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**Paper for the House Committee meeting on 12 January 2018**

**Report of Subcommittee on Proposed Resolution under Section 7(a)  
of the Legal Aid Ordinance (Cap. 91)**

**Purpose**

This paper reports on the deliberations of the Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91) ("the Subcommittee").

**Background**

2. At present, a person whose financial resources<sup>1</sup> do not exceed \$290,380 is financially eligible for legal aid under the Ordinary Legal Aid Scheme ("OLAS") which covers civil proceedings in the District Court or higher courts as set out in section 5(1) of the Legal Aid Ordinance (Cap. 91) ("LAO") and criminal legal aid under the Legal Aid in Criminal Cases Rules (Cap. 221D).

3. The Supplementary Legal Aid Scheme ("SLAS") introduced in 1984 provides legal assistance to the "sandwich class" whose financial resources exceed the financial eligibility limit ("FEL") under OLAS, but below a certain amount. Under SLAS, legal aid is available to claims involving personal injuries or death, or medical, dental and legal

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<sup>1</sup> "Financial resources" means the aggregate of an applicant's yearly disposable income and disposable capital. A person's disposable income is his/her gross income minus deductible items as allowed under the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B) ("the Regulations"). A person's disposable capital consists of all assets of a capital nature, such as the sum of his/her credit balance, money due to him/her, the value of the person's interest in non-money resources, the value of business or share in a company etc., unless such items should be excluded from calculation under the Regulations.

professional negligence, where the claim is likely to exceed \$60,000. It also covers claims brought under the Employees' Compensation Ordinance (Cap. 282). The corresponding upper FEL for SLAS is \$1,451,900 as specified in section 5A(b) of LAO.

Review of financial eligibility limits

4. Pursuant to the Administration's report to the Legislative Council ("LegCo") on the Legal Aid (Amendment) Bill 1999 in September 1999, FELs under OLAS and SLAS are to be reviewed annually to take into account general price movement and biennially to take into account changes in litigation costs and other relevant factors.

5. In the previous annual review, the Administration proposed to increase FELs by 7.7% to reflect the Consumer Price Index (C) ("CPI(C)") changes between July 2012 and July 2014. The Administration informed the Panel on Administration of Justice and Legal Services in February 2015 and the proposed increase to FELs was approved by LegCo in July 2015. The adjusted FELs came into effect on 17 July 2015.

Outcome of the current review

6. The Administration has completed a new round of annual review on FELs. Noting that CPI(C) for the reference period (i.e. July 2014 to July 2016) has increased by 4%, the Administration has proposed to adjust FELs upward accordingly. The impact of general price movement after July 2016 will be reflected in the next review. The existing FELs and proposed FELs are shown below:

	<b>Existing FELs<sup>2</sup></b>	<b>Proposed FELs</b>
OLAS	\$290,380	\$302,000
SLAS	\$1,451,900	\$1,509,980

**Proposed resolution under section 7(a) of the Legal Aid Ordinance (Cap. 91)**

7. The Secretary for Home Affairs gave notice to move a motion pursuant to section 7(a) of LAO at the Council meeting of 12 July 2017 to

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<sup>2</sup> The figures for both FELs are rounded to the nearest \$10.

seek LegCo's approval for raising FELs of legal aid applicants by 4%. The proposed resolution is to increase FEL under OLAS from \$290,380 to \$302,000, and FEL under SLAS from \$1,451,900 to \$1,509,980 as specified in sections 5 and 5A of LAO respectively.

### **The Subcommittee**

8. At the meeting of the House Committee on 30 June 2017, Members agreed to form a subcommittee to study the proposed resolution under section 7(a) of LAO. The membership list of the Subcommittee is in the **Appendix**. At the request of the House Committee, the Secretary for Home Affairs withdrew his notice for moving the proposed resolution at the Council meeting of 12 July 2017 to allow time for the Subcommittee to study the proposed resolution in detail.

9. Under the chairmanship of Hon Holden CHOW Ho-ding, the Subcommittee held two meetings on 14 July and 7 November 2017 to examine the proposed resolution, including one meeting to discuss with the Administration.

### **Deliberations of the Subcommittee**

10. The Subcommittee supports the proposed adjustment to FELs for OLAS and SLAS. In the course of deliberations, members expressed views and concerns about the adequacy of the increase in FELs, further expansion of the scope of SLAS, vetting and approval criteria for legal aid applications, and the abuse of the legal aid system. The deliberations are summarized in the ensuing paragraphs.

#### Financial eligibility limits for legal aid

11. Some members reckon that as the original FELs adopted as baseline were too low, even with the annual adjustments based on price movement, the current FELs were inadequate to meet the need of people who have a genuine need to initiate legal actions but lack financial resources, especially in view of the rise in numbers of civil litigation and work-related injury cases in recent years which have come to their attention.

12. In response, the Administration advises that the annual review of FELs, as reported to LegCo in 1999, is considered an effective means to meet the changing financial needs of the legal aid applicants by taking the change in CPI(C) into account. Apart from the annual review, a biennial review of FELs should also be conducted to take into account changes in

litigation costs and other relevant factors. However, the Administration points out that while it has sought the assistance of the Hong Kong Bar Association and the Law Society of Hong Kong to provide information on private litigation costs to facilitate the biennial reviews, the information is not available from the two legal professional bodies and hence no adjustment has been made on FELs on the basis of changes in litigation costs since the biennial review mechanism was introduced in 2000.

13. Some members point out that as the legal fees charged by the legal practitioners vary widely due to various factors, in particular the experience and seniority of individual practitioners, it is understandable why the two legal professional bodies cannot provide information on the private litigation costs to the Administration for reference. Other members consider that there should be other possible ways for the Administration to collect the information on private litigation costs for the purpose of conducting the biennial reviews.

14. Various suggestions such as commissioning a consultancy study to ascertain the private litigation costs, seeking information about the costs assessed by the court from the Judiciary, and requesting that of legal costs incurred in the approved legal aid cases from the Legal Aid Department ("LAD") have been put forth by members for conducting the biennial reviews. Some members also suggest that the Administration should consider gathering information from LAD regarding the median incomes of those applicants who have been granted legal aid in the past to gauge whether FELs commensurate with the incomes of those in need.

15. Some members suggest that the Administration should consider conducting a comprehensive review of the FEL system to ensure that lack of financial resources will not impede access to justice. The Chairman suggests that in conducting the review, the Administration may analyse the legal costs incurred in cases by categories to optimize the allocation of legal aid resources to applications under different categories.

16. In response, the Administration advises that the policy objective of legal aid is to ensure that all those who meet the criteria set out in LAO and have reasonable grounds for pursuing or defending a legal action in the courts of Hong Kong will not be denied access to justice due to a lack of means, while it is also important to strike an appropriate balance between achieving the objective of legal aid and ensuring the prudent use of public funds. The Administration will take into account members' views and consider whether there is room for further enhancement of the FEL adjustment mechanism.

### Expansion of the scope of the Supplementary Legal Aid Scheme

17. Some members point out that legal cost is a very important factor for deciding whether to proceed with legal actions and the unbearably high legal costs have thwarted many, even the middle class, in taking legal actions to protect their legitimate interest and rights. In this connection, access to justice may be adversely affected.

18. In response, the Administration explains that under LAO, the Director of Legal Aid ("DLA") may waive the limit of financial resources imposed where DLA is satisfied that a person would be granted a legal aid certificate in proceedings which involve a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue. This serves as a safeguard to ensure that legal aid applications for proceedings involving human rights issues will not be refused on means. The Administration also states that SLAS provides legal assistance to the "sandwich class" whose financial resources exceed FEL under OLAS but below a specified limit.

19. Some members point out that under SLAS, if the legal proceedings for which legal aid has been granted are successful, 20% of the damages recovered by the legal aid applicant will be deducted and paid into the Supplementary Legal Aid Fund. If the proceedings are unsuccessful, the interim contribution paid will be used towards the payment of legal costs incurred for the legal aid applicant's claim and will not be refunded unless there is a surplus after payment of such costs. They point out that the potential financial burden has thwarted many in using SLAS.

20. In response, the Administration advises that subsequent to the substantial expansion of the scope of SLAS in November 2012, the Legal Aid Services Council completed a further review on the scope of SLAS and submitted its recommendations to the Administration in July 2016. The Administration has reported to the Panel on Administration of Justice and Legal Services on the Legal Aid Services Council's recommendations and the Administration's position in April 2017.

21. The Administration also advises that it has proceeded with the preparatory work with a view to introducing the legislative amendments into LegCo as soon as possible to implement the expansion proposals. The Administration will consult the Panel on the proposed legislative amendments to subsidiary legislation in the first half of 2018.

### Vetting and approval criteria for legal aid applications

22. The Subcommittee notes that apart from meeting the financial eligibility, i.e. the means test, the legal aid applicant has to pass the merits test in order to qualify for legal aid. Some members are disappointed to note that LAD has refused to grant legal aid to applicants in view of the small amounts of claims involved, such as in some employees' compensation cases.

23. In response, the Administration states that such cases are rare and illustrates the reasons behind an example which involves an employee's wages claim. The applicant in that case, whose claim was lost at the Labour Tribunal, applied for legal aid to lodge an appeal to the High Court against the Tribunal's decision. As that part of legal costs to be borne by the applicant (even if the appeal was successful) would be quite high, it is likely that the applicant would not receive any wages even if the applicant won the appeal case. Legal aid was therefore not granted in such circumstances.

24. Some members consider LAD's decision unreasonable since any application for legal aid will have to pass the merits test and, once it is passed, the amount of claims should not be a relevant consideration.

25. The Administration emphasizes that the amount of claims from the legal proceedings is only one of the many factors to be considered in conducting the merits test. In processing a legal aid application, LAD also needs to observe a long-standing principle whereby it is required to decide whether an ordinary person, who is facing the same circumstances as a legal aid applicant but without the assistance of legal aid, will initiate a legal action out of his/her own pocket. The Administration adds that this principle has been well-established under the United Kingdom's case law.

26. The Administration stresses that if significant public interests are involved, legal aid will be granted regardless of the amount of claim. In a past employees' compensation case where a legal point of great importance was an issue, for example, legal aid was granted for lodging the appeal to the Court of Final Appeal and the case was won.

### Abuse of the legal aid system

27. Some members point out that individual members of the public have applied for legal aid to take legal actions in the name of seeking social justice simply because there is legal aid and will not take legal actions out of their own pockets. They consider that the principle

mentioned in paragraph 25 reasonable and should be applied to those who abuse the legal aid system. The Administration should put in place measures to safeguard against the abuse of legal aid system which may adversely affect society, in particular the small and medium enterprises, and waste public resources.

28. The Administration explains that according to Regulation 11 of the Legal Aid Regulations (Cap. 91A), if anyone has repeatedly applied for legal aid after being refused, DLA may order that no consideration shall be given to any future application by that person for up to three years if it appears to DLA that his/her conduct has amounted to an abuse of the procedures provided under LAO.

29. Some members consider it too late for LAD to deal with abuse cases of the legal aid system only after the abusers have repeatedly made their applications for legal aid. They consider that LAD should be more proactive in preventing such abuses.

30. In response, the Administration states that LAD has put in place a monitoring mechanism to ensure that the processing of legal aid applications is reasonable and safeguards against abuse of legal aid. Furthermore, if anyone brings to the attention of LAD with relevant details that an applicant has furnished false information on their means or merits of their cases, LAD will cease the provision of legal aid if the allegation is substantiated and may refer the case to the Police for follow-up actions.

### **Recommendation**

31. The Subcommittee supports the proposed resolution and notes that the Administration will give a fresh notice for moving the proposed resolution to seek LegCo's approval of the proposed resolution. The Administration has subsequently advised that it will give notice to move the proposed resolution at the Council meeting of 31 January 2018.

### **Advice sought**

32. Members are invited to note the deliberations and recommendation of the Subcommittee.

## Appendix

### Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91)

#### Membership list

**Chairman** Hon Holden CHOW Ho-ding

**Members** Hon LEUNG Yiu-chung  
Hon Paul TSE Wai-chun, JP  
Hon Dennis KWOK Wing-hang  
Dr Hon Fernando CHEUNG Chiu-hung  
Hon Jimmy NG Wing-ka, JP  
Dr Hon Junius HO Kwan-yiu, JP  
Dr Hon CHENG Chung-tai

(Total : 8 members)

**Clerk** Ms Sophie LAU (up to 2 October 2017)  
Mr Lemuel WOO (since 3 October 2017)

**Legal Adviser** Mr YICK Wing-kin