Council

LC Paper No. LS18/05-06

**Paper for the House Committee Meeting
on 6 January 2006**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 16 December 2005**

Date of Tabling in LegCo : 21 December 2005

Amendment to be made by : 18 January 2006 (or 8 February 2006 if extended by resolution)

PART I LEGAL AID

Legal Aid Ordinance (Cap. 91)

Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005 (L.N. 224)

Currently, legal aid is available to a person whose financial resources do not exceed \$155,800. “Financial resources” shall be assessed by multiplying a person’s monthly disposable income by 12 and adding his disposable capital to that sum.

2. This Amendment Regulation amends the computation of the disposable income and disposable capital so as to facilitate access to legal aid.

3. Henceforth, when computing the disposable income, the following items are to be included as deductibles-

- (a) expenses providing for the care of a dependant (not just dependent children) who is unable to take care of himself due to his mental or physical condition; and
- (b) regular payments for the maintenance of an ex-spouse or a child.

4. As for computing “disposable capital”, insurance monies received by an applicant to provide for his care and medical treatment and appliance over the 3-year period commencing on the date of application is to be disregarded.

5. For a person whose financial resources exceed \$155,800 but do not exceed \$432,900, he can apply for legal aid under the Supplementary Legal Aid Scheme. If his civil claim is successful, he has to contribute to that Scheme. This Amendment Regulation reduces the contribution rate of a legally aided person from 12% to 10% of the value of any property recovered or preserved.

Legal Aid (Charge on Property) (Rate of Interest) Regulation (L.N. 225)

6. Under section 18A(3B) of the Legal Aid Ordinance (Cap. 91), where a property to be used as a home for a legally aided person has been recovered or preserved in proceedings and a first charge for the benefit of the Director of Legal Aid has been registered in respect of the property, the Director may defer enforcing the charge. The person, however, has to pay a simple interest at the rate of 10% per annum or at a prescribed rate on the sum that the Director would have retained in respect of the property.

7. The purpose of this Regulation is to prescribe the interest rate with due regard to market movements. The formula now prescribed is the average of the best lending rates of the note-issuing banks on 1 April in a year, less a discount factor.

8. In view of the apparent uncertainty, we have made enquiries with the Administration on which rate of interest is to prevail after a rate has been prescribed in addition to the fixed rate of 10%. The Administration's view is that the prescribed rate will prevail over the fixed rate. Their reason is that "notwithstanding a fixed rate specified in section 18A(3B)(b), the Ordinance empowers the Chief Executive in Council to prescribe the rate by regulation". The Administration states that they would keep in view a suitable opportunity to introduce appropriate amendments to section 18A (3B)(b) of the Ordinance. Members may refer to the correspondences at Annex I.

9. For background information on the above two Regulations, members may refer to the LegCo Brief (File Ref.: CSO/ADM CR 3/3221/02(05)) issued by the Chief Secretary for Administration's Office dated 14 December 2005.

10. According to the LegCo Brief, the Administration has consulted the Legal Aid Services Council, the Hong Kong Bar Association and the Law Society of Hong Kong on the above proposals. While there is demand for inclusion of more deductibles and further relaxations, the consultees broadly welcome the proposals.

11. The Legislative Council Panel on Administration of Justice and Legal Services was also consulted on the proposals in July 2003. The Panel shared the views of the consultees and also considered that a fundamental review of the legal aid system was necessary.

12. The above two Regulations shall come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

PART II ADOPTION

Adoption (Amendment) Ordinance 2004 (Commencement) Notice (L.N. 227)

13. The Adoption (Amendment) Ordinance (“Amendment Ordinance”) was passed by this Council in July 2004. The main objects of the Amendment Ordinance are to -

- (a) enable a step-parent to apply as the sole applicant for an adoption order;
- (b) prohibit privately arranged adoption;
- (c) provide for appeal against certain decisions of the Director of Social Welfare; and
- (d) give effect in Hong Kong to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (“the Convention”).

14. The Secretary for Health, Welfare and Food has appointed 25 January 2006 as the day on which the Amendment Ordinance is to come into operation. The following subsidiary legislation have to be made and will come into operation on the same day.

15. The Panel on Welfare Services was briefed on the proposed subsidiary legislation at its meeting on 12 December 2005. The Administration explained that the Convention was ratified by the Central People’s Government on 16 September 2005 and would take effect in Hong Kong on 1 January 2006. Members noted that it was the Administration’s intention to table the subsidiary legislation at LegCo for negative vetting on 21 December 2005 and to appoint 25 January 2006 as the commencement date for the Amendment Ordinance and the subsidiary legislation.

16. Members may refer to the LegCo Brief (File Ref.: HWF CR 1/5691/00(05)) issued by the Health, Welfare and Food Bureau dated 14 December 2005 for background information.

17. According to the Brief, the Administration has consulted the Judiciary, the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Family Law Association as well as the relevant non-governmental organizations on the proposed Rules and has taken into account their comments in finalizing the provisions.

**Adoption Ordinance (Cap. 290)
Convention Adoption (Exclusion) Order (L.N. 228)**

18. Under paragraph 2 of Article 39 of the Convention, a Contracting State may enter into a derogatory agreement with other Contracting States. Article 25 of the Convention further provides that a Contracting State may declare that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39. The Central People's Government has made such a declaration.

19. This Order declares that adoptions made in accordance with such an agreement shall be excluded from the meaning of "Convention adoption" as defined in the Adoption Ordinance (Cap. 290) ("the Ordinance").

Intercountry Adoption (Contracting States) Order (L.N. 229)

20. In accordance with section 20D of the Ordinance, the Secretary for Health, Welfare and Food declares that each of the States specified in the Order is a Contracting State to the Convention.

Adoption (Amendment) Rules 2005 (L.N. 230)

21. The Adoption Rules (Cap. 290 sub. leg. A) provide for the court rules and procedures that relate to local adoption. These Rules amend the Adoption Rules so that intercountry adoptions other than the Convention adoptions (i.e. non-Convention adoptions) could also be dealt with under the Adoption Rules. Some new Rules are added, for example-

- (a) new Rule 28 which provides for the manner of service of documents outside Hong Kong; and
- (b) new Rule 31A which provides for the procedures for making an application for an order for passing the care and control of an infant with a view to the infant being adopted.

22. The Administration also takes the opportunity to make textual amendments to the Rules so that consistency with the newly made Convention Adoption Rules could be achieved.

Convention Adoption Rules (L.N. 231)

23. These Rules are made by the Chief Justice to provide for the court rules and procedures for handling Convention adoptions. Whilst there are similarities to the Adoption Rules, some are specific to the Convention adoption, for example -

- (a) in Convention adoption, the “Court” means the Court of First Instance whereas either the District Court or the Court of First Instance may be involved in local/non-Convention adoption;
- (b) in Convention adoption, a convention adoption certificate will be issued so that the adoption can be automatically recognized by all Contracting States. No such international notification and recognition is needed for local and non-convention adoption;
- (c) in Convention adoption where Hong Kong acts as the State of Origin, since the infant and/or the applicant(s) have already resided overseas, the court may have the discretion to allow their attendance at the hearing of the application to be dispensed with. For local and non-Convention adoption, the court would normally require the applicant(s) and the infant to appear at the court hearing before an adoption order is granted; and
- (d) the procedures which provide for an application that an adoption is not to be recognized as a full adoption or for a declaration for non-recognition of an adoption on public policy ground are included in the Convention Rules. Such Rules are not to be provided in the local and non-Convention adoption.

24. We have raised some minor drafting points on the Rules. In response, the Administration states that it will improve the Rules when the opportunity arises e.g. in the context of a rectification exercise co-ordinated by the Department of Justice or when the Administration reviews the fee for Director of Social Welfare when acting as the Guardian ad Litem. Members may refer to the correspondences at Annex II.

PART III MISCELLANEOUS

Census and Statistics Ordinance (Cap. 316)

Census and Statistics (2006 Population Census) Order

(L.N. 226)

25. This Order directs the Commissioner for Census and Statistics to conduct a census of population of Hong Kong from 15 July to 1 August 2006 to obtain particulars of matters relating to persons dwelling, and households based, on land or on any vessel described in the Order. The purpose of the census is to obtain information on the demographic, social and economic characteristics of the population of Hong Kong at the time of the taking of the census.

26. Members may refer to the LegCo Brief (File Ref.: G19/1/1 Pt. 6) issued by the Financial Services and the Treasury Bureau dated 13 December 2005 for background information.

27. On 2 April 2004, the Panel on Financial Affairs was briefed on the Administration's planning work for the 2006 Population By-Census. At the meeting, a member expressed concern about the appropriateness of conducting the census in the summer holidays during which a lot of people might leave Hong Kong. In reply, the Administration explained that the proposed period would cover 18 days instead of the usual 9 to 13 days as in the past censuses and did not envisage any problems for the enumerators to make arrangements with individual sample households.

Securities and Futures Ordinance (Cap. 571)
Securities and Futures (Contracts Limits and Reportable Positions) (Amendment)
(No. 2) Rules 2005 (L.N. 232)

28. The purpose of these Rules is to amend Schedules 1 and 2 to the Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap. 571 sub. leg. Y) to standardize the prescribed limits and reporting levels of all stock options contracts on shares listed on a stock market in Hong Kong and to remove the prescribed limits and reporting levels of the delisted futures contracts.

29. Members may refer to the LegCo Brief issued by The Securities and Futures Commission dated 13 December 2005 for background information. According to the Brief, the Commission does not consider it necessary to conduct a public consultation as the amendments are essentially of a technical nature. The Hong Kong Exchanges and Clearing Limited has consulted the relevant trade (see paragraphs 14 - 17 of the Brief). The Panel on Financial Affairs has not been consulted.

30. The Amendment Rules will come into operation on 10 February 2006.

Road Traffic (Traffic Control) Regulation (Cap. 374 sub. leg. G)
Road Traffic (Traffic Control) (Designation of Prohibited and Restricted Zones)
(Amendment) Notice 2005 (L.N. 233)

31. This Notice is made by the Airport Authority with the approval of the Commissioner for Transport. It amends Schedules 1 and 2 to the Road Traffic (Traffic Control) (Designation of Prohibited and Restricted Zones) Notice (Cap. 374 sub. leg. U) to designate certain zones in the east side of the Chek Lap Kok Island as prohibited zones or restricted zones.

32. We have made enquiries with the Airport Authority. According to the Authority, three new roads, i.e. SkyCity Road, SkyCity Road East and Airport Expo-Boulevard are built to serve Hong Kong's new conference facilities at the AsiaWorld-Expo ("AWE"). Since AWE was opened three months earlier than its original schedule, the three roads were therefore required to be made available sooner to tie in with the opening of the conference facilities. The Notice has to come into operation on the date of gazettal.

33. This notice has not been discussed by the Panel on Transport nor the Panel on Economic Services.

34. Subject to our observations on L.N. 225 and L.N. 231, no difficulties relating to the legal and drafting aspects of the above items of subsidiary legislation have been identified.

Encl.

Prepared by

Ho Ying-chu, Anita
Assistant Legal Adviser
Legislative Council Secretariat
4 January 2006

LS/S/11/05-06

LS/S/11/05-06
2869 9209
2877 5029

Chief Secretary for Administration's Office
Administration Wing
12/F West Wing Central Government Offices
11 Ice House Street
Central
Hong Kong

29 December 2005

(Attention: Mrs Alice Cheung, Asst Dir of Adm 2)

BY FAX
Fax No. : 2877 0802
Total nos. of page(s) : (2)

Dear Mrs Cheung,

**Legal Aid (Charge on property)(Rate of Interest) Regulation
(L. N. 225 of 2005)**

I am scrutinizing the above Regulation with a view to advising Members on its legal and drafting aspects.

Under section 18A(3B)(b) of the Legal Aid Ordinance (Cap. 91), where a property to be used as a home for a legally aided person has been recovered or preserved in proceedings and a first charge for the benefit of the Director of Legal Aid has been registered in respect of the property, the Director may defer enforcing the charge. The person, however, has to pay a simple interest at a fixed rate of 10% per annum or at a prescribed rate on the sum that the Director would have retained in respect of the property.

The newly made Regulation prescribes that interest rate. Nonetheless, the prescribed rate can be higher or lower than the fixed rate. Who is to determine which rate of interest is to prevail and on what basis? Please clarify which interest rate is to be applicable.

It is appreciated if you could let me have your reply in both Chinese and English on or before 3 January 2006.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

cc: DoJ (Attn: Miss Mabel CHEUNG, SGC) Fax No. 2845 2215
LA

CSO/ADM/CR 3/3221/02

Room 1211
Central Government Offices
(West Wing)

Tel No. 2810 2576
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4 January 2006

By Fax [2877 5029]

Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road
Central
Hong Kong
(Attn: Miss Anita Ho)

Dear Miss Ho,

**Legal Aid (Charge on Property)(Rate of Interest) Regulation (“the Regulation”)
(L.N. 225 of 2005)**

Thank you for your letter of 29 December 2005.

You sought our clarification on whether the interest rate to be prescribed in the Regulation, or the rate of 10% as currently specified under section 18A(3B)(b) of the Legal Aid Ordinance (Cap. 91) is to prevail.

At present, the interest rate payable by aided persons under section 18A(3B)(b) of Cap. 91 is fixed at 10% per annum irrespective of market rates. The fixed rate was put into effect in May 1990, when the best lending rate per annum in the private market was 10% or above. Since then, the market best lending rate has been fluctuating and has been persistently lower than 10% per annum in the past few years. We have reviewed the existing arrangement and consider that in place of a fixed rate, it would be more appropriate to adopt an interest rate that has due regard to market movements. The formula that we propose to adopt under the Regulation is the average of the best lending rates of the note-issuing banks on 1 April in a year, less a discount factor. Using the average of the best lending rates of the note-issuing banks on 1 April 2005 (i.e.

5.250%) and the applicable discount factor at 2.307%, the interest rate applicable to aided persons would be 2.943% per annum in accordance with the proposed formula, much lower than the fixed rate of 10%.

Section 18A(3B)(b) of Cap. 91 provides that the interest rate shall be 10% per annum or at a prescribed rate. Section 28(2)(pa) specifically provides that the interest rate may be prescribed by regulation made by the Chief Executive in Council. Having consulted our legal advisor, we are of the view that an expeditious and efficient way to bring forth to the aided persons the benefit of an interest rate which is linked to the market and lower than the best lending rate is to prescribe the rate in accordance with the formula set out in the captioned Regulation, made under section 28(2)(pa) of Cap. 91. The Administration's view is that the prescribed rate will prevail over the fixed rate. Our reason is that notwithstanding a fixed rate specified in section 18A(3B)(b), the Ordinance still empowers the Chief Executive in Council to prescribe the rate by regulation.

The above notwithstanding, as a tidying up exercise, we would keep in view a suitable opportunity to introduce appropriate amendments to section 18A(3B)(b) of Cap. 91, to put beyond doubt that the prescribed rate is the prevailing rate. That could be effected for instance through such legislative vehicle as the Miscellaneous Provisions Bill piloted every now and then by the Department of Justice.

In this connection, we observe that unless there is a drastic change in the market conditions leading to a substantial increase of the best lending rate to well above 10%, it is unlikely that the prescribed rate will be higher than the fixed rate in the near future. We should also point out that the Regulation will not in any way affect the Director of Legal Aid (DLA)'s power under section 18A(3B)(c), which provides that where the DLA is satisfied that it would cause serious hardship to the aided person for him to pay all or any of the interest accrued under that paragraph, or that it is in all the circumstances just and equitable to do so, the DLA may waive either in whole or in part, the payment by the aided person of all or any of the interest so accrued.

Yours sincerely,

(Mrs Alice Cheung)
for Director of Administration

cc
DOJ (Attn: Ms Mabel Cheung)
DLA (Attn: Mr William Chan)

LS/S/11/05-06
2869 9209
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Secretary for Health, Welfare and Food
Health, Welfare and Food Bureau
Family Division
20/F Murray Building
Garden Road
Hong Kong

30 December 2005

(Attention: Ms Wendy Cheung, AS for Health, Welfare &
Food (Family)2)

BY FAX
Fax No. : 2524 7635
Total nos. of page(s) : (2)

Dear Ms Cheung,

**Convention Adoption Rules
(L. N. 231 of 2005)**

I refer to the legal and drafting aspects of the above Rules and would like to seek your clarification on the following-

Rule 11(2)

In “the accredited body in Hong Kong who makes arrangements for the adoption of the infant”, would it be more grammatical to use the word “which” instead of the word “who”?

Annex to Form C1

In this Convention adoption form, particulars such as HKID Number and Chinese Commercial Code are required. What if the applicant is a foreigner residing outside Hong Kong? Should words such as “if applicable” be added?

Form C4

It is noted that the mother of the infant, the father, the guardian etc. have to state that he/she understands that once the infant is adopted, a permanent parent-child relationship between the adopter and the infant will be created. They all have to give consent to the adoption and signed before a commissioner for oaths. However, only the mother has to declare that she fully understood the nature of the statement and agreed to the placement of the infant for adoption but not the others. Is there any special reason for this kind of arrangement?

Form C5

In the Chinese version “繼父母(單一申請人)” is mentioned. If the sole applicant is only one of the step-parent, should “繼父或繼母” be used instead of “繼父母”? Please also check this term in other Forms such as in Form C7.

It is appreciated if you could let me have your reply in both Chinese and English on or before 3 January 2006.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

cc: DoJ (Attn: Ms Françoise LAM, SGC) Fax No. 2869 1302
LA

Tel. No. : 2973 8127

Fax. No. : 2524 7635

3 January 2006

Ms Anita Ho
Assistant Legal Advisor
Legislative Council Secretariat
4/F Prince's Building
Central

Dear Anita,

**Convention Adoption Rules
(L.N. 231 of 2005)**

I refer to your letter of 30 December 2005.

Our response to the questions raised in your letter is as follows :

- (a) Rule 11(2) : while we consider that the word 'who' may also be used in this context because "who" can be used of something not human (please see, for example, section 8 of Cap. 414 ("...public authority who ..."; section 9 of Cap. 494A ("...issuing authority who...") and section 5 of Cap. 506A ("...approving authority who ...")), we have no objection to changing it to 'which' as you have suggested;
- (b) Annex to Form C1 : while we expect that a foreigner residing outside Hong Kong may use 'Not Applicable' for completing the entries for "HKID Number" and "Chinese Commercial Code", we have no difficulty with your proposal to make this crystal clear by inserting the words 'if applicable' for these two entries;
- (c) Form C4 : a person whose consent is required, regardless of whether he/she is a mother, father, guardian etc. of an infant, has to indicate clearly in this Form that he/she knows that once the infant

is adopted, a permanent parent-child relationship between the adopter and the infant will be created by signing the form before a commissioner for oaths. This is indicated in paragraph (1) of the Form. The Social Welfare Department, when asking the relevant person to sign this Form, will also make sure that the consenting party fully understands the implications of making a consent for adoption.

To play safe, we have requested that a commissioner for oaths indicates in the Form that the consenting party fully understands the nature of the consenting statement in this Form and agrees to the placement of the infant for adoption. There is therefore no doubt that all parties who give consent using this Form know the implications of such consent and it is not our intention to accord different treatment for mothers, as against the other possible types of consenting parties. But, to improve the clarity and better reflect such intention, we would remove the brackets and footnote (4) for the statement 'who satisfied me that he/she fully understood the nature of the foregoing statement and agreed to the placement of the infant for adoption' just before the signature of the witness in this Form.

We would also make similar amendments to a similar form (Form 4) in the Adoption Rules; and

- (d) Form C5 : Form C5 is to be completed by a parent of an infant who gives consent to the infant being adopted by a step-parent as a sole applicant. As '(單一申請人)' is mentioned immediately after '繼父母' in this Form, even if we do not use '繼父/繼母', it should still be clear that we mean either '繼父' or '繼母'. But, having regard to your comments, we have no difficulty with further clarifying this by replacing '繼父母' by '繼父/繼母'.

For consistency sake, we would also make similar amendments to Form C7 of the Convention Adoption Rules and the relevant forms in the Adoption Rules i.e. Forms 4B, 7 and 8.

You would appreciate that the above amendments, while improving the Convention Adoption Rules and Adoption (Amendment) Rules 2005, are all relatively trivial and their incorporation or not will not affect the substance and the legal effect of the legislative proposals. We therefore suggest that such amendments be made when the next opportunity arises, e.g. in the

context of the rectification exercise co-ordinated by the Department of Justice or when we review the fee for Director of Social Welfare when acting as the Guardian ad Litem (Rule 8 of the Adoption Rules and Rule 11 of the Convention Adoption Rules refer). This would enable the legislative amendments necessary for implementing the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption to commence as soon as possible.

Please feel free to call me if you have any questions on the above.

Yours sincerely,

(Ms Wendy Cheung)
for Secretary for Health, Welfare and Food

c.c. DoJ (attn: Ms Francoise Lam, Law Drafting Division)