

OUR REF : HAB/CR 19/1/49
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By fax and by post

27 October 2017

Mr Lemuel WOO
Clerk to Panel on Administration of Justice and Legal Services
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Woo,

Legal Aid Financial Eligibility Limits

Thank you for your letter dated 16 October 2017 attaching a letter from the Hong Kong Bar Association (“HKBA”) dated 30 June 2017. Having consulted the Legal Aid Department (“LAD”) and the Census and Statistics Department (“C&SD”), we set out the Government’s response in the ensuing paragraphs.

Mechanism for processing legal aid applications

The policy objective of legal aid is to ensure that all those who meet the criteria set out in the Legal Aid Ordinance (Cap. 91) (“LAO”) and have reasonable grounds for pursuing or defending a legal action in the courts of Hong Kong will not be denied access to justice due to a lack of means. To qualify for legal aid, a person is required to satisfy both the means test and merits test as provided by the LAO.

On means test, at present, a person whose financial resources¹ do not exceed \$290,380 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (“OLAS”) which covers civil proceedings in the District Court or higher courts as set out in section 5(1) of the LAO and criminal legal aid under the Legal Aid in Criminal Cases Rules (Cap. 221D). The corresponding upper limit for the Supplementary Legal Aid Scheme (“SLAS”) is \$1,451,900 as specified in section 5A(b) of the LAO. Pursuant to the Government’s report to the Legislative Council (“LegCo”) on the Legal Aid (Amendment) Bill 1999 in September 1999, the financial eligibility limits (“FELs”) under OLAS and SLAS are to be reviewed annually to take into account general price movement and biennially to take into account changes in litigation costs and other relevant factors. As reported in the paper submitted to the LegCo Panel on Administration of Justice and Legal Services (“AJLS Panel”) in June 2017, the Government has completed a new round of annual review on FELs. Noting that the Consumer Price Index (C) (“CPI(C)”) for the reference period (i.e. July 2014 to July 2016) has increased by 4.0%, we propose to adjust the FELs upward by 4.0% accordingly. The impact of general price movement after July 2016 will be reflected in the next review.

The merits test for civil cases is stipulated in section 10(3) of the LAO which reads “A person shall not be granted a legal aid certificate in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending, opposing or continuing such proceedings or being a party thereto”. In conducting the merits test, LAD will consider the background, evidence available and legal principles applicable to the case so as to determine whether legal aid should be granted. Before issuing a legal aid certificate, LAD must, in assessing the merits, be satisfied that there are reasonable grounds or points of law involved for which it is desirable to grant legal aid to enable the matter to be submitted to the court for decision or judgment.

¹ “Financial resources” means the aggregate of an applicant’s yearly disposable income and disposable capital. A person’s disposable income is his/her gross income minus deductible items as allowed under the Legal Aid (Assessment of Resources and Contributions) Regulations (“the Regulations”) (Cap. 91B). A person’s disposable capital consists of all assets of a capital nature, such as the sum of his/her credit balance, money due to him/her, the value of the person’s interest in non-money resources, the value of business or share in a company etc., unless such items should be excluded from calculation under the Regulations.

In 2016, among the 6 080 civil legal aid applications refused, 5 294 were refused on merits and 786 were refused on means. In the same year, 817 applications were refused on merits and 25 were refused on means out of the 842 criminal legal aid application refusals in total.

Established mechanism and procedures for reviewing and adjusting FELs

As explained in our letter to the Chairman of HKBA dated 11 April 2017, as well as our letters to HKBA dated 24 May and 30 June 2017, the Government has implemented the recommendation that the FELs of the OLAS and SLAS be reviewed annually to take into account general price movement, pursuant to the Government's report to the LegCo in September 1999. Since the introduction of the review mechanism in 2000, we have conducted several rounds of reviews on the FELs based on the year-on-year rates of change in CPI(C). CPI(C) is compiled based on the expenditure patterns of households in the relatively high expenditure range and is considered appropriate to reflect consumer price movement. In the last review, the FELs were increased by 7.7% in July 2015 in accordance with the change in CPI(C) during the reference period of July 2012 to July 2014. We propose to adjust the FELs upward by 4.0% in accordance with the increase in CPI(C) during the reference period of July 2014 to July 2016. The proposed adjustment using the rate of change in CPI(C) from July 2014 to July 2016 can reflect the actual price changes of that period as compared with the average annual increase in CPI(C) of 3.1% over the nine-year period from 2007 to 2016 compounded for two years, given that the price movements in earlier years had been taken into account in previous annual reviews.

Following the established procedures, we informed the two legal professional bodies and AJLS Panel of the annual review outcome of FELs in April and June 2017 respectively. The LegCo House Committee decided in June 2017 to form a subcommittee to scrutinise the Resolution concerning the adjustments of FELs. The subcommittee will meet in early November 2017. Subject to the completion of work by the subcommittee as well as LegCo's approval, the Government will appoint the commencement date to effect the revised FELs.

Supplementary Legal Aid Scheme

SLAS provides legal assistance to the “sandwich class” whose financial resources exceed the limit allowed under the OLAS, but below a certain amount. SLAS is a self-financing scheme funded by application fees, interim contributions, final contributions deducted from damages recovered for the aided person in successful proceedings and legal costs recovered under or by virtue of an order or agreement for costs made in the aided person’s favour. The underlying principle is that any legal costs lost by the unsuccessful litigants would be made up by the contributions and deductions in successful claims thereby ensuring the continued viability of scheme. Financial prudence is essential to maintaining the financial viability of SLAS.

The level of the FEL for SLAS was within the scope of the review on SLAS conducted by the Legal Aid Services Council (“LASC”) further to the substantial expansion of SLAS in November 2012. In its recommendations to the Chief Executive in July 2016, among other things, LASC recommended that no change be made to the level of FEL for SLAS, having considered previous increases as well as the average legal costs of assigned out SLAS cases with judgment after trial, and that the FEL be monitored and reviewed annually. The Government carefully considered LASC’s proposal to maintain the FEL level and accepted its recommendation. At the LegCo AJLS Panel meeting on 24 April 2017, we reported to the AJLS Panel on LASC’s recommendations of the review on SLAS as well as the Government’s position.

Transfer of legal aid portfolio

Finally, according to LASC’s recommendations submitted to the Chief Executive in April 2013, there was no immediate need to establish an independent legal aid authority. LASC considered that LAD should remain a government department, as the degree of independence upheld and exercised by LAD was considered sufficient. As announced in the Chief Executive’s 2017 Policy Address this month, the Government will implement LASC’s proposal to transfer LAD from the Home Affairs Bureau to the Chief Secretary for Administration’s Office to underline the independence of our legal aid system. The transfer will take effect after the necessary approval has been obtained from LegCo.

We shall be grateful if you would circulate the above information to Members of the AJLS Panel.

Yours sincerely,

(Karyn CHAN)
for Secretary for Home Affairs

c.c. Director of Legal Aid (Attn: Mr Chris CHONG)
Commissioner for Census and Statistics (Attn: Ms Kaisy HUNG)