

**For discussion on  
26 May 2008**

**Legislative Council Panel on  
Administration of Justice and Legal Services**

**Five-yearly Review of the Criteria for  
Assessing the Financial Eligibility of Legal Aid Applicants**

**PURPOSE**

This paper informs Members of the progress of the Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applications (“the Review”) and invites Members’ views on proposals for further consideration.

**BACKGROUND AND FUNDAMENTAL PRINCIPLES**

2. Since 1997, reviews have been conducted on the overall approach for assessing the financial eligibility of legal aid applicants.
3. The promotion of access to justice is a key purpose of publicly funded legal aid. In the past few years, the scope of legal aid has been expanded where justified. Like any other public expenditure, we need to ensure that legal aid expenditure represents good value for money as we are accountable to the community for prudent and effective use of public money.
4. Towards this end, we adopted two cardinal criteria, namely means (financial eligibility) and merits (the prospect of success, costs and benefit and the prospect of recovery) tests to assess the legal aid applications. Financial eligibility ensures that recipients of legal aid are those who are most in need of financial help for court proceedings. It follows that individuals, including the legally aided persons, should make financial contribution to the costs of their cases where they are able to do so. If necessary, they are expected to meet all or part of any outstanding case costs from property recovered or preserved on their behalf at the conclusion of the case (the Director of Legal Aid (“DLA”)’s first charge). The twin operations of contributions and DLA’s first charge provide incentive for the legally aided person to approach the case in a reasonable manner, i.e. to seriously consider offers in settlement and to keep an eye on the costs of the case as it progresses.

## THE REVIEW

5. Against the above fundamental principles, the purpose of the Review is to examine the current approach used to assess the financial eligibility limits. In this respect, it is important to preserve the fundamental principles of legal aid whilst formulating an approach which is simple, fair, financially prudent and easy to administer. At present, the financial eligibility limit for the Ordinary Legal Aid Scheme (“OLAS”) which covers civil proceedings at District Court and above is \$165,700. The same eligibility limit applies to criminal legal aid under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance. The Supplementary Legal Aid Scheme (“SLAS”) is a self-financing legal aid scheme available to those whose financial resources are above \$165,700 but do not exceed \$460,300. It covers cases involving personal injury or death and medical, dental or legal professional negligence where the claim for damages is likely to exceed \$60,000, and employees’ compensation claims irrespective of amount. The eligibility limits are set out in the Legal Aid Ordinance. At present, about 53% of the Hong Kong households are financially eligible for OLAS; whereas when OLAS and SLAS taken together, about 70% of households are eligible.

6. We consulted this Panel on the scope of the Review at the Panel meeting on 26 March 2007. The following sets out the scope as proposed by this Panel and other stakeholders and the latest thinking of the Administration.

### **A. Financial capacity approach in assessing the financial eligibility of legal aid applicants**

7. LAD currently adopts a “financial capacity” approach, which aggregates a person’s yearly disposable income and disposable capital,<sup>1</sup> in assessing the means of legal aid applicants. A person whose financial capacity does not exceed the financial eligibility limits is eligible for legal aid. The financial capacity approach has been working satisfactorily and is not so complex as to be confusing for an applicant.

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<sup>1</sup> In other words, a person’s financial capacity refers to the capital assets and annual income after deduction of certain statutory allowances.

8. We plan to maintain the current approach of aggregating a person's yearly disposable income and his disposable capital when conducting the means test.

### **B. Method of computing disposable income**

9. According to the Legal Aid (Assessment of Resources and Contributions) Regulations ("Regulations"), a person's disposable income is the income that person may reasonably expect to receive during the period of computation. It is calculated by his income minus a number of statutory deductible items, such as payment of salaries tax and maintenance payments.<sup>2</sup>

10. One deductible item is an allowance equivalent to the 35-percentile household expenditure excluding rent. The allowance reflects the general expenditure of a household in maintaining an acceptable standard of living.<sup>3</sup> There have been calls from this Panel and the Legal Aid Services Council ("LASC") to raise the 35-percentile household expenditure. We are critically examining the pros and cons and the associated financial and other implications.

### **C. Method of computing disposable capital**

11. In accordance with the statutory requirements, a person's disposable capital is the value of his/her resource of a capital nature, disregarding a number of items including the value of any interest in the only or main dwelling, and insurance money received in respect of the injuries to which the person's personal injury claim relates, to cover his/her future medical needs.<sup>4</sup>

12. There have been suggestions that in assessing a person's financial eligibility, relevant factors such as age and physical condition and their earning power should be taken into account. Some suggested that savings for the elderly should be disregarded while others proposed a waiver of the means test for applicants with severe disability. It has been put forward that the savings of the elderly are meant to support their future living needs. Disabled persons who lose 100% of their earning

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<sup>2</sup> The deductible items are set out in Part II of Schedule 1 of the Regulations.

<sup>3</sup> The existing allowance of household with no dependent to household with six or more dependents is in the range \$3,710 to \$18,230.

<sup>4</sup> The items to disregard are set out in Schedule 2 of the Regulations.

capacity are in a similar position as the elderly in terms of their lack of earning power and the need for their savings to be used to support their future living needs.

13. We will take reference from the practices of other departments as well as overseas practices with regard to the treatment of the resources of elderly and disabled persons. We are critically examining the proposal for an elderly and disabled persons' disregard, the scope of such disregard, eligibility for such disregard and the mechanism to implement such disregard in addition to the pros and cons of the proposals and the associated financial and other implications. We are also looking into matters such as the desirability of maintaining the total disregard for the applicant's main dwelling when considering the overall eligibility criteria.

#### **D. Financial eligibility limits**

14. At present, a single financial eligibility limit applies to all types of cases under OLAS as well as criminal legal aid cases. Another limit exists for SLAS. There have been requests to pose different limits for different types of cases. There have also been calls for setting a higher limit for criminal legal aid cases.

15. In the context of criminal legal aid, the DLA has the discretion to waive the limit in the interests of justice. In practice, the DLA seldom refuses criminal legal aid applications solely on means ground except for applicants who fail to provide full and frank disclosure on means. The number of refusals purely on means is insignificant (none in 2004 and 2005; 2 in 2006 and 4 in 2007). That being the case, there may not be a need to set a higher limit for criminal legal aid cases. For civil cases, an across-the-board financial eligibility limit is clear and simple to understand and administer. We are looking into the practices of overseas legal aid jurisdictions and will consider alternative options on the way forward.

#### **E. Review cycle of financial eligibility limits**

16. By practice, the Administration conducts **an annual review** on the financial eligibility limits to take account of movement of price level to maintain the real value of the limits. **A biennial review** is conducted to take into account factors other than inflation, including changes in litigation costs. In addition, **a five-yearly review** is

conducted to examine the continual propriety of the financial eligibility system.

17. Given the difficult and time consuming task of carrying out several reviews over a fixed period of time, the arduous task of data collection and the resources that have to be spent on such reviews, the scope for streamlining the number and frequency of such reviews is under consideration.

#### **F. The Supplementary Legal Aid Scheme**

18. SLAS was introduced in 1984 to provide civil legal aid to persons who have good potential claims but whose financial resources exceed the limit for OLAS but are unable to meet the costs of conducting litigation on a private basis. It is self-financing in nature and was established with a loan of \$1 million from the Lotteries Fund. The scheme was to cater for applicants who have reasonable grounds to take proceedings for damages for personal injuries or death. In 1995, it was extended to include medical, dental and legal professional negligence claims. To provide for the expansion of the scope and additional caseload arising from an increase in the financial eligibility limit of the SLAS at the time, the Government made a one off capital injection of \$27 million to the SLAS Fund with the approval of the Finance Committee of the Legislative Council.

19. SLAS operates on the following fundamental principles –

- (a) It is provided to further the legal aid policy objective, and hence should be made available to those with limited financial resources;
- (b) To maintain the financial viability of SLAS, it should only cover cases that involve monetary claims of reasonable size, with high success rate and a reasonably good chance of recovering damages; and
- (c) Cases eligible for SLAS should be those that deserve priority in funding in the sense that significant injury or injustice to the individual is involved.

20. SLAS is funded by application fees, interim contributions, final contributions and payment of legal costs deducted from the damages

recovered for the aided person in successful proceedings. The underlying principle is that the losses of unsuccessful litigants would be made up by the contributions and deductions in successful claims, thereby ensuring the continued viability of this financially autonomous scheme.

21. There have been requests including those from this Panel and the LASC to expand the scope of SLAS; raise or even remove the eligibility limits and increase contribution rates or adopt a sliding scale of contribution rates to compensate for the expansion of scope and the increase/removal of the financial eligibility limit.

22. Any proposals to extend the scope of SLAS must not jeopardize the financial viability of the scheme and thus requires thorough consideration. This is particularly the case as the SLAS Fund is liable to pay the full legal costs of the opposite party as well as that of assigned lawyers if claims supported by the Fund are unsuccessful. In one recent unsuccessful claim supported by the Fund, the total loss to the Fund is estimated to be as high as \$18 million.

23. Detailed consideration is currently being given to the scope of SLAS, including the feasibility of regarding SLAS as a safety net legal aid scheme.

## **WAY FORWARD**

24. Members' views on the above aspects of the Review are welcome. Members should note that the proposals are still under consideration and options need to be thoroughly examined particularly in terms of financial and other implications by all relevant Government bureaux and departments before recommendations can be made.

25. Subject to Members' views, we will consult relevant stakeholders including the LASC and we plan to revert to this Panel around the end of 2008.

**Home Affairs Bureau  
Legal Aid Department  
May 2008**