

# 香 港 人 權 監 察

## HONG KONG HUMAN RIGHTS MONITOR

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### **Submission to LegCo Panel on Administration of Justice and Legal Services Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants**

**May 2010**

#### **Introduction**

1. The Government has conducted the five-yearly review on the criteria for assessing the financial eligibility of legal aid applicants (the Review), and recommends three proposals on the financial eligibility of legal aid applicants.
2. The Hong Kong Human Rights Monitor (the Monitor) considers legal assistance as one of the fundamental human rights, and the existing financial eligibility limits (FELs) fail to cater to most of Hong Kong people, especially the lower middle class and the retired elderly. Thus the Monitor welcomes the Review conducted and the recommendations made by the Government. The Monitor will set out our views on the proposals as well as other issues in legal aid services as below.

#### **Recommendation 1: Replacing the 35-percentile household expenditure with the median household expenditure as deductible allowance**

3. The recommended adjustments will increase the financial eligibility limits for both the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS) and provide a wider access to legal aid. The Monitor opines that such an adjustment can better reflect public affordability on legal expenses and thus agrees with the recommendation.

#### **Recommendation 2: Adjustment of the FELs**

4. The Government proposes to increase the FEL for OLAS from the existing amount of \$175,800 to \$260,000; and from \$488,400 to \$1 million for SLAS. The Monitor agrees to increase the FELs for both OLAS and SLAS to also better reflect public affordability on legal expense.
5. The Monitor notes that besides the Government's recommendation to increase the FEL for SLAS to \$1 million, the Legal Aid Services Council (the Council) suggests that \$1.3 million should be the appropriate level for the FEL for SLAS, after considering the information and data presented to the Council.<sup>1</sup> The Government, however, insists that the proposed FEL of \$1 million for SLAS is appropriate. The Monitor urges the Government to re-consider the level of FEL for SLAS.

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<sup>1</sup> See p. 2 of the letter from the Legal Aid Services Council to the Home Affairs Bureau on "Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applicants", 26 March 2010. LC Paper No. CB(2)1200/09-10(01).

6. The Council also points out that the rate of contribution in respect for SLAS is only capped at the maximum FEL for OLAS, and suggests that there should be a separate scale of contribution for SLAS because in reality two legal aid schemes are to assist different income groups in the community. The Monitor agrees with the Council on these. The Government has not explained its position on this issue yet, and the Monitor urges the Government to explain its position on such a recommendation from the Council.
7. As suggested by the Monitor before, the Director of Legal Aid should have the discretionary power to exclude certain assets or incomes in calculating the total financial capacity whenever appropriate and reasonable in order to ensure justice in some exceptional cases. Similar discretion should also be given to special classes of people who are unable to replenish their financial resources in the future and who actually have limited means, for instances people who are on pension, disabled or seriously ill.<sup>2</sup>

### **Recommendation 3: Calculation of financial resources for elderly persons**

8. The Monitor opines that elderly persons are more difficult to replenish their financial resources in the future, thus agrees with the Government's recommendation to disregard part of savings of the elderly applicants who have reached the age of 65 at the time of applications, irrespective of their employment status.
9. The Monitor notes that the Council is of the view that the age requirement at 65 as the Government suggested should be relaxed, because it is a common phenomenon that people have saved something for their retirement well before they are 65. The Monitor shares the same concern with the Council since beside the MPF saving, most people in Hong Kong will have some other savings for retirement. Therefore the Monitor urges the Government to relax the age requirement for this recommendation.

### **Other suggestions**

10. In response to the public requests for expanding the scope of SLAS, the Government claims that SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio to maintain its financial stability.<sup>3</sup> The Monitor was disappointed by the Government's refusal to expand the scope of the SLAS. While understanding the importance of financial stability of SLAS considering that SLAS is a self-financed programme, the Monitor worries that such an arrangement would sacrifice the right to legal assistance and justice if the financial reasons are overwhelming.
11. The Monitor notes that the rates of contribution from damages recovered by successful legal aid persons had been reduced to present 6% for cases settled before delivery of brief to counsel, and 10% for other cases. In order to maintain the financial stability of the SLAS after expanding the scope of it, the Monitor suggests increasing the rates of contribution. The Law Reform Commission adopting the suggestion of the Law Society that applicants who are above certain amount (both groups suggest that threshold at \$439,800, the existing financial eligibility of SLAS) could be asked to pay a higher contribution rate than the existing 10%. The Law Reform Commission further claimed that "even a 15% contribution rate would be

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<sup>2</sup> See para. 41, Submission from the Hong Kong Human Rights Monitor to the LegCo Panel on Administration of Justice and Legal Services on the Research Report "Legal aid systems in selected places", 25 January 2010. LC Paper No. CB(2)833/09-10(01).

<sup>3</sup> See para. 17, "Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applicants", Home Affairs Bureau and Legal Aid Department, March 2010. LC Paper No. CB(2)1148/09-10(01).

substantially lower than the rate of about 25%-30% of that commonly charged by unregulated claims intermediaries.<sup>4</sup>

12. The Law Reform Commission has published a report on Conditional Fees in 2007. Besides proposing that SLAS should be expanded by raising the FELs and increasing the types of cases covered, the report also proposed setting up a Conditional Legal Aid Fund (CLAF) to finance the litigation, take a share of the compensation in successful cases, and also pay the defendants' legal costs in unsuccessful cases. The Law Reform Commission believed that this CLAF would be "a sustainable and efficient structure for widening access to justice; and provided that it is properly structured, it has the potential to surpass SLAS".<sup>5</sup> The Monitor urges the Government to consult the public and to study the pros and cons for setting up the CLAF, and take measures if it is found to be beneficial.
13. Following the LegCo's Research Report on "Legal aid systems in selected places", the Monitor submitted a written submission to the LegCo Panel on Administration of Justice and Legal Services on the ways to improve our legal aid system.<sup>6</sup> Apart our views on FELs for legal aid services which are mentioned above, the Monitor remains our positions stated in our previous submission. The submission is enclosed and our key suggestions are:
  - the coverage of legal aid services should be expanded to include legal advice, or the Free Legal Advice Scheme should be enhanced to provide in-depth legal advices in broad situations<sup>7</sup>;
  - the provision of article 5AA of the Legal Aid Ordinance should be expanded to include a waiver of the limit of financial resources when there is a breach of any international human rights conventions applicable to Hong Kong, any anti-discrimination ordinances, the Personal Data (Privacy) Ordinance, and when the issue is related to public interest;
  - amendments to the Legal Aid in Criminal Cases Rules should be made as soon as possible to allow for legal aid to be granted in cases without any convictions involved going to the Court of Final Appeal (CFA);
  - legal aid services to be expanded to Hong Kong people involving cases which happened in mainland China;
  - extending the legal aid services or the Duty Lawyer Scheme to cover other administrative bodies whose decisions have serious consequences for the persons affected, especially where volunteer services are not available to fill the gaps;
  - expanding the scope of legal aid services at the community level, for instance allowing the Legal Aid Department to fund non-profit organizations to provide legal aid services at the community level.
14. The Monitor believes that further improvements on legal aid services are essential to achieve the principle of "equality before and equal protection of law". The Monitor urges the Government to respond to the demands of the public and act promptly on improving our legal aid systems on both FELs and other administrative arrangements.

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<sup>4</sup> See para 7.37 of the Report on Conditional Fees published by the Law Reform Commission of Hong Kong, July 2007.

<sup>5</sup> See recommendation 3 of the Report on Conditional Fees published by the Law Reform Commission of Hong Kong, July 2007.

<sup>6</sup> Submission from the Hong Kong Human Rights Monitor to the LegCo Panel on Administration of Justice and Legal Services on the Research Report "Legal aid systems in selected places", 25 January 2010. LC Paper No. CB(2)833/09-10(01).

<sup>7</sup> Free Legal Advice Scheme is a scheme run by the Duty Lawyer Scheme funded by the Home Affairs Bureau. For more information please refer to <http://www.dutylawyer.org.hk/en/free/free.asp>.