

**For discussion on
30 April 2018**

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

Review of the Director of Legal Aid's First Charge

PURPOSE

This paper briefs Members on the outcome of the review on the Director of Legal Aid's First Charge ("DLA's first charge") and the way forward.

PROPOSAL

2. Members are invited to note that the Government will –
 - (a) adjust upward the amount of maintenance that may be exempted from DLA's first charge specified in section 18A(5)¹ of the Legal Aid Ordinance ("LAO") (Cap. 91) from \$4,800 to \$8,660 and the amount of DLA's first charge to be waived in cases of serious hardship specified in section 19B(1)(a)² of the LAO from \$57,400 to \$103,510; and
 - (b) introduce a mechanism such that the two amounts specified in sections 18A(5) and 19B(1)(a) of the LAO would be adjusted on an annual basis in conjunction with the annual review of the financial eligibility limits ("FELs") for legal aid applicants specified in sections 5 and 5A of the LAO to take into account the general price movement in future.

¹ According to section 18A(5)(b) of the LAO, DLA's first charge does not apply to "maintenance pending suit or a periodical payment under an order made in domestic proceedings, or under an agreement having the same effect as an order, for maintenance of a child, spouse or former spouse unless the payments are for the maintenance of a spouse or former spouse and are at a rate exceeding \$4,800 (or its equivalent) each month". Section 18A(5)(c) of the LAO also provides that DLA's first charge does not apply "where the payment of maintenance for a spouse or former spouse is payable at a rate exceeding \$4,800 (or its equivalent) each month, the first \$4,800 (or its equivalent) of each payment".

² According to section 19B(1)(a) of the LAO, "upon receipt of all moneys paid to him pursuant to section 19 or 19A, the Director shall retain ... provided that where the Director is satisfied that it would cause serious hardship to any person to retain any such sum under this paragraph and that it is in all the circumstances just and equitable to reduce the sum to be so retained, the amount to be so retained shall be reduced by such amount not exceeding \$57,400 as the Director may determine".

BACKGROUND

3. According to section 18A(5) of the LAO, if a legally-aided person is successful in recovering or preserving any money or property in the legally aided proceedings, he / she will be required to repay the Director of Legal Aid (“DLA”) all sums paid or payable on his / her behalf out of the money or property recovered or preserved (maintenance for children and maintenance for spouse up to the first \$4,800³ per month exempted). The sum that the legally-aided person has to pay DLA is called DLA’s first charge. Moreover, DLA may exercise discretion to waive his first charge for an amount not exceeding \$57,400³ in cases of serious hardship pursuant to section 19B(1)(a) of the LAO.

4. Both sections 18A(5) and 19B(1)(a) of the LAO serve to provide relief to legally-aided persons who may suffer hardship from the deduction of legal expenses out of what is recovered for them. Section 18A(5) allows an aided person to retain an amount required for him / her to meet monthly expenses from periodical maintenance received in matrimonial proceedings. Section 19B(1)(a) is applicable to all legal aid cases and gives DLA the authority to deduct from what an aided person recovers an amount which is less, by up to the amount specified therein, than the full amount of the statutory charge, if serious hardship would otherwise be caused to the aided person.

5. The Home Affairs Bureau and the Legal Aid Department (“LAD”) have recently completed a review on the amounts specified in sections 18A(5) and 19B(1)(a) of the LAO and consider it necessary to adjust the two amounts to bring them in line with inflationary changes as well as other developments. The detailed proposal is set out in paragraphs 6 to 9 below.

PROPOSED ADJUSTMENTS AND MECHANISM

Amount of maintenance that may be exempted from DLA’s first charge (specified in Section 18A(5) of the LAO)

6. We propose to adjust the current amount of \$4,800 specified in section 18A(5) of the LAO to \$8,660, representing an increase of about 80%. The increase takes into account two factors, namely the general price movement as measured by the Consumer Price Index (C)

³ The amounts specified in sections 18A(5) and 19B(1)(a) of the LAO were set in 1997.

(“CPI(C)”) since July 1996⁴ up to July 2017 as well as the substantial increase of 48% to the FEL of the Ordinary Legal Aid Scheme (“OLAS”) from \$175,800 to \$260,000 in May 2011.

7. The FEL of OLAS was increased by 48% in May 2011 pursuant to a review completed in 2010⁵. As both the review of FELs and the current proposal address the issue on financial resources of legally-aided persons with the aim of relieving their financial burden, we see a strong case to make reference to and include the 48% increase in the FEL of OLAS in this exercise, which will bring clear benefits to the spouse or former spouse receiving monthly maintenance in the case of section 18A(5) and to the aided person facing serious hardship in the case of section 19B(1)(a).

Amount of DLA's First Charge that may be waived in cases of serious hardship (specified in Section 19B(1)(a) of the LAO)

8. For the same reason, on the amount specified in section 19B(1)(a) of the LAO, similarly, we propose to increase the current amount of \$57,400 to \$103,510 (+80%), taking into account also the general price movement as measured by CPI(C) since July 1996 up to July 2017 and the substantial increase of 48% to the FELs of OLAS in May 2011.

Annual Adjustment Mechanism

9. In addition to the adjustments proposed in paragraphs 6 to 8 above, we also propose to introduce a mechanism for adjusting the two amounts on an annual basis to take into account the general price movement as measured by CPI(C), in conjunction with the annual review of FELs⁶ in future.

⁴ The previous adjustment which took effect in May 1997 had reflected the general price movement up to July 1996.

⁵ In the review of FELs, in order to reflect more realistically the expenditure level of households of the population that require assistance in funding legal proceedings, the expenditure level of personal allowances for the means test (which had been previously set at the 35-percentile household expenditure) was adjusted to the median, resulting in a significant increase in personal allowances.

⁶ The FELs of legal aid applicants under OLAS and the Supplementary Legal Aid Scheme are provided in sections 5 and 5A of the LAO respectively. The FELs are subject to annual review to take into account the general price movement pursuant to the Government's report to LegCo on the Legal Aid (Amendment) Bill 1999 in September 1999. In cases where adjustments to FEL are greater than the changes in price movement as measured by CPI(C), we will review the need for the amounts specified in sections 18A(5) and 19B(1)(a) of the LAO to follow suit on a case-by-case basis.

CONSULTATION

10. We have informed the Legal Aid Services Council, the Hong Kong Bar Association and the Law Society of Hong Kong of the outcome of the review and the way forward.

IMPLICATIONS ON REVENUE

11. The estimated annual revenue forgone arising from the two proposed adjustments amounts to about \$549,000 and the impact on government revenue is insignificant. Moreover, LAD will absorb the workload arising from the implementation of the proposed adjustments with its existing manpower resources.

WAY FORWARD

12. The proposal involves amendments to the LAO which will be introduced into LegCo by way of subsidiary legislation subject to positive vetting⁷. Our preliminary plan is to introduce the amendments into LegCo in the 2018-19 legislative session.

ADVICE SOUGHT

13. Members are invited to note and comment on the outcome of the review and the way forward set out in the paper.

**Home Affairs Bureau
Legal Aid Department
April 2018**

⁷ Section 22A of the LAO provides that LegCo may, by resolution, amend the rate of maintenance payments specified in section 18A(5) (i.e. \$4,800) and the amount specified in the proviso to section 19B(1)(a) (i.e. \$57,400).