

法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: (59) in LASC 2/10/1/5 Pt 4

Yr Ref :

E-mail : secy@lasc.hk

web-site : <http://www.lasc.hk/>

Tel : 2838 5006

13 December 2010

The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Upper Albert Road, Central
Hong Kong

Dean C F Donald,

Review of the Supplementary Legal Aid Scheme

As you know, the Legal Aid Services Council (LASC) has all along been keen to improve the Supplementary Legal Aid Scheme (SLAS) in Hong Kong to enhance the coverage of legal aid and provide for greater access to justice for the middle class. The Council has set up an Interest Group on the Scope of SLAS (IG) to examine the subject. The IG has finished its study and submitted a report to the Council. I have pleasure to report to you the recommendations of the Council which has deliberated carefully the report of the IG.

Interest Group on the Scope of SLAS (IG)

The IG was chaired by a member of the Council who is a barrister with wide representation from different stakeholders. Members of the IG include the Vice Chairman and members of the Hong Kong Bar Association (HKBA), a former Director of Legal Aid, solicitors, a representative from Legal Aid Department (LAD), a District Councillor, an academic and members of the public. The IG met 9 times to discuss and to consider written submissions and views, including the proposals put forward by the HKBA. It also examined relevant legislation and statistics and reviewed other materials.

Supplementary Legal Aid Scheme (SLAS)

SLAS was established in 1984 as a self-financing scheme aiming to provide legal aid for the middle class. When SLAS was first introduced, it only covered claims arising from personal injuries or death. It was funded by a \$1 million loan facility provided by The Lotteries Fund. The scope was extended subsequently in 1992 to include employees' compensation claims. With an one-off grant of \$27 million from the government in June 1995, the scope was further extended to include medical, dental and legal professional negligence claims.

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 financial eligibility limit (FEL) for the Ordinary Legal Aid Scheme (OLAS). At present, the FEL of OLAS is \$175,800. On successful conclusion of the case, the aided person is also required to pay a contribution from any damages recovered. The rates of contribution are currently set at 6% for cases settled before delivery of brief to counsel and 10% for other cases. The majority of the cases are settled before delivery of brief to counsel.

SLAS covers mainly cases where the defendants are insured or where there is assured payment of damages. So far, SLAS has been financially sustainable mainly because of the choice of types of claims, high success rate of litigation, the high chance of recovering legal costs and damages and the substantial interest income earned over the years on the unused fund.

Review of SLAS

In reviewing SLAS, the question of whether it is necessary and feasible to expand the scope of SLAS has been examined and if so, in what way, how and when.

After deliberation, the Council considers that SLAS can be extended by way of establishing a parallel scheme with a wider scope of coverage ('SLAS Part II'). Detailed recommendations are set out in the ensuing paragraphs.

fe

SLAS Part II

The Council recommends to extend SLAS by way of creating a parallel scheme with a wider scope of coverage. This parallel scheme should be administered separately from the existing scheme (SLAS Part I). SLAS Part II could be more ambitious in terms of the types of claims to be covered and at the same time would adopt a separate set of contribution rates to better reflect the risk profile of such claims and thereby better protect the overall financial viability of the scheme. SLAS Part II would be tested for its viability and effectiveness, and be reviewed and fine-tuned periodically without jeopardizing the existing SLAS Part I which has been serving the public well.

I) Funding and Management

The Council acknowledges that the Government has earmarked \$100 million for injection into the SLAS Fund to expand the scheme to cover more types of cases. The Council is of the view that this fund injection should be set aside for SLAS Part II. SLAS Part II will be administered by the Director of Legal Aid separately from SLAS Part I. The scheme is to cover monetary claims with a good prospect of success and recovery which would permit the scheme to be self-financing. The Council has reviewed the financial performance of SLAS Part I and noted that the scheme would have incurred a net loss in recent years if it has not been supplemented by bank interest income earned on the unused fund. The Council therefore recommends that the entire sum of \$100 million should be handed over to the Director of Legal Aid as soon as possible so that interest income can start to accrue to support the launch of SLAS Part II.

II) Scope

The Council is of the view that the types of cases to be covered by SLAS Part II should be introduced on an incremental basis, starting with the less risky types of cases. Other types of cases may be included after a review of the scheme in say, 2 years after its implementation. With this in mind, the Council recommends that SLAS Part II should cover the following :

(i) Professional Negligence

A wider range of professional negligence should be included on an incremental basis taking into account whether the profession concerned is insured or required to be. Accountants, architects, engineers and surveyors are recommended to be included in the

first batch;

(ii) Claims against Incorporated Owners of a Multi-storey Building

It is noted that personal injury claims against individual owners and Incorporated Owners (IOs) of a multi-storey building are already covered under SLAS Part I, whether they are insured or otherwise.

The Council recommends that claims against IOs for property damage in a multi-storey building should be brought under SLAS Part II. Adequate publicity and public education are needed so that the IOs are made fully aware of their potential liability and may thereby be encouraged to effect adequate insurance cover.

As to claims against individual owners alone, the Council, taking into account a number of factors including the difficulties of recovery, considers that it is not appropriate to include them in the scheme.

(iii) Derivatives Claims

Currently, money claims in derivatives of securities, currency futures or other futures are specifically excluded from OLAS. The Council is of the view that structured financial products are now common place, some of which may be derivatives of securities but are not speculative in nature. To fight against unscrupulous practice but at the same time not to encourage speculative activities, the Council recommends that the exception in OLAS should be suitably amended and SLAS Part II should likewise include such cases.

The Council is of the view that the following may worth consideration at a later stage :

(i) Estate Agents, Independent Financial Consultants and Insurance Agents

Claims against estate agents, independent financial consultants and insurance agents may be considered, pending review of the recoverability implications (including their respective insurance positions);

(ii) Claims against Developers in the Sale of New Flats etc

The Council has strong concern about claims arising from sale

11

of new flats, offices or shop premises. However, statistics of the Legal Aid Department in respect of claims by new flat buyers against property developers under OLAS in the past 10 years or so indicate that the success rate of such cases was very low, and even for the two successful cases, the recovery of both damages and costs was very small or even empty.

Noting that the government will introduce legislation to strengthen the regulation over selling of new flats, the Council has decided not to include such claims under SLAS Part II for the moment but to keep the matter under review; and

(iii) Small Marine Accidents

Claims for personal injury in small boat accidents are already covered under SLAS Part I. Claims for property damage in small marine accidents may be considered at a later stage.

The Council does not recommend the following to be included under SLAS Part II :

(i) Trust

Claims in respect of Trust because they would probably be covered under professional negligence;

(ii) Company Disputes, Minority Shareholders

Currently, claims involving disputes between limited companies or their minority shareholders regarding the respective rights of the company and the shareholders is expressly excluded from OLAS by Schedule 2, Part II, para 11(c) of Legal Aid Ordinance, Cap 91. Besides, they may not involve monetary claims; and

(iii) Sale of Goods and Provision of Services

Claims arising out of the sale of goods and the provision of services would probably be taken care of by the Consumer Council. Besides, legislation strengthening the regulation over selling of goods and services has been introduced by the Trade Description Amendment Ordinance 2008, and the government is currently consulting the public about further legislation to protect consumer against unfair trade practices. The subject should be put on hold pending the outcome of the legislative changes.

III) Fee and Contributions

The Council is of the view that the application fee and the contributions payable by the applicant/aided person for SLAS Part II claims should be higher than those for SLAS Part I claims to reflect the complexity of such claims and the higher risks associated with such proceedings in order that the scheme may be self-financing. It is therefore recommended that:-

- (1) the non-refundable application fee be set at \$5,000;
- (2) the interim contribution be set at 10% of the assessed financial resources of the aided person, but in any event not less than the maximum interim contribution payable by persons aided under OLAS; and
- (3) on successful conclusion of the case, the contribution rate from the aided persons should be 20%, which can be lowered to 15% if the claim is settled before delivery of brief to counsel.

SLAS Part I

The Council has also taken the opportunity to review SLAS Part I and acknowledges that it is operating effectively and should be continued. Nevertheless, the Council has the following recommendations :

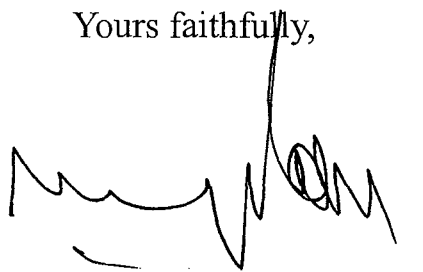
- (i) Employees Claims
Employees claims on appeal from the Labour Tribunal should be included without size limit because this is socially deserving;
- (ii) Alignment of professional negligence claims
to align the administration of legal aid available for claims against professional negligence and considering the complexity and risk profile of such cases, the Council recommends that medical, dental and legal professional negligence claims currently provided in SLAS Part I be transferred to SLAS Part II; and
- (iii) Fees and Contributions
The Council has reviewed the administrative fee charged by the LAD for administering the scheme, the application fee and the contribution rates payable by aided persons and concluded that these should remain unchanged.

Financial Eligibility Limit

The Council has earlier recommended to the government that the financial eligibility limit of SLAS Part I should be increased to \$1.3 million pending further consideration of a Second Tier SLAS, i.e. SLAS scheme with a higher FEL. Noting that there were calls from other stakeholders for the FEL to be increased, the Council has reconsidered this issue. After deliberation, the Council concludes that, given the recommendation to expand the scope of SLAS horizontally by establishing SLAS Part II, the higher risks that this may impose on the financial viability of SLAS and the need for additional funding, the study of the Second Tier SLAS be put on hold and the FEL for SLAS Part I & II be maintained at \$1.3 M.

I trust the foregoing recommendations are fair and reasonable and would urge the government to implement them at full speed for the benefit of the Hong Kong community. Meanwhile, please feel free to contact me if you require any clarifications or additional information.

Yours faithfully,



Paul M R Chan
Chairman

c.c. Secretary for Home Affairs