

**Extract from the draft minutes of meeting of
the Panel on Administration of Justice and Legal Services
on 21 December 2010**

X X X X X X X X X

Action

IV. Report on the study conducted by the Legal Aid Services Council's ("LASC") Interest Group on the Scope of the Supplementary Legal Aid Scheme ("SLAS")

[LC Paper Nos. CB(2)570/10-11(01) to (02), CB(2)591/10-11(04) to (05), CB(2)638/10-11(01) to (02) and IN02/10-11]

Briefing by LASC

9. Ms Corinne Remedios, member of LASC and Chairperson of the Interest Group on Scope of SLAS ("IG"), briefed members on the recommendations of LASC on expansion of SLAS as set out in the letter dated 13 December 2010 from the Chairman of LASC to the Chief Executive ("CE") [LC Paper No. CB(2)570/10-11(01)]. In gist, LASC recommended that SLAS be extended by way of establishing a parallel scheme with a wider scope of coverage ("SLAS Part II") to be administered separately from the existing scheme ("SLAS Part I"); and that the entire sum of \$100 million earmarked by the Administration for injection into the SLAS fund should be set aside for SLAS Part II and handed over to the Director of Legal Aid ("DLA") as soon as possible. Ms Remedios then elaborated on the detailed recommendations of LASC as follows -

SLAS Part II

- (a) the types of cases to be covered by SLAS Part II should be introduced on an incremental basis, starting with the less risky types of cases. With this in mind, LASC recommended that SLAS Part II should cover the following types of cases in the first batch: (i) professional negligence claims against accountants, architects, engineers and surveyors; (ii) claims for property damage against incorporated owners of a multi-storey building; and (iii) derivative claims;
- (b) the following types of cases might worth consideration after the first batch was introduced: (i) claims against estate agents, independent financial consultants and insurance agents; (ii) claims against developers in the sale of new flats, offices or shop premises; and (iii) small marine accidents;

Action

- (c) LASC did not recommend the inclusion of the following types of cases under SLAS Part II: (i) claims in respect of trusts; (ii) claims involving disputes between limited companies or their minority shareholders; and (iii) sale of goods and provision of services;
- (d) higher application fees and contribution rates should be adopted for SLAS Part II claims to reflect the complexity of such claims and the higher risks involved;
- (e) SLAS Part II should be tested for its viability and effectiveness and be reviewed and fine-tuned periodically;

SLAS Part I

- (f) employee claims on appeal from the Labour Tribunal should be included under SLAS Part I without size limit as this was socially deserving; and
- (g) medical, dental and legal professional negligence claims be transferred from the existing SLAS to SLAS Part II to align the administration of legal aid for claims against professional negligence and having regard to the complexity and risk profile of such cases.

10. At the request of the Chairman, LASC agreed to provide the Chinese version of the report of IG on expansion of SLAS [LC Paper No. CB(2)570/10-11(02)] as soon as practicable to facilitate relevant organizations to give views on the subject at the meeting on 24 January 2011.

LASC

Briefing by the Administration

11. DSHA introduced the Administration's paper [LC Paper No. CB(2)591/10-11(04)] setting out, among others, the Administration's timetable on processing LASC's proposals on expansion of SLAS. DSHA said that the Administration noted LASC's recommendations that SLAS be extended on an incremental basis starting with the less risky types of cases, and that higher contribution rates be set for cases under SLAS Part II to help sustain the long-term financial viability of the scheme. The Administration would carefully consider the recommendations of LASC and the views of stakeholders before formulating its position. She added that the Administration also noted LASC's recommendation that derivative claims be covered not only under

Action

SLAS Part II, but also the Ordinary Legal Aid Scheme ("OLAS"). While this was outside the scope of the review on SLAS, the Administration would study the viability of the proposal.

12. The Chairman enquired about the Administration's position on LASC's recommendation that medical, dental and legal professional negligence claims currently covered under the existing SLAS be transferred to SLAS Part II. DSHA responded that the recommendation would not affect the coverage of such professional negligence claims under SLAS. It would, however, mean that aided persons for such claims would have to pay the higher contribution rates proposed for SLAS Part II. The Administration recognized that the proposed higher contribution rates would have a positive impact on the financial viability of the scheme, and would carefully examine the recommendation in the light of stakeholders' views before coming to its view on the matter.

Views of the two legal professional bodies

Hong Kong Bar Association ("Bar Association")

13. Mr Ruy Barreto, Mr Kumar Ramanathan and Mr Nicholas Pirie presented the views of the Bar Association as detailed in its submission [LC Paper No. CB(2)638/10-11(02)].

14. Mr Ruy Barreto said that at its meeting on 21 July 2010, the Panel had reached a consensus that the Administration should study the proposals put forward in the Bar Association's submission dated 20 July 2010 as the basis for improving legal aid services. The Bar Association was disappointed with the recommendations of LASC which had failed to address fully the integrated package of proposals put forward by the Bar Association. For instance, LASC had not responded to the proposals for further increasing the financial eligibility limits ("FELs") for OLAS and SLAS to \$350,000 and \$3 million respectively. Neither had LASC indicated whether it agreed with the Administration's proposal of lowering the age requirement for the special elderly provision for calculation of financial resources to 60. In addition, LASC had also failed to provide a clear timetable for implementing its proposal of expanding the scope of SLAS on an incremental basis.

15. Mr Kumar Ramanathan said that there was a fundamental conceptual error with the LASC report. He elaborated that there was no such thing as a risky type of claim, but one could have risky individual cases. Individual cases of all types of claims could be difficult and complex, and risk assessment should be based on the facts and merits of each individual case, and not the type

Action

of claim it belonged to. In response to the Chairman's enquiry on the Bar Association's view on LASC's proposal of dividing SLAS into Part I and Part II, Mr Ramanathan said that there should only be one scheme of SLAS, pointing out that IG, in paragraph 53 of its report, envisaged that the two schemes would be merged eventually. In any event, the Bar Association considered that the professional negligence claims currently covered under the existing SLAS should not be transferred to the proposed SLAS Part II, bearing in mind that part of the surplus in the existing SLAS Fund came from damages recovered from such types of cases. The Bar Association did not see any good reasons for dividing SLAS into two schemes.

16. Mr Nicholas Pirie said that he was pleased to see that LASC agreed with the Bar Association's proposal of extending SLAS to cover claims concerning financial products. Pointing out that the Financial Services and Treasury Bureau had indicated that it would implement the proposal of establishing a Financial Dispute Resolution Centre to handle disputes arising from services provided by financial institutions to individual consumers, he saw no reason why legal aid should not be made available under SLAS for claims concerning financial products. Mr Pirie further said that the proper test for expansion of scope of SLAS should be recoverability of damages. Applying such a test, he considered that claims against independent financial consultants should be included in the expansion of SLAS, given that all persons registered under the Securities and Futures Ordinance (Cap. 571) had been required to take out compulsory insurance since 1994. He considered that legal aid should also be made available for class actions should legislation be introduced for class actions. Noting that with the reduction of the contribution rates, the annual operating surplus of the SLAS Fund had been steadily declining, he was of the view that consideration should be given to increasing the contribution rates for all SLAS cases to strengthen the financial position of the SLAS Fund.

Law Society of Hong Kong ("Law Society")

17. Mr Leslie YEUNG referred members to the submission of the Law Society tabled at the meeting for its preliminary observations on LASC's recommendations on expansion of SLAS. He highlighted that the Law Society considered LASC's proposed contribution rates for SLAS Part II at 20% and 15% (for cases settled before delivery of brief to counsel) of the awarded damages too high, and this would turn the middle class to engage recovery agents. He added that the Law Society had no strong view on the proposed creation of SLAS Part II to cover the new types of claims, having regard to the complexity of such claims and given that the proposed SLAS Part II would be tested for viability and subject to review.

Action

(*Post-meeting note:* The Law Society's submission was issued to members vide LC Paper No. CB(2)657/10-11(01) on 22 December 2010.)

LASC's response to the views of the two legal professional bodies

18. Mr Paul CHAN, in his capacity as Chairman of LASC, said that LASC was well aware of the discussions of the Panel over the past year on reform of legal aid services. He explained that his letter to CE dated 13 December 2010 had focused on SLAS. Half of the members of LASC were drawn from the legal profession while the other half were lay members; and the quorum requirement was 70% of total membership of LASC. The composition and quorum requirement of LASC ensured a balanced representation of views during LASC's discussions. Apart from the views of the legal profession, LASC would also consider the views of stakeholders from other sectors of the community. He stressed that as an independent advisory body, LASC would examine carefully the views of all stakeholders before reaching its own conclusion on issues under study.

19. On the proposed division of SLAS into Part I and Part II, Mr Paul CHAN said that the proposal was made having regard to the self-financing design of SLAS and the need to maintain its financial viability by a high success rate in litigation of cases under SLAS. He pointed out that in 2008, the loss of one SLAS case had cost the SLAS Fund some \$17 million. Hence, great prudence was needed in considering the additional types of cases to be covered under SLAS. As SLAS operated as a kind of mutual insurance fund, it was considered appropriate to charge higher contribution rates for cases under SLAS Part II given the higher risks involved.

Discussion

20. Noting from paragraph 7 of the Administration's paper that the Administration would consult the relevant bureaux before formulating its position on LASC's recommendation to remove the \$60,000 limit for employees' claims cases, Mr WONG Kwok-hing enquired when the Administration would come to its decision on the matter. Referring to paragraph 18 of the same paper, DSHA advised that the Administration would report to the Panel in February/March 2011 on its position on the proposed expansion of SLAS, including the proposal for removing the \$60,000 limit for employees' claims cases.

Action

21. Mr WONG Kwok-hing enquired whether individual members of Incorporated Owners ("IOs") could apply for legal aid to defend against claims brought against them in their capacities as members of IOs. Deputy Director of Legal Aid/Applications and Processing advised that under the existing legal aid system, IOs could not apply for legal aid for taking or defending legal proceedings. On the other hand, if a person was being sued by IOs, he could apply for legal aid to defend against the legal action.

22. While welcoming LASC's proposed expansion of SLAS, Ms Audrey EU expressed disappointment with its recommendation that claims against estate agents and claims against developers in the sale of new flats be considered at a later stage on the ground that the Government would introduce legislation to strengthen the regulation over selling of new flats. In her view, irrespective of whether such legislation would be introduced, the general public could hardly afford to take legal action against developers if they had no recourse to legal aid. She urged LASC to re-consider its recommendation in this regard. Mr Albert HO, Mr LAU Kong-wah and Mr LEUNG Kwok-hung also expressed support for including claims against developers in SLAS. Mr Albert HO considered that monetary claims between buyers and sellers arising from sale of flats (such as those involving forfeiture of deposits) should also be covered under SLAS.

23. Mr LAU Kong-wah noted from the letter of LASC's Chairman to CE that the success rate of claims by new flat buyers against property developers was very low, and even for the few successful cases, the recovery of both damages and costs was very small or even empty. However, he also noted from a previous submission of the Bar Association that there was a high rate of recovery in respect of such claims. He sought clarification on the apparently conflicting information.

24. Mr Paul CHAN explained that the statistics cited in his letter to CE was based on claims by new flat buyers against property developers dealt with under OLAS in the past 10 years as provided by the Legal Aid Department ("LAD"). The statistics showed that the success rate of this type of claims was very low. In one of the cases, two senior counsel had been engaged in different stages of the proceedings but eventually the case was lost. To facilitate the Panel's consideration, LASC would provide the relevant statistics to members after the meeting. Mr CHAN further said that LASC had recommended not including such claims under SLAS Part II for the time being as it reckoned that they would have a higher success rate after the Government had introduced legislation to strengthen the regulation over the sale of new flats. Mr Ruy Barreto reiterated the Bar Association's view that LASC had muddled

Action

up the criteria for expansion of types of cases covered under SLAS, which should be based on reasonable prospects of recovery of damages, with the merits test conducted by LAD professionals in processing individual cases.

25. Mr Albert HO expressed disagreement with LASC's view that claims in respect of trusts should not be included in SLAS as they would probably be covered under professional negligence. He pointed out that not all such claims could be covered under professional negligence, given that trustees and executors of wills were not necessarily professionals.

26. Mr Albert HO also did not subscribe to LASC's view that claims arising out of the sale of goods and provision of services could be taken care of by the Consumer Council and hence should not be included under SLAS. He stressed that the mechanism for dealing with consumer claims under the Consumer Legal Action Fund was no substitute for legal aid, as the size of the Fund was small and only cases involving significant public interest might be granted with assistance under the Fund after a rigorous selection process. Echoing the view that the Consumer Legal Action Fund was inadequate to meet the needs of the general public for legal assistance in respect of claims arising from the sale of goods and provision of services, Mr LAU Kong-wah sought elaboration from LASC on its rationale for not recommending the inclusion of such types of claims under SLAS.

27. Mr Paul CHAN said that except for claims under the Employees' Compensation Ordinance (Cap. 282), the existing SLAS only covered cases where the claim was likely to exceed \$60,000. In general, claims arising from the sale of goods and provision of services involved small amounts of claims, and the litigation costs involved usually far exceeded the values of the damages. Owing to the small amounts involved in such claims, not much contributions were expected to be generated from successful cases; on the other hand, one lost case could impact heavily on the SLAS Fund which had to bear the costs of both sides. This was one of the reasons why LASC had recommended against the inclusion of such claims under SLAS. The Chairman said that given the \$60,000 threshold requirement, she did not consider that the small size of such claims was a valid reason for excluding altogether this type of claims from SLAS.

28. Mr LEUNG Kwok-hung opined that in considering the types of cases to be covered under SLAS, LASC should give predominant weight not to financial consideration, but to the importance of widening access to justice and promoting equality before the law. In his view, extending the scope of SLAS to cover claims against developers in the sale of flats as well as claims arising

Action

from the sale of goods and provision of services could help deter unfair or unscrupulous trade practices by large corporations.

29. On LASC's proposal of dividing SLAS into Part I and Part II and setting higher contribution rates for claims under SLAS Part II, Ms Audrey EU considered it unjustifiable to propose that higher contribution rates be charged for cases under SLAS Part II on the ground that they were more risky types of cases. She pointed out that irrespective of the type of claims they belonged to, all legal aid applications had to satisfy the merits test, and cases assessed to have a low chance of success or recovery of damages would not be granted legal aid. Mr Albert HO shared the view that there was a conceptual problem with the proposed division of SLAS into Part I and Part II. He considered it wrong in principle to say that certain types of cases were more risky than the others, as risk assessment should be based on the facts and merits of each case. The Chairman said that the Bar Association had also elaborated on this point in paragraphs 11 to 15 of its submission and requested LASC to make a response to this at the next meeting.

30. Dr Priscilla LEUNG said that LASC's recommendations for expansion of SLAS had responded in part to the long-standing call of Members for enhancing the middle class' access to justice. For instance, Members' proposals of extending the scope of SLAS to cover claims concerning financial products and a wider range of professional negligence claims had been taken on board by LASC. However, she was concerned that LASC's recommendations had not addressed the demand for extension of legal aid to cover disputes concerning compulsory land sale, provision of legal assistance to Hong Kong residents involved in litigation on the Mainland, and cases where whistleblowers were being sued for defamation and there was great disparity in the financial resources between the two parties. She called on LASC to consider including these types of cases in its recommendations for expansion of SLAS.

31. Mr TAM Yiu-chung expressed support for LASC's recommendation to establish SLAS Part II to extend the coverage of SLAS. He, however, considered that the contribution fees under the existing SLAS and OLAS should be lowered so that more people could benefit from the expanded ambit of legal aid.

32. Ms Emily LAU said that it appeared that financial consideration was the prime concern of LASC in considering the types of cases to be covered under the expansion of SLAS. She enquired whether members of LASC who were drawn from the legal profession and lay members held different views on the expansion of SLAS and how LASC sought to strike a proper balance between

LASC

Action

maintaining the financial viability of SLAS and widening the middle class' access to justice in making its recommendations on expansion of SLAS.

33. Mr Paul CHAN said that members of LASC had indeed expressed different views during their deliberations on expansion of SLAS; however, it could not be said that lawyer members and non-lawyer members inevitably differed in views. He reiterated that given the self-financing nature of SLAS, LASC must take account of the financial viability of SLAS in considering the type of cases to be covered under the scheme. He stressed that all members of LASC were committed to expanding the coverage of SLAS to widen access to justice.

34. Concluding the discussion, the Chairman said that further discussion would be held on the expansion of SLAS at the next regular meeting scheduled for 24 January 2011. She requested LASC to respond to the concerns raised by members and the legal professional bodies. She also requested the Clerk to prepare the minutes of this discussion item as soon as possible to facilitate the discussion at the January 2011 meeting.

X X X X X X X X X X

LASC
Clerk