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Panel on Administration of Justice and Legal Services Meeting on 30 April 2018

Updated background brief on the review of the Supplementary Legal Aid Scheme

Purpose

This paper provides background information on the Supplementary Legal Aid Scheme ("SLAS"), and summarizes the major views and concerns expressed by Legislative Council ("LegCo") Members on SLAS and related matters.

Background

2. The Administration's policy objective on legal aid is to ensure that no one with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means. The Legal Aid Ordinance (Cap. 91) ("LAO"), enacted in 1967, sets out the legal framework for the administration of legal aid. The Legal Aid Department ("LAD") provides legal aid for civil proceedings under the Ordinary Legal Aid Scheme ("OLAS") and SLAS, as well as for criminal proceedings under OLAS. To qualify for legal aid, a person is required by law to satisfy both the means and merits tests as provided by LAO.

Supplementary Legal Aid Scheme

3. SLAS is a statutory self-financing legal aid scheme which came into operation in 1984. It is funded by 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 Administration 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 number of applications received and certificates granted under SLAS between 2013 and 2016 are tabulated in **Appendix I**.

Financial eligibility limit

4. SLAS provides legal assistance to people whose financial resources exceed the statutory limit allowed under OLAS (currently at \$302,000), but are below the financial eligibility limit ("FEL") specified for SLAS (currently at \$1,509,980).¹ Successful applicants of SLAS are required to pay an interim contribution upon acceptance of the offer of legal aid and details are set out in **Appendix II**.

Guiding principles

5. SLAS has been targeting at cases which involve monetary claims 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. As advised by the Administration, in considering new categories of cases to be covered by SLAS, the above principle should be borne in mind so that cases which do not involve monetary claims, or have a relatively low success rate or poor prospect of recovery should not be covered by SLAS.

Recent review of the Supplementary Legal Aid Scheme

6. 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 claims 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

¹ Pursuant to a resolution moved under section 7(a) of LAO and approved at the Council meeting of 31 January 2018, FELs under OLAS and SLAS have respectively been increased to \$302,000 and \$1,509,980 with effect from 26 February 2018.

uncompleted first-hand residential properties, and representation for employees in appeals against awards made by the Labour Tribunal.

7. At the Administration's invitation to conduct a further review on SLAS subsequent to the substantial expansion of the scope as mentioned in paragraph 6, the Legal Aid Services Council ("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 Panel on Administration of Justice and Legal Services ("the Panel") and consulted the two legal professional bodies in July 2015. LASC submitted its recommendations to the Chief Executive in July 2016.

8. Having considered LASC's recommendations, policy objectives of legal aid, the guiding principles of SLAS as well as views from relevant bureaux and departments, the Administration 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; 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 FEL for SLAS for the time being and that FEL be monitored and reviewed annually; and

- (d) maintain the age-related exemption of assets for means test for OLAS and SLAS at age of 60.

9. In April 2017, the Administration briefed the Panel on LASC's recommendations and its position on the recommendations.

Major views and concerns of Legislative Council Members

10. The major views and concerns expressed by LegCo Members in previous discussions on matters relating to SLAS are summarized in the ensuing paragraphs.

Proposed expansion of the scope of the Supplementary Legal Aid Scheme

11. At its meeting on 24 April 2017, the Panel generally welcomed the proposed expansion of the scope of SLAS, which was detailed in paragraph 8(a) above. Having said that, some members were disappointed at LASC's recommendations of not including a number of claims, some of which had been long-standing requests raised by members in previous reviews of SLAS. They considered that to improve the access to justice for the middle class, the Administration should further expand the scope of SLAS to include more types of cases.

Sale of goods and provision of services

12. At the Panel meetings on 28 March 2011 and 24 April 2017, some members were disappointed that the expanded scope of SLAS had not included claims arising out of the sale of goods and the provision of services. They opined that even with the prohibition for unfair trade practices deployed by trades against consumers set out under the Trade Descriptions Ordinance (Cap. 362), provision of legal assistance was still necessary to enhance protection of consumers' rights and access to justice, especially for the sandwich class.

13. In this regard, the Administration advised that Cap. 362 was not the sole factor for consideration. When considering this issue, the Administration was mindful that claims arising out of the sale of goods and the provision of services generally had a lower success rate when compared with other types of proceedings under SLAS and a higher cost-to-damage ratio, and the inclusion of this type of claims might compromise the financial viability of the Supplementary Legal Aid Fund. Besides, under the current regime for consumer protection, the Consumer

Legal Action Fund was available to give consumer access to legal remedies by providing financial support and legal assistance.

Claims against the incorporated owners of a multi-storey building

14. At the Panel meeting on 24 April 2017, some members were disappointed at LASC's recommendation of not including claims against the incorporated owners of a multi-storey building. They considered that interests in property were involved in the above claims and that property was valuable asset of many Hong Kong citizens and hence their interests should be well protected.

15. In response, the Administration advised that most of the claims against the incorporated owners were related to the issue of bid-rigging and thus monetary claims might not be involved. Moreover, the proceedings under SLAS already included claims involving personal injuries or death against an incorporated owner. Given the above, LASC considered that the claims against the incorporated owners should not be included in SLAS for the time being and the issue might be revisited in future review. The Administration had no objection to LASC's view.

16. At the meeting, some members expressed the view that despite the Competition Ordinance (Cap. 619), which was in force to penalize bid-rigging cartel members, the proceedings under this regime could only be brought about by the Competition Commission and that individuals had no right to sue for bid-rigging. They therefore suggested that the Administration should make reference to the Hong Kong Bar Association ("the Bar Association")'s view to include claims against the incorporated owners under SLAS so as to enhance the protection for individual owners.

Claims against property developers by minority owners in compulsory sales

17. When discussing the review of SLAS on 28 March 2011, some members urged the Administration to reconsider expanding the scope of SLAS to cover claims against property developers by minority owners in respect of compulsory sales of building units. They considered that the issues in dispute were not only valuation matters, but also legal principles and analysis. Moreover, many of these minority owners were in dire need of legal support as the property involved was very often the only asset they had.

18. In response, the Administration pointed out that as evidenced in the past rulings of the Lands Tribunal, the chance of granting a compulsory sale order was very high and, assuming continuation of this trend, the chance of a minority owner granted with legal aid losing the case and having to bear all the costs was very high. Moreover, very often, a minority owner who appeared before the Lands Tribunal sought to resist the majority owners' application for compulsory sale or, if the application was to be granted, the terms and conditions for the sale.

19. At the Panel meeting on 24 April 2017, the Administration briefed members on LASC's recommendation that, since the issues in debate were often related more to valuation rather than legal matters, and the Lands Tribunal's orders for compulsory sales normally did not involve monetary claims, LASC considered that claims against property developers by minority owners in compulsory sales did not meet the principle of SLAS in paragraph 5 above and should not be covered by SLAS. The Administration concurred with LASC's recommendation.

Class action

20. Given that LASC would further consider the proposal to include class action under SLAS and that the Bar Association also supported this proposal, a member of the Panel asked for a concrete timetable for further review. The Administration advised that since the Working Group on Class Actions and its Sub-committees were deliberating on the details of the proposed class action scheme, the Administration considered it premature to set a timetable at present before any proposed reform to permit class action had taken shape.

Defamation proceedings

21. At the Panel meetings on 16 February and 23 March 2015, some members took the view that the scope of SLAS should also be expanded to cover more types of cases, such as defamatory libel cases. According to the Administration in April 2017, defamation proceedings were expressly excluded from OLAS as they were not regarded as deserving cases which should be funded by the public purse. Research also indicated that these types of cases were generally not covered by legal aid in overseas jurisdictions. The Administration had no objection to LASC's recommendation that SLAS should not be extended to these types of cases.

Election petitions

22. During the discussion on the review of SLAS at the Panel meeting on 24 April 2017, there was a view that the Administration should include election petitions under SLAS so as to protect the constitutional rights of legislators. The Administration advised that litigants of cases involving Bill of Rights issues were entitled to legal assistance under LAO and that the Director of Legal Aid might waive FEL imposed on the applicant for Bill of Rights related cases if he was satisfied that the criteria as stipulated in LAO had been met. Moreover, when deliberating on new categories of cases to be covered by SLAS, one of the guiding principles was that the cases should involve monetary claims.

Views of the Hong Kong Bar Association

23. At the Panel meeting on 24 April 2017, the Bar Association pointed out that its suggestions including claims against the incorporated owners of a multi-storey building, claims against property developers by minority owners in compulsory sale, claims for minority oppressed share owners and class action under SLAS had not been taken into account by LASC. In particular, the Bar Association raised concerns about claims for bid-rigging and building maintenance claims being excluded. The Bar Association indicated that individuals had no right to sue for bid-rigging under the Competition Ordinance (Cap. 619) and opined that claims for improprieties by incorporated owners should be covered by SLAS. The Bar Association also said that when there was a compulsory sale, a sale price would be assessed and thus this should be covered by SLAS as monetary claims too. Moreover, the Bar Association proposed to reduce the age related exemption for assets test from 60 to 55.

Financial eligibility limit of the Supplementary Legal Aid Scheme

Financial eligibility of applicants

24. During the deliberations at the Panel meetings on 10 July 2012 and 16 February 2015, some members and the two legal professional bodies expressed concern that the current FEL for SLAS which was too low had excluded a significant portion of the sandwich class. The Administration was therefore urged to do more, such as raising the existing FEL of SLAS, in helping the sandwich class to gain access to justice. When examining the Estimates of Expenditure 2016-2017, a member raised a question, asking whether the Administration would

consider relaxing the asset limit of applicants under SLAS in order to benefit more needy people from the middle class. The Administration responded that at present, FELs of OLAS and SLAS were regularly adjusted in accordance with the movements in the Consumer Price Index (C). The Administration would continue to monitor the operation of SLAS and keep its FEL under review.

Calculation of financial resources

25. At the Panel meetings on 16 February and 23 March 2015, some members raised examples of problems with the assessment of financial resources of legal aid applicants. They pointed out that the determination of an applicant's financial resources would include those of the applicant's spouse, even though the applicant had separated from his/her spouse. They also noted that, in determining an application for a probate case, LAD would also assess the financial resources of all of the beneficiaries of the estate concerned. As such, if, say, only the financial resources of one of the five beneficiaries exceeded FEL of OLAS or SLAS, legal aid would be refused. Members considered that LAD should review the method for assessing financial resources to enable more people to gain access to legal aid.

Legal aid contributions

26. At the meeting of the Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91) on 7 November 2017, some members pointed out that under SLAS, if the legal proceedings for which legal aid had been granted are successful, 20% of the damages recovered by the legal aid applicant would be deducted and paid into the Supplementary Legal Aid Fund. If the proceedings were unsuccessful, the interim contribution paid would be used towards the payment of legal costs incurred for the legal aid applicant's claim and would not be refunded unless there was a surplus after payment of such costs. They pointed out that the potential financial burden had thwarted many in using SLAS.

Latest development

27. The Administration will brief members on the proposed legislative amendments pursuant to the review of SLAS, as mentioned in paragraph 8, at the Panel meeting to be held on 30 April 2018.

Relevant papers

28. A list of relevant papers is in **Appendix III**.

Council Business Division 4
Legislative Council Secretariat
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Appendix I

Number of applications received and certificates granted under the Supplementary Legal Aid Scheme between 2013 and 2016

Year	Applications received	Certificates granted
2013	197	147
2014	238	175
2015	211	169
2016	225	164

Legal aid contributions under the Supplementary Legal Aid Scheme

Successful applicants of the Supplementary Legal Aid Scheme ("SLAS") are required to pay an interim contribution upon acceptance of the offer of legal aid. For cases related to personal injuries, employees' compensation claims, and appeals against awards made by the Labour Tribunal, the interim contribution is a flat rate of 25% of the financial eligibility limits ("FELs") of the Ordinary Legal Aid Scheme ("OLAS"), i.e. \$72,595. As for the remaining types of proceedings under SLAS, which include claims for various professional negligence, negligence claims arising from the sale of personal insurance products, and claims against developers in the sale of first-hand residential properties, the prescribed interim contribution rate is either 25% of FEL of OLAS or an amount equivalent to 10% of the assessed financial resources of the applicant, whichever is the higher.

2. If a proceeding under SLAS is successful, depending on the type of the case, a prescribed percentage of either 10% or 20% of the damages recovered would be deducted as final contribution and paid into the Supplementary Legal Aid Fund to support the continued operation of SLAS. If the case is settled before the commencement of the trial or the hearing, the percentage deduction would be 6% or 15% instead, depending on the type of the case. The eventual amount paid to the Supplementary Legal Aid Fund is dependent on the amount of damages recovered for each individual case.

3. The highest, lowest, median and total amounts of interim and final contributions paid by aided persons under SLAS from 2013 to 2015 are set out below:

Year	Interim contribution paid by aided persons on acceptance of legal aid ¹				Final contribution paid by aided persons on finalization of accounts of successful cases			
	Highest amount (\$)	Lowest amount (\$)	Median amount (\$)	Total amount (\$)	Highest amount (\$)	Lowest amount (\$)	Median amount (\$)	Total amount (\$)
2013	67,405	65,000	65,000	7,435,653	330,000	1,200	15,000	3,497,917
2014	67,405	65,000	67,405	7,911,830	332,352	1,800	18,900	3,308,224
2015	124,872	67,405	67,405	8,192,012	349,718	407	18,000	4,800,708

¹ FEL of OLAS was increased from \$260,000 to \$269,620 in June 2013 and \$269,620 to \$290,380 in July 2015, and the interim contribution payable by aided persons of SLAS (i.e. 25% of FEL of OLAS) was increased from \$65,000 to \$67,405 and \$67,405 to \$72,595 correspondingly.

4. As regards payment of interim contribution, the Director of Legal Aid may allow, in appropriate circumstances, payment by instalments (normally not more than six monthly instalments). Relevant factors for consideration include the likely duration of the aided proceedings, the actual monthly income of the applicant after deduction of basic and essential expenditure, and the amount of available assets which includes savings and readily realizable assets.

Appendix III

Review of the Supplementary Legal Aid Scheme

List of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
28.3.2011	Panel on Administration of Justice and Legal Services	Administration's paper on the review of the Supplementary Legal Aid Scheme	CB(2)1320/10-11(01) http://www.legco.gov.hk/yr10-11/english/panels/ajls/papers/aj0328cb2-1320-1-e.pdf
		Submission from the Hong Kong Bar Association	CB(2)1373/10-11(01) http://www.legco.gov.hk/yr10-11/chinese/panels/ajls/papers/aj0328cb2-1373-1-ec.pdf
		Minutes of meeting	CB(2)259/11-12 http://www.legco.gov.hk/yr10-11/english/panels/ajls/minutes/aj20110328.pdf
20.12.2011	Panel on Administration of Justice and Legal Services	Administration's paper on the further expansion of the Supplementary Legal Aid Scheme	CB(2)600/11-12(01) http://www.legco.gov.hk/yr11-12/english/panels/ajls/papers/aj1220cb2-600-1-e.pdf
		Minutes of meeting	CB(2)1932/11-12 http://www.legco.gov.hk/yr11-12/english/panels/ajls/minutes/aj20111220.pdf
10.7.2012	Panel on Administration of Justice and Legal Services	Administration's paper on the further expansion of the Supplementary Legal Aid Scheme	CB(2)2458/11-12(01) http://www.legco.gov.hk/yr11-12/english/panels/ajls/papers/aj0710cb2-2458-1-e.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Submission from the Hong Kong Bar Association	CB(2)2549/11-12(01) http://www.legco.gov.hk/yr11-12/chinese/panels/ajls/papers/aj0710cb2-2549-1-ec.pdf
		Letter dated 9 July 2012 from the Law Society of Hong Kong	CB(2)2549/11-12(02) http://www.legco.gov.hk/yr11-12/chinese/panels/ajls/papers/aj0710cb2-2549-2-ec.pdf
		Minutes of meeting	CB(2)2876/11-12 http://www.legco.gov.hk/yr11-12/english/panels/ajls/minutes/aj20120710.pdf
24.6.2014	Panel on Administration of Justice and Legal Services	Administration's paper on the Legal Aid Services Council's recommendations on the independence of legal aid	CB(4)822/13-14(05) http://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj0624cb4-822-5-e.pdf
		Submission from the Hong Kong Bar Association on the need and benefits of having an independent legal aid authority	CB(4)/854/13-14(01) http://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj0624cb4-854-1-e.pdf
		Administration's paper on the progress report on the review of the Supplementary Legal Aid Scheme and operation of the Two-year Pilot Scheme to provide legal advice for litigants in person	CB(4)822/13-14(06) http://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj0624cb4-822-6-e.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Minutes of meeting	CB(4)94/14-15 http://www.legco.gov.hk/yr13-14/english/panels/ajls/minutes/ajl20140624.pdf
16.2.2015	Panel on Administration of Justice and Legal Services	Administration's paper on the proposed amendment of the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B) and adjustment of the financial eligibility limits of the Ordinary and Supplementary Legal Aid Schemes	CB(4)493/14-15(04) http://www.legco.gov.hk/yr14-15/english/panels/ajls/papers/ajls20150216cb4-493-4-e.pdf
		Minutes of meeting	CB(4)743/14-15 http://www.legco.gov.hk/yr14-15/english/panels/ajls/minutes/ajls20150216.pdf
23.3.2015	Panel on Administration of Justice and Legal Services	Administration's paper on the provision of legal aid and assignments of lawyers to legally aided persons by the Legal Aid Department	CB(4)658/14-15(03) http://www.legco.gov.hk/yr14-15/english/panels/ajls/papers/ajls20150323cb4-658-3-e.pdf
		Minutes of meeting	CB(4)1205/14-15 http://www.legco.gov.hk/yr14-15/english/panels/ajls/minutes/ajls20150323.pdf
24.4.2017	Panel on Administration of Justice and Legal Services	Administration's paper on the review of the Supplementary Legal Aid Scheme	CB(4)817/16-17(03) https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170424cb4-817-3-e.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Minutes of meeting	CB(4)75/17-18 https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170424.pdf
14.7.2017 7.11.2017	Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91)	Report of the Subcommittee on Proposed Resolution under Section 7(a) of the Legal Aid Ordinance (Cap. 91) to the House Committee meeting on 12 January 2018	CB(4)452/17-18 https://www.legco.gov.hk/yr17-18/english/hc/papers/hc20180112cb4-452-e.pdf

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