Highlights

Expansion of Supplementary Legal Aid Scheme

Recommendations

Having considered the Council's recommendations on the expansion of Supplementary Legal Aid Scheme ("SLAS") submitted to the Chief Executive in July 2016, policy objectives of legal aid, the guiding principles of SLAS as well as views from relevant government bureaux and departments, the Home Affairs Bureau ("HAB") reported to the Legislative Council ("LegCo") Panel on Administration of Justice and Legal Services ("AJLS") in April 2017 that the Government 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 ("SFC"); 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, claims against breach of trusts, claims involving 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 financial eligibility limit ("FEL") for SLAS for the time being and that the FEL be monitored and reviewed annually; and

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

Justifications

Scope and Guiding Principles of SLAS

SLAS is a statutory self-financing legal aid scheme which came into operation in 1984. It provides legal assistance to people whose financial resources exceed the statutory limit allowed under OLAS (currently at $290,380), but are below the FEL specified for SLAS (currently at $1,451,900).

The Supplementary Legal Aid Fund ("SLAF") which finances SLAS was set up under section 29 of the Legal Aid Ordinance. SLAF is funded by an 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 Government 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 balance of SLAF stood at $193 million as at end September 2016.

To maintain its financial viability, SLAS has been targeting at cases 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. When deliberating on new categories of cases to be covered by SLAS, this principle should be borne in mind and one should not seek to cover cases which do not involve monetary claims, or have a relatively low success rate or poor prospect of recovery.

Categories of Cases Recommended for Inclusion in SLAS

(i) Professional Negligence Claims against Relevant Financial Intermediaries Licensed by the Securities and Futures Commission

For the financial sector, SLAS currently covers professional negligence claims against certified public accountants (practising) and negligence claims against insurers or their intermediaries in respect of the taking out of the personal insurance products. LASC recommended that the scope of SLAS should be expanded to include monetary claims exceeding $60,000 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 SFC (referred to as "relevant financial intermediaries"). These relevant financial intermediaries are required by law to maintain professional insurance.

One of the guiding principles of SLAS is that claims should have a high chance of recovery of damages. Having regard to the prospect of recoverability of legal costs and LASC's recommendation that any expansion of SLAS should be made on an incremental basis, the Government agreed that SLAS should be expanded to cover financial intermediaries licensed for Types 1, 2 or 8 regulated activities at the current stage. Following the incremental approach, the Government did not intend to expand SLAS to cover other financial intermediaries which are not required by law to take out professional insurance for the time being.

(ii) Derivatives Claims

OLAS was expanded in November 2012 to cover proceedings involving money claims in derivatives of securities, currency futures or other futures contracts when fraud, deception or misrepresentation was involved at the time of purchase. As such, LASC recommended that the same should be included under SLAS.

According to the record of the Legal Aid Department ("LAD"), eight applications related to such proceedings were received under OLAS and no certificate was granted between November 2012 and December 2016. In the current review on SLAS, reference has been made to the experience gained from the inclusion of these claims under OLAS during the past four years. Since the proposed inclusion in SLAS would unlikely have a significant impact on the financial viability of SLAS, the Government supported LASC's recommendation.

Categories of Cases Not Recommended for Inclusion in SLAS

The Government accepted LASC's recommendations that the scope of SLAS should not be expanded to cover claims for the following categories of cases. Its comments are summarized below –

(i) Sale of Goods and Provision of Services

With the Trade Descriptions Ordinance ("TDO") (Cap. 362) in place to prohibit unfair trade practices deployed by traders against consumers, LASC recommended not including claims arising out of the sale of goods and the provision of services under SLAS for the time being. Should this be considered in future, it should be mindful of the fact that such claims generally have a lower success rate when compared with other types of proceedings under SLAS (e.g. personal injury and employees' compensation) and a high cost-to-damage ratio, and the inclusion may compromise the financial viability of SLAF.

(ii) Class Action

LASC noted that there are different ways to structure a class action system. It could be a named plaintiff or a number of named plaintiffs to file a claim on behalf of a "class" of people or businesses who claim to have suffered from a common injury or loss. LASC considered that the inclusion of class action should be actively considered when the law governing class action is available.

The Director of Legal Aid ("DLA") should also have discretion to grant legal aid in appropriate class action cases to allow flexibility for evolving situation or circumstances.

The Working Group on Class Actions ("Working Group") and its Sub-committee are deliberating on the details of the proposed class action scheme. In the light of the current position, it was considered pre-mature to give consideration to the question of funding in the present context before any proposed reform to permit class action has taken shape.

As regards the justifications for not expanding the scope of SLAS 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, claims for breach of trusts, claims involving disputes between limited companies and their minority shareholders, defamation proceedings and election petitions; and for maintaining the level of FEL for SLAS, the Government did not have any contrary view to LASC's recommendations. More details of the Government's comments on these items can be found from the LegCo paper ref. CB(4)817/16-17(03).

Age Related Exemption for Assets Test

The current FELs for OLAS and SLAS are $290,380 and $1,451,900 respectively. The financial resources of an applicant is calculated as follows –

Monthly disposable income x 12 months + disposable capital

Monthly disposable income is the net monthly income after various allowable deductions have been made from gross income. The deductions include items such as rent, rates and a statutory allowance for the applicant's own living expenses and that of their dependants. Disposable capital consists of all assets of a capital nature, such as cash, bank savings, jewellery, antiques, stocks and shares, and property.

Capital disregards for elderly applicants was introduced in May 2011 with a view to better protecting elderly citizens' right of access to justice by providing more favourable treatment of the disposable capital assets owned by elderly applicants when calculating their disposable capital, taking into account their general lack of earning power and the prospect of diminishing earnings. For applicants who have reached the age of 60, an amount of capital equal to the FEL of OLAS, i.e. $290,380, will not be counted as their capital for both OLAS and SLAS applications.

LASC suggested lowering the age limit to 55 so as to better protect the assets of the elderly from being depleted in litigation as they are approaching the end of their working life and could not earn back those monies. However, in view of the world trend in extension of retirement age, including the Government's raising the retirement age for civil service new recruits from 60 to 65 for civilian grades since 1 June 2015, and with reference to the eligible age for various Government policies and services targeting at the elderly, the Government did not see strong justifications for lowering the age limit for assets test. As such, it was recommended maintaining the current age limit of 60.

The Council welcomed the Government's proposals on the expansion of SLAS. It however hoped that the Government could reconsider lowering the age limit for assets test to 55 with a view to further protecting elderly citizens' right of access to justice.