

LASC D/P 56/03[R]

DISCUSSION PAPER

LEGAL AID SERVICES COUNCIL

**Comments of Legal Aid Services Council on
Five-Yearly Review of the Criteria for Assessing
Financial Eligibility of Legal Aid Applicants conducted in 2003**

BACKGROUND

As one of the recommendations arising from the 1992 legal aid policy review, the Administration undertakes to review once every five years whether any changes should be made to the way in which the Legal Aid Department (LAD) assesses the financial eligibility of applicants for the legal aid services it provides. The first five yearly review was conducted as part of the 1997 legal aid policy review. In accordance with the review time table, the Administration completed the second five yearly review on the criteria for assessing the financial eligibility of legal aid applicants in May 2003.

2. Subsequently, the Administration Wing of the Chief Secretary for Administration's Office provided a paper reporting on the Administration's findings, and invited the Council to comment on the recommendations.

CURRENT POSITION

3. During the past few months, the Council held a number of meetings to consider the paper. We should like to express our appreciation to the Administration Wing, LAD, the Census and Statistics Department, and Dr Wong Hung, Assistant Professor, Department of Social Work of The Chinese University of Hong Kong for assisting us in our deliberations.

4. At Council's working session held on 17 October, members agreed that a working group comprising the Chairman, Messrs Ruy Barretto, Junius Ho, Ng Shui Lai, Justein Wong and Mrs Fanny Yu be formed to attend to the matters. Subsequently, the working group endorsed a draft position paper which was adopted by the Council at its meeting on 28 November 2003.

5. The Council's comments on the paper's recommendations are summarized below.

COMMENTS ON THE PAPER

Ref : Paragraph 14

Subject : Approach for Assessing Financial Capacity

Administration's Recommendation : *The current approach of aggregating an applicant's yearly disposable income and his disposable capital in conducting the means test should be maintained.*

Council's Comments: The Council agrees to the recommendation. However, it notes the Administration's view that the current approach was working satisfactorily, and would ask the Administration to provide the criteria adopted in coming to this conclusion.

Ref : Paragraph 16

Subject : Income

Administration's Recommendation : *Loss or reduction of future income should be taken into account in calculating an applicant's disposable income, subject to proof to the satisfaction of the Director of Legal Aid (DLA).*

Council's Comments: The Council agrees to the recommendation.

Ref : Paragraph 19

Subject : Amount to provide for the Care of any Dependant Living with the Applicant during the time that Such Person is Absent from Home by Reason of

Employment

Administration's : *In calculating disposable income, the present*
Recommendation *deductible item of the provision for care of dependant*
infant if the applicant has to leave the infant alone at
home by reason of employment, should be extended
to cover the amount incurred to provide for the care
of the applicant's other dependants, be them their
parents, grandparents, or siblings provided that they
are living with him and are unable to take care of
themselves by reasons of age, infirmity, mental or
physical disabilities, and require care by the
applicant. We also propose to extend this
allowance to self-employed applicants.

Council's Comments: The Council agrees in general to the recommendation and proposes that the condition for the dependant to live with the applicant be relaxed. Under past family traditions it was not uncommon for an extended family to live under the same roof. Nowadays with increasing availability of institutional support, it is not unusual for families to use the services of old age homes and care and attention homes or similar institutions to take care of their aged dependants.

Ref : Paragraph 21

Subject : Maintenance Payment

Administration's : *Maintenance payment, either ordered by the court or*
Recommendation *made voluntarily by an applicant to support the*
living of his/her ex-spouse and children, should be
deducted in calculating the disposable income of a
legal aid applicant, subject to documentary proof of
actual maintenance payment made. The sum
deductible where maintenance payment is made
voluntarily by the applicant should be pegged to the
limits of the present statutory allowances for
dependants. No such limit should however be
imposed if the maintenance payment is ordered by

the court.

Council's comments: The Council agrees in general to the recommendation but proposes that the scope should be extended to cover other periodical payments ordered by the Court.

Ref : Paragraph 23

Subject : Median Household Expenditure Approach

Administration's Recommendation : *The standard personal allowance deductible in calculating disposable income should maintain at 35-percentile household expenditure.*

Council's Comments: At the 1997 policy review, the government adopted the position that ordinary legal aid was targetted at the lower middle class and below. This has been policy since then. Although the government has not clearly defined who belong to the lower middle class and below, it has taken household expenditure as the yardstick in calculating allowable expenditure. If household expenditure is used for this purpose, we consider that household income may also be used to define the lower middle class and below.

The government uses the 35-percentile household expenditure to calculate allowable expenditure, but this figure does not reflect the entire lower middle class and below. The more sensible benchmark should be median household expenditure, and we recommend this to the Administration.

Indeed, for the same reason, the government should use median household income to define the lower middle class and below. With the adoption of both median household income and expenditure, there will be a rational basis in reviewing consumer price movements as they affect legal aid.

However, according to professional advice it would be more appropriate to define social class in terms of

occupation. As applying this method would mean a drastic change from current practice we would not consider it for this review exercise, but would recommend to the Administration to explore this for the long term. The Council will be pleased to study this to facilitate the Administration's decision to use this method or otherwise.

At the same time, it is noteworthy that according to social research, 66.4% of the working population belonged to the lower middle class and below using the working population's occupation and employment status data collected by the Population Census 2001. This finding would seem to confirm that using median household income and expenditure is an appropriate yardstick for legal aid purposes in respect of its target group - the lower middle class and below.

In our previous communication regarding annual adjustment of financial eligibility limits, we question the adequacy of using Consumer Price Index (C) [CPI(C)]. Since CPI(A) measures price changes covering about 50% of the less well off households in Hong Kong, it seems more reasonable to adopt CPI(A) for the Ordinary Legal Aid Scheme (OLAS). This also ties in with our recommendation that the government should adopt median household income and expenditure for estimating financial eligibility and for defining the target group respectively under existing government policy.

The Council notes that the Supplementary Legal Aid Scheme (SLAS) is for the "sandwich class" while OLAS is for the "lower middle class and below". Obviously the sandwich class is a level higher than the lower middle class and below for which the OLAS is intended. It is logical to draw the conclusion that the sandwich class refers to the upper middle class.

According to social research, 92.8% of the working population belonged to the "upper middle class and below". Deducting the 66.4% in the lower middle class and below will give us 26.4% of the working population being in the upper middle class, i.e. the sandwich class – for which SLAS is intended to serve. Again as this study adopts the working population as the basis, we recommend this should be further explored in the long term.

On the other hand, the Administration could best consider what percentile brackets of household income and expenditure should be adopted to define the eligibility parameters of SLAS. As the size of the sandwich class is about 26.4%, it appears not unreasonable to adopt 75-percentile (25% above median) household expenditure for calculating the standard personal allowance for SLAS, pending the outcome of the long term review.

The Council considers that it is reasonable for SLAS to adopt a higher percentile of household expenditure allowance than OLAS because –

- (a) SLAS, unlike OLAS, is a self-financing scheme;
- (b) under SLAS (but not OLAS) an aided person is required to contribute 12%/6% of the damages recovered to the SLAS Fund if the proceedings are successful; and
- (c) the expenditure mix of persons in "sandwich class" and "lower middle class and below" are different, and it is not appropriate to mix up the expenditure pattern of both schemes.

These recommendations are even more cogent given that the Administration has decided to reduce the financial eligibility limits of OLAS and SLAS by 8.2% to reflect deflation from July 2000 to July 2003 using the questionable CPI(C). The proposed adjustment will ameliorate the impact of the proposed reduction of financial eligibility limits. The Council believes that the proposed interim

adjustment of standard personal allowance of OLAS and SLAS may not increase legal aid expenditure significantly as legal aid expenses are affected by many social economic factors, including how many people are involved in legal proceedings and whether those involved choose to apply for legal aid. Further, the Council has advised the Administration in March to consider using an alternative or adjusted index instead of CPI(C) to reflect the change in price when adjusting the financial eligibility limits. The Council now proposes that CPI(A) be used to reflect price change in respect of the financial eligibility limit of OLAS and CPI(B) be used to reflect price change in respect of the financial eligibility limit of SLAS, having regard to the coverage of the two indices. CPI (A) & (B) measure the price changes faced by households in the relatively low and medium expenditure ranges, covering about 50% and another 30% of households in Hong Kong respectively.

Ref : Paragraph 29

Subject : Insurance compensation as disposable capital

Administration's Recommendation : *In assessing disposable capital of an applicant to pursue an accident-related personal injury claim whether or not the accident arises from work, the DLA should be able to disregard an amount of the insurance monies paid to the applicant in respect of his bodily injuries to which the claim relates, which the DLA considers reasonable to cover such future expenses on treatment, equipment and care and attention, as may be certified to be necessary by a registered medical practitioner as a result of the injury, subject to proof to the satisfaction of DLA.*

Council's Comments: The Council agrees to the recommendation, but is of the view that compensation or insurance payment to the applicant arising from an incident not relating to his legal aid application should also be disregarded, if the payment/compensation is meant to compensate for the loss of future earning capacity of the

applicant.

The Council understands that retirement benefits received under the Mandatory Provident Fund (MPF) will be counted in calculating an applicant's disposable capital. As MPF retirement benefits are meant to support the livelihood of the recipient when he is no longer employable, they should be disregarded in computing disposable capital.

Ref : Paragraphs 31 - 32

Subject : Borrowed money and cash in bank as disposable capital; Debt and Negative Value of Capital Assets

Administration's Recommendation : *There is no justification to exclude borrowed money and cash in bank in calculating disposable capital, and there is no justification to include debt as a deductible item in the assessment of financial resources of legal aid applicants.*

Council's Comments: The Council considers that the rule should be refined so that debts to an authorized or licensed financial institution can be taken into account, subject to the applicant's making a declaration to disclose details of his debt for LAD to consider.

Ref : Paragraph 38

Subject : Resources of a spouse

Administration's Recommendation : *The present requirement of aggregating the financial resources of an applicant and his/her spouse should be maintained to safeguard against possible abuses.*

Council's Comments: The Council agrees to the recommendation.

Ref : Paragraph 43

Subject : Resources of an applicant who is an infant

Administration's Recommendation : *The present arrangement of not aggregating the financial resources of an infant and his*

parents/guardians in determining the financial resources of the infant should be maintained.

Council's Comments: The Council agrees to the recommendation.

Ref : Paragraph 56

Subject : Increasing the Financial Eligibility Limit for SLAS

Administration's Recommendation : *There is no justification for an increase of the financial eligibility limit for SLAS to \$1 million.*

Council's Comments: The Council considers that the financial eligibility limit for SLAS should be increased from \$471,600 to \$672,000 in order to maintain the same purchasing power of the limit in 1984. The Council is aware that in 1984, a person would be eligible for SLAS if his disposable capital did not exceed \$100,000 and his annual income did not exceed \$180,000, and no deductible items were allowed under SLAS in assessing a legal aid applicant's income. In 1992, the financial capacity approach was introduced with a total financial eligibility limit of \$280,000 (by combining the disposable capital and annual income). As from 1992, a legal aid applicant's disposable income under SLAS has been assessed as his gross income minus his standard personal allowance and other deductible items. Since 1992, the limit has been adjusted in line with Consumer Price Index (C) [CPI(C)]. Notwithstanding the changes introduced in 1992, the Council considers that the financial eligibility of SLAS should be adjusted to \$672,000 to reflect price changes between 1984 and 1992. The changes introduced in 1992 did increase the number of persons eligible for SLAS by introducing the financial capacity approach and by applying the disposable income concept of OLAS to SLAS. However no adjustment was made to reflect the price changes from 1984 to 1992. Increasing the financial eligibility limit of SLAS will improve access to justice. While more successful

applications for legal aid will increase the workload of LAD, increasing the financial eligibility limit will not require additional funding as the scheme is self-financing and has been able to generate surplus. Unrepresented litigants constitute a drain on Judiciary's resources. Similarly, the increasing number of damages recovery agents operating on "no win, no charge" basis suggests that there is unmet need for legal service.

Ref : Paragraph 60

Subject : Reducing the contribution rate

Administration's Recommendation : *The contribution rate for SLAS should be reduced to 10%/6%.*

Council's Comments: The Council agrees to the proposed reduction if there is no expansion in SLAS. However, if SLAS takes on more cases (see Council's comments on paragraphs 23 and 56 above), the existing contribution rate should be retained so that the scheme can benefit more people.

Ref : Paragraph 61

Subject : Adopting a Sliding Scale for SLAS Contribution

Administration's Recommendation : *A flat rate for SLAS contribution should be retained.*

Council's Comments: The Council agrees to the recommendation.

Ref : Paragraph 62

Subject : Payment of Contribution by Instalments

Administration's Recommendation : *The present practice of allowing payment of interim contribution of \$45,425 by a maximum of 6 monthly instalments in appropriate circumstances on a case by case basis should be maintained; and the practice should be made known to applicant.*

Council's Comments: The Council agrees to the recommendation.

Ref : **Paragraph 67**

Subject : Enlarging the Scope of SLAS

Administration's Recommendation : *In order to maintain the financial viability of SLAS, there should be no extension to the scope of SLAS.*

Council's Comments: The Council has explored the possibility of broadening the scope of legal aid, including that of SLAS. It notes the Administration's view that SLAS is successful because most SLAS applications relate to cases where insurance is required by law, and where additional safeguards against non-recovery of damages are in place (e.g. Motor Insurers Bureau and Employees Compensation Assistance Fund). Further, the bulk of the cases funded by the scheme are Personal Injury (PI) cases which traditionally have a very high success rate with high compensation. On the other hand, the SLAS also covers professional negligence cases which do not have a high success rate and do not always attract high compensation. To expand the scope of SLAS to cover additional cases which are more risky will raise the question whether the fund of SLAS may be depleted endangering the sustainability of the SLAS.

The Council has attempted to formulate viable proposals to expand the scope of SLAS and has consulted the Commissioner of Insurance and other relevant professions on the issue of statutory or professional liability which could come under SLAS. The Council through its Working Party on the Scope of Legal Aid will continue to search for areas suitable to be included in SLAS, and will advise the Administration once suitable proposals are identified.

OTHER ISSUES

6. Apart from the foregoing issues, the Council has asked the DLA to consider whether there are areas where discretion by DLA can be introduced to deal with potential hardship or potential injustice created by existing rules, and to report to the Council if such areas are identified.

7. According to the Interim Report on Measures to Improve Environmental Hygiene in Hong Kong issued by the Team Clean in May 2003, it would be necessary for flat owners to improve building maintenance to ensure common areas and facilities are well-maintained and that drainage systems are inspected regularly and, if faulty, repaired quickly. Currently, legal aid is not available to owners' corporations to enable them to carry out maintenance responsibilities. It is proposed that as an interim measure the relevant legislation be amended so that legal aid may be available to office-bearers of owners' corporations to enable them to commence legal action in their personal capacity to enforce the Building Management Ordinance or the Deed of Mutual Covenant on maintenance and repair of buildings. In the long term, the Legal Aid Ordinance should be amended to enable eligible owners' corporations to enforce the Building Management Ordinance or the Deed of Mutual Covenant on maintenance and repair of buildings.

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