



法律援助服務局
LEGAL AID SERVICES COUNCIL

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The Honorable C Y LEUNG, GBM, GBS, JP
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Tamar, Hong Kong

Dear  ,

**Further Review of the
Supplementary Legal Aid Scheme**

Thank you for your Home Affairs Bureau's invitation to the Legal Aid Services Council for conducting a further review of the Supplementary Legal Aid Scheme ("SLAS").

The Council is responsible for, inter alia, advising the Chief Executive on legal aid policy. It has been keen to uphold and enhance the rule of law by striving to ensure access to justice and equality before the law of people of limited means. In 2010, the Council has made a submission on the expansion of SLAS to the Chief Executive with a view to enhancing the coverage of legal aid and providing greater access to justice for the middle class.

For the further review of SLAS suggested by the Home Affairs Bureau, the working group set up by the Council has recently completed the study. I have the pleasure to report to you the findings of the Council.

Working Group on Expansion of SLAS

The Working Group on Expansion of SLAS ("WG") is composed of members of the Council. It is chaired by a barrister and supported by a solicitor and members of other professions. It is tasked to discuss and consider whether

it is necessary and feasible to further expand the scope of SLAS and, if so, which type(s) of cases should be included. In addition to the views expressed by members of the WG, the WG has considered written submissions and views, the Hong Kong Bar Association's position papers on this topic dated 20 July 2010 and 5 November 2012 in particular, examined relevant statistics and reviewed other materials. Recently the WG has also deliberated the written submissions of Hong Kong Bar Association and the Law Society of Hong Kong dated 18 and 24 November 2015 respectively in response to the preliminary proposal of WG.

Supplementary Legal Aid Scheme

SLAS came into operation in 1984. It was established on the basis of self-financing and financial viability. It aims at providing legal assistance to people whose financial resources exceed the upper limit allowed under the Ordinary Legal Aid Scheme (OLAS) but are below a ceiling amount. The financial eligibility limit (FEL) for SLAS is currently set at \$1,451,900.

SLAS is funded by the initial seed money of \$1 million from the Lotteries Fund, an injection of \$27 million from the general revenue in 1995, 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, costs awarded and receipts from first charge enforcement, etc.

All along, the types of proceedings covered by SLAS are those: (a) which deserve priority for public funding in the sense that significant injury or injustice to the individual, as distinct from that to a commercial concern or a group of citizens, is involved; and (b) which involve monetary claims and have a high success rate and a good chance of recovering costs and damages.

SLAS was limited initially to cover claims for damages for personal injuries or death. It was expanded in 1992 to include employees' compensation claims and in 1995 civil proceedings for medical, dental and legal professional negligence.

In November 2012, the scope of SLAS was significantly expanded having considered the Council's recommendations and taken into account the views of relevant stakeholders. In addition to the pre-existing claims relating to personal injuries or death, employees' compensation and medical, dental and legal professional negligence, SLAS was expanded to cover a wider range of

professional negligence claims, negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products, monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties, and representation for employees in appeals against awards made by the Labour Tribunal.

The LegCo Finance Committee's funding approval of \$100 million was obtained in December 2012 to support the operation of the expanded SLAS. As at the end of March 2016, the balance of the Supplementary Legal Aid Fund was \$191.5 million.

Since the expansion in 2012, the Legal Aid Department has been gaining experience on the newly added proceedings and assessing their impact on the Supplementary Legal Aid Fund.

Financial viability of the Supplementary Legal Aid Fund depends on the choice of claims covered, the merits test, the success rate in litigation, the recoverability of legal costs spent and the damages to costs ratio. At present, most of the SLAS claims are covered by insurance policies and the bulk of the SLAS cases are personal injuries claims which have a very high success rate and high compensation ratio.

The loss of any SLAS case impacts heavily on the Supplementary Legal Aid Fund as it has to bear the costs of both sides. In 2008, the loss of a SLAS funded personal injuries claim with estimated costs of \$17 million led to a drastic reduction of the Supplementary Legal Aid Fund from \$102 million to \$88 million. Without the gain from bank interest, there would be a net loss in most of the past 10 years.

Further Review of SLAS

In reviewing SLAS, the question of whether it is necessary and feasible to expand the scope of SLAS has been examined. The matters of: i) whether monetary claims are involved; ii) whether the claims have a high success rate; and iii) whether there is a good chance of recovering costs and damages have also been taken into account.

After deliberation, the Council supports the WG's recommendations that the scope of SLAS should be further expanded. Against the background above-mentioned, the Scheme should continue to be self-financing and

financially viable. It is also agreed that the expansion may be introduced on an incremental basis and the viability of the Supplementary Legal Aid Fund should be closely monitored. To facilitate future review of the scope of SLAS, it is considered necessary to create and maintain statistics on the newly added types of cases, and to conduct analysis of their impact on the Supplementary Legal Aid Fund.

Detailed recommendations in respect of the types of cases that have been considered for inclusion in the SLAS are given in the ensuing paragraphs.

Claims against the Incorporated Owners of a Multi-Storey Building

In the last review, the Administration did not propose to expand the scope of SLAS to cover property damage claims against the incorporated owners of a multi-storey building. It also revealed that it was not a mandatory requirement for the incorporated owners to procure insurance to cover damages to property of the third party, so individual owners would be the ones who were responsible for a share of the legal costs if proceedings involving property damage claims arose. Besides, it would be unfair if legal aid was made available only for claims against incorporated owners instead of all property damage cases. The Council took note of these points.

In the current review, since the issue of bid-rigging for building renovation and maintenance contract is a big concern of the community, the Council has focused on the study if legal aid should be provided under SLAS to help individual owners counter act against the improprieties of incorporated owners, for instance, the incorporated owners' failure to follow the established procedures or the act that is outside its authorities say not enough notice or members to make a quorum for a meeting to discuss matters that will adversely affect the benefit of individual owners, etc.

The Council recognizes that as in the case of property damage claims, the inclusion of claims solely against incorporated owners under SLAS may give an impression that SLAS is giving a special privilege to claims against body corporate and it will not be easy to explain the difference in treatment if legal aid will not be available under SLAS for claims where incorporated owners do not exist. Besides, monetary claims may not be involved in relation to the issue of bid-rigging. Any loss in the proceedings will adversely affect the Supplementary Legal Aid Fund which is limited in resources. In addition, the Competition Ordinance is in full force and the Competition Commission has

kicked off its “Fighting Bid-rigging Cartels” Campaign and committed to use the full extent of its power to end bid-rigging cartels. In view of the circumstances, the Council considers that claims against the incorporated owners of a multi-storey building should not be included in SLAS for the time being and the issue may be re-visited in due course.

Independent Financial Consultants

According to the Securities and Futures Commission, if a corporation is licensed for Type 1 (dealing in securities), Type 2 (dealing in future contracts) or Type 8 (securities margin financing) regulated activities, it is required to take out and maintain insurance. The Council therefore considers that monetary claims exceeding \$60,000 against independent financial consultants registered under the Commission and required to have insurance cover could be included in SLAS.

Derivatives Claims

The OLAS was expanded in November 2012 to cover monetary claims in derivatives of securities, currency futures or other futures when fraud, misrepresentation or deception was involved at the time of purchase. In view that the exception has been removed from OLAS, the Council considers that the same types and scope of coverage of derivatives claims exceeding \$60,000 should also be included in SLAS.

Small Marine Accidents

Small boat accidents resulting in personal injuries have already been covered under SLAS. The chance of claims purely for property damage is quite remote. Even if it occurs, the insurers of the boat owners will safeguard their insured clients’ interest. Therefore, the Council does not recommend extension of SLAS to claims for property damage from small marine accidents.

Claims against Property Developers by Minority Owners in Compulsory Sales

Noting that claims against property developers by minority owners in compulsory sales are related to the Lands Tribunal’s orders to sell and normally do not involve monetary claims, the Council considers that such claims should not be covered by SLAS.

Trusts

In general, any person could be appointed as trustee for a trust. He/she may not necessarily be a professional. Hence, it could not be sure whether costs and damages could be recovered if claims in respect of the trust occurs. Even if a professional say solicitor is assigned as trustee, the claims against such kind of professional are already covered by professional negligence claims. Therefore, the Council considers it not appropriate/necessary to expand SLAS to cover claims for breach of trust against trustees.

Disputes between Limited Companies and Their Minority Shareholders

Since claims involving disputes between limited companies and their shareholders regarding their respective rights are expressly excluded from OLAS and such claims may not necessarily be related to monetary claims, the Council considers that SLAS should not be expanded to cover this type of claims.

Sale of Goods and Provision of Services

The Council recommends not including claims arising out of the sale of goods and the provision of services in SLAS for the time being because actions will be taken by the Customs and Excise Department under the Trade Descriptions Ordinance, and consumer class actions will be covered by the Consumer Legal Action Fund set up by the Consumer Council.

Class Action

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. The Council considers that the inclusion of this item should be actively considered when the law governing class action is available. It also views that the Director of Legal Aid should have discretion to grant legal aid in appropriate class action cases to allow elasticity for evolving situation or circumstances.

Defamation Proceedings and Election Petitions

The Home Affairs Bureau together with the Legal Aid Department have helped conduct a research on whether election petitions and defamation

proceedings are covered by legal aid in overseas jurisdictions. Available information indicates that election petitions are generally not covered by legal aid in England & Wales, New South Wales and Victoria of Australia, New Zealand, North Ireland, Ontario of Canada, Scotland and Singapore. As for defamation proceedings, it is not covered by legal aid in Ontario of Canada, Victoria of Australia and Singapore, and it is generally not covered except under special or exceptional circumstances in England & Wales, New South Wales of Australia, Northern Ireland and Scotland. In Hong Kong, legal aid is not provided for election petitions and defamation proceedings under OLAS. Having considered the above, the Council does not recommend extending SLAS to these two types of cases.

Financial Eligibility Limit

Following the recommendation of the Council in the five-yearly review of the criteria used to assess the financial eligibility of legal aid applicants in 2010, the Administration adopted \$1.3 million as the level of FEL for SLAS. Such amount was based on the average legal costs (i.e. \$1.297 million) of a SLAS case that actually went to trial in 2008. The FEL for SLAS is currently set at \$1,451,900. In view that the average legal costs provided by the Legal Aid Department appear to be roughly the same throughout the years, the Council does not propose any change to the level of FEL for SLAS for the time being but recommends it be monitored and reviewed every year.

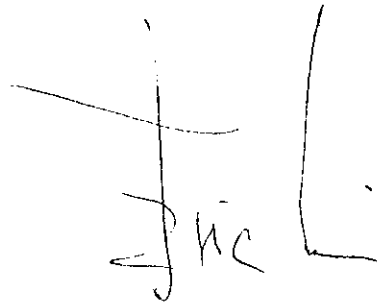
Age Related Exemption for Assets Test

Regarding the age related exemption for assets test in assessing the financial resources of legal aid applicants, the Council has proposed in its letter to the Home Affairs Bureau dated 3 August 2011 the Administration to take age 55. The Council maintains the view because it is considered necessary to protect the assets of the elderly from being “used up” in litigation as they are approaching the end of their working life and could not earn back those monies.

I trust the foregoing recommendations are fair and reasonable though the Council, with only limited manpower and resources, has exchanged views with the two legal bodies instead of collecting views from all relevant stakeholders when the proposals were discussed within the Council’s working group. We consider that, if necessary, the related government bureau could initiate a consultation which should be wide enough to involve all the stakeholders before finalizing its position.

For the benefit of Hong Kong, I would urge the government to seriously consider an early implementation of the Council's recommendations without delay. Meanwhile, please feel free to contact me if you require any clarifications or additional information.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Eric Li', with a stylized flourish extending to the left.

Eric LI Ka Cheung
Chairman