

Briefing for the Legal Aid Services Council

2019 Policy Address

Policy Initiatives of the Chief Secretary for Administration's Office

INTRODUCTION

This paper briefs Members on the policy initiatives of the Chief Secretary for Administration's Office (CSO) in relation to legal aid¹ in the 2019 Policy Address and the Policy Address Supplement.

OUR VISION

2. Legal aid services form an integral part of the legal system in Hong Kong. We strive to ensure the accessibility of legal aid and free legal advice services to the public to contribute towards upholding the value of everyone being equal before the law.

NEW INITIATIVE

Increasing the Financial Eligibility Limits of Legal Aid Applicants

3. The policy objective of legal aid is to ensure that all those who meet the criteria set out in the Legal Aid Ordinance (LAO) (Cap. 91) 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 must satisfy both the means test and merits test as provided by the LAO.

4. At present, a person whose financial resources² do not exceed the statutory financial eligibility limit (FEL) of \$307,130 is eligible for legal aid under the Ordinary Legal Aid Scheme (OLAS) which covers committal

¹ We have implemented the initiative as announced in the Chief Executive's 2017 Policy Address to transfer the responsibilities for formulating legal aid policy and housekeeping the Legal Aid Department (LAD) from the Home Affairs Bureau to CSO. The transfer took effect on 1 July 2018.

² "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.

proceedings in the Magistrates' Courts (MC), civil and criminal proceedings in the District Court (DC) or courts at levels above. Apart from OLAS, LAD also operates a Supplementary Legal Aid Scheme (SLAS) to provide additional legal aid support on certain types of civil cases³ to the "sandwich class" who may not meet the means test criterion of OLAS. Those with financial resources exceeding the FEL of OLAS (i.e. \$307,130) but are below \$1,535,650 may apply for legal aid under SLAS. Since 1999, the Government has been making annual adjustments to the two FELs with reference to the general price movement on the basis of the Consumer Price Index (C) (CPI(C)). Upon our previous review, a one-off adjustment was made in 2011 to increase the FELs of OLAS and SLAS by 48% and 166% respectively with a view to enhancing the public's access to justice.

5. As announced in the 2019 Policy Address Supplement, the Government proposes to increase the FELs of OLAS and SLAS by about 30%, i.e., from the current level of \$307,130 to \$400,000 for OLAS and from \$1,535,650 to \$2,000,000 for SLAS.

6. We have reviewed and propose increasing the FEL of OLAS from \$307,130 to \$400,000 having regard to the higher increase in legal costs than that of general price movement since the last one-off adjustment in 2011, as well as the affordability of private litigation services to OLAS applicants. In the absence of any representative data on private litigation costs, we have made reference to the average cumulative change of a series of indices relevant to legal professionals' expenses, including civil litigation costs of legally aided cases, nominal wage indices and rental indices for private offices for comparison with that of CPI(C) for the purpose.

7. We separately propose to increase FEL of SLAS from \$1,535,650 to \$2,000,000. Apart from the increase in legal costs as compared with price changes, we also see merit in providing a modest buffer for sandwich class applicants with financial resources marginally higher than the current FEL of SLAS, particularly elderly applicants who are living on savings (not regular income) who may otherwise need to exhaust all their assets to cope with tremendous legal costs for the more complicated cases.

³ OLAS covers both civil and criminal proceedings in the District Court or courts above in accordance with the LAO, while the scope of SLAS is more limited and covers only certain types of civil cases, e.g., cases involving personal injury or death, professional negligence claims against eleven professions including doctors, dentists and lawyers. It also covers negligence claims against insurers or their intermediaries in respect of the taking out of the personal insurance products; and monetary claims against vendors in the sale of completed or uncompleted first-hand residential properties, where the claim for damages is likely to exceed \$60,000.

8. Legal aid is not an entirely free service, as all successful applicants are required to pay a contribution according to the level of their financial resources⁴. For SLAS cases, an additional percentage up to 20% of the value recovered will be deducted and paid to the independent Supplementary Legal Aid Fund (the Fund) should the aided person win the case. This is to ensure the financial sustainability of the Fund which is operated on a self-financing basis. Following the proposed increase in the FELs, we will continue to rely on the existing statutory safeguards, including the merits test, as well as the caps on deductible household expenditure and rent from income and assets in calculating financial resources in the means test, to ensure that our legal aid system will not be abused by more well-off applicants.

9. The proposal will serve to enhance access to legal aid so that it will continue to meet our policy objective, i.e. to ensure that all those who have reasonable grounds for pursuing or defending a legal action in the courts of Hong Kong will not be denied access to justice owing to a lack of means. To give effect to these upward adjustments of the FELs, we will introduce legislative amendments into the Legislative Council (LegCo) by way of subsidiary legislation within the 2019-20 legislative session. We will continue to make annual adjustments to the FELs of OLAS and SLAS with reference to the general price movement (i.e. the CPI(C)). We will also continue to work closely with the two legal professional bodies in keeping abreast of the changes to legal costs and affordability of legal aid applicants with a view to considering the need for making one-off adjustments to either or both of the two FELs as and when necessary.

⁴ The contribution to be paid under OLAS according to the level of the aided person's financial resources is provided in the table below –

Financial resources	Contribution rates	Contribution payable
\$0 - \$38,391	-	\$0
\$38,392 - \$76,782	2%	\$768 - \$1,536
\$76,783 - \$115,173	2.5%	\$1,920 - \$2,879
\$115,174 - \$153,565	5%	\$5,759 - \$7,678
\$153,566 - \$191,956	10%	\$15,357 - \$19,196
\$191,957 - \$230,347	15%	\$28,793 - \$34,552
\$230,348 - \$268,738	20%	\$46,070 - \$53,748
\$268,739 - \$307,130	25%	\$67,185 - \$76,783

For SLAS, the interim contribution is 25% of FEL under OLAS (i.e. \$76,783) for Type I proceedings; and 10% of the assessed financial resources of the aided person or 25% of the FEL under OLAS (i.e. \$76,783), whichever is higher, for Type II proceedings.

Type I proceedings include personal injuries or death, employees' compensation and the representation for employees in appeals against awards made by the Labour Tribunal, which are more closely related to the livelihood of the individuals and generally carry a lower risk of litigation. Type II proceedings include professional negligence, negligence claims against insurers or their intermediaries for personal insurance products, and monetary claims against first-hand residential properties vendors.

ONGOING INITIATIVES

Review of SLAS

10. The Legal Aid Services Council (LASC) completed a review of the scope of SLAS and submitted its recommendations to the Government in July 2016. We subsequently reported to Members LASC's recommendations and the Government's position in April 2017, and briefed Members in April 2018 on the relevant legislative amendments to expand the scope of SLAS to cover monetary claims against certain financial intermediaries as well as derivatives claims⁵. Members expressed support for the proposal. The Government is drawing up the legislative amendments, with a view to implementing the proposals within the 2019-20 legislative session. In the meantime, LASC has already embarked on the next round of review with a view to further expanding the scope of SLAS on an incremental basis. In particular, LASC is looking into the possibility of expanding SLAS to include claims against the incorporated owners of multi-storey buildings.

Review of Criminal Legal Aid Fees

11. Pursuant to the report to LegCo Finance Committee in October 1992, criminal legal aid fees⁶, prosecution fees⁷ and duty lawyer fees⁸ are subject to review on a biennial basis to take into account changes in the Consumer Price Index (C) (CPI(C)) during the reference period. Following the completion of the previous biennial review for the reference

⁵ It is recommended by LASC and supported by this Panel that the scope of SLAS be expanded to cover civil proceedings in respect of monetary claims –

- (a) for professional negligence against financial intermediaries licensed or registered for Type 1 (dealing in securities), Type 2 (dealing in futures contracts) or Type 8 (securities margin financing) regulated activities with the meaning of the Securities and Futures Ordinance; and
- (b) in respect of derivatives of securities, currency futures or other futures contracts on the basis that the person seeking legal aid was induced to deal in those derivatives, futures or contracts by fraud, deception or misrepresentation.

The Government has taken the opportunity of the current legislative amendment exercise for expanding the scope of SLAS to revise the minimum claim amount for proceedings to which SLAS applies in order to tie in with the Judiciary's increase of the jurisdictional limit of the Small Claims Tribunal to \$75,000 (which took effect on 3 December 2018).

⁶ Fees payable to lawyers in private practice who undertake litigation work in respect of criminal cases by LAD.

⁷ Fees payable to lawyers in private practice engaged by the Department of Justice on a standard briefing-out basis to prosecute criminal cases on fiat.

⁸ Fees payable to duty lawyers engaged under the Duty Lawyer Scheme, which provides legal representation to eligible defendants appearing in all MCs.

period of July 2014 to July 2016, the revised fees (with an upward adjustment of 4.0%) came into effect on 3 April 2018. For the biennial review covering the reference period of July 2016 to July 2018, we reported the outcome to Members who indicated support in January 2019. The Government will introduce the legislative amendments into LegCo by way of subsidiary legislation within the 2019-20 legislative session to implement the proposed adjustments.

Review of Director of Legal Aid's First Charge

12. The Government has completed a review on the amounts specified in sections 18A(5) and 19B(1)(a) of the LAO relating to the Director of Legal Aid's first charge⁹ and briefed this Panel in April 2018 on the outcome of the review and the way forward. Members indicated support for the proposed adjustments to the two amounts¹⁰ with a view to bringing them in line with inflationary changes as well as other developments. The Government will introduce the legislative amendments into LegCo by way of subsidiary legislation within the 2019-20 legislative session to implement the proposed adjustments.

ADVICE SOUGHT

13. Members are invited to note the policy initiatives set out above.

Administration Wing
Chief Secretary for Administration's Office
October 2019

⁹ According to section 18A(5) of the LAO, if a legally-aided person is successful in recovering or preserving any money or property in the legally aided proceedings, he/she will be required to repay the Director of Legal Aid (DLA) all sums paid or payable on his/her behalf out of the money or property recovered or preserved (periodical maintenance for spouse or former spouse up to the first \$4,800 per month and periodical maintenance for children exempted). The sum that the legally-aided person has to pay DLA is called DLA's first charge. Moreover, DLA may exercise discretion to waive his first charge for an amount not exceeding \$57,400 in cases of serious hardship pursuant to section 19B(1)(a) of the LAO.

¹⁰ Members supported that, taking into account the inflationary changes as measured by CPI(C) from July 1996 to July 2017 as well as the substantial increase in the FEL of OLAS by 48% in May 2011, the amount specified in section 18A(5) be adjusted upwards from \$4,800 to \$8,660 and the amount specified in 19B(1)(a) be adjusted upwards from \$57,400 to \$103,510. In order to take into account the change in price movement up to July 2019 (i.e. two years from July 2017 as in the original proposal), we will adjust the two amounts concerned from \$4,800 to \$9,100 and from \$57,400 to \$108,850 respectively.