

立法會

Legislative Council

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Paper for the House Committee meeting on 5 March 2004

Report of the Subcommittee on proposed resolution under section 7(a) of the Legal Aid Ordinance

Purpose

This paper reports on the deliberation of the Subcommittee on proposed resolution under section 7(a) of the Legal Aid Ordinance (the Subcommittee).

Background

2. The financial eligibility limits of legal aid applicants were last revised in 1997. At present, a person whose financial resources do not exceed \$169,700 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (OLAS). The corresponding limit for the Supplementary Legal Aid Scheme (SLAS) is \$471,600.
3. Under the former practice adopted for review of the financial eligibility limits, the limits were reviewed and adjusted in line with changes in consumer prices once every two years. Following a Legal Aid Policy Review conducted in 1997, the Administration has revamped the review cycle. The limits are now reviewed annually to take account of changes in Consumer Price Index (C) (CPI(C)). Moreover, a biennial review is conducted to take account also of changes in litigation costs. The revised review cycle was implemented in 2000.
4. Apart from the annual and biennial reviews, the Administration also reviews once every five years the criteria for assessing the financial eligibility of legal aid applicants. The five-yearly review is of a wider scope covering the approach for assessing the financial resources of legal aid applicants and the methods of computing the disposable income and disposable capital of legal aid applicants.

The proposed resolution

5. The financial eligibility limits for OLAS and SLAS are set out in sections 5(1) and 5A(b) of the Legal Aid Ordinance respectively. Pursuant to section 7(a)

of the Ordinance, the limits may be amended by a resolution of the Legislative Council.

6. The proposed resolution seeks to amend sections 5(1) and 5A(b) of the Ordinance to adjust downward the limit for OLAS from \$169,700 to \$155,800, and that for SLAS from \$471,600 to \$432,900. The proposed resolution is in **Appendix I**.

7. The Chief Secretary for Administration (CS) originally gave notice on 19 December 2003 to move the proposed resolution at the Council meeting of 14 January 2004. In view of the formation of the Subcommittee, CS withdrew the notice of the proposed resolution pending deliberation of the Subcommittee.

The Subcommittee

8. At the House Committee meeting on 9 January 2004, Members agreed to form a subcommittee to study the proposed resolution. A membership list of the Subcommittee is in **Appendix II**.

9. Under the chairmanship of Hon Margaret NG, the Subcommittee has held two meetings with the Administration.

Deliberation of the Subcommittee

Review on financial eligibility limits of legal aid applicants

10. The Administration has advised the Subcommittee that after the implementation of the revised review cycle, the first annual review on the financial eligibility limits of legal aid applicants to take account of changes in CPI(C) was conducted in the second half of 2001. The review findings indicated that the decrease in CPI(C) for the period from July 2000 to July 2001 was 1.2%. In view of this small decrease, the Administration decided at the time to defer the downward adjustment to the limits, pending the outcome of the following annual review in 2002.

11. The second and third annual reviews to take account of consumer price changes have since been completed. They reflected further decrease in CPI(C) of 2.7% over the period from July 2001 to July 2002, and 4.5% over the period from July 2002 to July 2003 respectively. Given the significant and persistent decrease in consumer prices, the Administration considers that there is a need to adjust downward the financial eligibility limits so as to maintain their real values. The Administration therefore proposes to adjust the limits downward to take into account the cumulative reduction in consumer prices of 8.2% recorded during July 2000 to July 2003.

12. The Subcommittee notes that there is no statutory requirement that the financial eligibility limits have to be adjusted strictly in accordance with changes in CPI(C) during the reference period. The Administration had in fact exercised flexibility in the 2001 exercise and refrained from adjusting the eligibility limits right away, taking into account the small change in consumer prices. Some members have also pointed out that it is widely believed that the present deflationary pressure in Hong Kong will soon come to an end. Hence, it is doubtful that there is a pressing need to reduce the financial eligibility limits in a mechanical way solely to reflect the decrease in CPI(C).

13. The Administration has advised that the purpose of adjusting the financial eligibility limits is to maintain the real value of the limits, based on changes in CPI(C) and litigation costs as the objective criteria for adjustment. In 2003, the Administration had proposed to adjust the financial eligibility limits downward, taking into consideration the results of the two annual reviews on changes in CPI(C) from July 2000 to July 2002 and the first biennial review on changes in litigation costs from July 2000 to July 2002. However, in the course of consultation on the proposed adjustment, the third annual review to take account of consumer price changes up to July 2003 was completed. The Administration therefore decides that it would be appropriate to reduce the eligibility limits in one revision exercise to reflect the cumulative reduction in CPI(C) occurring in the three-year period from July 2000 to July 2003.

14. Hon Margaret NG and Hon Audrey EU have pointed out that the Government's policy is to provide publicly funded legal aid to ensure that no one with reasonable grounds to pursue litigation is prevented from doing so because of a lack of means. Nevertheless, under the present financial eligibility limits, many legal aid applicants, including litigants involved in very complicated cases, have been refused legal aid on grounds of means despite that they are unable to afford the full costs of private litigation. In the opinion of the members, the existing financial eligibility limits have been set at low levels which fail to reflect realistically the financial viability of persons to conduct litigation on a private basis. The present legal aid regime, therefore, fails to achieve the policy objective of providing legal aid to those genuinely in need of assistance. The reduction in the eligibility limits would deprive more people with justifiable grounds for taking legal action from the grant of legal aid.

15. The Administration has explained that as legal aid was funded by the public coffer, there has to be an in-built mechanism to determine priorities for legal aid and to regulate and limit the cost. The means and merits tests are the two cardinal criteria for the granting of legal aid to those with the greatest need for help. The Administration has further advised that there are additional statutory and administrative safeguards in place to ensure fair and proper administration of legal aid. These include -

- (a) the Director of Legal Aid (DLA) may exercise the discretion provided under section 5AA of the Legal Aid Ordinance to waive the financial eligibility limits, in civil cases where human rights issues are involved, i.e. in relation to a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. The grant of legal aid is subject to a contribution payable by the legally aided person in accordance with the rates specified in Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations;
- (b) DLA may exercise the discretion provided under Rule 15(2) of the Legal Aid in Criminal Cases Rules to waive the financial eligibility limits, in criminal cases where DLA is satisfied that it is desirable to do so in the interests of justice, subject to payment of a contribution by the legally aided person; and
- (c) legal aid applicants who are initially refused legal aid on means can apply for legal aid again at subsequent stages of the legal proceedings. Legal aid may be granted to the applicants if they then pass the means test and the merit test.

16. Some members have questioned whether legal aid applicants would be willing to take the risk of utilizing a considerable part of their financial resources to conduct private litigation, without any assurance that they would be granted legal aid at a subsequent stage.

17. Hon Margaret NG has enquired about the impact of the proposed adjustment on the coverage of legal aid. The Administration has informed the Subcommittee that with the revised eligibility limit for OLAS, 55.9% of the total households as at July 2003 would be financially eligible for legal aid, as compared with 55.4% as at July 2000 under the prevailing eligibility limit. As regards the SLAS, 72.6% of the total households as at July 2003 would be financially eligible, as compared with 74.3% as at July 2000 under the prevailing eligibility limit.

Changes in litigation costs

18. Some members consider that litigation costs are an important factor affecting a person's ability to litigate. Changes in litigation costs should therefore be taken into account in adjusting the financial eligibility limits.

19. The Administration has explained that in conducting the biennial review to ascertain changes in litigation costs during the period from July 2000 to July 2002, the Administration has sought relevant information from the two legal professional bodies, the Legal Aid Department (LAD) and the Judiciary.

However, neither the legal professional bodies nor the Judiciary possess cost statistics of sufficient details for establishing a definite trend of changes in litigation costs. The Judiciary has, on the basis of information available to it, provided statistics on taxed costs for some non-legally aided cases in 2002, and made comparison between the costs in July 2000 and July 2002. Nevertheless, due to the small number of cases sampled, the Administration is unable to conclude that the statistics are representative of the private litigation costs during the reference period.

20. According to the statistics compiled by the LAD, despite the deflationary pressure, the two years during 2000 to 2002 have not seen a drop in the median litigation costs for civil legal aid cases, save for matrimonial proceedings, which was brought about following a wider acceptance of fixed costs amongst legal practitioners as prescribed in the District Court (Fixed Costs in Matrimonial Causes) Rules following the revamp of the scale by the Judiciary in 2000. The weighted average of the changes in median litigation cost of legal aid cases is worked out to be -0.16%. That said, the Administration is unable to assume from those legal aid statistics that they represent also the costs of private litigation.

21. The Administration has further advised that in determining the fees payable to counsel/solicitors acting on behalf of the legally aided persons in civil cases, DLA is obliged to take into consideration the rates or range of fees generally allowed by the Taxing Masters, having regard to the indicative rates set out in the letter from the Registrar of the High Court to the Law Society of Hong Kong in July 1997. Such indicative rates or range of fees still remain applicable to date, despite the cumulative deflation recorded at 13.4% between July 1997 and July 2003.

22. Based on the information to hand, the Administration does not see a case of recommending adjustments to the financial eligibility limits to reflect changes in litigation costs from July 2000 to July 2002. The Administration therefore proposes that no change to the financial eligibility limits should be made on account of changes in the litigation costs during the reference period.

23. Hon LEE Cheuk-yan has pointed out that with the exception of matrimonial cases, the other three major types of civil legal aid cases have witnessed an increase in the median litigation costs. Also, the median litigation costs for criminal legal aid cases handled in the District Court, which constituted the vast majority of the total criminal legal aid cases, have also increased. He considers that the increases in litigation costs have imposed a heavier burden on the litigants and should be taken into account in deciding whether or not the financial eligibility limits should be adjusted.

Assessment of disposable income of legal aid applicants

24. One of the recommendations arising from the Legal Aid Policy Review in 1997 was to adopt the 35-percentile household expenditure, instead of the Comprehensive Social Security Assistance (CSSA) rates, as the yardstick for determining the allowances deductible in calculating the disposable income of legal aid applicants. Hon LEE Cheuk-yan has expressed the view that the median household expenditure should replace the 35-percentile household expenditure as the standard personal allowance deductible in assessing disposable income.

25. The Administration has explained that the adoption of the 35-percentile household expenditure for assessing disposable income is to reflect the expenditure level of the target group for legal aid, i.e. households in the lower middle class and below. This method has enabled more people to be financially eligible for legal aid, as compared with the previous practice of pegging the deductible to CSSA rates. The Administration considers that its policy position remains valid today and shall therefore maintain the 35-percentile household expenditure as the standard personal allowance.

Unrepresented litigants

26. Hon Audrey EU considers that refusal of LAD to grant legal aid on grounds of means has resulted in more and more litigants being forced to appear in legal proceedings without legal representation. Unrepresented litigation is considered to have created problems for the due administration of justice. It has prolonged the length of the trial, exerted pressure on the court's time and resources and increased the costs of litigation.

27. Hon Audrey EU considers that an unrepresented litigant who is refused legal aid on means and cannot afford the costs of legal representation on a private basis would be placed in a disadvantageous position as compared to the other parties to the proceedings who are legally represented. She has queried whether the refusal of LAD to grant legal aid in such cases is consistent with the spirit of Article 25 of the Basic Law (BL25), which stipulates that all Hong Kong residents shall be equal before the law.

28. The Administration has responded that according to legal advice, BL25 has been examined by our court on several occasions and it appears that the court perceives BL25 as a constitutional guarantee of the right of equality. The focus of BL25 is on whether the law treats people in an equal, non-discriminatory manner, not whether the parties are equal with each other. BL25 is reflected in Article 22 of the Hong Kong Bill of Rights, which is identical to Article 26 of ICCPR. Evident from the case law is that our court in its interpretation of the Article has closely followed the United Nations Human Rights Committee's general comment on the right to equality guaranteed under Article 26 of ICCPR. According to the Human Rights Committee, "Article 26 not only entitles all

persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

29. The Administration also advises that the guarantee in BL25 is reinforced by the right to fair hearing protected under Article 10 of the Hong Kong Bill of Rights, which incorporates Article 14 of the ICCPR. Both articles state, among others, that all persons shall be equal before the courts and tribunals. The Judiciary is therefore under a legal obligation to treat both litigants in person and litigants legally represented in a fair and non-discriminatory manner. In the view of the Administration, under the legal aid regime and the legislative framework regulating it, all applicants who pass both the means test and merits test are eligible for legal aid. It is most unlikely that the current legal aid regime would raise an issue under BL25.

30. The Administration further states that there is no conclusive evidence to show that the increase in the number of unrepresented litigants arose from shortfalls in the provision of legal aid under the present system. On this issue, the Administration has noted that the Working Party on Civil Justice Reform appointed by the Chief Justice is currently studying, among other things, the situation of unrepresented litigation in Hong Kong and the means to assist unrepresented litigants. The Department of Justice is also undertaking a review on the demand for and supply of legal services in Hong Kong. It is expected that the reviews would come up with useful conclusions and recommendations on the matter.

Employees involved in insolvency of employers

31. Hon LEE Cheuk-yan has pointed out that there were cases where employees retrenched for reason of insolvency of their employers had to give up their claims because their applications for legal assistance in filing a petition to the court for the making of a bankruptcy or winding up order against their employers were refused on grounds of means.

32. The Administration has advised that cases in which employees claiming against their insolvent employers had been refused legal aid were limited. In 2003, out of a total of 1 256 applications for legal aid for filing winding-up petition or bankruptcy orders against the employers, only 16 applications were refused on grounds of means. Moreover, LAD has been assisting claimants affected by the insolvency of their employers in applying to the Labour Department for ex-gratia payment from the Protection of Wages on Insolvency Fund (PWIF). Liaison meetings between the two Departments are held to resolve practical problems and consider how best to provide a better service to the employees. To strengthen cooperation in this respect, a working group

comprising senior staff of both Departments has been set up to explore further ways to streamline the referral procedures to expedite relief payments from the PWIF.

General review on provision of legal aid services

33. The Administration has informed the Subcommittee that it has been consulting the Panel on Administration of Justice and Legal Services (AJLS Panel) on the recommendations of the five-yearly review. The discussion will cover a wide range of issues including, inter alia, the criteria for assessing the financial resources of legal aid applicants. The Administration considers that the issue of how the financial eligibility limits of legal aid applicants should be appropriately set can be followed up in the context of this ongoing discussion with the AJLS Panel.

Stance of members of Subcommittee

34. Hon Margaret NG, Hon LEE Cheuk-yan, Hon Albert HO Chun-yan and Hon Audrey EU have stated that they do not support the proposed resolution to adjust downward the financial eligibility limits for OLAS and SLAS.

35. Hon Miriam LAU has indicated that Members belonging to the Liberal Party support the proposed resolution, and that measures to improve the provision of legal aid services should be considered in the review being undertaken by the AJLS Panel.

Recommendation

36. The Subcommittee has no objection to the Administration giving notice to move the proposed resolution at a Council meeting. As members of the Subcommittee have different views on the proposed resolution, it would be a matter for individual members to decide whether or not to support the proposed resolution.

37. The Administration has given notice on 2 March 2004 for CS to move the proposed resolution at the Council meeting on 17 March 2004.

Advice sought

38. Members are invited to note the recommendation of the Subcommittee.

LEGAL AID ORDINANCE

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 7(a) of the Legal Aid Ordinance (Cap. 91) on 2004.

RESOLVED -

- (a) that the Legal Aid Ordinance (Cap. 91) be amended -
 - (i) in section 5(1), by repealing "\$169,700" and substituting "\$155,800";
 - (ii) in section 5A(b)-
 - (A) by repealing "\$169,700" and substituting "\$155,800";
 - (B) by repealing "\$471,600" and substituting "\$432,900"; and
- (b) that this Resolution shall come into operation on a day to be appointed by the Director of Administration by notice published in the Gazette.

Clerk to the Legislative Council

2004

Explanatory Note

This Resolution reduces the limit of financial resources for a person to be eligible for legal aid under the Legal Aid Ordinance (Cap. 91).

《 法律援助條例 》

立法會決議

立法會於 2004 年 月 日根據《 法律援助條例 》(第 91 章)第 7(a)條提出和通過的決議。

議決 —

- (a) 《 法律援助條例 》(第 91 章)現予修訂 —
 - (i) 在第 5(1)條中，廢除 “\$169,700” 而代以 “\$155,800” ；
 - (ii) 在第 5A(b)條中 —
 - (A) 廢除 “\$169,700” 而代以 “\$155,800” ；
 - (B) 廢除 “\$471,600” 而代以 “\$432,900” ；及
- (b) 本決議自行政署長以憲報公告指定的日期起實施。

立法會秘書

2004 年 月 日

註釋

本決議調低根據《法律援助條例》(第 91 章)有資格獲得法律援助的人的財務資源上限。

**Subcommittee on proposed resolution
under section 7(a) of the Legal Aid Ordinance**

Membership list

Chairman	Hon Margaret NG
Members	Hon Albert HO Chun-yan Hon LEE Cheuk-yan Hon Jasper TSANG Yok-sing, GBS, JP Hon Miriam LAU Kin-yee, JP Hon LI Fung-ying, JP Hon Audrey EU Yuet-mee, SC, JP (Total : 7 Members)
Clerk	Mrs Percy MA
Legal Adviser	Miss Anita HO
Date	6 February 2004