

LEGISLATIVE COUNCIL BRIEF

Legal Aid Ordinance (Chapter 91)

LEGAL AID (ASSESSMENT OF RESOURCES AND CONTRIBUTIONS) (AMENDMENT) REGULATION 2005

LEGAL AID (CHARGE ON PROPERTY) (RATE OF INTEREST) REGULATION

INTRODUCTION

At the meeting of the Executive Council on 6 December 2005, the Council ADVISED and the Chief Executive ORDERED that the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005, at Annex A; and the Legal Aid (Charge on Property) (Rate of Interest) Regulation, at Annex B, should be made.

A

B

JUSTIFICATIONS

2. Following the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants and consultations with the Legal Aid Services Council (LASC) and the Legislative Council (LegCo) Panel on Administration of Justice and Legal Services (AJLS Panel) in 2003, we propose that improvements be made on the criteria to further facilitate access to legal aid. We also propose to link to market movements the rate of interest that accrues on the Director of Legal Aid (DLA)'s first charge on property recovered or preserved for an aided person.

3. To implement the proposed measures, we need to amend the Legal Aid (Assessment of Resources and Contributions) Regulations (the Assessment Regulations) and introduce the Legal Aid (Charge on Property) (Rate of Interest) Regulation.

Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005

(A) Method of Computing Disposable Income

4. At present, certain expenses may be deducted in accordance with the rules in Schedule 1 to the Assessment Regulations when calculating the disposable income of a legal aid applicant⁽¹⁾. We propose to amend the Assessment Regulations to extend the deductible items as follows -

(i) Amount to provide for the care of dependants during the time that the legal aid applicant is at work

5. Currently, the amount to provide for the care of any dependant infant⁽²⁾ living with the applicant during his absence from home by reason of employment, if considered reasonable, is a deductible item. We propose to amend Schedule 1 to the Assessment Regulations to relax the provision as follows -

- (a) aside from dependant infant, the amount incurred by the applicant to provide for the care of his other dependants such as parents, grandparents or siblings should also be deductible, if considered reasonable, provided that the dependants are unable to take care of themselves by reason of their mental or physical conditions;
- (b) the deductible should also be made available to self-employed persons; and
- (c) the condition that the applicant is “absent from home” should be removed, i.e. an amount to provide for the care of any eligible dependant during the time that the person is at work, irrespective of whether he is absent from home, is deductible, if it is reasonable to do so.

Notes ⁽¹⁾ When calculating the financial resources of a legal aid applicant, the Director of Legal Aid may, where appropriate, treat the financial resources of another person as the applicant’s financial resources. Under such circumstances, the deductible expenses allowed for the applicant may similarly be applicable to that person. In the vast majority of the cases, the person in question is the spouse of the applicant.

⁽²⁾ Under section 2 of the Legal Aid Ordinance, “infant” is defined as “an unmarried person who has not attained the age of 18 years.”

Taking into account the view expressed by the LASC and the legal professional bodies, we propose also to remove the requirement that a dependant has to be living with the applicant.

(ii) Maintenance payment

6. Since maintenance payment is to support the legal aid applicant's spouse who is living separate and apart from him, or his former spouse or children following the divorce/separation, we consider maintenance payment as a reasonable deductible item in calculating the disposable income of a legal aid applicant. We propose to amend Schedule 1 to the Assessment Regulations to this effect. We would make it clear that the amount allowed should either be the amount ordered by the court and actually paid, or in case of a voluntary payment, the amount which is considered to be reasonable by the DLA and which should not exceed the amount actually paid and the statutory allowances for household expenditure allowed for the divorced or separated spouse and children as if they were his only dependants.

(B) Method of Computing Disposable Capital

7. Schedule 2 to the Assessment Regulations contains the rules for computing the disposable capital of a legal aid applicant. At present, certain items may be deducted in accordance with the rules in Schedule 2 when calculating the disposable capital of a legal aid applicant. We propose to include as an additional deductible item insurance monies received by an applicant following an injury, if such monies are required to help meet his care and medical treatment and appliance needs arising from the injury.

8. In assessing the disposable capital of an applicant who pursues a personal injury claim, the DLA may disregard an amount of the insurance monies received by the applicant in respect of the injury to which the claim relates, to cover such expenses that the person may incur for the care and medical treatment and appliance required in the following three years, as considered by the DLA to be reasonable in the circumstances of the case. We propose the three-year cap taking into account that an average personal injury claim takes about three years to complete. And, in considering whether the amount is reasonable, the DLA shall have regard to factors including the actual amount of expenses incurred by the applicant in the past year and any relevant medical evidence.

(C) Supplementary Legal Aid Scheme (SLAS)

9. The SLAS is to provide civil legal aid to those whose financial resources exceed the limit for the Ordinary Legal Aid Scheme but have difficulties meeting the costs of conducting litigation on a private basis. It is a self-financing scheme and covers claims for damages arising from personal injury and death, and medical, dental and legal professional negligence where the claim for damages is likely to exceed \$60,000. The SLAS also covers claims under the Employees' Compensation Ordinance irrespective of the amount of claim. At present, as provided in Schedule 3 to the Assessment Regulations, if a claim receiving assistance from the SLAS is successful, 12% of the value of any property recovered or preserved will be payable for the benefit of the SLAS fund, unless the claim is settled before the delivery of a brief for attendance at trial to counsel, in which case the rate of contribution should be reduced to 6%. The balance of the SLAS fund⁽³⁾ is about \$94 million as at the end of the last financial year on 30 September 2005.

10. With the current financial operation of the SLAS fund, we can see room to reduce a SLAS aided person's contribution rate for a successful claim from 12% to 10%, with the 6% remains unchanged. We propose to amend Schedule 3 to the Assessment Regulations to reflect this improvement measure.

Legal Aid (Charge on Property) (Rate of Interest) Regulation

Interest Accrued on the DLA's First Charge on Property Preserved or Recovered on Behalf of an Aided Person

11. At present, an aided person has to contribute towards the legal costs of the proceedings. Pursuant to section 18A of the Legal Aid Ordinance (LAO), the DLA is entitled to a first charge on any property recovered or preserved for the aided person in the proceedings, in respect of any outstanding contribution, as well as that part of the net liability the DLA incurred on behalf of the aided person in excess of the total contribution. Under section 18A(3B)(b), if the DLA agrees to defer enforcing the first charge, a simple interest payable by the aided person shall accrue at a fixed rate of 10% per annum.

Note ⁽³⁾ The fund is made up of application fees of \$1,000 per application, interim contributions of \$38,950, legal costs recovered and percentage contribution in successful claims, net of legal costs and other related expenses paid and administration fees.

12. We have reviewed the existing arrangement for a fixed interest rate and propose to adopt instead an interest rate that has due regard to market movements. In this connection, we note that the average best lending rate of the note-issuing banks, which is a broad commercial rate linked to movements in the market, is currently at 7.583% per annum. Since legal aid service is to assist those who cannot afford to take legal action on their own because of a lack of means, for the purpose of section 18A(3B)(b), we propose that the interest rate should be one which is lower than the commercial best lending rate.

13. The formula we propose is the average of the best lending rates of the note-issuing banks on 1 April in a year, less a discount factor. The discount factor is the differential between the average best lending rates of the note-issuing banks and the average 12-month Hong Kong Dollar Interest Settlement Rates over the ten-year period ending on 31 March of the year. We adopt a ten-year time frame for the discount factor in order to smooth out short term fluctuation in market movements. Government adopts similar formula for a number of other Government loan schemes⁽⁴⁾ for the public. The rate so calculated for the purpose of section 18A(3B)(b) shall apply to the period from 1 June of the year to 31 May of the following year. We propose to introduce the Legal Aid (Charge on Property) (Rate of Interest) Regulation to this effect.

Other Issues Covered in the Review

14. We propose that loss or reduction of future income should be taken into account in calculating an applicant's disposal income. We also propose that the Legal Aid Department (LAD) should make known to applicants under SLAS that if his circumstances so justify, he may be permitted to make payment on his interim contributions by a maximum of 6 monthly instalments. Implementation of these proposals do not require legislative amendments and they have already been put into practice administratively. Separately, the LASC and the two legal professional bodies have also endorsed our proposal to maintain status quo on a number of areas. They include maintaining the current "financial capacity" approach in conducting means test; the present requirement of aggregating the financial resources of an applicant and his/her spouse to safeguard against abuses; and the present requirement of not aggregating the

Note ⁽⁴⁾ The schemes include, for example, the Non-means-tested Loan Scheme for eligible students of publicly-funded institutions and the Open University of Hong Kong, the Comprehensive Building Safety Improvement Loan Scheme and the Incentive Scheme for Hygiene Improvement in Food Premises.

financial resources of an infant and his parents/guardians in determining his financial resources.

LEGISLATIVE TIMETABLE

15. The legislative timetable is as follows -

Publication in the Gazette	16 December 2005
Tabling at the Legislative Council	21 December 2005

The negative vetting period of both Regulations will expire on 18 January 2006, i.e. the 28th day after the LegCo meeting at which the Regulations are laid, or if the negative vetting period is extended by LegCo through a motion, on 8 February 2006, i.e. the first LegCo meeting after 21 days from the extension. We propose that the Regulations shall come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

IMPLICATIONS OF THE PROPOSAL

16. The proposal is consistent with the Basic Law, including the provisions concerning human rights. Both Regulations will not affect the current binding effect of the LAO and the Assessment Regulations. According to LAD's assessment on the basis of past experience, the proposed measures under paragraphs 5, 6 and 7 above will entail additional recurrent expenditure in the estimated amount of \$8.59 million per annum due to the anticipated increase in the number of qualified legal aid applications. We also estimate that the proposal under paragraph 10 above will result in an annual loss of \$0.37 million to the SLAS Fund. As regards the proposed change of interest rate in paragraph 13 above, it will lead to a reduction in general revenue of around \$0.54 million per annum. The proposal has no civil service, economic, productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

17. We have consulted the LASC and the AJLS Panel on the proposals. The Hong Kong Bar Association and the Law Society of Hong Kong have also expressed their views. While there is demand for

inclusion of more deductibles and further relaxations, the consultees broadly welcome our proposals, which can improve access to legal aid services.

PUBLICITY

18. A press release will be issued on 16 December 2005, the day when the two regulations are published in the Gazette, and a spokesman will be available to answer media and public enquiries.

ENQUIRIES

19. Any enquiries on this brief can be addressed to Mrs Alice Cheung, Assistant Director (Administration) at 2810 2576.

Administration Wing
Chief Secretary for Administration's Office
14 December 2005

LEGAL AID (ASSESSMENT OF RESOURCES AND CONTRIBUTIONS) (AMENDMENT) REGULATION 2005

(Made by the Chief Executive in Council under section 28 of the Legal Aid Ordinance (Cap.91))

1. Commencement

This Regulation shall come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

2. Schedule 1 amended

Part II of Schedule 1 to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) is amended –

(a) in rule 5 -

(i) by repealing subparagraph (a) and substituting –

“(a) the expenses for the care of a dependant who is –

- (i) an infant; or
- (ii) unable to take care of himself by reason of his mental or physical condition,

during the time that that person is at work (whether that person is absent from home or not);”;

(ii) in subparagraph (b), by adding “and” at the end;

(b) by adding before rule 5A –

“5AA. Where the income of the person concerned consists, wholly or in part, of profits from a trade,

business or gainful occupation other than an employment at a wage or salary, there shall be deducted, if it is reasonable to do so, the expenses to provide for the care of a dependant who is –

- (a) an infant; or
- (b) unable to take care of himself by reason of his mental or physical condition,

during the time that that person is at work (whether that person is absent from home or not).”;

(c) by adding -

“9. (1) Subject to paragraphs (2) and (3), where the person concerned makes regular payments for the maintenance of –

- (a) a spouse living separate and apart or a former spouse; or
- (b) a child,

there shall be a deduction in respect of those payments.

(2) The deduction under paragraph (1) may only be made if the spouse or child (as the case may be) is not taken into account as a dependant of the person concerned in calculating the amount equivalent to the 35-percentile household expenditure referred to in rule 8(1).

(3) The amount to be deducted under paragraph (1) shall be –

- (a) where the payment is made under a court order, the amount actually paid; and

(b) in any other case, the amount specified in paragraph (4).

(4) The amount to be deducted under paragraph (3)(b) shall be such amount as the Director considers to be reasonable having regard to the circumstances of the case, but shall not exceed whichever is the lower of the following –

- (a) the amount actually paid as maintenance;
- (b) the 35-percentile household expenditure differential.

(5) In this rule, “35-percentile household expenditure differential” (住戶開支第 35 個百分值差額) means the difference in amount between the 35-percentile household expenditure (calculated in accordance with rule 8(2)) in –

- (a) the case where the person or persons (as the case may be) for whose maintenance the payment is made, is or are regarded as the only dependant or dependants of the person concerned; and
- (b) the case where the person concerned is regarded as having no dependant.”.

3. Rules for computing disposable capital

Schedule 2 is amended by adding –

“12A. (1) Where an application relates to a claim for damages arising from personal injury to a person, and monies have been received by the

person concerned under an insurance policy in respect of the injury, there shall be disregarded such amount as the Director considers to be reasonable to provide for the care and medical treatment and appliance which are likely to be required by the injured person as a result of the injury over the 3-year period commencing on the date of application.

(2) In determining the amount to be disregarded under subsection (1), the Director shall have regard to the circumstances of the case, including but not limited to -

- (a) the amount, if any, actually incurred to provide for the care and medical treatment and appliance required by the injured person as a result of the injury during the 12-month period immediately preceding the date of application; and
- (b) the medical evidence, if any, as to the care and medical treatment and appliance which are likely to be required by the injured person as a result of the injury.”.

4. Contributions

Part III of Schedule 3 is amended –

- (a) by repealing paragraph 3 and substituting –
“3. Subject to paragraph 4, the rate of contribution is 10%.”;
- (b) by repealing paragraph 4 and substituting –
“4. Where a claim is settled prior to delivery of a brief for attendance at trial to counsel, the rate of contribution is 6%.”.

Clerk to the Executive Council

COUNCIL CHAMBER

2005

Explanatory Note

This Regulation amends the rules for computing the disposable income and disposable capital of a person applying for or receiving legal aid, and the contribution under the Supplementary Legal Aid Scheme. The rules and the contribution are set out in the Schedules to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) (“principal Regulations”).

2. The amendments to the rules for computing the disposable income of a relevant person are as follows -

- (a) The expenses to provide for the care of a dependant who is an infant or who is unable to take care of himself due to his mental or physical condition when the person is at work (whether the person is absent from home or not) may be deducted, where it is reasonable to do so. This deduction is given where the person is at work by reason of employment for a wage or salary or engagement in a trade, business or gainful occupation. Currently, a deduction is allowed only for the care of a dependant infant living with the person during the time that the person is absent from home by reason of employment (see section 2(a) and (b)).
- (b) A new rule is added to provide for deduction to be made in respect of regular payments made by the person for the maintenance of a spouse living separate and apart or a former spouse, or a child. In the case of a payment under a court order, the amount actually paid is deductible. In the case of a voluntary payment, an amount that the Director of Legal Aid (“Director”) considers to be reasonable is

deductible, but it should neither exceed the amount actually paid nor the amount calculated in respect of the spouse or child using the formula set out in rule 8(2) of Schedule 1 to the principal Regulations (see section 2(c)).

3. A new rule for computing disposable capital is added. Under the new rule, if an application for legal aid relates to a claim for damages arising from personal injury to a person and monies have been received under an insurance policy in respect of the injury, an amount that the Director considers to be reasonable to provide for the care and medical treatment and appliance that the injured person may require as a result of the injury over the next 3 years may be disregarded (see section 3).

4. The contribution to be paid to the Director in respect of a property recovered or preserved under the Supplementary Legal Aid Scheme is reduced from 12% to 10% of the value of the property. The rate of contribution remains at 6% where a claim is settled before delivery of the brief for attendance at trial to counsel (see section 4).

LEGAL AID (CHARGE ON PROPERTY)(RATE OF INTEREST) REGULATION

(Made by the Chief Executive in Council under section 28 of the Legal Aid Ordinance (Cap. 91))

1. Commencement

This Regulation shall come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

2. Interpretation

In this Regulation –

“BLR” (最優惠利率), in relation to a day, means the arithmetic mean of the best lending rate quoted by each note-issuing bank on that day;

“HKDISR” (港元利息結算率), in relation to a quotation day, means the 12-month Hong Kong Dollar Interest Settlement Rate quoted by The Hong Kong Association of Banks in respect of that day;

“interest period” (利率期) means any 12-month period commencing on 1 June in a year;

“Monthly BLR” (當月最優惠利率), in relation to a month, means the arithmetic mean of the BLR on all days within that month;

“Monthly HKDISR” (當月港元利息結算率), in relation to a month, means the arithmetic mean of the HKDISR on all quotation days within that month;

“note-issuing bank” (發鈔銀行) has the meaning assigned to it in section 2 of the Legal Tender Notes Issue Ordinance (Cap. 65);

“quotation day” (公布日) means a day on which The Hong Kong Association of Banks makes a quotation for the 12-month Hong Kong Dollar Interest Settlement Rate in respect of that day.

3. Prescribed rate of interest

(1) Subject to subsection (3), for the purposes of section 18A(3B)(b) of the Ordinance, the prescribed rate of interest, in relation to an interest period, shall be an annual rate –

- (a) calculated in accordance with the formula set out in subsection (2); and
- (b) rounded to 3 decimal places.

(2) The formula referred to in subsection (1) is –

$$\text{BLR}_{(1 \text{ April})} - (\text{Monthly BLR}_{(120 \text{ months})} - \text{Monthly HKDISR}_{(120 \text{ months})}),$$

where

- (a) “BLR_(1 April)” is the BLR on 1 April of the year in which the interest period commences;
- (b) “Monthly BLR_(120 months)” is the arithmetic mean of the Monthly BLR of all months within the 120-month period ending on 31 March of the year in which the interest period commences;
- (c) “Monthly HKDISR_(120 months)” is the arithmetic mean of the Monthly HKDISR of all months within the 120-month period ending on 31 March of the year in which the interest period commences.

(3) Where the annual rate calculated in accordance with the formula set out in subsection (2) is less than zero, the prescribed rate of interest, in relation to the interest period, shall be zero.

Clerk to the Executive Council

COUNCIL CHAMBER

2005

Explanatory Note

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 or his dependants 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 under specified circumstances. The person, however, has to pay simple interest on the sum that the Director would have retained in respect of the property. The purpose of this Regulation is to prescribe the rate for that interest.