

**For discussion on
30 March 2009**

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

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

PURPOSE

This paper informs Members of the progress of the Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applications (“the Review”).

BACKGROUND AND FUNDAMENTAL PRINCIPLES

2. Since 1997, reviews have been conducted on the overall approach for assessing the financial eligibility of legal aid applicants.

3. The promotion of access to justice is a key purpose of publicly funded legal aid. Like any other public expenditure, we need to ensure that legal aid expenditure represents good value for money as we are accountable to the community for prudent and effective use of public money.

4. Towards this end, we adopted two cardinal criteria, namely means (financial eligibility) and merits (the prospect of success, costs benefit and the prospect of recovery) tests to assess the legal aid applications. Financial eligibility ensures that only those in need of financial assistance for court proceedings receive legal aid.

THE REVIEW

5. Against the above fundamental principles, the purpose of the Review is to examine the current approach used to assess the financial eligibility limits. In this respect, it is important to preserve the fundamental principles of legal aid whilst formulating an approach which is simple, fair, financially prudent and easy to administer.

6. We consulted this Panel on the scope of the Review. The following sets out the scope as proposed by this Panel and other stakeholders and the thinking of the Administration.

A. Financial capacity approach in assessing the financial eligibility of legal aid applicants

7. LAD currently adopts a “financial capacity” approach, which aggregates a person’s yearly disposable income and disposable capital¹, in assessing the means of legal aid applicants. A person whose financial capacity does not exceed the financial eligibility limits is eligible for legal aid. The financial capacity approach has been working satisfactorily and is not so complex as to be confusing for an applicant.

8. We plan to maintain the current approach of aggregating a person’s yearly disposable income and his disposable capital when conducting the means test.

B. Method of computing disposable income

9. According to the Legal Aid (Assessment of Resources and Contributions) Regulations (“Regulations”), a person’s disposable income is the income that person may reasonably expect to receive during the period of computation. It is calculated by his income minus a number of statutory deductible items, such as payment of salaries tax and maintenance payments.²

10. One deductible item is an allowance equivalent to the 35-percentile household expenditure excluding rent. The allowance reflects the general expenditure of a household in maintaining an acceptable standard of living.³ There have been calls from this Panel and the Legal Aid Services Council (“LASC”) to raise the 35-percentile household expenditure. We are critically examining the associated financial and other implications.

¹ In other words, a person’s financial capacity refers to the capital assets and annual income after deduction of certain statutory allowances.

² The deductible items are set out in Part II of Schedule 1 of the Regulations.

³ The existing allowance of household with no dependent to household with six or more dependents is in the range of \$3,900 to \$19,150.

C. Method of computing disposable capital

11. In accordance with the statutory requirements, a person's disposable capital is the value of his/her resource of a capital nature, disregarding a number of items including the value of any interest in the only or main dwelling, and insurance money received in respect of the injuries to which the person's personal injury claim relates, to cover his/her future medical needs.⁴

12. There have been suggestions that in assessing a person's financial eligibility, relevant factors such as age and their earning power should be taken into account. Some suggested that savings for the elderly should be disregarded. We are carefully examining the suggestions.

D. Financial eligibility limits

13. Currently, applicants with financial resources not exceeding \$165,700 are eligible for the Ordinary Legal Aid Scheme ("OLAS")⁵ and applicants with financial resources above \$165,700 but not exceeding \$460,300 are eligible for the Supplementary Legal Aid Scheme ("SLAS").

14. The financial resources of legal aid applicants are computed after offsetting a wide range of deductibles which are essential to maintaining the livelihood of the applicants and their dependents at a reasonable level. At present, the income deductibles and capital disregards include, inter alia, a standard allowance for household expenditure, rent/mortgage payment of the main dwelling, salaries/profits tax payment, provision for the care of any dependants including children living with the applicant who are unable to care for themselves while he/she is at work, and the value of any interest in the main dwelling. In other words, whatever the financial resources a person is left with after the allowable deductibles and disregards are taken into account, those resources can in principle be used for other purposes such as litigation without causing them to suffer undue hardship.

⁴ The items to disregard are set out in Schedule 2 of the Regulations.

⁵ OLAS covers civil proceedings at District Court and above. The same eligibility limit applies to criminal legal aid under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance.

15. At present, a single financial eligibility limit applies to all types of cases under OLAS as well as criminal legal aid cases. Another limit exists for SLAS. There have been requests to pose different limits for different types of cases. There have also been calls for setting a higher limit for criminal legal aid cases.

16. In the context of criminal legal aid, the Director of Legal Aid (“DLA”) has the discretion to waive the limit in the interests of justice. In practice, the DLA seldom refuses criminal legal aid applications solely on means ground except for applicants who fail to provide full and frank disclosure on means. The number of refusals purely on means is insignificant. That being the case, there may not be a need to set a higher limit for criminal legal aid cases. For civil cases, an across-the-board financial eligibility limit is clear and simple to understand and administer.

E. SLAS

17. Hong Kong is the only jurisdiction that operates a legal aid scheme on a self-financing basis like SLAS. When SLAS was first introduced in 1984, it only covered claims arising from personal injuries or death. The scope was extended subsequently to include employees’ compensation claims and medical, dental and legal professional negligence claims. The rates of contribution from damages recovered by successful legal aid persons were reduced twice, in 2000 and in 2006, to the present 6% for cases settled before delivery of brief to counsel and 10% for other cases.

18. To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio. An additional but important element for SLAS coverage is that the recovery prospect must be reasonably good. SLAS therefore covers mainly cases where the defendants are insured or where there is assured payment of damages (i.e. claims for personal injuries or death and work-related accidents). The high chance of recovery of damages helps ensure, to a large extent, the financial sustainability of the scheme. Consequently, SLAS only covers cases which involve monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages.

19. If the delicate balance in this successful formula is upset as a result of covering civil cases which do not involve monetary claim or those which have a relatively low success rate or poor prospect of recovery, the SLAS fund will risk running into a deficit or even bankruptcy. This is especially true in light of the fact that under the existing scheme, the fund is liable to pay the full legal costs of the opposite party as well as the applicant's own legal costs if a claim fails. It would not be in the public interest if eventually due to the depletion of the SLAS fund, the scheme could not meet its purpose.

20. As at December 2008, the fund balance of SLAS was \$88 million. In recent years, the amount of contribution received from cases dropped significantly and the income of the fund relied heavily on interest on bank deposits.

21. Factors attributing to the change in financial position of the fund in recent years include the cuts in the contribution rate by aided persons in successful cases since 2000, which was reduced from 15% to 12% and further to 10% in 2003, the relatively low number of applications, hence the number of claims resulting in a downward trend in the amount of contributions payable to the fund.

22. Against the above considerations and in view of the financial position of the SLAS fund, we have to be extremely cautious in considering whether there is room for expanding the scope of SLAS.

WAY FORWARD

23. Members are invited to note that the Administration is critically considering the way forward and the relevant financial and other implications. We will consult the LASC when our recommendations are ready.

**Home Affairs Bureau
Legal Aid Department
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