

For Information

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

Follow-up to meeting on 24 May 2010

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

Background

This paper sets out the Administration's response to issues raised by members at the Panel meeting on 24 May 2010.

Setting of the Financial Eligibility Limit (FEL)

2. Some members and deputations have requested the Administration to further elaborate on our rationale for raising the FELs for the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS) to the proposed level of \$260,000 and \$1 million respectively.

3. In LC Paper No. CB(2) 1364/09-10(01), we have elaborated on the factors considered in setting the revised FELs, including the percentage of cases with litigation costs below the revised FELs, levels of financial resources of the prospective applicants eligible for legal aid, and the financial implications arising from the adjustments. The Administration does not have, as a matter of policy, a target coverage of legal aid services, in terms of percentage of eligible households.

4. In conducting the present five-yearly review, attempts have been made to make reference to the costs of litigation as they have a bearing on a person's ability to pay for private legal services. However, litigation costs are only indicative and vary greatly from one case to another and from time to time, we consider it not practicable to link the litigation costs directly to the FEL. We cannot agree with the argument that the FEL should be pitched at a level equivalent to the costs levels of cases at the highest end to cater for exceptional circumstances. In fact, we have already made reference to the costs of legally-aided civil cases for OLAS and note that the median costs for most types of cases are well below the proposed FEL,

implying that applicants with resources above these levels should be able to afford litigation on a private basis. The cost information of the major types of cases in 2008 and 2009 is at Annex. We note that even for the more costly miscellaneous personal injuries cases, the median costs was around \$170,000 in 2008 and \$180,000 in 2009, which is well below the proposed FEL for OLAS.

5. We have looked into the eligibility limits in some other common law jurisdictions and noted that in some countries, legal aid limits are linked to price inflation rate whereas in some others, the limits draw reference from standards of poverty. The limits in Hong Kong have long moved away from any linkage with the social welfare system. A typical example is the adoption of household expenditure as the benchmark for calculating the amount of personal allowances in lieu of the Comprehensive Social Security Assistance rate. We are content that persons whose financial capacity exceeding the proposed FEL in Hong Kong should be able to afford the costs of conducting litigation on a private basis in all but exceptional cases.

6. We have taken heed of the calls from many stakeholders and Members that there should be more room to relax the FEL for SLAS. We would be able to pursue the proposal to raise the FEL for SLAS by as much as 100% only if the scope of SLAS remains as it is to preserve its financial viability. If the scope of SLAS were extended to include the types of cases which do not involve monetary claims of a reasonable size, with a low success rate and a low chance of recovering damages, the financial viability of the fund would be adversely affected. Such an increase in FEL would further expose the fund to financial risk which is contrary to the self-financing principle of the scheme.

7. We do not see any compelling reasons for further raising the FEL for SLAS to the extent of, say, up to the level of \$3 million, as some stakeholders have suggested. Despite the self-financing nature of the scheme, SLAS are meant to provide an alternative scheme for people in the “sandwiched class” who are not eligible for OLAS. SLAS cases are funded by contributions from SLAS applicants and the funds should be used in a prudent manner. We are of the view that for those applicants whose resources are at the level of, say \$3 million, they should be able to fund the costs of private litigation and the case for funding such applications has not been made out.

8. As illustrated in our previous submissions to the Panel, we consider that the proposed increase to SLAS is appropriate and can benefit many needy applicants.

Proposal to waive the upper limit of the means test for cases involving wages claims

9. At the last Panel meeting, it was suggested that considerations should be given to relax the financial eligibility for applicants so that employees who are financially ineligible for legal aid can also receive legal aid in the filing of winding-up/bankruptcy petitions against employers defaulting awards of the Labour Tribunal (LT).

10. Currently, OLAS covers amongst other cases, employees' compensation cases. To qualify for legal aid, an applicant must pass the means test and the merits test. For those applicants whose means exceed the upper limit of the FEL for OLAS but below that for SLAS, they may apply for assistance under SLAS. Under SLAS, legal aid covers, amongst other cases, claims under the Employees' Compensation Ordinance irrespective of the amount claimed.

11. In respect of application for legal aid by employees to take winding up or bankruptcy proceedings against an insolvent employer, the employees normally nominate amongst themselves a representative whom they believe can pass the means test to apply for legal aid. If the representative's means exceed the financial eligibility limit, another employee will be nominated to apply for legal aid. For those cases where the insolvent employer employs less than 20 employees, and there exists sufficient evidence to support the presentation of a winding up/bankruptcy petition but it is unreasonable or uneconomical to do so, the Legal Aid Department (LAD) will make a recommendation to the Commissioner for Labour (C for L) to make ex-gratia payment to the employees concerned pursuant to section 18 of the Protection of Wages on Insolvency Ordinance. Since 1999, the employees in such cases are not required to apply for legal aid and to undergo a means test. Instead, LAD would assist the employees by conducting the relevant company or business registration searches and preparing a statutory demand for the payment of the arrears of wages. LAD will then provide the representative with detailed guidelines on the procedures to be adopted for serving the statutory demand including the contact details of newspapers and sample advertisement notice in case substituted service of the statutory demand on the employer is required. Once the time limit for payment prescribed in the statutory demand expires and no payment is made, LAD would make a recommendation to C for L for ex-gratia payment to the employees. For those cases that require the filing of a bankruptcy or winding up petition, legal aid will be granted to the eligible employees. In 2009, there were 358 legal aid applications relating to insolvency matters. Only four applicants did not pass the means tests. Following the refusal, we facilitated two other employees in two of the cases to apply for legal aid, which was subsequently granted.

12. In the light of the legal aid policy objective, the Administration does not consider that there are justifications to exempt a particular group of persons from the means test on the basis of their background or the type of cases they are pursuing. Waiver of means test is a major departure from the legal aid policy subscribed to by many advanced overseas legal aid jurisdictions as it is well recognized that legal aid should only be provided to those who lack the means to take or defend proceedings. Extending the scope of existing waiver could result in public money being diverted from those who cannot afford the costs of litigation to those who can, purely on the basis of the type of legal actions being undertaken. The principle must always be to maintain equal access to legal aid regardless of the nature of the cases save in very exceptional circumstances as provided under the current section 5AA of the Legal Aid Ordinance so that only people with meritorious cases who pass the means and merits test will receive funding support.

13. Though the execution of LT awards is part of the remedies of civil justice system, the Administration has all along spared no efforts to enhance the enforcement of LT awards and assist employees to get back their entitlements. Where an employer is insolvent and unable to clear his employees' wages, LAD will assist the qualified employees to file winding up or bankruptcy petition against the defaulting employer and Labour Department will assist the affected employees to apply for ex-gratia payment from the Protection of Wages on Insolvency Fund. As a stern measure against wilful defaulting employers who are able but unwilling to pay, the Administration has introduced a new criminal offence against employers' failure to pay LT awards comprising wages and entitlements underpinned by criminal sanction under the Employment Ordinance. The related Employment (Amendment) Ordinance 2010 was enacted in April 2010 and will commence on 29 October 2010. Employers who wilfully and without reasonable excuse fail to pay the awarded sum within 14 days after it becomes due will be liable to prosecution and, upon conviction, be subject to a maximum penalty of \$350,000 and three years' imprisonment. This will serve as an important deterrent against wilful non-payment of LT awards.

**Home Affairs Bureau
Legal Aid Department**

July 2010

Information from LAD
Median Litigation Costs
for Civil Legal Aid Cases

Types of Cases	2008		2009	
	Median (\$)	No. of Cases	Median (\$)	No. of Cases
Matrimonial (MAT) Cases	14,904	4,320	14,950	3,963
Employee Compensation (EC) Cases	83,736	883	88,601	977
Miscellaneous Personal Injuries (PI) Cases	172,729	902	180,000	919
Wage Claim in Insolvency (WC) Cases	37,423	730	33,622	604
Other OLAS cases	123,751	573	131,775	542