

**Response to
The Law Reform Commission of Hong Kong Conditional Fees Sub-committee
Consultation Paper on Conditional Fees ('the consultation paper')
By
The Administration Wing of the Chief Secretary's Office and
The Legal Aid Department**

This note sets out the Administration's response to the consultation paper, insofar as it concerns the Supplementary Legal Aid Scheme (SLAS).

General

2. Paragraph 7.3 of the consultation paper makes it clear that the proposals on conditional fees are intended to "operate in parallel with, and to supplement legal aid, rather than to replace it or justify any reduction in legal aid funding". In this regard, we wish to re-affirm the Administration's commitment to the continued provision of legal aid services in Hong Kong, pursuant to our policy objective to ensure that no one with reasonable grounds for taking or defending a legal action in the Hong Kong court should be prevented from doing so because of a lack of means. We would remain so committed irrespective of whether any conditional fee arrangement is introduced in Hong Kong.

3. Recommendations 1 to 11 concern the proposed conditional fee arrangement. Recommendation 13 concerns a non-means tested privately run contingency legal aid fund to co-exist with SLAS operated by the Legal Aid Department. These are matters outside the purview of our legal aid policy. Accordingly, we will focus our comments to Recommendation 12, given its specific reference to SLAS operated by the Legal Aid Department.

Recommendation 12

4. Recommendation 12 advocates that, "given the success of the Supplementary Legal Aid Scheme in widening access to justice by using event-triggered fees on a self-financing basis, consideration should be given to expanding SLAS on a gradual incremental basis, by raising the financial eligibility limits and by increasing the types of cases which can be taken up by SLAS".

5. For the avoidance of doubt, we should first of all clarify that while the amount of contribution from an aided person under SLAS may vary depending on whether damages have been successfully recovered on his behalf, the payment of fees to assigned lawyers undertaking the cases is **not** conditional or determined by outcome. The assigned lawyers under SLAS are paid legal fees whether or not the claims of the aided person are successful. Expansion of SLAS is therefore not a replacement for the proposed conditional fee regime.

6. With the above clarification, the Administration will need to critically examine whether there is scope to implement changes to SLAS along the directions of the recommendation. In so doing, we will be guided by the following principles -

- (a) while SLAS at present does not require recurrent funding from the public coffer because of its self-financing nature, it is provided to further the legal aid policy objective, and is made available to those with limited financial resources. Albeit that SLAS has a higher financial eligibility limit than that under the Ordinary Legal Aid Scheme (OLAS), the target group remains to be persons with limited means; otherwise there is little policy or operational perspective for SLAS to be operated by the Legal Aid Department; and
- (b) As SLAS is self-financing in nature, any changes to the scheme must not undermine or jeopardize the case of maintaining financial viability of the scheme, albeit on a basis to supplement the OLAS.

Financial eligibility limit

7. Given the policy objective of legal aid, determining the means of an applicant is one of the two cardinal criteria of the legal aid schemes, the other being the merits of the case. At present, persons with financial resources not exceeding \$432,900 are financially eligible for SLAS. The limit is net of a wide range of deductibles essential to maintaining the livelihood of the applicants and his dependants at reasonable level, including a standard allowance for household expenditure, rent/mortgage payment of the main dwelling, salaries/profits tax payment, provision for the care of any dependant children living with him while he is at work, and value of any interest in the main dwelling, etc. It is estimated that under the current limit, over 70% of the households in Hong Kong are financially eligible for SLAS.

8. With this wide percentage coverage and given that the median legal costs for the categories of the cases covered by SLAS range from \$70,000 to \$179,000, it seems difficult to justify major extension of the limit. It should also be noted that Hong Kong is the only jurisdiction in the world that has a scheme on a self-financing basis like SLAS.

Scope of SLAS

9. At present, SLAS covers civil proceedings at District Court and above, which involve claims for damages arising from personal injury and death, and medical, dental and legal professional negligence where the claim for damages is likely to exceed \$60,000. It also covers claims under the Employees' Compensation Ordinance irrespective of the amount of claim.

10. As noted in paragraph 5 above, the SLAS Fund is supported by contribution from winning cases, which serve to cover in full the legal fees of unsuccessful claims. The healthy status of the financial position of SLAS Fund at

present is the result of a careful design built on the principle of cross-subsidization.

11. Indeed, overseas researches/studies suggest that legal assistance provided by a self-financing scheme like SLAS needs to focus itself on the types of litigation that carry a high chance of success with good damages to costs ratio. It is well accepted that the success rate of personal injury or death claims and employees' compensations claims is very high while that in respect of professional negligence case, by virtue of their complex nature is relatively lower. From the experience of the OLAS and SLAS, the success rate of personal injury/death employees' compensations claims is high (80%) while that in respect of professional negligence cases is relatively lower (60%) given their complex nature. Hong Kong is already more advanced by including professional negligence claims in SLAS.

12. Another important feature of SLAS is that it covers mainly cases where the defendants are insured or where there is assured payment of damages (i.e. claims for personal injuries or death and work-related accidents). The high chance of recovering damages helps ensure, to a large extent, the financial sustainability of the scheme.

13. To sustain its financial viability therefore, SLAS should only cover cases which involve monetary claims of reasonable size, with high success rate and a reasonably good chance of recovering damages. If the delicate balance in this successful formula is upset, by including for instance civil cases which do not involve monetary damages, or which have a relatively lower success rate, the SLAS Fund will risk running into a deficit or even bankruptcy. It would not be in the public interest if eventually due to the depletion of the SLAS Fund, the scheme is unable to cater for cases it was set up for originally, let alone other new cases. Against these considerations, we would need to be extremely cautious in considering whether there is room for expansion in the scope of SLAS, lest new cases, i.e. those high risk cases with lower chance of success or cases with small monetary claims, will serve to upset the cross-subsidization and deplete the SLAS Fund gradually.

14. In this regard, it may be helpful if we could further explain the current financial position of the SLAS Fund. The balance of about \$93 million in the SLAS Fund as at 30 September 2005 is the total accumulated since the inception of SLAS in 1984, and includes a Government injection of \$27 million in 1995. Since the rates of contribution by aided persons in successful cases were reduced in 2000, the effect of the new rates is reflected in the steadily reducing annual surplus in recent years (\$10.7M in 2000-01, HK\$9.4M in 2001-02, \$7.7M in 2003-03, \$4.7M in 2003-04, and about \$1.4M in 2004-05). Indeed, for 2004-05, if not because of the interest income, the SLAS Fund would have incurred a deficit for the year. We expect that the trend will continue since the contribution rate in respect of successful claims will soon be further reduced from 12% to 10%, in accordance with the amendment legislation that the Administration has recently introduced into the Legislative Council. There is little scope for SLAS to absorb more types of civil cases unless these can be proved to be able to meet the criteria of SLAS.

15. And, we have taken a critical look at the scope of cases that are proposed to be subject to conditional fee arrangement under Recommendation 2 of the consultation paper. We note that they are either already covered under SLAS (viz. personal injury, employees' compensation and professional negligence cases), or, in our view, questionable as to whether they meet the criteria of SLAS as outlined in paragraph 6 above (e.g family cases, insolvency cases).

Others

16. We note that the Legal Aid Services Council has suggested that SLAS should be expanded, that an independent statutory body should be vested with the responsibility for the full operation of the new scheme, preferably with Legal Aid Department as the executive arm, and that the Government should provide the additional seed money required for the new scheme to take on the expanded scope. We have already set out above our reservations on the expansion of SLAS. Our view is, if an expanded SLAS were to do away with any means test on the financial resources of the applicants and the legal aid dimension, and were to be operated by an independent statutory body, there is little need for the Legal Aid Department to continue to be the executive arm of the scheme.

17. Recommendation 13 proposes the setting up of a non-means tested contingency legal aid fund which should be privately run by an independent body. As stated above, determining the means of an applicant and merits of the case are two cardinal criteria of the Government-run legal aid scheme. A non-means tested scheme envisaged under Recommendation 13, whether or not coupled with merits test, falls outside the purview of our legal aid policy. That notwithstanding, we wish to forward our observation that should such a scheme be set up, the legal professional bodies which are familiar with the operation of SLAS and their expansion proposal seem appropriate to consider taking on the modified scheme. In this regard, it is noted that at present, the Duty Lawyer Service is administered jointly by the two legal professional bodies through the council of the Duty Lawyer Service.

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