



LEGAL AID SYSTEMS IN SELECTED PLACES ("Research Report")

Submissions

The Law Society has considered the findings in the Research Report and has the following comments on the issues raised:

1. Independent Statutory Legal Aid Authority

The Legal Aid Department is a government department and its policies are set by the Home Affairs Bureau. It is important for the Government to remove any perception by the public that the decision-makers in the Legal Aid Department, who are all civil servants, may not at all times act independently and impartially. Legal Aid is not a form of "social welfare" but is in fact an integral part of the justice system.

We note this concern had been raised by the Legal Aid Services Council (LASC) as long ago as 1998 in a submission entitled *Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority (September 1998)* when LASC observed:

"the arrangement of having civil servants administering publicly funded legal aid services was institutionally flawed because of the risk of pressure from the Administration. Such an arrangement encourages the perception of a lack of independenceAn independent legal aid authority ...would recognize and give expression to institutional protection for operational independence through clear separation of the powers to make legal aid policies on the one hand and to operate legal aid services on the other. The authority's framework and arm's length relationship with the Government would properly foster the culture of independence, thus enhancing service delivery.

*Moreover, the board of the independent legal aid authority should allow for greater public participation. There should be more members of the public nominated by different non-governmental organizations or public bodies of different social backgrounds"*¹

The Law Society has long advocated and continues to advocate for the establishment of an independent statutory Legal Aid Authority.

¹ LASC "Legal Aid in Hong Kong" pp232-234

2. Review of Community Legal Advice Service

The legal aid systems in Ontario, UK and New South Wales all provide some form of free legal advice to their citizens in the form of “*Community Legal Service*” in England and Wales, “*Community Legal Clinics*” in Ontario, and the “*Community Legal Services Programme*” in NSW.

The Department of Justice’s recent Report on “*Demand for and Supply of Legal Services*” confirms that members of the public in Hong Kong encounter difficulties in trying to deal with “difficult to solve problems” many of which are less than HK\$10,000 in value.

Members of the legal profession, both solicitors and barristers have traditionally provided pro bono services to the community by participating in such schemes as *The Free Legal Advice Scheme*, *Property Management Advisory Centres*, *Law Week*, *Bar’s Free Legal Advice Scheme*; the Administration provides funding to the *Duty Lawyer Service* which offers the public information via *Tel-law* on topics such as “making a will, bankruptcy, Guardianship Board etc” , finally, many NGOs also provide advice with some legal content e.g. domestic violence.

The needs of the community are not met by this piecemeal approach.

The Law Society notes the Report contains a summary of the services offered by the *Community Legal Clinics* in the Province of Ontario (see page 31 of the Report) and **recommends that the Government consider expanding the role of legal aid to provide such community legal services in Hong Kong.**

3. Supplementary Legal Aid Scheme (“SLAS”)

The Law Society supports the expansion of SLAS which has been self funding since its introduction in 1984.

We note that Lord Justice Jackson praised SLAS in his Preliminary Report on “*Civil Litigation Costs Review*” as “the most famous self funding scheme...operated by the Hong Kong Legal Aid Department”. (See Appendix 1).

We note the President of the Law Society also made the following plea for action at the Opening of the Legal Year 2005:

- **Widen the band of financial eligibility**
Currently it is available for applicants with disposable income of HK\$175,880 but not exceeding HK\$488,400
- **Extend the category of actions under SLAS**

Appendix 1:

Extract from Preliminary Report on “*Civil Litigation Costs Review*” by Lord Justice Jackson’s on CLAF and SLAS

4. Review of Financial Eligibility Limits

We note the financial eligibility limits are adjusted every February in line with the Consumer Price Index A and also every 5 years in line with the latest Household Expenditure Survey.

We question whether the means test is functioning as the current level of disposable income is far too low as it excludes such a significant portion of the *sandwich class*. Hong Kong was ranked as the 5th most expensive city in the world in *Mercer's 2009 Cost of Living Survey*².

We recommend a full review of the financial eligibility limits so that more Hong Kong citizens will be eligible for either ordinary legal aid or for SLAS.

5. Per Capita spending

The findings on the per capita spending in the Report are sobering:

○ Hong Kong	HK\$75
○ England and Wales	HK\$430
○ Ontario	HK\$173
○ NSW Australia	HK\$150

It is worth repeating that Legal Aid is not some form of social welfare, it is an integral part of the administration of justice and the Government has a duty to ensure it complies with Article 25 of the Basic Law: "*All Hong Kong residents shall be equal before the law*".

The Government has a duty to facilitate the community's access to the justice system by increasing funding to ensure Legal Aid maintains its role as an integral part of the legal system.

The Law Society of Hong Kong
1 September 2009

127849

² <http://www.mercer.com/costofliving>

CHAPTER 18. CLAF AND SLAS EXPLAINED**1. INTRODUCTION**

1.1 **Nature of self-funding schemes.** This chapter considers self-funding schemes under which the costs of funding claims are re-cycled by means of a levy of some sort on successful claims, enabling a population of cases to be funded on a broadly cost neutral basis. Such a mechanism has never been put into operation in this jurisdiction, although there have been numerous proposals to do so and self-funding schemes have been set up in other jurisdictions with varying degrees of success.

1.2 Self-funding schemes are different in concept from individual funding mechanisms such as a conditional or contingency fee agreement between lawyer and client. A CFA can work for an individual claim in isolation, its success fee and premium being determined solely according to the risks of that individual case. By contrast self funding systems usually require a range of cases in which the stronger will tend to subsidise the weaker.⁵⁴ Professor Zander has pointed out:

“The concept avoids the main alleged danger of contingency fees of lawyers being tempted into unethical conduct because of the financial importance of winning.”⁵⁵

1.3 **CLAF and SLAS.** Most self-funding schemes are put forward under the banner of either a CLAF or a SLAS. CLAF usually stands for “Contingency [or Contingent] Legal Aid Fund”. SLAS usually stands for “Supplementary Legal Aid Scheme”. These are not terms of art and cover a wide variety of funding options. For the purposes of this report, however, I will use the term CLAF when referring to a free-standing fund. The essential feature of a CLAF is therefore that once it is established it is expected to stand on its own feet and be fully self-financing. A SLAS on the other hand is a self-funding mechanism which is built into or added onto an existing publicly funded legal aid scheme, and administered by the relevant legal aid authority. In principle self-funding mechanisms could be introduced into any legal aid scheme across the board, in which case the effect would simply be to reduce the net cost of the scheme. Most proposals for a SLAS, however, propose it for individuals outside normal legal aid eligibility: the so-called “MINELAS”, who are too rich for legal aid but too poor to proceed privately.

1.4 **Background.** In 1978 Justice published its original proposals for a CLAF. 21 years later in 1997 in the run-up to the Access to Justice Act 1999 (“1999 Act”) and removal of personal injury cases from the scope of legal aid a range of proposals were made by the Bar Council, Law Society and the Consumer Association.⁵⁶ None of these proposals were implemented, as the Government chose instead to promote and enhance CFAs under the 1999 Act reforms (see chapter 16). However, provisions were included (but not as yet implemented) within the 1999 Act to provide for a CLAF or SLAS system.⁵⁷ It was also observed at the time that if there was indeed a

⁵⁴ Admittedly this distinction becomes blurred when one considers a large solicitors firm running a basket of cases under CFAs to spread the risk of losing. However, the terms of each CFA must be justified on its own facts – see *C v W* [2008] EWCA Civ 1459 and earlier authorities.

⁵⁵ “*Cases and Materials on the English Legal System*” (Cambridge University Press, tenth edition, 2007), page 646.

⁵⁶ See “*CLAF – An idea whose time has come*”, Bar Council 1997; “*Proposals to link legal aid and conditional fees*”, Law Society 1997; CA Policy Paper on CLAF, 1997.

⁵⁷ The 1999 Act section 28. See next chapter.

sound business case for setting up a CLAF there was nothing to prevent this being done on a private commercial basis.

1.5 The CJC Report. In June 2007 the Civil Justice Council published its second report on the future funding of litigation and alternative funding structures.⁵⁸ This report included a detailed evaluation of a wide range of CLAF and SLAS options and recommended that a CLAF should not be established but that, subject to consultation and appropriate financial modelling, a SLAS should be set up and operated by the Legal Services Commission. The Government has chosen not to implement this proposal at the present time, there being insufficient evidence of need for a SLAS mechanism in light of the wide availability of CFAs.

1.6 Main policy issues. In this report I will not set out in detail the numerous possible varieties of CLAF or SLAS which could be established – these are discussed in more detail in the CJC report. It is however useful to summarise the main policy issues which would need to be addressed in setting up such a scheme, with particular reference to the impact on costs and cost shifting:

- (i) Should any self-funding scheme be set up as a CLAF or as a SLAS and, for a CLAF in particular, where should initial seed funding come from?
- (ii) From what source should the levy on successful cases come, and how should it be calculated? Most CLAF and SLAS models are based on a percentage levy on damages recovered, but other options include a levy on *inter partes* costs recovered.
- (iii) Who should be liable for other side's costs (assuming cost shifting applies)? This issue can be highly material to the viability of a CLAF or SLAS. A potential key advantage of a SLAS is to make use of statutory legal aid cost protection under section 11 of the 1999 Act.
- (iv) What should the remuneration regime be for lawyers operating under the scheme? For a SLAS the obvious answer is likely to be to use existing legal aid remuneration rates.

2. SELF FUNDING SCHEMES IN OTHER JURISDICTIONS

(i) Hong Kong

2.1 The Hong Kong SLAS. The most famous self funding scheme is that operated by the Hong Kong Legal Aid Department, established in 1984. It is a SLAS in the true sense, funded by a levy of damages recovered. The levy is 10%⁵⁹ in respect of cases that proceed to trial and 6% in respect of cases settled before the brief for trial is delivered. Whilst applicants to the SLAS are means-tested the eligibility limits are higher than those which apply in the main Ordinary Legal Aid Scheme.⁶⁰ The SLAS scheme was started up with a \$1 million Hong Kong dollar loan (subsequently repaid) provided by the Jockey Club (which has a similar role to lottery funding in the UK). The scheme has been running profitably, in the sense of covering both its expenditure

⁵⁸ "Improved access to Justice – Funding Options and Proportionate Costs", CJC, August 2007.

⁵⁹ This figure was originally 12%, but was reduced to 10% in 2005.

⁶⁰ According to figures provided at a meeting with the Hong Kong Legal Aid Department in March 2009, approximately 50% of households are eligible for ordinary legal aid; approximately 70% of households are eligible for support from the SLAS.

and administration costs, for 25 years. The scheme covers a range of personal injury cases from road traffic to clinical and dental negligence.⁶¹

2.2 Number of cases supported. Despite its high profile, the scheme covers only a modest number of cases, the volume of which has fallen somewhat in recent years. The legal aid authorities have a cautious approach to assessing the merits of applications, but it also appears likely that significant numbers of more straightforward personal injury cases proceed by means other than the SLAS. It should be noted, however, that CFAs and contingency fee agreements are not permitted in Hong Kong. The following table shows the volume of cases accepted by the Hong Kong SLAS in recent years:

Year	Applications received	Certificates granted
1997	260	179
1998	252	157
1999	365	268
2000	211	204
2001	220	159
2002	162	124
2003	106	79
2004	120	85
2005	158	85
2006	137	127
2007	136	79
2008	146	95

2.3 Success rates and financial viability of the SLAS. The above figures are on a calendar year basis. The SLAS scheme's financial year, however, runs from 1st October to 30th September. In the year 2006-7 the success rate for cases supported by the SLAS was 90.5%. In the year 2007-8 the success rate was 87%. A high success rate is necessary for the financial viability of the fund. A substantial number of "won" cases may be necessary to cover the costs of both sides in one "lost" case. By way of example, the Hong Kong Legal Aid Department tells me that one heavy case which was recently lost cost the SLAS a total of some HK \$17 million.⁶² The balance of the SLAS fund as at the end of December 2008 was HK \$90.3 million.

2.4 Mediation. Since 2nd April 2009 the SLAS has been empowered to meet the costs of mediation as well as costs of court proceedings. If the mediation is successful, it is anticipated that the defendant will reimburse the mediation costs as part of the settlement. If, however, for any reason the defendant does not reimburse the mediation costs, then the Legal Aid Department would deduct those costs (as well as the 6% levy) from the damages.

2.5 Perceptions of the SLAS amongst court users. The Hong Kong Law Society regards the SLAS as a valuable mechanism for promoting access to justice. I understand that the Law Society is pressing for the SLAS to be extended in two ways: first to widen the band of financial eligibility; secondly to widen the range of cases which the SLAS is empowered to support. There is, however, a perception amongst certain commercial solicitors⁶³ that when they are litigating against a SLAS supported

⁶¹ Originally the SLAS only covered personal injury claims. In 1995, however, with the aid of a HK \$27 million grant from the Hong Kong Government, the scheme was expanded to cover claims for medical, dental and legal negligence.

⁶² This was an employers liability case, with senior counsel, junior counsel and expert witnesses on each side. The trial lasted over a month. There was no appeal.

⁶³ Expressed to me at a meeting of commercial solicitors on 25th March 2009.

claimant, the bureaucracy of the Legal Aid Department makes settlement negotiations difficult. The Department assesses a case at the outset and again just before trial. However, settlement between those two dates can give rise to difficulties. In the opinion of those commercial solicitors, a CLAF operated independently of the Legal Aid Department but upon the same principles as the present SLAS would be more advantageous.

(ii) Canada

2.6 Ontario. The Ontario Class Proceedings Fund (the "Fund") was established pursuant to the Class Proceedings Act 1992 with seed funding of Cdn \$500,000, which was a grant made jointly by the Law Foundation of Ontario and the Attorney General of Ontario. The Fund meets adverse costs orders and pays disbursements⁶⁴ in class actions, but it does not pay fees to the claimants' lawyers. If the action is successful, then the Fund recovers from the proceeds of the action (a) the disbursements which it has previously paid out and (b) 10% of the net proceeds of the action.⁶⁵ In Canadian class actions, the claimants' lawyers invariably act on contingency fee agreements.⁶⁶ The amount of the lawyers' remuneration is fixed by the court at the end of each case. The court may allow less remuneration than is provided for in the contingency fee agreement. The lawyers' fees are also deducted from the proceeds of the litigation. The various deductions made from the damages (as itemised above) are partially offset by whatever costs are recovered from the defendants, either by order of the court or pursuant to the terms of the settlement.

2.7 Although successful, the Ontario Class Proceedings Fund operates on relatively low volumes. The larger and more meritorious class actions usually proceed without reference to the Fund. In 2007 the Fund supported two class actions (out of three applications). In 2008 the Fund supported nine class actions (out of 12 applications). I am told by counsel to the Class Proceedings Committee (which runs the Fund) that the Fund supports approximately 10% of all class actions.⁶⁷ The Fund has supported 89 class actions since commencement of operations in 1993. The balance held by the Fund as at 31st December 2008 was Cdn \$6,571,628.

2.8 I heard some concern expressed by the judiciary as to the high level of the deduction made by the Fund in cases where (a) the sum awarded to the claimants may be large and (b) the commitment made by the Fund may be modest (e.g. because the claim is strong and is settled early). The Fund, however, has no discretion as to what it deducts, since the figure of 10% is fixed by statute. I am told, however, that the Class Proceedings Committee is considering whether amendments to the 1992 Act should be sought, which would reduce the percentage deducted (a) in very high value cases and (b) in low value cases.

2.9 Quebec. Perhaps the most innovative and active self-funding scheme is the Fonds D'aide aux Recours Collectifs ("the Fonds") which has been operating in Quebec since 1978. The Fonds is a form of subsidised CLAF to support class actions. Canada has a comprehensive class action regime, including the power of courts to

⁶⁴ Disbursements are court fees, experts' fees etc. Counsel's fees do not constitute disbursements.

⁶⁵ The net proceeds of the action are the proceeds of the action after all costs have been deducted.

⁶⁶ In contingency fee agreements for class actions, the premium for success is a multiple of the normal fee, rather than a percentage of the sum awarded to the claimants: see chapter 61 below.

⁶⁷ Meeting on 9th April 2009.

award general “*cy pres*” damages which may remain unallocated to any individual claimant at the end of a case. The Fonds generates its income from a levy on these or on allocated damages.

2.10 Interestingly, the Fonds operates in a jurisdiction where there is only limited cost shifting.⁶⁸ In successful cases the claimant lawyers will reimburse the Fonds for the funding provided (which will have been at limited prescribed rates similar to those under our own legal aid regime) and receive payment by way of contingency fee out of all damages awarded together with limited *inter partes* costs.

(iii) Australia

2.11 South Australia. The South Australia Litigation Assistance Fund (“SALAF”) was set up in July 1992 with a seeding grant of Aus \$1 million. Applications for assistance are considered by an Assessment Panel of the SALAF. If an application for assistance is approved, the SALAF pays the assisted party’s costs on an ordinary solicitor/client basis. In the event of success, the SALAF (a) recovers costs from the defendant and (b) deducts 15% of the judgment or settlement sum. If the assisted party is unsuccessful, the SALAF does not meet any costs order made in favour of the defendant. The SALAF has now operated successfully for some 19 years. Over that period it has received on average 85-90 applications per year.

2.12 Western Australia. The Western Australia Litigation Assistance Fund (“WALAF”) was launched in April 1989 with a seeding grant of Aus \$1 million.⁶⁹ The Fund encountered difficulties and ceased accepting applications in 1996. When I visited Western Australia on 27th March 2009, I was told that a new litigation assistance fund was in the process of being set up. It is anticipated that this fund will commence operations within the next few weeks.

2.13 Victoria. A charitable trust, “Law Aid”, is administered by the Law Institute of Victoria and the Victorian Bar Council for the assistance of civil litigants. Law Aid will meet the disbursements of an assisted party, including expert fees, witness expenses, court fees etc. Law Aid is dependent upon the barrister and solicitor acting either *pro bono* or on a “no win - no fee” basis. In the event of success, Law Aid deducts 5.5%⁷⁰ of the judgment or settlement sum.

2.14 It is a feature of the above schemes and of similar schemes set up in certain other states that the volume of applications is low. This is no doubt attributable to the fact that fee shifting applies in these jurisdictions. The schemes offer no form of cost protection to the assisted parties, who remain fully liable for any adverse costs orders. This clearly acts as a major deterrent to bringing claims. Detailed information on Australian funding systems can be obtained from the Queensland Public Interest Law Clearing House.⁷¹

(iv) Northern Ireland

2.15 Legal aid remains available for personal injury claims in Northern Ireland and neither conditional nor contingency fees are available. This lack of alternative, more aggressive, funding models could make Northern Ireland an attractive location for a

⁶⁸ In Quebec costs are awarded in class actions on the small claims basis.

⁶⁹ Paid jointly by the WA Lotteries Commission and the Public Purpose Trust.

⁷⁰ Law Aid has a statutory entitlement to deduct up to 10%, but 5.5% is the figure currently set by the trustees of Law Aid.

⁷¹ See www.qpilch.org.au.

CLAF or SLAS. Whilst none has been established, several studies have indicated that such a system could well be viable. A 2001 study by the Legal Service Research Centre⁷² based on existing legal aid damages claims was positive, provided there was careful screening of the merits of applications. However, a further study by Deloitte & Touche⁷³ was more sceptical, but was based on the premise that a CLAF or SLAS should accept liability for other side's costs.

2.16 The Legal Services Commission for Northern Ireland has been consulting on setting up a form of SLAS in the event that legal aid ceases to be available for personal injury cases. For the time being, however, while legal aid remains in place, the Commission plans to tighten up the merits criteria for legal aid by implementing a Funding Code similar to that operating in England and Wales.⁷⁴ That may create a more disciplined system within which a SLAS would be economically viable.

⁷² "Report on the feasibility of a CLAF scheme for Northern Ireland", LSRC, July 2001.

⁷³ "Review of the Operation of Litigation Funding Agreements in Northern Ireland", Deloitte & Touche, November 2002.

⁷⁴ See chapter 12 for more details.