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**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 brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information and summarizes the discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on issues relating to the expansion of the scope of the Supplementary Legal Aid Scheme ("SLAS") and the Ordinary Legal Aid Scheme ("OLAS") in the context of the five-yearly review of the criteria for assessing financial eligibility of legal aid applicants ("five-yearly review").

Background

Government's legal aid policy and framework

2. According to Article 35 of the Basic Law, Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR") guarantees all individuals the right to a fair hearing in both criminal and civil proceedings. Article 14(3) of ICCPR further provides that a person charged with criminal offence shall be entitled to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it." The Hong Kong Bill of Rights Ordinance (Cap. 383) incorporates into Hong Kong law the provisions of ICCPR as applied to Hong Kong.

3. The Government's policy objective on legal aid is to ensure that no one with reasonable grounds for taking legal action in the Hong Kong courts is prevented from doing so because of a lack of means.

4. 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 OLAS and SLAS. Legal aid will be granted to applicants who satisfy the means test and the merits test.

5. The Legal Aid Services Council ("LASC") was set up on 1 September 1996 under the Legal Aid Services Council Ordinance (Cap. 489) to supervise the provision of legal aid services provided by LAD and to advise the Government on legal aid policy.

OLAS and SLAS

6. OLAS covers civil proceedings in 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, Mental Health Review Tribunal cases, and Coroners' inquests involving interests of public justice.

7. As regards SLAS, the Scheme provides legal assistance to persons whose financial resources exceed the upper limit allowed under the OLAS in certain types of cases. Introduced in 1984, SLAS is a self-financing scheme aiming to provide legal aid for the middle-class people. 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. 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. It also covers claims under the Employees' Compensation Ordinance (Cap. 282) irrespective of the amount of claim.

8. 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 financial resources exceed \$260,000 but do not exceed \$1.3 million. The costs of SLAS are met from the Supplementary Legal Aid Fund ("SLAS Fund"), 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. On approval of the application, 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.

Recent discussions of the Panel and related developments

9. The Panel has made long standing calls for expansion of the scope of SLAS. Relevant discussions held by the Panel in the context of the five-yearly review at the meetings on 29 March, 24 May, 21 July, 30 September, 22 November and 21 December 2010 and 24 January, 28 March 2011 and 20 December 2011 are summarized in the following paragraphs.

Expansion of the scope of SLAS

10. The Panel had all along held the view that given the success of SLAS in widening access to justice, there was a strong case for expanding the scope of the scheme. Both the Hong Kong Bar Association ("Bar Association") and the Law Society of Hong Kong ("Law Society") were supportive of the proposed expansion. In its Report on Conditional Fees published in July 2007, the Law Reform Commission also recommended increasing the types of cases covered under SLAS.

11. When the Administration reported to the Panel on its proposals arising from the five-yearly review on 29 March 2010, it advised the Panel of its recommendation not to expand the scope of SLAS to cover other categories of cases. According to the Administration, any proposal for extending the scope of SLAS must not undermine or jeopardize its financial viability, given its self-financing nature. SLAS was by design aimed at cases which involved monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages. The Administration stressed that if the scope of SLAS was to be extended to cover cases which did not fulfill such criteria, the SLAS Fund would be exposed to financial risk. The Administration also pointed out that 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.

12. Members did not subscribe to the Administration's view and urged the Administration to consider seriously expanding the scope of SLAS to enhance the middle class' access to justice. Some members suggested that the scope of SLAS should be expanded to cover monetary claims arising from systemic financial disputes (such as those relating to Lehman Brothers-related minibonds) and appeals relating to judgments delivered by various tribunals. Members considered that the expansion of SLAS would not have any adverse impact on the financial viability of the scheme, given that only applicants whose case or defence had been assessed to have a reasonable chance of success would be granted assistance under the scheme, and a percentage of damages or compensation would be recovered from successful SLAS cases and paid into the

SLAS Fund. They pointed out that the Director of Legal Aid ("DLA") had all along been very prudent in assessing legal aid applications and case monitoring. For cases with a low chance of recovery of damages or low damages to cost ratio, DLA would exercise discretion to reject the applications or ensure early settlements as appropriate. Some members also stressed that the decision on the 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.

13. At the meeting on 21 July 2010, members noted the proposals put forward by the Bar Association for expanding the scope of SLAS. The Bar Association set out in its submission [LC Paper No. CB(2)2105/09-10(01)] various types of cases which were covered by insurance either as a matter of law or practice, including mis-selling of financial and insurance products, claims against other types of professional negligence presently not covered by SLAS (such as services provided by accountants, estate agents, surveyors and engineers) and disputes relating to trusts. The Bar Association proposed that SLAS should be expanded to cover these areas for which recoverability of damages should not be an issue, thereby addressing the Administration's concern that expanding the coverage of SLAS would undermine the financial viability of the scheme. The Panel passed a motion requesting that the Administration should, based on the Bar Association's proposals, conduct a study as soon as possible on the implementation of measures to expand and improve legal aid services.

Recommendations of LASC on the expansion of the scope of SLAS

14. At the meeting on 30 September 2010, members were advised that the LASC's Interest Group on Scope of SLAS ("Interest Group") was studying the Bar Association's proposals along with its own study on the expansion of SLAS. At the meeting on 21 December 2010, LASC briefed the Panel on its recommendations [LC Paper No. CB(2)570/10-11(01)] and held further discussion with the Panel, the legal professional bodies and relevant organizations at the meeting on 24 January 2011. In gist, LASC recommended that SLAS be extended on an incremental basis, starting with cases of lower risk profile. It also recommended that SLAS be divided into Part I and Part II to be administered and monitored separately, with the new types of claims to be included under Part II for which a higher contribution rate would be payable.

15. While generally welcoming LASC's proposed expansion of SLAS, some members considered LASC's proposals too conservative both in terms of the scope and the pace of the reform. Members noted LASC's view that claims against developers in the sale of new flats should be introduced at a later stage, pending the Government's introduction of new legislation to strengthen regulation over the sale of new flats which would assist in the proof of liability.

Some members considered that such cases should be included in the first batch, rather than at a later stage as recommended by LASC. These members pointed out that irrespective of whether new legislation would be introduced, the general public could hardly afford to take legal action against developers if they had no recourse to legal aid.

16. Some members expressed disagreement with LASC's recommendation that claims arising out of the sale of goods and provision of services should not be included under SLAS on the ground that such claims could be taken care of by the Consumer Council. These members considered that the mechanism for dealing with consumer claims under the Consumer Legal Action Fund was no substitute for legal aid, as the size of the Fund was small and only cases involving significant public interest might be granted with assistance under the Fund after a rigorous selection process. LASC explained that such cases were not recommended for inclusion in SLAS as they generally involved small amounts of claims and the litigation costs involved usually far exceeded the values of the damages. Dr Margaret NG, however, considered that given the \$60,000 threshold requirement, the small size of such claims was not a valid reason for excluding altogether this type of claims from SLAS.

17. A member also did not subscribe to LASC's view that claims in respect of trusts should not be included in SLAS on the ground that they would probably be covered under professional negligence. He pointed out that not all such claims could be covered under professional negligence, given that trustees and executors of wills were not necessarily professionals. Some members also suggested that SLAS should also be extended to cover monetary claims between buyers and sellers arising from the sale of flats (such as those involving forfeiture of deposits), compulsory land sale cases under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545), provision of legal assistance to Hong Kong residents involved in litigation on the Mainland, and cases where whistleblowers were being sued for defamation and there was great disparity in the financial resources between the two parties. Members also noted the Bar Association's view that SLAS should also be made available for cases concerning class actions and protection of minority rights.

The Administration's proposal for expanding the scope of SLAS

18. At the meeting on 28 March 2011, the Administration reported to the Panel on its proposals for expanding the scope of SLAS. Having studied the LASC's recommendations and taken into account the views of the Panel and relevant stakeholders, the Administration proposed that claims of the following categories, with claim amounts exceeding \$60,000, be covered under the expanded SLAS using an enhanced rate of application fee and contribution –

- (a) professional negligence claims against Certified Public Accountants, Architects, Registered Professional Engineers, Registered Professional Surveyors, Authorized Land Surveyors, Registered Professional Planners, Landscape Architects and Estate Agents;
- (b) claims arising from sale of insurance products; and
- (c) claims against developers in the sale of first-hand residential properties.

19. Members noted another submission from the Bar Association [LC Paper No. CB(2)1373/10-11(01)] urging the Administration to further expand the scope of SLAS to cover more types of cases. The Administration, however, did not support other proposals for expanding the scope of SLAS to cover claims against property developers by minority owners in respect of compulsory sales of building units, claims against sale of goods and provision of services, claims in respect of trusts, property damage claims against incorporated owners, claims against small marine boat accidents and claims involving disputes between limited companies and their minority shareholders.

20. A member expressed disagreement with the Administration's decision of not including claims arising from the sale of goods and provision of services under SLAS on the grounds of low success rate and high cost-to-damages ratio of these claims. The Administration explained that having considered that claims from sale of goods and provision of services involved small amount and the litigation costs involved usually far exceed the values of the damages, and that such claims had a relatively low success rate, the Administration did not seek to expand SLAS to cover such claims.

21. In response to the concern of some members that claims against property developers by minority owners in respect of compulsory sales of building units would not be covered under SLAS, the Administration stressed that the self-financing principle of SLAS should be adhered to in considering the issue. Given that no monetary value was involved in compulsory sale cases and past results of the Lands Tribunal had shown that the chance of it granting a compulsory sale order was very high, the Administration envisaged that the chance of the aided minority owner losing the case and having to bear all the costs would be very high.

22. Regarding money claims in derivatives of securities, currency futures or other futures contracts, members noted that while the Administration would not seek to expand SLAS to cover derivative claims in the coming exercise, it would conduct a study on amending LAO with a view to enabling money claims in derivatives of securities, currency futures or other futures contracts be

covered under OLAS when fraud, misrepresentation/deception was involved at the time of purchase.

23. The Administration reported on its progress in taking forward the relevant legislative proposals at the Panel meeting on 20 December 2011. The Administration confirmed that it would take forward the above proposal on the expansion of SLAS and the study on amending LAO. Members in general were supportive of the early implementation of the legislative proposals, but considered the proposed expansion inadequate.

Contribution required to be paid by aided persons

Contribution rate

24. Members noted with concern that some applicants had turned down the grant of legal aid and represented themselves in court as they could not afford the cost involved, and sought clarification on whether any adjustments would be made to the contribution rates under OLAS and SLAS following the adjustments of FELs. Some members considered that DLA should be given the discretion to waive the payment of contribution in cases where the legally aided applicants had financial difficulties in making such payment. They also suggested that consideration be given to setting different contribution rates for different types of cases, for instance, a lower contribution rate could apply to appeals relating to Labour Tribunal ("LT") awards.

25. At the meeting on 28 March 2011, the Administration advised that it proposed the application fee and rates of contribution for the new types of cases to be covered under the expanded SLAS as follows –

- (a) the application fee be increased to \$5,000;
- (b) the interim contribution rate be set at 10% of the assessed financial resources of the aided person, but in any event not less than the current interim contribution payable by the aided persons under SLAS as set out in Regulation 14(a) of the Legal Aid (Assessment of Resources and Contributions) Regulations ("LA(ARC)R") (Cap. 91 sub. leg. B); and
- (c) the final contribution rate be increased to 20% of the value of property recovered, and to 15% where a claim is settled prior to delivery of a brief for attendance at trial to counsel.

26. According to the Administration, the enhanced application fee and rates of contribution shall also apply to the existing three types of professional negligence claims against the medical, dental or legal professions. However, the Law Society considered that the existing rates of application fee and

contribution should be maintained given that the SLAS Fund had all along been making money and there was a current credit balance of \$88 million.

Interim contribution for employee claims on appeal from LT

27. Some members expressed concern about the interim contribution payable for employee claims on appeal from LT proposed for inclusion under SLAS Part I. Members noted that while the interim contribution payable under SLAS (\$43,950 at that time) would be refunded to an aided person who was successful in his proceedings, the aided person was still liable for the legal expenses which were not recoverable from the other party, and this might amount to tens of thousands of dollars. Given the relatively small size of employee claims on appeal from LT, members urged the Administration to consider waiving the payment of interim contribution for such claims. The Administration was requested to provide for members' reference an analysis, with different scenarios, on the total amount of contributions payable for employee claims on appeal from LT should such claims be covered under SLAS Part I as proposed by LASC.

28. A member considered that legal aid should be granted unconditionally to employees for employee claims on appeal from LT. Given that legal representation was not allowed in LT and appeals against LT awards were made on a point of law, and having regard to the implications of the judgments on later cases, he considered it unfair that employees had to shoulder the litigation costs for such appeals.

29. Regarding the interim contribution for employee claims on appeal from LT, the Administration advised that it proposed to cover employees' claims on appeals from LT, regardless of the criteria on claim amounts (i.e. the general requirement that the claim amount should exceed \$60,000), under the expanded SLAS using the existing rates of application fee and contribution. The Administration agreed with the LASC's recommendation to exempt this type of cases from the increased rates of application fee and contribution. The Administration, however, would not further waive the requirement for interim contributions as this would violate the self-financing principle of SLAS and would have significant read-across implications on other types of SLAS claims.

Proposed Resolution under section 7(b) of LAO to expand the scope of OLAS and SLAS

30. Subsequent to the meeting on 20 December 2011 at which members were briefed on the progress of amendments to the LAO in respect of expansion of OLAS and SLAS, the Secretary for Home Affairs gave notice to move a proposed resolution under section 7(b) of the LAO ("the Proposed Resolution")

at the Council meeting of 28 March 2012 to seek the approval of LegCo 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 (practicing), registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorized land surveyors, estate agents, and registered landscape architects;
 - (ii) negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products; and
 - (iii) monetary claims against the vendors in the sale of first-hand completed or uncompleted residential properties; 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 LT, regardless of the amount in dispute.

31. At the House Committee ("HC") meeting on 23 March 2012, Members formed a subcommittee to study the Proposed Resolution ("the Subcommittee"). Major views of the Subcommittee are set out in the ensuing paragraphs.

32. The Subcommittee considered it unfair that employees had to bear the litigation costs for such appeals, having regard to the fact that legal representation was not allowed in LT and appeals against LT awards were made on a point of law. The Administration was requested to consider taking advantage of funds such as the Protection of Wages on Insolvency Fund and the Occupational Deafness Compensation Fund, or setting up a fund along those lines, to provide financial assistance to employees seeking representation in LT appeal cases.

33. The Subcommittee was provided with illustrations of the proposed amendments to the Legal Aid Regulations ("LAR") (Cap. 91 sub. leg. A) and the LAR(ARC)R (Cap. 91 sub. leg. B), and members raised no query on them. The Subcommittee agreed to recommend to HC that it was not necessary to form a subcommittee to study the amendments when they were tabled for negative vetting by LegCo, subject to the amendments being materially the

same as those in the illustrations provided to the Subcommittee, so that the proposed expansion of the SLAS could take effect as soon as possible.

34. The Subcommittee noted that after passage of the Resolution, the Administration would amend LAR and the LA(ARC)R to provide for the application fee and the rates of contribution to be levied in relation to some of the new types of civil proceedings under the expanded SLAS, and to adjust the application fee and the rates of contribution for certain civil proceedings under the existing SLAS as follows:

- (a) for the application fee and rates of contribution for any of the new types of civil proceedings mentioned in paragraph 30(b) above:
 - (i) the application fee be set at \$5,000;
 - (ii) the interim contribution rate be set at 10% of the assessed financial resources of the aided person or the current interim contribution (i.e. \$65,000) payable by an aided person under SLAS as set out in regulation 14(a) of the LA(ARC)R, whichever is the higher; and
 - (iii) where the claim is settled before the date of commencement of the trial, the rate of levy on value of property recovered in the final contribution be set at 15% of the value of property recovered (however, if the settlement is made before that date but after the delivery of a brief to counsel for attendance at trial, the rate would be 20%); and in any other case, the rate be set at 20%;
- (b) for any of the civil proceedings in relation to existing types of claim for medical, dental and legal professional negligence, the application fee and rates of contribution be set at the same level as proposed in paragraph 34(a) above; and
- (c) for representation for employees in respect of civil proceedings relating to appeals under the Labour Tribunal Ordinance (Cap. 25) as mentioned in paragraph 30(c) above, the application fee and rates of contribution be set at the levels under the existing SLAS before the expansion of scope.

35. The Proposed Resolution was passed at the Council meeting of 11 July 2012. At the meeting of the Executive Council on 25 September 2012, the Chief Executive("CE")-in-Council ordered that the Legal Aid (Amendment) Regulation 2012 and the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2012 ("the amendment regulations") should be made

to provide for the enhanced application fees and rates of contribution applicable to the newly added legal proceedings under the expanded SLAS. The legislative amendments will commence operation on 30 November 2012.

Injection into the SLAS Fund

36. In his 2010-2011 Policy Address delivered on 13 October 2010, the CE announced that to complement the SLAS review being conducted by LASC, and to benefit more people from the middle class, the Government would earmark \$100 million for injection into the SLAS fund when necessary to expand the scheme to cover more types of cases.

Advice sought

37. Members are invited to note the above information.

Council Business Division 4
Legislative Council Secretariat
30 October 2012