



THE

LAW SOCIETY
OF HONG KONG

香港律師會

THE LAW SOCIETY'S SUBMISSIONS ON THE FIVE-YEARLY REVIEW OF THE CRITERIA FOR ASSESSING THE FINANCIAL ELIGIBILITY OF LEGAL AID APPLICANTS
(“Five-yearly Review”)

The Law Society's Legal Aid Committee has discussed and reviewed the proposals jointly put forward by the Home Affairs Bureau (“HAB”) and the Legal Aid Department (“LAD”) for the current Five-yearly Review in their March 2010 paper and has the following comments:

Adjustment of the Financial Eligibility Limits (“FELs”)

1. The Administration proposed an increase of about 50% in the FEL for Ordinary Legal Aid Scheme (“OLAS”) from HK\$175,800 to HK\$260,000 and a more substantial increase of about 100% in the FEL for the Supplementary Legal Aid Scheme (“SLAS”) from HK\$488,400 to HK\$1 million.
2. The Law Society's Legal Aid Committee welcomes in principle the increase in the FELs for the OLAS and SLAS as a step in the right direction to widen the net of legal aid.
3. However, the question remains as to what levels the FELs should appropriately be for OLAS and SLAS for the coming 5 years. The Committee submits that one obvious criterion for the Five-yearly Review is there should be “appropriate coverage” of legal aid and the Administration should ensure that the legal aid coverage should not be too extensive so that the Government will be spending too much public fund on legal aid or too limited so that the public would be denied legal justice because of a lack of means.
4. The Committee has concern that after all these years of discussion, the Administration abruptly stated that they had “completed” the Five-yearly Review and come up with proposed figures of increase in the FEL in late March without disclosing in detail as to how they had arrived at the revised figures and without taking into account views and suggestions expressed by stakeholders over the years or else how they have taken such views and suggestions into account.

5. The LegCo Panel on Administration of Justice and Legal Services (“*AJLS Panel*”) adjourned discussion of the subject at the meeting of 29 March 2010 to enable the Administration to provide justifications for the proposed increase in FEL. However, it is noted with regret that the Administration’s April paper was not any more helpful and discussion had to be adjourned by the AJLS Panel a second time to 21 July 2010.
6. The Administration’s April 2010 paper merely stated that “*when the FELs were first introduced, no formula was used to arrive at the figures and that there was no quantitative elaboration behind them.*” **The Committee submits that clear criteria should be set out for the sake of both the present and future reviews of the FELs.**
7. The Administration’s April paper went further to state that in considering the revised FELs, the Administration has taken into account various factors including “*percentage of cases with litigation costs below the revised FELs, the levels of financial resources of the prospective applicants eligible for legal aid, and the financial implications arising from the adjustments.*” However, it is doubtful whether the Administration has made any “*appropriate coverage*” assessment and what empirical data they have relied on to arrive at the presently proposed increased FEL figures.
8. The Committee has the benefit of reading the Bar’s 29 May 2010 submissions. It noted that the Bar proposed the following increases in the FELs:
 - HK\$350,000 for OLAS
 - HK\$3 million for SLAS
9. The Bar put forward as justifications for their proposals the test used in the Scott Report, namely, that “*a person should have access to legal representation without undue financial hardship*” with the objective “*to ensure that no one is placed in a position that his standard of living is reduced below acceptable levels*” (paras. 29(f) and (g) of the Bar’s submissions refer).
10. Without detailed information from the Administration as to how they have arrived at the proposed increase in the FEL, it is simply impossible for stakeholders including the Law Society to properly assess the extent the FEL should be increased.
11. Given the huge gap between the Bar’s and the Administration’s proposed increased FEL figures, the Administration should provide relevant data to “*justify*” why they have arrived at much lower levels of increase in the FEL.

12. **The Committee submits that the Administration should furnish full information on the basis and criteria that they adopted in arriving at the increased figures for consideration by all concerned. In particular, the Administration should clarify:**
- (a) on what basis they have come up with the suggested FEL figures and whether and how they have taken into account the guiding principles in the Scott Report;**
 - (b) whether and if so, how they have taken into account in their proposals relevant data which would hinge on the affordability of the persons in need of legal aid, including the litigation costs; and if so, what data they have relied on apart from the data in relation to legally aided civil cases provided by LAD as the costs of litigation; have they approached the Judiciary for relevant data; and if not, would they set up a scheme to obtain such data?**
 - (c) the implications of their present proposals taking into account the facts that (i) conditional fee arrangement is illegal in Hong Kong; and (ii) there is no legal expense insurance available in the place e.g. the percentage of cases with litigation costs below the revised FEL and the extent this would have met the presently unmet needs, the increase in allocation of fiscal resources into legal aid, etc.**

Replacing the 35-percentile household expenditure with the median household expenditure as deductible allowance

13. The Committee supports in principle the relaxation in the FEL by way of raising the level of personal allowance to the median household expenditure in calculating disposable income.
14. However, the Administration has again not clarified how they had come up with the median household expenditure figure: no data was provided to justify why this was increased to the median percentile figure but not the 66 percentile figure, as suggested by Professor Wong Hung of Chinese University, or the 66 percentile for OLAS and 75 percentile for SLAS as suggested by the Bar.
15. **The Committee submits that the Administration should elaborate on why they have chosen the “median” household expenditure figure.**

Calculation of financial resources for elderly persons

16. The Committee agrees that elderly applicants for legal aid should be entitled to more favourable calculation of their disposable capital given their retirement or diminishing earning capacity.

17. It is however again unclear on what basis the Administration has come up with the present proposal for elderly applicants, i.e. to disregard an amount of savings equivalent to the level of the FEL for OLAS.
18. The Administration also provided no explanation as to why a 65 age requirement has been set and not 55.
19. **The Committee submits that the Administration should elaborate on the basis of their proposals.**

Expansion of the scope of SLAS

20. The Committee is very disappointed to note that the Administration has taken a very conservative approach and not recommend for expansion of the SLAS to cover other types of litigation.
21. This goes contrary to the recommendations put forward in the Law Reform Commission's Report on Conditional Fees; and is also against the persistent call by the 2 professional bodies to expand the scope of SLAS to enhance access to justice.
22. The Committee shares the Bar's concern that the Administration's decision was arrived at based on a mistaken view about the basic principles of SLAS.
23. One of the primary reasons the Administration has given for not expanding the scope of SLAS to cover other cases was that these other cases were not covered by insurance, thus bringing a low prospect of recovery of damages. However, such reasoning runs counter to the Government's pronounced policy objective on legal aid, i.e. to ensure that no one with reasonable grounds for taking legal action would be prevented from doing so due to a lack of means.
24. The Administration explained at the AJLS Panel on 29 March that "*if the scope of SLAS was to be extended to cover cases which did not fulfil such criteria, the Administration would not be able to raise the FEL of SLAS to HK\$1 million at the same time. Instead, it might be necessary to set different financial eligibility limits for different types of cases under SLAS. The administration did not consider such an approach desirable and considered it more preferable to have an across-the-board financial eligibility which was clear and simple to understand and administer. Having considered and balanced the pros and cons of various proposals for the expansion of SLAS, the Administration recommended raising its financial eligibility limit to HK\$1 million but not the expansion of its scope to cover other categories of cases.*" **The Administration should make known to stakeholders what options it had considered to facilitate an informed discussion on the subject.**

Legal Aid for Employees in employer insolvency cases and in recovery of employment-related debts

25. The AJLS Panel has invited views from stakeholders on how assistance could be provided to employees in obtaining legal aid in employer insolvency cases and in recovery of employment-related debts.
26. The Committee noted that the AJLS Panel has requested the Administration to provide a supplementary paper setting out:
 - (a) the reasons for ceasing the service of assisting employees in enforcing Land Tribunal awards provided by the LAD before 1995 and whether consideration could be given to providing such service again; and
 - (b) assistance to be provided to employees in obtaining legal aid for recovery of wages and measures to be taken to ensure the enforcement of Lands Tribunal awards, with relevant statistics on such cases.
27. Pending sight of the further information to be provided by the Administration, the Committee would like to reserve its comments on this subject.

**The Law Society of Hong Kong
Legal Aid Committee
20 July 2010**