

**For discussion on
29 March 2010**

**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

The Administration has completed the five-yearly review on the criteria for assessing the financial eligibility of legal aid applicants (“the Review”). This paper briefs Members on the Administration’s recommendations pursuant to the Review.

BACKGROUND

2. The purpose of the Review is to examine the current approach used to assess the financial eligibility limits of legal aid applicants. We consulted this Panel on the scope of the current Review at the meeting in March 2007 and reported progress to the Panel in May 2008 and March 2009 respectively.

FINANCIAL ELIGIBILITY LIMITS

3. When a person faces legal proceedings, he is expected to draw on both his income and capital to meet the legal costs to the extent that he can do so without suffering undue hardship. A means test was devised to assess an applicant’s financial capability to undertake litigation. The idea is that when employing his resources (being his annual income and capital) to litigate, a person should be allowed to keep a portion of his resources for his daily needs and those of his family (being the deductibles and disregards). Under this principle, a legal aid applicant’s financial capacity is assessed by aggregating his annual disposable income and disposable capital, minus certain deductibles such as rent or mortgage payments of his main or only dwelling and personal allowance, and disregards such as value of his household furniture and effects of main or any dwelling he occupies.

4. At present, applicants with financial resources not exceeding **\$175,800** are eligible for the Ordinary Legal Aid Scheme (**OLAS**). Applicants with financial resources above \$175,800 but not exceeding **\$488,400** are eligible for the Supplementary Legal Aid Scheme (**SLAS**), under which legal aid is available to applicants for claims involving personal injury and death, or medical, dental and legal professional negligence, where the claim for damages exceeds or is likely to exceed \$60,000 (also covers claims under Employees' Compensation Ordinance irrespective of the amount claimed).

5. Some quarters of the community believe that many people, though assessed to be above the current financial eligibility limits (FELs) for legal aid schemes, cannot afford the costs of litigation in the private market. In response to the calls from the community, the Administration proposes that the following package of improvement measures be implemented which aim at bringing about improvements that confer benefits on all legal aid recipients.

PROPOSALS

6. It is recommended that the following proposals arising from the five-yearly review be implemented –

- (a) the **median monthly household expenditure** be used to replace the 35-percentile household expenditure as a deductible component in calculating disposable income;
- (b) the **FEL** for **OLAS** be **raised** from the present \$175,800 by about 50% **to \$260,000** and that for **SLAS** from \$488,400 by about 100% **to \$1 million**; and
- (c) an amount equivalent to the **FEL of OLAS** be **disregarded** from the **savings of the elderly legal aid applicants** who have reached the age of 65 at the time of the applications, irrespective of their employment status, when calculating their disposable capital.

Details of our proposals are set out in the following paragraphs.

Recommendation 1: Replacing the 35-percentile household expenditure with the median household expenditure as deductible allowance

7. In calculating the disposable income of legal aid applicants for assessing their eligibility for legal aid, a personal allowance is deducted to recognize that applicants should be allowed to keep an amount required for other expenses of households of a particular size. The personal allowance is currently set at a level equivalent to the “35-percentile household expenditure” (varies depending on household size), which is defined to mean the level of expenditure of households of a particular size, excluding expenditure for rent, as obtained in the household expenditure survey conducted by Census and Statistics Department, such that 35% of the households of that size have household expenditure below that level, and 65% of the households have household expenditure above that level.

8. The 35-percentile household expenditure was adopted in 2000 to replace the Comprehensive Social Security Assistance rates as the deductible personal allowance. The aim was to reflect more realistically the expenditure level of households of the population that require assistance in funding legal proceedings. The Legal Aid Services Council (LASC) has taken the view that there is room to raise the allowance to at least the 50-percentile (i.e. the median). We agree with the LASC that there is room to raise the allowances by replacing the 35-percentage household expenditure with the median household expenditure as deductible allowance.

Recommendation 2: Adjustment of the FELs

9. The Legislative Council passed a motion on “Relaxing the eligibility criteria for legal aid” at the meeting on 11 February 2009, suggesting that the eligibility criteria for legal aid should be further relaxed. Having regard to the public aspirations for relaxing the FELs and as a genuine attempt to enhance access to justice for those who need to take or defend proceedings but unable to do so because of a lack of means, it is proposed that a significant increase of about 50% be made to the FEL for OLAS, increasing the FEL from the existing amount of \$175,800 to \$260,000.

10. As for SLAS, it is a self-financing scheme and funded primarily from contributions paid by successful legal aid applicants upon acceptance of legal aid and from percentage contributions payable out of damages or compensation recovered. Cases funded under SLAS are predominantly personal-injury related cases which, unlike cases under OLAS, have a good damages to costs ratio and which traditionally have a high success rate with good prospect and greater assurance of recovery of damages and costs. We therefore consider that there is more room for raising the FEL without compromising the financial viability of the

scheme. We propose that a more substantial increase of about 100% be made to the FEL for SLAS, raising the limit to \$1 million.

11. Illustration of the impact on different types of households as a result of our proposed increase to the FELs (as described in paragraphs 9 and 10) for OLAS and SLAS is made at **Annex A**.

12. Under the current legal aid regime, successful legal aid applicants have to contribute towards the amount of the costs and expenses of the aided proceedings. For SLAS, applicants pay an interim contribution and subsequently a percentage contribution up to 10% of the damages/compensation recovered upon successful claims. Where a claim is settled prior to delivery of a brief for attendance at trial to counsel, the rate of contribution is 6%. We intend to continue with these rates after raising the FELs.

Recommendation 3: Calculation of financial resources for elderly persons

13. We recognize that elderly applicants generally lack earning power (and those who are still employed face a genuine prospect of diminishing earnings), and they are more reluctant to deploy their capital for defending or taking legal action, hence undermining their access to justice. Furthermore, it is not uncommon in overseas legal aid jurisdictions for the financial resources of elderly applicants to be treated more favourably. We consider there is a case for more favorable treatment of the disposable capital for elderly applicants for OLAS and SLAS.

14. We recommend disregarding part of the savings of the elderly applicants who have reached the age of 65 at the time of the applications, irrespective of their employment status. The amount of savings to be disregarded is recommended to be at the level of the FEL for OLAS (i.e. \$175,800 currently, proposed to be increased to \$260,000), and be adjusted annually in pace with the FEL adjustments.

OTHER PROPOSALS CONSIDERED

Expansion of the scope of SLAS

15. We note that there are requests for expanding the scope of SLAS, including the recommendation in the Law Reform Commission's Report on Conditional Fees published in 2007, which proposed that SLAS should be expanded by raising the FELs and increasing the types of cases covered.

16. In considering the case for expansion of the scope of SLAS to cover more cases, it is important that we take into account the objective of the scheme. When SLAS was first introduced in 1984, it only covered claims arising from personal injuries or death. The scope was extended subsequently to include employees' compensation claims and medical, dental and legal professional negligence claims. The rates of contribution from damages recovered by successful legal aid persons were reduced twice, in 2000 and in 2006, to the present 6% (for cases settled before delivery of brief to counsel) and 10% (for other cases). We have taken the opportunity of the Review to examine whether there is scope for improving the operations of SLAS without undermining or jeopardizing the financial viability of the scheme.

17. To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio. SLAS covers mainly cases where the defendants are insured or where there is assured payment of damages (i.e. claims for personal injuries or death and work-related accidents). Monetary claims other than employees' compensation (EC) and personal injury claims do not have a high success rate generally. This is because EC compensation claims operate under a no-fault compensation scheme and for personal injury cases, the law on negligence is generally more straightforward with comprehensive statutory regulations, codes of practice and numerous judgments of the court governing the duties and standard of care of the tortfeasor, especially in work related and traffic accidents.

18. The high chance of recovery of damages helps ensure, to a large extent, the financial sustainability of the scheme. Therefore, SLAS only covers cases which involve monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages.

19. If the delicate balance in this successful formula is upset as a result of covering civil cases which do not involve monetary claims, or those which have a relatively low success rate or poor prospect of recovery, the continued viability of the SLAS fund will be under threat. In recent years, the amount of contribution received from cases has dropped significantly and the income of the fund relies heavily on investment. Based on cases whose accounts were finalized in the last 6 financial years, the SLAS fund suffered a net loss where the legal costs incurred in those cases exceeded the income earned in 3 out of 6 of those years. Net income from finalized cases dropped from just over \$4 million in 2003-04 to \$0.6 million in 2008-09.

20. Factors attributing to these changes include the cuts in the contribution rate by aided persons in successful cases from 15% to 12% in 2000, and further to 10% in 2003. In addition, the size of the claims made was relatively smaller in

recent years which resulted in an overall decrease in damages recovered and hence the contributions payable to the fund.

21. Against the above considerations and in view of the financial position of the SLAS fund, we **recommend not to expand the scope of SLAS** to cover other categories of cases. Elaborations on why particular categories of cases could not be covered are set out in **Annex B**.

Other Suggestions

22. Apart from the demands for expansion of SLAS, we note there are other suggestions to expand the legal aid regime. We are of the view that acceding to such requests would erode the fundamentals of our legal aid regime and open the flood-gate with substantial financial and other implications. These suggestions include-

- (a) To waive the means tests for various claims such as the employees' compensation claims and professional negligence claims;
- (b) To expand the scope of legal aid to cover cases such as disputes in libel and derivatives, and to set different eligibility limits for different types of cases;
- (c) To implement a scheme of "legal aid vouchers" to provide a "lump-sum grant" to all Hong Kong people to apply for legal aid;
- (d) To provide more assistance to employees in obtaining legal aid in employees' compensation cases and employer insolvency cases; and
- (e) To expand the legal aid scheme to cover legal actions taken by Hong Kong residents in the Mainland.

23. The fundamental legal aid policy is that legal aid should only be granted to those who lack the means to take or defend legal action. We must therefore exercise prudence in defending the means test and merits test, which are the two cardinal principles of legal aid. In this light, the Director of Legal Aid's exemption power should be restrictive.

24. As for the FELs, we consider that setting different eligibility limits for different types of cases/clientele would not only be discriminatory but would also make the means-testing procedure more complicated, as we need to devise and justify the different schemes of different exemptions or deductibles. Fragmented amendments to the Legal Aid (Assessment of Resources and Contributions)

Regulations that afford different benefits to specific groups of applicants as opposed to benefits that apply to all applicants would render the means testing process unduly time-consuming, onerous and burdensome for all concerned, and go against the overseas experience of adopting a simple means test of legal aid applicants, and against the calls from the public and from LegCo and the legal profession for more simplified legal aid application vetting process. We consider that an “across-the-board” increase of the FELs will facilitate our upholding of a more simplified legal aid application vetting process, save administrative costs, be clear to understand and more user-friendly for the legal aid applicants. This approach is preferred to the alternative of setting different limits for different types of cases or provision of exemptions for specific groups of legal aid applicants, given the difficulty in estimating the costs of individual cases at the outset, the diverse nature of cases and the difference in caseload of different types of cases.

25. We also consider that other proposals, such as the scheme on “legal aid vouchers” and expansion of the legal aid regime beyond the jurisdiction of Hong Kong, deviate substantially from the operation of the long-standing legal aid system and that they should not be further pursued.

CONSULTATION WITH LASC

26. The Administration has consulted the LASC on the above package of proposals in January 2010. The LASC supports the proposal to relax the FELs for OLAS and SLAS. However, it is of the view that the FEL for SLAS should be raised to the amount of \$1.3 million.

27. The LASC welcomes the Administration’s proposals to replace the 35-percentile household expenditure with the median household expenditure as a deductible in calculating the personal disposable income and to provide a more favourable treatment in calculating the disposable capital of elderly applicants, though it is suggested that the age requirement for elderly applicants should be further relaxed. The LASC's Interest Group on Scope of Legal Aid has looked into the issue of expanding the scope of SLAS and considered it not appropriate, for the time being, to recommend any extension. It is understood that the Group will continue to study all the issues relating to SLAS including its scope with a view to bringing further improvements to the Scheme.

BIENNIAL REVIEWS OF FINANCIAL ELIGIBILITY LIMITS OF LEGAL AID APPLICANTS

28. When the Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91) scrutinized the Administration's proposal to adjust the FELs pursuant to the annual and biennial review of the FELs in May 2009, the Administration has been asked to review the methodology on collecting information on private litigation costs in the context of the current Review.

29. Currently, we are relying on the two legal professional bodies to provide information on private litigation costs for conducting the biennial review of the FELs. However, both legal professional bodies have expressed difficulties in obtaining such information from their members. The Administration will explore with the two legal professional bodies how the problems identified in obtaining the information may be resolved.

WAY FORWARD

30. Members are invited to comment on the proposals put forth by the Administration. Subject to the Panel's discussion, the Administration will formulate legislative proposals with a view to putting the adjustments into effect in the 2010-11 legislative session.

**Home Affairs Bureau
Legal Aid Department
March 2010**

Illustrations of the impact of the proposed increase in FELs for OLAS and SLAS

<i>Scenario 1: Household of 2 adults and 2 children</i>	
<p><i>Disposable Income:</i></p> <p>Income: \$420,000/year (\$35,000 p/m)</p> <ul style="list-style-type: none"> - Mortgage Payment: \$130,000/year - Salaries Tax : \$25,000 /year - MPF payment : \$10,500/year - Expenses on dependents : \$30,000/year - Personal allowance \$11,120/month (for households with 4 persons)=\$133,440/year <p>= \$91,060</p>	<p><i>Disposable capital:</i></p> <p>1 residential flat (self-occupied) \$3 million (disregarded)</p> <p>+Savings in bank account \$100,000</p> <p>+ one car \$65,000</p> <p>= \$165,000</p>
<p>Total Financial Capacity = \$256,060(\$91,060+ \$165,000) (EXCEEDING the current FEL of \$175,800 for OLAS but below the proposed FEL of \$260,000)</p>	

Scenario 2: Household of 2 adults and 2 children

Disposable Income:

Income: \$1,080,000/year
 (\$90,000/month)

- Mortgage Payment: \$360,000/year
- Salaries Tax : \$67,500 /year
- MPF payment : \$27,000/year
- Expenses on dependents : \$30,000/year
- Personal allowance \$11,120/month (for households with 4 persons) = \$133,440/year

= \$462,060

Disposable capital:

1 residential flat (self-occupied) \$6 million
 (disregarded)

- +Savings in bank account \$200,000
- + one car \$150,000
- + stocks and shares \$100,000

= \$450,000

Total Financial Capacity = **\$912,060** (\$462,060 + \$450,000)
(EXCEEDING the existing FEL of \$488,400 for SLAS but below the proposed FEL of \$1 million)

**Considerations against expanding the scope of SLAS
to cover other types of cases**

We have critically examined the proposals but do **NOT** consider it viable to expand SLAS to cover other types of cases.

(i) Family cases which involve lump sums, including matrimonial cases

Considerations

The recovery of damages in successful SLAS cases is primarily due to such claims covered by insurance as required by law. In family cases with claims against a private individual, the chances of obtaining an empty judgment are high, thus bringing a very low prospect of recovery of damages.

Periodical payments are long term commitment. In many cases, payers settle some installments and default in others. As a result, the litigation costs for recovery of such payments are considerably high, sometimes even exceeding the amounts recovered.

Usually, the property that can be recovered in a matrimonial dispute is the matrimonial home. It is unreasonable and not practicable to request the legally aided person to sell the matrimonial home and pay contributions to the SLAS Fund.

If only lump sum payments are required to be put under SLAS and whereas, for the above reasons, the matrimonial home and periodical payments recovered are not required, this will cause another problem: it will be unfair and arbitrary to require a legally aided person who has recovered a lump sum payment to make such contributions while another legally aided person who has also received substantial benefit, such as a matrimonial home or periodical payments, is not required to contribute.

For the above reasons, we do not consider it suitable to expand SLAS to cover family cases.

(ii) Product liability cases

Considerations

Product liability claims where claimants have suffered personal injuries are already covered under OLAS and SLAS.

We do not recommend extending SLAS to cover product liability cases.

(iii) Commercial cases where damages are the primary remedy

Considerations

This broad range of cases covers disputes between business persons and can cover contracts for the supply of goods, services, finance, property, etc. The facts of these cases can be complicated and usually involve voluminous documents and a substantial amount of evidence from witnesses. The litigation costs for these cases can be considerably high. The success of these cases often depends on the credibility of the witnesses and the conduct and honesty of the litigants. Very often, these cases involve issues of misrepresentations, waivers, estoppels, quality of performance, actual or apparent authorities, etc. Irrespective of the quality of merits testing in such cases, it will be difficult to predict the outcome of such cases. Previous experience shows that these cases do not have a high success rate. Furthermore, since most of these cases are not covered by insurance, they will likely turn out to be unrewarding due to the inability and sometimes unwillingness of the opposite parties to satisfy the judgment debts and costs even if judgments were obtained in favour of the legally aided persons.

We consider it inappropriate to include commercial cases in SLAS.

(iv) Probate cases

Considerations

Probate cases are usually involving feuding family members and are aggressively litigated thus incurring high costs and yet very often, the size of the estate is not large comparing with the size of personal injuries claims. Aside from the difficulty in assessing the reasonable prospects of success in such cases, there is doubt whether these cases fall within the guiding principle of SLAS.

We do not recommend including probate cases in SLAS.

(v) Insolvency cases

Considerations

A large proportion of insolvency cases involve enforcement of Labour Tribunal Awards. According to LAD's record, the recovery rate of these cases is low due to the employers' inability to pay and their lack of insurance.

Nevertheless, in most of these insolvency cases, employees will, among themselves, nominate a representative, who is financially eligible for legal aid to make application. If the representative is not financially eligible for legal aid, the employees will nominate a substitute claimant to replace. In 2009, there were 358 applications for recovery of wages, among which only four applicants were over on means. Two out of the four applicants were subsequently dealt with through applications by substituted wage claimants. One of the remaining two cases was referred to the Labour Department for ex-gratia payment from the Protection of Wages on Insolvency Fund. Once a Petition for bankruptcy or winding up, as the case may be, is filed by the representative claimant against the employer, all other employees, whether they are legally aided or not, will have the benefit of the proceedings as they may apply to the Protection of Wages on Insolvency Fund for ex-gratia payments and submit proof of debts to the Official Receiver upon the granting of bankruptcy or winding up orders against the employers. The increase in FEL for OLAS will be welcomed by employees as it is envisaged that in consequence of the raise in FEL, there will be more insolvency cases for recovery of wages covered by legal aid.

We do not consider it appropriate to extend the scope of the SLAS to cover insolvency cases.

(vi) Claims by a flat buyer against a property development company

Considerations

These cases normally involve a buyer attempting to rescind a sale agreement for breach of the agreement on the part of the developer. According to similar cases covered in the OLAS, the success rate for cases involving claims by a flat buyer against a property development company is very low and the median costs for litigation are high. This is because the Sale and Purchase Agreements signed by the purchasers are standard forms prescribed under the Consent Scheme or Non-Consent Scheme, as the case may be. The room for argument on the construction of the terms of the Agreement is very limited.

When there is a dispute between a flat buyer and a property development company, the issue will usually be on the facts relating to the whole development, for example whether the developer has completed the development on time or whether the architect has duly issued a certificate of extension of time. These are hard facts and can rarely be challenged successfully. In addition, as these issues are generally related to the development as a whole, there will be other purchasers who have financial resources to take the matter to the court.

We take the view that it is inappropriate to extend the scope of SLAS to cover these cases.

(vii) Wage Claims

Considerations

According to LAD, there were 5 such cases the accounts of which were finalized in 2009. The appeal in one of the 5 cases was dismissed and recovery action in one other case, though successful, failed. Legal costs incurred and payable by the Fund in both cases amounted to \$336,750. The sum awarded to the successful aided persons in the 3 remaining cases came to \$89,513.50. If these 5 cases were aided under SLAS, the Fund would recover \$8,951.35, i.e. \$89,513.50 x 10% by way of percentage contribution. Once the costs payable in the two cases mentioned are taken into account, the Fund would make a loss of \$327,798.65 from aiding these 5 cases.

It is not difficult to appreciate from looking at the costs situation and sum awarded in these five cases to realise the importance of adhering to the time-honoured formula of selecting cases with high chance of success, good damages to costs ratio and assured prospect of recovery when considering extension of the scope of SLAS. This triumvirate elements are essential ingredients in ensuring the financial viability of the Fund. Extension of SLAS to cases which do not possess such elements would invariably cause damage and will have a gradual and adverse effect on the future of the Scheme which derives its income from damages paid for broken limbs suffered by the aided persons, some from serious injuries and in many cases the lives of relatives of persons assisted under the Scheme.

We do not consider it appropriate to extend the scope of SLAS to cover such cases.