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Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 30 September 2010, at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan (Deputy Chairman)
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun
Hon LEUNG Kwok-hung
- Members attending** : Hon WONG Kwok-hing, MH
Hon WONG Kwok-kin, BBS
Dr Hon PAN Pey-chyou
- Members absent** : Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon IP Wai-ming, MH
- Public Officers attending** : Ms Grace LUI Kit-yuk
Deputy Secretary for Home Affairs
- Mr William CHAN Heung-ping
Director of Legal Aid
- Mr KWONG Thomas Edward
Deputy Director of Legal Aid

Attendance by invitation : Hong Kong Bar Association

Mr Ruy Barretto, SC

Mr Kumar Ramanathan, SC

Mr Valentine YIM

Mr Nicholas Pirie

The Law Society of Hong Kong

Mr Leslie YEUNG

Member of the Legal Aid Committee

Ms Rebecca HO

Member of the Legal Aid Committee

Ms Christine W S CHU

Assistant Director of Practitioners Affairs

The Hong Kong Federation of Trade Unions
Rights & Benefits Committee

Mr TAM Kin-sun

Committee Member

Civic Party

Mr Dennis KWOK

Member

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Amy YU
Senior Council Secretary (2)3

Mrs Fonny TSANG
Legislative Assistant (2)3

I. Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants

[LC Paper Nos. CB(2)1148/09-10(01), CB(2)1200/09-10(01), CB(2)1364/09-10(01), CB(2)1600/09-10(01), CB(2)1601/09-10(01), CB(2)1654/09-10(01), CB(2)2076/09-10(01), CB(2)2099/09-10(01), CB(2)2103/09-10(01), CB(2)2105/09-10(01) to (02), CB(2)2298/09-10(01), CB(2)2304/09-10(01), CB(2)2327/09-10(01) and CB(2)2329/09-10(01)]

Briefing by the Administration

Deputy Secretary for Home Affairs ("DSHA") briefed members on the Administration's paper [LC Paper No. CB(2)2298/09-10(01)] setting out the Administration's latest recommendations arising from the current five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants ("five yearly review"). DSHA advised that having considered the views expressed by the Legal Aid Services Council ("LASC"), the Panel and relevant stakeholders, the Administration proposed to further relax the financial eligibility limit ("FEL") of the Supplementary Legal Aid Scheme ("SLAS") from \$1 million to \$1.3 million and to lower the age requirement for elderly persons to be entitled to an amount equivalent to the FEL of the Ordinary Legal Aid Scheme ("OLAS") be disregarded in calculating their financial resources from 65 to 60. These improvement measures aimed to further extend the ambit of legal aid to cover more needy people.

2. The Chairman said that when the five-yearly review was last discussed at the meeting on 21 July 2010, the Panel passed a motion that the Government should, based on the Hong Kong Bar Association's ("Bar Association") proposal for amending the Legal Aid Ordinance (Cap. 91) ("LAO"), conduct a study as soon as possible on the implementation of measures to expand and improve legal aid services. The Panel had requested the Administration to revert to members on its consideration of the proposals put forward by the Bar Association for broadening the scope of SLAS, and that an injection of funding be made into the SLAS Fund for this purpose. She asked whether the Administration had undertaken any work in this regard over the past two months.

3. DSHA responded that the Administration noted that LASC's Interest Group on Scope of Legal Aid ("Interest Group") was examining the possibilities for expansion of the scope of SLAS, including the proposals put forward by the Bar Association. As indicated by the Chairman of LASC at the Panel meeting held on 24 May 2010, the Interest Group aimed to finish the study in six months. In the meantime, the Administration had been undertaking relevant preparatory

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work, including examination of the justifications and considerations for the Administration's injection of \$27 million into the SLAS Fund in 1995. Such preparatory work would facilitate the Administration's consideration of the recommendations of LASC on the scope of SLAS once they were available.

4. The Chairman informed members that LASC had advised the LegCo Secretariat that it would not be able to send representatives to the meeting. LASC had also advised that its Interest Group was continuing its study on expansion of SLAS and aimed to finish the study by around end of November 2010. LASC would deliberate on its recommendations and advise the Administration accordingly. It would also keep the Panel informed.

5. Members noted the updated background brief prepared by the Legislative Council ("LegCo") Secretariat on the five-yearly review [LC Paper No. CB(2)2304/09-10(01)].

Views of deputations

Bar Association

6. Mr Kumar Ramanathan and Mr Ruy Barretto highlighted the following points made in the Bar Association's submission for the meeting [LC Paper No. CB(2)2327/09-10(01)] -

- (a) the Bar Association had put forth in its submission dated 20 July 2010 concrete proposals for expanding the scope of SLAS to widen access to justice for the middle class. The proposals were not new, as they were based on those made by LASC's Interest Group back in 2002. There should be no further foot-dragging on the part of the Administration. The Administration should provide a definite timetable for dealing with the proposals;
- (b) the Administration had misunderstood the proper principles of SLAS. The Administration had stressed that SLAS was aimed at cases that carried a high chance of success. This was contrary to section 10(3) of LAO which provided that the test for the grant of legal aid was "reasonable grounds" for taking legal actions, and not a high chance of success;

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- (c) the proposed expansion of the scope of SLAS would not undermine the financial viability of the Scheme. With the implementation of the Civil Justice Reform, it was envisaged that more cases would be settled before they went to court. This meant that more SLAS cases could be settled with relatively little legal costs, and the SLAS Fund would benefit from the contributions from damages recovered by legally aided persons in such cases. Should the scope of SLAS be broadened to cover a wider range of cases, more people would benefit from it and the increased demand on the Scheme would also generate more income for the SLAS Fund;
- (d) the existing FELs were too low. To reflect the full costs of legal proceedings which might include liability to pay for the opponent's costs in addition to the litigant's own legal costs should the action fail, the FEL for SLAS should be raised to the region of \$3 million; and
- (e) the Bar Association maintained its view that the age requirement for exempting part of the savings in calculating disposable capital should be lowered to the age of 50, on the ground that people at that age would face undue hardship if they were required to risk their retirement savings for a litigation, bearing in mind that they were nearing retirement and it might be difficult for them to rebuild their retirement assets once lost.

Law Society of Hong Kong ("Law Society")
[LC Paper No. CB(2)2329/09-10(01)]

7. Mr Leslie YEUNG said that the Law Society supported the Bar Association's stance on expansion of SLAS. He expressed dissatisfaction that there had not been any progress on the Administration's consideration of the proposals on expansion of SLAS since the last Panel meeting held in July 2010.

The Hong Kong Federation of Trade Unions, Rights & Benefits Committee ("HKFTU")

8. Mr TAM Kin-sun urged the Administration to re-consider seriously HKFTU's proposal that the means test be waived for employees who had been granted an award by the Labour Tribunal ("LT") but the employers concerned lodged an appeal to the High Court. He pointed out that due to the high legal costs involved in an appeal case in the High Court, many employees had been

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forced to give up their right to recover wages. He further said that the Administration had indicated that for cases where the insolvent employer employed less than 20 employees, and there was sufficient evidence to support the presentation of a winding up/bankruptcy petition but it was unreasonable or uneconomical to do so, the Legal Aid Department ("LAD") could make a recommendation to the Commissioner for Labour to make ex-gratia payment to the employees concerned. His experience, however, was that the Labour Department seldom exercised such discretion.

9. The Chairman invited Mr TAM Kin-sun to give his view on whether the Administration's proposed increase of the FEL for OLAS to \$260,000 could help resolve the difficulties faced by employees in wage claims. In response, Mr TAM Kin-sun said that the FEL for OLAS was too low. He pointed out that even if an employee's financial resources did not exceed \$260,000 and was granted legal aid, he might be required to pay a contribution towards the legal costs incurred, which might amount to tens of thousands of dollars. In his view, the proposed increase of the FEL for OLAS would not be of much help to employees in pursuing wage claims.

Civic Party

10. Mr Dennis KWOK expressed dissatisfaction that the Administration was unable to report any progress to the Panel on its consideration of the proposed amendments to LAO put forward by the Bar Association, in particular those relating to the expansion of the scope of SLAS, since the Panel's discussion in July 2010. Mr KWOK did not consider it necessary for the Administration to await the completion of LASC's study on expansion of SLAS before coming to its own view on Bar Association's proposals, given that such proposals were initiated by LASC back in 2002.

Discussion

Assistance to employees in wage claims

11. The Chairman said that the Panel had also requested the attendance of representatives of the Labour and Welfare Bureau for the meeting to discuss measures to assist employees in wage claims. The Labour Department had advised the LegCo Secretariat that it would not send representatives to the meeting. The LegCo Secretariat was given to understand that the Labour Department had provided information on the efforts and measures it had taken against defaults of LT awards to Home Affairs Bureau ("HAB") to facilitate its reporting to the Panel on the subject.

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12. In response to members' request, DSHA reported on the measures taken by the Labour Department to assist aggrieved employees in their wage claims. Where the employer was insolvent, the Labour Department would refer the affected employees to LAD to file winding-up/ bankruptcy petition against the employer and assist them to apply to the Protection of Wages on Insolvency Fund ("PWIF") for ex-gratia payments in respect of wages and termination payments. The Labour Department had also put in place the Award Enforcement Support Service since July 2008, whereby an officer in each of the Labour Relations Division branch offices was assigned to provide to employees information on modes of executing the LT award, assist in the application procedures of PWIF and make appropriate referrals to relevant government departments for legal and financial aids.

(Post-meeting note: After the meeting, the Administration had provided a supplementary paper on the measures taken by the Labour Department to assist employees in wage claims, which was issued to members vide LC Paper No. CB(2)156/10-11(01) on 27 October 2010.)

13. Mr WONG Kwok-hing questioned the effectiveness of the measures taken by the Labour Department in resolving the practical difficulties faced by employees in wage claims. He stressed that the gist of the problem was that the legal costs for the filing of winding-up/bankruptcy petitions against insolvent employers (about \$60,000) was often disproportionate to the amount of the wage claim (the median amount of such claim in 2008-2009 was \$40,000). Employees concerned who were not able to pass the means test for legal aid were practically forced to give up their right to recover outstanding wages. Even for employees who were able to obtain legal aid in their filing of winding-up/bankruptcy petitions, they might be required to make contributions to the legal costs incurred. Mr WONG urged the Administration to give serious consideration to HKFTU's proposal that legal aid be granted unconditionally to employees in wage claims.

14. DSHA responded that waiver of means test was a major departure from the legal aid policy and the Administration did not consider it appropriate to exempt a particular group of persons from the means test on the basis of their background or the type of cases they were pursuing. While the Administration could not accede to the request for waiving the means test in respect of wage claims, it recognized the difficulties faced by employees and was working on measures to assist them in this regard. In response to Mr WONG Kwok-hing's further enquiry, DSHA said that after LASC had completed its study by end of November 2010, the Administration would consider LASC's recommendations and come up with proposals to improve access to legal aid, including measures to assist employees in wage claims.

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15. On the issue of contribution payable by legally aided employees in wage claim cases, Director of Legal Aid ("DLA") advised that a contribution was payable by a legally aided person whose financial resources exceeded a certain level. The relevant data indicated that some 90% of the legally aided persons under OLAS either did not have to pay any contribution or were only required to pay \$1,000 or \$2,000 as contribution. Furthermore, should a legally aided person win his case, his legal costs would be paid by the other party and the contribution he had paid might be refunded to him.

Expansion of scope of SLAS

16. In response to the Chairman's enquiry on whether the Administration had examined the Bar Association's proposals for expansion of SLAS, DSHA said that HAB and LAD had commenced to study the proposals after they were put forth in July 2010. Representatives of LAD had also participated in the work of LASC's Interest Group which was examining the Bar Association's proposals along with its own study. She stressed that as LASC was the statutory body charged with the responsibility for advising the Government on legal aid policy, the Administration should consider the recommendations of LASC before coming to its view on the feasibility of expanding the scope of SLAS.

17. The Chairman queried the need for the Administration to solicit LASC's views on the Bar Association's proposals for expansion of SLAS, given that the proposals were based on those initiated by LASC back in 2002. The proposals had not been taken forward then owing to the SARS outbreak in 2003 and the subsequent economic downturn, which had resulted in the shelving of many legal aid reform proposals. As Hong Kong was not facing any economic downturn now, she saw no reason for further delaying the proposed expansion of SLAS. Mr LEUNG Kwok-hung echoed similar views. DSHA responded that apart from economic considerations, there were also different views on the proposals at that time and eventually they had not been adopted for implementation. The Bar Association had raised again these proposals for discussion in July 2010 and the Administration was willing to re-examine them. She reiterated that LASC's Interest Group, chaired by a representative from the Bar Association and comprised members from different sectors including the legal profession, academia and non-governmental organizations, was currently examining the possibilities for expansion of the scope of SLAS, including Bar Association's proposals, and the study was expected to conclude by around end of November 2010. The Administration would further consider the feasibility of expanding the scope of SLAS having regard to the recommendations of LASC.

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18. Ms Audrey EU said that given that SLAS had generated operational surpluses over the years and all SLAS applications had to satisfy the merits test, she saw no reason why its coverage could not be expanded to cover the types of cases proposed by the Bar Association, which were mostly concerned with protection of consumer interests such as claims against financial institutions and insurance companies concerning financial and insurance products.

19. In response, DSHA reiterated that the Administration was willing to consider the expansion of SLAS to cover other types of cases so long as the financial viability of the Scheme would not be affected. LASC was currently studying the types of cases to be covered under the expansion of SLAS which could benefit the public on the one hand and maintain the financial viability of the Scheme on the other. The Administration would consider the recommendations of LASC before coming to its view on the matter. In response to Ms Audrey EU's further enquiry, DSHA said that in assessing whether certain types of cases would affect the financial sustainability of SLAS, such factors as prospects of recovery of damages and legal costs involved would be taken into account.

20. The Chairman said that the decision to expand SLAS to cover medical, dental and legal professional negligence in 1995 was based on two main considerations. First, such types of cases carried a high chance of recovery of damages as the defendants were insured, and hence the financial viability of SLAS would not be affected. Second, these were generally difficult types of cases (such as medical negligence) which were costly to fight and the high legal costs were not affordable by the general public. These were prime factors which should be taken into account in considering the types of cases to be covered under SLAS.

21. The Deputy Chairman also queried the need for the Administration to wait for the outcome of LASC's study before coming to its view on the expansion of SLAS and expressed dissatisfaction that the Administration was dragging its feet on the matter. In his view, the types of cases proposed by the Bar Association for expansion of SLAS were no different from those covered under its current scope such as medical, dental and legal professional negligence and he saw no reason why they could not be covered under SLAS. He also questioned whether LASC had the relevant data for assessing the viability of the Bar Association's proposals, such as the success rate, chance of recovering damages, and damages to costs ratio of the types of cases proposed by the Bar Association for expansion of SLAS, and considered that LAD was in a better position to make such an assessment. He stressed that the decision on the

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coverage of SLAS should not be based solely on economic considerations; facilitating access to justice and upholding the rule of law should also be prime considerations.

22. Mr LEUNG Kwok-hung considered that the Administration was duty-bound to explain to the Panel how it assessed the impact of the Bar Association's proposals for expansion of SLAS on the financial viability of the Scheme.

23. DSHA reiterated that the Administration was willing to look into the expansion of SLAS provided that the financial viability of the Scheme was not jeopardized. She clarified that the Administration had not ruled out the Bar Association's proposals. LASC's Interest Group was studying the types of cases that could be covered under SLAS and the Administration would consider LASC's recommendations before coming to its view on the matter. In considering the feasibility of expansion of SLAS to cover other types of cases, the Administration would take into account all relevant factors, including the chance of recovery of damages, the legal costs involved and whether the damages to be awarded through litigation would make the likely costs worthy of committing, in the light of the overall policy objective of ensuring that no one with reasonable grounds for taking legal actions was prevented from seeking justice due to a lack of means.

24. Mr Valentine YIM enquired whether the Administration had provided its views on the Bar Association's proposals to LASC's Interest Group. DLA responded that so far, LAD had not been requested to provide its views to the Interest Group on expansion of SLAS. The Interest Group had only invited staff of LAD to provide relevant information on SLAS, such as its operation, financial situation and success rates of cases, to assist it in its study.

25. Mr Paul TSE asked whether the Administration would consider the Law Society's suggestion of first implementing its present proposals arising from the five-yearly review, while discussion on expansion of SLAS would continue, so that more people could take early advantage of the proposed extended coverage of legal aid. DSHA responded that it was the Administration's plan to submit at the beginning of the 2010-2011 session the legislative amendments for effecting the proposals for adjusting the FELs for OLAS and SLAS, raising the level of deductible allowance in assessing financial eligibility for legal aid and disregarding part of the savings of elderly in assessing their financial eligibility for legal aid.

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26. Referring to the statement in paragraph 15 of the Administration's paper that "to maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio", Ms Audrey EU noted the Bar Association's comment that it was contrary to section 10(3) of LAO to assert that SLAS was for cases with high chance of success, because the test was for "reasonable grounds", and not high chance of success. She sought the Administration's view on the Bar Association's comment.

27. DSHA and DLA explained that "high chance of success" in paragraph 15 of the Administration's paper and "reasonable grounds" in section 10(3) of LAO referred to two different matters. Section 10(3) of LAO referred to the threshold for granting individual legal aid applications, i.e. whether an applicant had reasonable grounds for taking legal actions; whereas "high chance of success with good damages to costs ratio" in paragraph 15 of the Administration paper were criteria for determining which types of cases should be covered under SLAS. DLA elaborated that under SLAS, a legally aided person was required to pay a contribution of 6% to 10% of the damages to the SLAS Fund if he won his case; on the other hand, if a legally aided person was unsuccessful in his claim, the SLAS Fund had to pay the legal costs of both parties, which could involve significant sums. Hence, to maintain its financial viability, SLAS only covered cases with a high success rate, a good chance of recovering damages and good damages to costs ratio. The success rate of cases funded under SLAS was about 90%.

28. The Deputy Chairman said that it was his understanding that in deciding whether to grant an application made under OLAS, aside from the merits of the case, LAD would also take into account the recoverability of damages. He believed that the same considerations also applied to assessment of SLAS applications, meaning that LAD could reject a SLAS application should it reckon that the chance of recovery of damages was low. Furthermore, the areas of expansion proposed by the Bar Association involved mostly monetary claims where the defendants were often large corporations. In his view, there was no cause for concern that the proposed expansion of SLAS would undermine the financial viability of the Scheme.

29. DLA responded that LAD would indeed consider the recoverability of damages in assessing legal aid applications under OLAS and SLAS. Given its self-financing nature, he stressed the need to exercise great prudence in considering the types of cases to be covered under SLAS to ensure that the sustainability of the SLAS Fund could be maintained. He reiterated that if there were many SLAS cases where damages could not be recovered from the defendants, the SLAS Fund would be exposed to financial risk.

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30. Ms Audrey EU said that the issue of damages to costs ratio arose in all types of legal aid cases, and was not peculiar to those proposed in the Bar Association's submission. Hence, it was not a valid ground for objecting to the expansion of SLAS. DLA had all along been very prudent in assessing legal aid applications and case monitoring. For cases with low damages to cost ratio, DLA would exercise discretion to reject the applications or ensure early settlements as appropriate. The fact that over 90% of the SLAS cases were successful showed that DLA had been very prudent in the scrutiny of the merits of cases. She trusted that DLA would continue to exercise great prudence in assessing applications after the coverage of SLAS had been expanded. She called on the Administration to consider seriously the Bar Association's proposals for expanding SLAS to improve access to justice for consumers and the middle class.

31. Mr Paul TSE said that should the Administration had serious concern about the expansion of SLAS, it should consider allowing some form of conditional/contingency fee arrangements in Hong Kong to provide an alternative funding avenue for litigants who could not afford the high legal costs and had no recourse to legal aid.

32. The Chairman enquired whether any of the types of cases proposed by the Bar Association for expansion of SLAS were considered by the Administration to have an adverse impact on the financial viability of SLAS. DLA responded that LAD was collating relevant information on the types of cases proposed by the Bar Association, such as the size of the monetary claims and chance of recovery of damages. The Chairman requested DLA to provide such information and analysis for the Panel's reference. DLA said that he noted that the Bar Association had provided information on the recoverability of damages of the types of cases proposed for expansion of SLAS. LAD would need to ascertain whether legal aid for such types of cases had been granted under OLAS and would provide relevant information to the Panel if available.

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33. Mr Nicolas Pirie and Mr Ruy Barretto considered that the Administration had confused the merits test under section 10(3) of LAO with the issue of recoverability of damage. Mr Barretto stressed that the Bar Association recognized the importance of ensuring that the types of cases covered under SLAS should have a reasonably good chance of recovering damages, and the categories of cases proposed by the Bar Association all met this important criterion. Mr Barretto further said that, as stated in Bar's submission, it was wrong for HAB to assert that SLAS was for cases with good damages to cost ratio when in fact SLAS was for difficult types of cases such as medical

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negligence which were costly to fight. Mr Barretto considered it incumbent upon the Administration to provide a firm timetable on when it would come to its decision on the Bar Association's proposals.

34. DSHA reiterated that the Administration was willing to consider extending the category of actions covered under SLAS on the premise that they must not jeopardize the financial viability of the Scheme. The Administration noted that members did not see the need to adopt an excessively prudent approach in considering the types of cases to be covered under the expansion of SLAS. She added that upon completion of LASC's study in November 2010, the Administration would consult the Panel on LASC's recommendations before coming to its view on the matter.

Way forward

35. As LASC was expected to complete its study by November 2010, members agreed to recommend to the Panel in the 2010-2011 session that the issue of expansion of SLAS should be re-visited at its meeting in December 2010 and LASC should be invited to the meeting to brief Members on its deliberations on the recommendations of the Interest Group on expansion of SLAS. Members also agreed that the Panel should write to LASC expressing regret that LASC was unable to send any representative to the meeting to discuss the issue of expansion of SLAS with Members and enquiring when it expected to complete its deliberations on the study undertaken by the Interest Group and report accordingly. LASC would also be requested to provide a response to the views and concerns expressed by Members on the issue.

Clerk

Clerk

II. Any other business

36. There being no other business, the meeting ended at 6:40 pm.