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Paper for the House Committee meeting on 16 November 2012

**Report of the Subcommittee on
Legal Aid (Amendment) Regulation 2012,
Legal Aid (Assessment of Resources and Contributions) (Amendment)
Regulation 2012 and
Legal Aid Ordinance - Resolution of the Legislative Council
(Commencement) Notice**

Purpose

This paper reports on the deliberations of the Subcommittee on Legal Aid (Amendment) Regulation 2012, Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012 and Legal Aid Ordinance - Resolution of the Legislative Council (Commencement) Notice.

Background

2. The Government's policy objective on legal aid is to ensure that no one with reasonable grounds for taking or defending a legal action in the Hong Kong courts is prevented from doing so 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. Legal aid is provided by the Legal Aid Department ("LAD") under the Ordinary Legal Aid Scheme ("OLAS") and the Supplementary Legal Aid Scheme ("SLAS"). Legal aid will be granted to applicants who satisfy the means test and the merits test.

OLAS and SLAS

3. Under section 5 of and Schedule 2 to LAO, OLAS covers civil proceedings in the District Court and above. The types of cases covered include matrimonial cases, traffic accident claims, landlord and tenant disputes, claims in respect of industrial accidents, employees' compensation, immigration matters, breach of contract, professional negligence, seamen's wage claims, employees' wages and severance pay, applications to the Mental Health Review Tribunal, and inquests into deaths under the Coroners Ordinance (Cap. 504) involving interests of public justice.

4. Introduced in 1984, SLAS is a self-financing scheme aiming to provide legal assistance to the middle-class people whose financial resources exceed the upper limit allowed under the OLAS in certain types of cases. The scheme was limited initially to cover claims for damages for personal and fatal injuries. It was subsequently extended to cover employees' compensation claims in 1992 and medical, dental as well as legal professional negligence in 1995. Under section 5A of and Schedule 3 to LAO, its current scope covers cases of personal injury or death, medical, dental and legal professional negligence where the claim is likely to exceed \$60,000 (paragraphs 1, 2 and 4 of Part I of Schedule 3). It also covers claims under the Employees' Compensation Ordinance (Cap. 282) ("ECO") irrespective of the claim amount (paragraph 3 of Part I of Schedule 3).

5. As a result of the recent five-yearly review, the Administration proposed to raise the financial eligibility limit ("FEL") for OLAS and SLAS. With effect from 18 May 2011, OLAS is available to those whose financial resources do not exceed \$260,000 and SLAS is available to those whose assessed financial resources exceed \$260,000 but do not exceed \$1.3 million. The costs of SLAS are met from the Supplementary Legal Aid Fund ("the SLAF"), which is financed by the applicants' contributions and damages or compensation recovered. On application, an applicant has to pay an application fee of \$1,000. For approved applications, on accepting the offer of a legal aid, the aided person is required to pay an interim contribution calculated at 25% of the FEL for OLAS (i.e. \$65,000). On successful conclusion of the case, the aided person is also required to pay a contribution from any damages recovered. The rates of contribution from damages recovered were reduced twice, in 2000 and 2005, to the present 6% for cases settled before delivery of brief to counsel and 10% for other cases.

The Resolution to expand the scope of OLAS and SLAS

6. In his 2010-2011 Policy Address, the Chief Executive announced that to complement the SLAS review being conducted by the Legal Aid Services Council ("LASC"), and to benefit more middle-class people, the Government would earmark \$100 million for injection into the SLAF when necessary to expand the SLAS to cover more types of cases. On 17 July 2012, a resolution was passed by the Legislative Council under section 7(b) of LAO ("the Resolution") pursuant to a motion moved by the Secretary for Home Affairs ("SHA") to amend Schedules 2 and 3 to the LAO to:

- (a) expand the scope of OLAS to cover monetary claims in derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation or deception is involved in respect of the sale;
- (b) expand the scope of SLAS to cover claims of the following categories with claim amounts exceeding \$60,000 -
 - (i) professional negligence claims against certified public accountants (practising), registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorized land surveyors, estate agents, and registered landscape architects (paragraph 5 of Part I of Schedule 3 to the LAO);
 - (ii) negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products (paragraph 6 of Part I of Schedule 3 to the LAO); and
 - (iii) monetary claims against the vendors in the sale of first-hand completed or uncompleted residential properties (paragraph 7 of Part I of Schedule 3 to the LAO); and
- (c) expand the scope of SLAS to cover representation for employees in appeals brought by either the employer or the employee against awards made by the Labour Tribunal, regardless of the amount in dispute (paragraph 8 of Part I of Schedule 3 to the LAO).

7. During the scrutiny of the proposed Resolution by a subcommittee formed by the House Committee ("HC") in March 2012 in the last legislative term, members were briefed that the provisions under the Legal Aid Regulations ("LAR") (Cap. 91 sub. leg. A) and the Legal Aid (Assessment of Resources and Contributions) Regulations ("LA(ARC)R") (Cap. 91 sub. leg. B) needed to be amended to raise the application fees and rates of contribution under the expanded SLAS to maintain the financial viability of the SLAS. Members were generally content with the legislative proposals.

The Amendment Regulations

Legal Aid (Amendment) Regulation 2012

8. The Legal Aid (Amendment) Regulation 2012 amends the LAR to adjust the application fee under the SLAS as follows:

- (a) \$1,000 for proceedings mentioned in paragraphs 1, 2, 3 and 8 of Part I of Schedule 3 to the LAO as amended by the Resolution, i.e. personal injury claims, employees' claims under the ECO and appeals under the Labour Tribunal Ordinance (Cap. 25) ("Type I proceedings"); and
- (b) \$5,000 for proceedings mentioned in paragraphs 4 to 7 of Part I of Schedule 3 to the LAO as amended by the Resolution, i.e. medical, dental or legal professional negligence claims and those referred to in paragraph 6(b) above which are, in the opinion of the Director of Legal Aid, likely to exceed \$60,000 ("Type II proceedings").

Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012

9. The Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012 amends the LA(ARC)R to adjust the contributions payable by persons to whom legal aid is granted ("aided persons") under the SLAS. The new amounts of contributions are as follows:

- (a) for Type I proceedings:

- (i) an interim contribution in the sum of \$65,000 being the maximum contribution payable by an aided person under section 18(1) of the LAO as assessed in accordance with Part I of Schedule 3 to the LA(ARC)R; and
 - (ii) a final contribution in an amount equivalent to the aggregate of the following:
 - (A) the sums paid or payable on the aided person's account out of the SLAF;
 - (B) the costs incurred on behalf of that person; and
 - (C) 10% of the value of any property recovered or preserved for the aided person in the proceedings (or 6% thereof if the claim is settled before the date of commencement of the trial or the hearing or if counsel is engaged before the delivery of a brief to counsel for attendance at the trial or hearing), less any application fee and interim contribution paid;
- (b) for Type II proceedings:
- (i) an interim contribution in an amount equivalent to 10% of the aided person's financial resources or \$65,000 (being the maximum contribution payable by an aided person under section 18(1) of the LAO), whichever is the higher; and
 - (ii) a final contribution in an amount equivalent to the aggregate of the following:
 - (A) the sums paid or payable on the aided person's account out of the SLAF;
 - (B) the costs incurred on behalf of that person; and
 - (C) 20% of the value of any property recovered or preserved for the aided person in the proceedings (or 15% thereof if the claim is settled before the date of commencement of the

trial or the hearing or if counsel is engaged before the delivery of a brief to counsel for attendance at the trial or hearing), less any application fee and interim contribution paid.

10. Both Amendment Regulations will come into operation on 30 November 2012.

The Commencement Notice

11. By the Legal Aid Ordinance - Resolution of the Legislative Council (Commencement) Notice, SHA has appointed 30 November 2012 as the date on which the Resolution, referred to in paragraph 6 above, will come into operation.

The Subcommittee

12. At the HC meeting on 12 October 2012, Members formed a subcommittee to study the Legal Aid (Amendment) Regulation 2012, the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012 and the Legal Aid Ordinance - Resolution of the Legislative Council (Commencement) Notice. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon Dennis KWOK, the Subcommittee has held two meetings, including one meeting with the Administration, the Hong Kong Bar Association and The Law Society of Hong Kong.

Deliberations of the Subcommittee

Rates of contribution under the expanded SLAS

13. As set out in paragraph 9(b) above, under the expanded SLAS, the rate of final contribution for Type II proceedings (i.e. the new types of civil proceedings apart from those relating to Labour Tribunal appeals and existing types of civil proceedings for professional negligence claims) is 20% or 15% if the claim is settled before the date of commencement of the trial or the hearing, or if counsel is engaged, before the delivery a brief to counsel for attendance at the trial or the hearing.

14. Members share the views of the two legal professional bodies that the rates of final contribution for Type II proceedings at 15% and 20% are too high, having regard to the fact that the rates of final contribution under the existing SLAS are 6% and 10%. Members also consider that the Administration is overly prudent in setting the final contribution rates for Type II proceedings at 15% and 20%, having regard to the fact that legal aid would only be granted for cases which have passed the merits test.

15. The Administration has advised that the higher final contribution rates for Type II proceedings are recommended by the LASC on the grounds that the cases concerned are generally more complex and have a higher risk profile, with high legal costs. From the experience of OLAS and SLAS, the success rate of personal injuries, fatal accident and employees' compensation claims is high (about 90%), while that in respect of professional negligence cases is relatively low (about 70%). As the maximum liability for costs of an aided person under the SLAS if the case is lost is limited to the initial application fee and interim contribution paid, any shortfall in the total costs of the case would be borne by the SLAF, it is therefore necessary to set the final contribution rates for Type II proceedings at 15% and 20% at the outset to maintain the financial viability of the SLAF.

16. The Administration has further advised that while the aided person who wins a case has to pay the final contribution for the SLAS, he or she is given credit for the application fee and interim contribution paid when calculating the final contribution amount.

17. Hon LEE Cheuk-yan is of the view that the risk of depletion of the SLAF as a result of the expansion of the scope of the SLAS is low, as other cases under the SLAS, such as employees' compensation and personal injuries claims which have high success rate based on past experience, can "cross-subsidize" the riskier cases.

18. The Administration has advised that the exact financial implications of expanding the scope of SLAS are difficult to estimate. By way of illustration, the Administration has pointed out that the balance of SLAF used to be in excess of \$100 million. However, as a result of losing one case, the SLAF has to fork out about \$17 million to meet the total legal costs of the case. The balance of the SLAF is currently about \$88 million.

19. While the Hong Kong Bar Association remains of the view that the final contribution rates for Type II proceedings under the expanded SLAS are high, it does not raise serious objection to these rates provided that the Administration undertakes to re-visit the issue after acquiring experience under a very strict timetable. The Hong Kong Bar Association has raised the concern that the high contribution rates may encourage people who suffered personal injuries, say, due to medical professional negligence, and who could not afford private legal fees, to seek help from recovery agents instead. The Law Society of Hong Kong urges the Administration to re-visit the issue within one to two years after the implementation of the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012.

20. Members have asked the Administration to come up with a timetable for reviewing the final contribution rates for Type II proceedings under the SLAS and to provide the criteria for adjusting such rates if it decides to do so.

21. The Administration has advised that it will review the final contribution rates for Type II proceedings under the SLAS and adjust the rates, where appropriate, in light of operational experience. The Administration does not rule out reducing the rates, as had been done in the past, if the SLAF can be maintained at a level sufficient to provide legal services to people who are financially in need.

Further reform of the SLAS

22. Members agree with the views of the two legal professional bodies that the scope of the SLAS should be further expanded to cover more new types of cases, such as but not limited to class actions, as set out in the submission of the Hong Kong Bar Association.

Follow-up action

23. The Subcommittee has agreed to refer the issues referred to in paragraph 22 above to the Panel on Administration of Justice and Legal Services for follow up.

Recommendation

24. The Subcommittee supports the Amendment Regulations and the Commencement Notice. The Subcommittee does not propose any amendment to the above subsidiary legislation.

Advice sought

25. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
14 November 2012

**Subcommittee on Legal Aid (Amendment) Regulation 2012,
Legal Aid (Assessment of Resources and Contributions) (Amendment)
Regulation 2012 and Legal Aid Ordinance – Resolution of the Legislative
Council (Commencement) Notice**

Membership List

Chairman Hon Dennis KWOK

Members Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Cyd HO Sau-lan
Hon Alan LEONG Kah-kit, SC (up to 5 November 2012)
Hon WU Chi-wai, MH
Hon TANG Ka-piu

Total : 6 Members

Clerk Mary SO

Legal Adviser Bonny LOO