

**For discussion on
24 April 2017**

**Legislative Council
Panel on Administration of Justice and Legal Services**

Review of the Supplementary Legal Aid Scheme

INTRODUCTION

Subsequent to the substantial expansion of the scope of the Supplementary Legal Aid Scheme (“SLAS”) in November 2012 following the previous review, the Home Affairs Bureau invited the Legal Aid Services Council (“LASC”) to conduct a further review on SLAS. This paper briefs members on LASC’s recommendations on the proposed expansion of SLAS and the Government’s position having considered the need to meet public demands in the light of latest developments.

PROPOSALS

2. Having carefully considered LASC’s recommendations, policy objectives of legal aid, the guiding principles of SLAS as well as views from relevant bureaux and departments, the Government has decided to –

- (a) accept LASC’s recommendation on expanding the scope of SLAS to cover monetary claims exceeding \$60,000 –
 - (i) for professional negligence against financial intermediaries licensed for Type 1 (dealing in securities), Type 2 (dealing in futures contracts) or Type 8 (securities margin financing) regulated activities by the Securities and Futures Commission (“SFC”); and
 - (ii) for proceedings in derivatives of securities, currency futures or other futures contracts when fraud, deception or misrepresentation was involved at the time of purchase;
- (b) accept LASC’s recommendation that the scope of SLAS should not be expanded to cover claims against the incorporated owners of a multi-storey building, claims for property damage from accidents involving small marine boats, claims against property developers by minority owners in compulsory sales, trusts, disputes between limited companies and their minority

- shareholders, sale of goods and provision of services, class actions, defamation proceedings and election petitions;
- (c) accept LASC's proposal that no change is to be made to the level of financial eligibility limit ("FEL") for SLAS for the time being and that the FEL be monitored and reviewed annually; and
 - (d) maintain the age-related exemption of assets for means test for the Ordinary Legal Aid Scheme ("OLAS") and SLAS at age of 60.

JUSTIFICATIONS

Scope and Guiding Principles of SLAS

3. SLAS is a statutory self-financing legal aid scheme¹ which came into operation in 1984. It provides legal assistance to people whose financial resources exceed the statutory limit allowed under OLAS (currently at \$290,380), but are below the FEL specified for SLAS (currently at \$1,451,900).

4. The scope of SLAS initially covered claims for damages for personal injuries or death. It was expanded to include employees' compensation claims in 1992 and civil proceedings for medical, dental and legal professional negligence in 1995. In November 2012, the scope of SLAS was significantly expanded to cover a wider range of professional negligence claims, negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products, monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties, and representation for employees in appeals against awards made by the Labour Tribunal.

5. To maintain its financial viability, SLAS has been targeting at cases that carry a high chance of success with good damages to costs ratio since inception. SLAS covers mainly cases where the defendants are insured or where the likelihood for payment of damages is high (e.g. claims for personal injuries or death and work-related accidents). The high chance of recovery of damages helps ensure, to a large extent, the financial sustainability of the scheme. When

¹ The operation of SLAS is governed by the provisions prescribed under Part VI of the Legal Aid Ordinance (Cap. 91) ("LAO"). The Supplementary Legal Aid Fund ("SLAF") which finances SLAS was set up under section 29 of the LAO. SLAF is funded by an initial seed money of \$1 million from the Lotteries Fund and an injection of \$27 million and a further injection of \$100 million by the Government in 1995 and 2012 respectively to support the operation of the expanded SLAS. Its income sources also include the application fees payable by applicants, the interim contributions from aided persons and the final contributions from a percentage deduction of the damages recovered in successful cases. The balance of SLAF stood at \$193 million as at end September 2016.

deliberating on new categories of cases to be covered by SLAS, we should bear in mind this principle and not seek to cover cases which do not involve monetary claims, or have a relatively low success rate or poor prospect of recovery.

Proposed Expansion of Scope of SLAS

6. Whilst we were still gaining experience on the proceedings newly added in November 2012 and assessing their impact on the SLAF, we invited LASC to conduct a further review on the scope of SLAS in 2014. LASC formed a Working Group on Expansion of SLAS to follow up on the review. In reviewing SLAS, apart from the question of whether it is necessary and feasible to expand the scope of SLAS, LASC also took into account matters including whether monetary claims are involved, whether the claims have a high success rate and whether there is a good chance of recovering costs and damages. After deliberation, LASC recommended that the scope of SLAS should be further expanded on an incremental basis and made the following recommendations –

(a) Recommended by LASC for Inclusion in SLAS

(i) Relevant Financial Intermediaries Licensed by the Securities and Futures Commission

7. For the financial sector, SLAS currently covers professional negligence claims against certified public accountants (practising) and negligence claims against insurers or their intermediaries in respect of the taking out of the personal insurance products. LASC recommended that the scope of SLAS should be expanded to include monetary claims exceeding \$60,000 for professional negligence against financial intermediaries licensed for Type 1 (dealing in securities), Type 2 (dealing in futures contracts) or Type 8 (securities margin financing) regulated activities by the SFC (referred to as “relevant financial intermediaries”). These relevant financial intermediaries are required by law to maintain professional insurance.

8. One of the guiding principles of SLAS is that claims should have a high chance of recovery of damages. Having regard to the prospect of recoverability of legal costs and LASC’s recommendation that any expansion of SLAS should be made on an incremental basis, we agree that SLAS should be expanded to cover financial intermediaries licensed for Types 1, 2 or 8 regulated activities at the current stage. Following the incremental approach, we do not intend to expand SLAS to cover other financial intermediaries which are not required by law to take out professional insurance for the time being.

(ii) Derivatives Claims

9. OLAS was expanded in November 2012 to cover proceedings involving money claims in derivatives of securities, currency futures or other futures contracts when fraud, deception or misrepresentation was involved at the time of purchase². As such, LASC recommended that the same should be included under SLAS.

10. According to the record of the Legal Aid Department (“LAD”), eight applications related to such proceedings were received under OLAS and no certificate was granted between November 2012 and December 2016³. In the current review on SLAS, we have made reference to the experience gained from the inclusion of these claims under OLAS during the past four years. We consider that the proposed inclusion in SLAS would unlikely have a significant impact on the financial viability of SLAS and support LASC’s recommendation.

(b) Other Proposals Not Supported by LASC

11. LASC did not recommend the inclusion of the following types of cases in SLAS. LASC’s views and our comments are summarised below –

(i) Claims Against the Incorporated Owners of a Multi-storey Building

12. LASC noted the concern of the community on the issue of bid-rigging and explored whether legal aid should be provided under SLAS to help individual owners counteract the improprieties of incorporated owners. However, LASC considered that such inclusion may give an impression that SLAS is giving a special privilege to claims against body corporate as SLAS will not be available for claims where incorporated owners do not exist. Moreover, monetary claims may not be involved in relation to the issue of

² Prior to November 2012, the LAO expressly excluded proceedings involving money claims in derivatives of securities, currency futures or other futures contracts as it was considered inappropriate to spend public fund to aid persons who incurred losses when engaging in speculative activities. Noting that structured financial products were increasingly common in Hong Kong, LASC recommended in the previous review completed in 2012 that the above-mentioned claims should be covered under both OLAS and SLAS when fraud, deception or misrepresentation was involved at the time of purchase. With the concern about a relatively low damages to costs ratio for this type of claims under SLAS which may impact on SLAF’s financial viability, in the 2012 exercise, we amended the legislation to cover these claims under OLAS, but not under SLAS.

³ Among the eight applications received, seven did not pass the merits test and one did not pass the means test.

bid-rigging. Noting that the Competition Ordinance (Cap. 619) is in full force and the Competition Commission has kicked off its “Fighting Bid-rigging Cartels” Campaign, LASC recommended that claims against the incorporated owners of multi-storey buildings should not be included in SLAS for the time being and the issue may be re-visited in due course. We have no objection to LASC’s recommendation.

(ii) Accidents Involving Small Marine Boats

13. Small boat accidents resulting in personal injuries have already been covered by SLAS. Given that the chance of claims purely for property damage is quite remote, and would be safeguarded by the insurers of the boat owners in any case, LASC did not recommend extension of SLAS to claims for property damage from accidents involving small marine boats. We do not have any comment on LASC’s recommendation.

(iii) Claims Against Property Developers by Minority Owners in Compulsory Sales

14. SLAS operates on a self-financing basis with a portion of the damages recovered contributed to SLAF. As the Lands Tribunal’s orders for compulsory sales normally do not involve monetary claims, LASC considered that claims against property developers by minority owners in compulsory sales do not meet the principle of SLAS and should not be covered by SLAS. We concur with LASC’s recommendation.

(iv) Trusts

15. We note from LASC’s findings that in general, any person could be appointed as a trustee for a trust. If the trustee is a professional, such as a solicitor, claims are already covered under “professional negligence”. If the trustee is a non-professional, there is no assurance that the costs and damages could be recovered. We also note that a trust may be set up with a lot of variations and actions against trustees for breach of trust may not necessarily be monetary claims. As such, we have no contrary view to LASC’s recommendation of not expanding SLAS to cover claims for breach of trust against trustees.

(v) Disputes between Limited Companies and their Minority Shareholders

16. LASC recommended that claims involving disputes between limited companies and their shareholders regarding their respective rights should not be included in SLAS on the basis that these claims are expressly excluded from

OLAS⁴ and may not necessarily be related to monetary claims. Such disputes in general include complaints by minority shareholders for low or no dividend payments, dilution of shareholding, exclusion from directorship or refusal by the company to provide financial statements, convene general meetings. We have no contrary view to the recommendation of LASC.

(vi) Sale of Goods and Provision of Services

17. With the Trade Descriptions Ordinance (“TDO”) (Cap. 362) in place to prohibit unfair trade practices deployed by traders against consumers, LASC recommended not including claims arising out of the sale of goods and the provision of services under SLAS for the time being. Should this be considered in future, we should be mindful of the fact that such claims generally have a lower success rate when compared with other types of proceedings under SLAS (e.g. personal injury and employees’ compensation) and a high cost-to-damage ratio, and the inclusion may compromise the financial viability of SLAF.

(vii) Class action

18. LASC noted that there are different ways to structure a class action system. It could be a named plaintiff or a number of named plaintiffs to file a claim on behalf of a “class” of people or businesses who claim to have suffered from a common injury or loss. LASC considered that the inclusion of class action should be actively considered when the law governing class action is available. The Director of Legal Aid (“DLA”) should also have discretion to grant legal aid in appropriate class action cases to allow flexibility for evolving situation or circumstances.

19. The Working Group on Class Actions⁵ (“Working Group”) and its Sub-committee are deliberating on the details of the proposed class action scheme. In the light of the current position, we consider it pre-mature to give

⁴ This type of claims is an excepted proceeding under OLAS as prescribed in paragraph 11(c) of Part 2 of Schedule 2 to the LAO given that it does not meet the policy objective of legal aid. Disputes amongst shareholders (minority versus majority) within a company are not regarded as deserving cases which should be funded by the public purse.

⁵ The Working Group is a cross-sector working group established by DoJ and chaired by the Solicitor General with members from the private sector, relevant government bureaux and departments (namely CEDB, HAB and LAD), the two legal professional bodies and the Consumer Council to study the proposals in the Law Reform Commission’s Report on Class Actions and to make recommendations to the Government on how to take the matter forward. There is also a representative from the Judiciary to provide input from the perspective of interface with court operations.

consideration to the question of funding in the present context before any proposed reform to permit class action has taken shape.

(viii) Defamation Proceedings and Election Petitions

20. Defamation proceedings and election petitions are expressly excluded from OLAS as they are not regarded as deserving cases which should be funded by the public purse⁶. Research also indicates that these two types of cases are generally not covered by legal aid in overseas jurisdictions⁷. We have no objection to LASC's recommendation that SLAS should not be extended to these two types of cases.

Financial Eligibility Limit

21. In May 2011, the FEL for SLAS was substantially increased from \$488,400 to \$1,300,000, based on the average legal costs of SLAS cases that went to trial in 2008. Pursuant to the decision of the Chief Executive in Council in July 1999, FELs are reviewed annually to take into account general price movement so as to better maintain the real value of the limits. A biennial review should also be conducted to take into account changes in litigation costs⁸. The FEL of SLAS was further increased to \$1,348,100 in June 2013 and \$1,451,900 in July 2015 to take into account changes in the Consumer Price Index (C) ("CPI(C)") during the reference periods.

22. Noting that the average legal costs of assigned out SLAS cases with judgment after trial for the period from 2009 to 2014 provided by LAD at

⁶ As prescribed in paragraphs 1 and 4 of Part 2 of Schedule 2 to the LAO, excepted proceedings include defamation, other than the defence of a counterclaim alleging defamation; and election petitions arising from Legislative Council and District Council elections, except where the petitioner claims that a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue.

⁷ Available information indicates that election petitions are generally not covered by legal aid in England and Wales, New South Wales, Victoria, New Zealand, North Ireland, Ontario, Scotland and Singapore. As for defamation, it is not covered by legal aid in Ontario, Victoria and Singapore. It is generally not covered except under special or exceptional circumstances in England and Wales, New South Wales, Northern Ireland and Scotland.

⁸ In conducting the biennial review of FELs, we sought information on litigation costs from the two legal professional bodies, the Judiciary and LAD. Since the two legal professional bodies do not have statistics on private litigation costs and the statistics from the Judiciary and LAD are not representative of the overall litigation costs, there has not been any adjustment made for the biennial review since its introduction in 2000.

Annex appear to be roughly the same throughout the years, LASC did not propose any change to the level of FEL for SLAS for the time being but recommended that it be monitored and reviewed every year. We support LASC's recommendation and will continue to conduct the annual reviews on the FELs.

Age Related Exemption for Assets Test

23. The current FELs for OLAS and SLAS are \$290,380 and \$1,451,900 respectively. The financial resources of an applicant is calculated as follows –

$$\text{Monthly disposable income}^9 \times 12 \text{ months} + \text{disposable capital}^{10}$$

Capital disregards for elderly applicants was introduced in May 2011 with a view to better protecting elderly citizens' right of access to justice by providing more favourable treatment of the disposable capital assets owned by elderly applicants when calculating their disposable capital, taking into account their general lack of earning power and the prospect of diminishing earnings. For applicants who have reached the age of 60, an amount of capital equal to the FEL of OLAS, i.e. \$290,380, will not be counted as their capital for both OLAS and SLAS applications.

24. We have deliberated on whether any adjustment should be made to the age limit for exemption of assets for means test. LASC suggested lowering the age limit to 55 so as to better protect the assets of the elderly from being depleted in litigation as they are approaching the end of their working life and could not earn back those monies. However, in view of the world trend in extension of retirement age, including the Government's raising the retirement age for civil service new recruits from 60 to 65 for civilian grades since 1 June 2015, and with reference to the eligible age for various Government policies and services targeting at the elderly, we do not see strong justifications for lowering the age limit. As such, we recommend maintaining the current age limit of 60.

⁹ Monthly disposable income is the net monthly income after various allowable deductions have been made from gross income. The deductions include items such as rent, rates and a statutory allowance for the applicant's own living expenses and that of their dependants.

¹⁰ Disposable capital consists of all assets of a capital nature, such as cash, bank savings, jewellery, antiques, stocks and shares, and property. Some assets are not included in the calculation of the applicant's disposable capital, for examples, the value of the house they live in, the value of household furniture and effects, personal clothing, tools and implements of trade.

CONSULTATION

25. In formulating its recommendations, LASC's Working Group on Expansion of SLAS has revisited suggestions which were not taken in the previous review and considered the views raised at previous Panel on Administration of Justice and Legal Services ("AJLS Panel") meetings and expressed by the two legal professional bodies. The Home Affairs Bureau has consulted relevant bureaux and departments on LASC's recommendations in formulating the above proposals. We have asked the relevant bureau to help pass this paper to the industry bodies of the relevant financial intermediaries which would be brought under the remit of SLAS for their information.

FINANCIAL IMPLICATIONS

26. The financial position of SLAF for the past three financial years is set out at **Annex**. At the end of the previous financial year for SLAF on 30 September 2016, the fund balance was \$193 million, with an income of \$8 million and an expenditure of \$4 million during the year. The financial position of SLAF is considered generally healthy.

27. With reference to the number of applications received for the new categories of cases covered under the expansion of SLAS in 2012¹¹ and derivatives claims under OLAS¹², the proposed expansion of scope is not expected to have significant impact on SLAF and no further injection is needed for the time being. The financial implications and increase in workload for processing and monitoring new applications arising from the proposed expansion of scope will be absorbed by the existing resources of LAD.

¹¹ Since the expansion of SLAS in November 2012, seven applications were received and four certificates were granted for the new categories of cases covered under SLAS.

¹² For derivatives claims which have been covered under OLAS since November 2012, there were a total of eight applications and no certificate had ever been granted. Out of the eight applications, one was refused on means and the financial resources of that applicant was within the FEL of SLAS while the rest were refused on merits grounds.

WAY FORWARD

28. We will proceed with the legislative exercise¹³ to put in place the proposals on expansion of SLAS, with a view to introducing the legislative amendments into LegCo in the 2017-18 legislative year.

BACKGROUND

29. LASC is a statutory body set up in 1996 under the Legal Aid Services Council Ordinance (“LASC Ordinance”) (Cap. 489) to oversee the administration of legal aid services provided by LAD, and to advise the Chief Executive (“CE”) on legal aid policy. LASC is chaired by a non-official¹⁴ and includes eight other members¹⁵, with DLA as an ex-officio member.

30. At the Government’s invitation to conduct a further review on SLAS subsequent to the substantial expansion of the scope in November 2012, LASC formed a Working Group on Expansion of SLAS to follow up on the review. In the course of the review, the Working Group has taken into account comments expressed by stakeholders including the AJLS Panel and consulted the two legal professional bodies in July 2015. LASC submitted its recommendations to the CE in July 2016.

31. 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 the loss of unsuccessful litigants would be made up by the contributions and deductions in successful claims thereby ensuring the continued viability of scheme. Proceedings under SLAS are categorised into two types. Type I proceedings include personal injuries or death, employees’

¹³ To expand the scope of SLAS, we would need to amend Schedule 3 of the LAO which is a piece of subsidiary legislation subject to positive vetting by the LegCo. We would also need to amend the Legal Aid Regulations (Cap. 91A) and the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B) to provide for the application fees, rate of interim and final contributions to be levied for the new types of cases under the expanded SLAS, and prepare a commencement notice, which are subsidiary legislation subject to negative vetting.

¹⁴ According to the LASC Ordinance, the Chairman shall not be a barrister or solicitor, or connected in any way directly with the practice of law. The incumbent Chairman is Dr Eric LI Ka-cheung.

¹⁵ Including two barrister members, two solicitor members and four lay members.

compensation and the representation for employees in appeals against awards made by the Labour Tribunal, which have been regarded as the “more deserving” cases in that they closely affect 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. Key operational and financial statistics on SLAS are set out in **Annex**.

32. When the scope of SLAS was expanded in November 2012, having considered the complexity and risk profile of these new types of proceedings, LASC recommended that the application fees and rates of contribution for professional negligence claims against the pre-existing professions and new professions and other new types of cases (except employees’ claims on appeals from the Labour Tribunal) should be aligned and increased. Having regard to the self-financing design of SLAS and the need to maintain its financial viability, it was agreed that the application fee and rates of contribution for civil proceedings in relation to claims for medical, dental and legal professional negligence be set at the same level as the new types of civil proceedings and they were grouped under Type II.

33. The non-refundable application fee is \$1,000 for Type I proceedings and \$5,000 for Type II proceedings. The interim contribution is 25% of OLAS’ FEL for Type I proceedings, and 10% of the assessed financial resources of the aided person or 25% of OLAS’ FEL, whichever is higher, for Type II proceedings.

ADVICE SOUGHT

34. Members are invited to note the outcome of the review.

**Home Affairs Bureau
Legal Aid Department
April 2017**

Supplementary Legal Aid Scheme**A. Number of applications received and certificates granted under the Supplementary Legal Aid Scheme (“SLAS”)**

Year	Applications received	Certificates granted
2014	238	175
2015	211	169
2016	225	164

B. Average legal costs of assigned out SLAS cases with judgment after trial

Year	Average Legal Costs
2009	\$577,229
2010	\$308,026
2011	\$582,161
2012	\$766,618
2013	\$643,778
2014	\$728,869
2015	\$470,061
2016	\$733,843

C. Financial position of the Supplementary Legal Aid Fund

Financial year ending on	30 Sep 2014 (\$ million)	30 Sep 2015 (\$ million)	30 Sep 2016 (\$ million)
Income	6.0	7.9	8.0*
Application fees	0.11	0.08	0.06
Contributions	3.04	5.13	5.23
Interest	2.85	2.67	2.70
Expenditure	5.6	5.6	4.1*
Fund balance	186.8	189.1	193.0*

* *Figures for the financial year ending on 30.9.2016 are unaudited and subject to change.*