LegCo Panel on Administration of Justice and Legal Services

Submissions of the Hong Kong Bar Association

on the Provision of Legal Aid Services

A. ACCESS TO JUSTICE – INTRODUCTION

1) Access to justice and equal protection under the law are hallmarks of any civilized society. They are critical components of life in Hong Kong and are core values enshrined under the Basic Law. This is especially so for the weaker and more vulnerable of our society who are almost always amongst the poorer members of society.

2) The Courts, both in civil and criminal matters, deal with the most fundamental matters concerning the liberty of a citizen, his or her guaranteed constitutional rights under the Basic Law, the right to recover damages from the wrongdoers when a civil wrong has been done to him or her, and the ability to assert their proprietary rights. When the cost of defending or protecting those rights becomes prohibitive, then the claim that the citizen has those rights is becomes a sham. It is not much use speaking of the rule of law if a significant portion of our society cannot afford to obtain access to the courts or cannot afford to defend themselves in the courts.

3) The Hong Kong Bar Association ("The Bar") recognises that the primary purpose of Legal Aid is to provide for such access to justice to members of the public who otherwise will not be able to afford to do so. The Bar also recognises that the Legal Aid system exists not to provide a comfortable living for lawyers.

4) Nevertheless, there is and there will always be a requirement for representation of the poorer members of our community by the legal

profession. Accordingly, remuneration to lawyers, under the Legal Aid scheme, must be realistic in both the rates paid to lawyers as well as in the method of remunerating lawyers for the services they provide. In particular, lawyers should be encouraged and not penalized for providing a good quality and efficient service.

5) The Bar also recognises that our society has undergone dramatic changes in recent years. In particular, the increasing awareness by members of our society of their rights as a citizen as well as the difficulties faced by an increasing number of our society who are not eligible under the Ordinary Legal Aid Scheme ("OLAS") and who cannot afford proper private legal representation to protect those rights.

6) The Supplementary Legal Aid Scheme ("SLAS") was conceived and designed for the purpose of providing financial assistance to this sector of our community in deserving cases and for which there is a reasonably good chance of success.[1] The Administration, in focusing on only those cases where the recovery of damages are covered by insurance, are unnecessarily restricting the scope of cases in which the SLAS would be most beneficial thereby widening the gap between those who can afford to litigate and those who cannot.

B. LEGAL AID AND THE CRIMINAL LAWYER

[1] Paragraph 22 of the Consultative Paper on Legal Aid of 1993

7) The Bar would refer to its papers submitted to the Panel dated 22nd April 2002 on the Review of the Provision of Legal Aid and a Review on SLAS. For ease of reference, the papers are attached as **Appendix I** herewith.

8) It is axiomatic that if Legal Aid lawyers provide access to justice, without such lawyers there is no access. Lawyers who provide legal aid services live in the commercial world. They run private businesses and do provide good value for money. In a system of law such as that which we have in Hong Kong, which is complex, lawyers are an important component of the means by which a member of the community obtains access to justice. In Hong Kong we have chosen to have a system of legal aid in which a great deal of the advice given to and representation of these eligible for legal aid is undertaken by lawyers in the private profession. In making this choice, Hong Kong has rejected the idea of lawyers in the direct pay of the Government undertaking that work. In choosing to use lawyers in private practice it has always been recognised that such lawyers should be paid a reasonable amount for their work. While 'reasonable amount' does not mean (and, historically, has not meant) payment at the topmost rate, it must not be forgotten that lawyers in private practice and rents, salaries, and professional indemnity insurance costs do not reduce simply because the lawyer accepts legal aid work. While there are many faults and imperfections in the current scheme (to which this paper refers in a moment), broadly the scheme has provided good value for money.

9) Nevertheless, for many criminal practitioners, the level of fees paid in criminal legally aided litigation is, in many respects, wholly inadequate. Over recent years, the Bar notes that the Administration has been successful in reducing, paring down and generally cutting

costs such that its criminal legal aid budget has been falling progressively over the last 8 years. This is a false economy.

10) The Bar is therefore concerned with the recent proposal by the Government to further reduce the fees paid to private lawyers engaged by the Legal Aid Department in criminal cases. In essence, the proposal put forward is that these fees be adjusted downwards by 4.3%.

11) However, in addition to such unilateral cutting of costs, the current structure of payments under legal aid fails to take into account the significant changes in the manner in which Criminal Law proceedings are concluded since the time the scale was first developed. Examples of such changes include:

a) The growing obligation on imposed on counsel by the courts to prepare written skeleton arguments where submissions of significance are either required or anticipated; and

b) The preparation time involved in commercial crime cases. Further these cases are being placed in the District Court more often than in the past.

12) Those with experience of legally aided cases know:-

a) **The Payment Of Fees Is Too Heavily Weighted In Favour Of Court Attendance** - Apart from the Brief Fee, there is no fee paid for preparation work, reading work, advising on evidence or the drafting of skeleton arguments. In effect, there is little or no incentive to conduct adequate preparatory work. Yet, there can be little doubt that time properly spent in preparation can substantially reduce time taken during the trial.

In turn, this would lead to a reduction of expenditure to the Administration, as a whole;[2]

b) **Payment for Appeals** – The maximum fee for the drafting of Perfected Grounds of Appeal is at present at HK$2,380 regardless of the length or complexity. There is no allowance for reading or research or for the drafting of skeleton arguments. Nevertheless, if the client goes private before the Appeal is heard then the Counsel will only receive payment for settling the Perfected Grounds of Appeal;

c) **Enhanced Payment for Cases of 'Exceptional Length or Complexity'** – There are no clear guidelines as to what 'exceptional length' or 'exceptional complexity' actually means. Nor are there any indicated guidelines as to how the enhancement amount paid by the Administration is calculated;

d) **Payment for Adjournments** – There is no provision within the Rules to compensate the Counsel where, through no fault of his, the trial was unable to commence on the due date and thus Counsel had 'lost days'. In effect, it is the Counsel and the Counsel alone who is being penalized for the adjournment; and

e) **Appeals Against Assessed Fees** – At present, there is no procedure for a person who is independent of the Legal Aid Department, such as the Taxing Master, to review the assessed fee, where counsel is aggrieved with the original assessment.

[2] See also the observations of the Scott Report at paragraph 6.8.

13) Many of these matters of complaint were addressed in the Scott Report. Unfortunately, the Administration has yet to implement any of the suggested recommendations contained in that report.[3]

14) In essence, the present system provides little or no incentive to Counsel who are increasingly becoming discouraged at being unable to provide what they see as an adequate professional service for their Legally Aided clients. Moreover, if this situation is allowed to worsen, then there may well be the situation whereby the Counsel that do carry out Legal Aid work in criminal litigation, will be the less experienced members of the profession. This could result in even greater inequality of arms.

15) What is worse is that very few of these problems arise in another area where Government pays lawyers: these problems do not exist when Government hires private lawyers to represent it is criminal and civil cases. Government in retaining private lawyers recognises the changes in criminal practice and the structure of payments provides substantial incentives to prepare well and to save court time. It seems strange that Government when paying for legal aid in many critical ways does the exact opposite of what it does in paying private lawyers to represent the Government. The resultant potential for inefficiency and, even worse, injustice is obvious. The mode by which lawyers undertaking legal aid work was developed a long time ago and in a time when the nature legal work was different to today. The mode cries out for reform and such a reform would, if undertaken properly, result in a more efficient system – to the benefit of the public purse.

[3] See **Appendix II** for a summary of the relevant portions of the Scott Report.

C. LEGAL AID AND THE CIVIL LAWYER

16) The Bar would again refer Members to its paper dated 22nd April 2002.

17) While lawyers undertaking civil legal aid cases are not subject to fixed fees like their counterparts under the criminal legal aid system (both due to the ways civil litigation are being conducted under our system and the difficulties in attracting top civil practitioners to undertake such cases in the past), there are many aspects which expose the weakness and deficiency of the present system.

18) One primary example is that in recent years there has been a growing trend of drastically reducing the practitioners' fees in civil legal aid cases during the taxation stage by the Court. Yet, there seems to be very little (if anything at all) which the Legal Aid Department has done to ensure that those lawyers who have agreed to undertake civil legal aid cases are paid in a fair and reasonable manner. Many complaints focus on the fact that often the Legal Aid Department, instead of allowing costs reasonably incurred coming out of the Common Fund, would simply allow them to be taxed off altogether. This will do very little to attract the reasonably good and competent, if not the best, practitioners to continue to undertake civil legal aid cases.

19) Due to the economic decline in the past few years, the Bar also sees that there are a growing number of practitioners who in the past might not have undertook civil legal aid cases or specialised in a certain area, would, through the co-operation of the applicants, undertake cases where they either have had no experience or, worse still, outside their specialty. This will do little credit to the legal profession and is not an efficient way of making use of public funds. The Bar would urge the Legal Aid Department to scrutinise the application procedures and would set up some form of monitoring systems on both branches of

the profession to ensure that only those who are competent and have a good track record are assigned with civil legal aid cases. The Bar recognises that there is much room in this area where the Administration can improve on the efficiency of the present legal aid system.

20) Further, despite requests made in many quarters in the past few years, there is reluctance on the part of the Administration to expand the SLAS. As a self-financing scheme which would enable more citizens who are in the 'sandwich class' to gain access to justice, the Bar fails to see any rational objection or financial reason of why the Administration is reluctant to an expansion of the Scheme.

D. LEGAL AID AND THE APPLICANT

21) The Bar understands that the Administration has to strike a fine balance between controlling its expenditure and providing legal assistance to those who need it.

22) Nevertheless, there has to be recognition that society is becoming increasingly aware of its rights as a citizen and the greater the awareness, the greater the expectation.

23) The Bar would urge the Administration to be forward looking and not backward thinking. Where possible, the Administration is urged to keep an open mind to the realms in which the rights of its citizens' can and should be protected.

24) In particular, the role that the SLAS can play is important. With the recent downturn in the economy, there has been an increase in the 'sandwich class' of persons who cannot afford private legal representation to pursue their claims but yet, are not eligible under OLAS.

25) However, many from this 'sandwich class' of persons are being shut out from pursuing their claims because of the self-imposed restriction on the scope of cases that can be handled under the SLAS.

26) The justification for such restriction is, and always has been, the need for the SLAS to be self-financing. Hence, as the Administration freely admits, the scope of cases is restricted to only those where there are Insurers from whom damages may ultimately be recovered.

27) The Bar warns that the Administration's blinkered approach is leading to many deserving cases not being pursued because the applicant lacks the funds for private legal representation and has too much funds to be eligible under OLAS.

28) The Bar considers that this Administration is placing too great an emphasis on the perceived security that can be provided by insurance. The Bar would point out that there are other forms of assets from which damages may be recovered that are as good as an insurance company (e.g. landed property, stock and shares, bank accounts etc.). Moreover, the Bar would point out that Insurer, like any other corporation, are susceptible to failure. Recovery of damages can therefore never be guaranteed.

E. CONCLUSION

29) There is no doubt that Legal Aid has benefited many in our society, and will continue to do so. However, the Administration has to recognize that times are changing both in the needs of the citizens of our community and in the practice environment of modern litigation. The Bar would therefore urge the Panel to raise the areas of concern, highlighted by this report, to the Administration, for their consideration.

Dated this the 23rd day of June 2003.

Hong Kong Bar Association

Appendix I

HONG KONG BAR ASSOCIATION'S VIEWS ON A REVIEW OF THE PROVISION OF LEGAL AID

INTRODUCTION

1. The Rule of Law is one of Hong Kong's most valuable assets. Access to the Courts, to legal advice and representation is a fundamental component of the Rule of Law and recognized as such in Article 35 of the Basic Law. To give substance to those rights to many in the community it has been necessary to introduce a scheme of Legal Aid.

2. The provision of legal aid in Hong Kong is characterized by a piecemeal approach from the outset.

   (a) The **Legal Aid Ordinance, Cap. 91**, ("LAO"), came into force at the beginning of 1967. The purpose of this Ordinance was to "*make provision for the granting of legal aid in civil actions to persons of limited means and for purposes incidental thereto or connected therewith"*. There is nothing mentioned about criminal cases in the Ordinance.

   (b) In 1969 the **Criminal Procedure Ordinance, Cap. 221**, ("CPO"), was amended to introduce section 9A. This provision enabled the Criminal Procedure Rules Committee, ("Rules Committee"), to make rules providing for the granting and administration of legal aid in the criminal courts. These rules were given the name of **Legal Aid in Criminal Cases Rules, Cap. 221**, ("The Rules"). The Rules came into force on the 1st January 1970.

   (c) In 1971, the Legal Aid Department, ("LAD"), was created to administer both the criminal and civil legal aid. Thereafter, changes were brought about by way of progressive and minor amendments to

the relevant provision in the Ordinance and its subsidiary regulations and the Rules.

(d) There has been a haphazard division of labour between the LAD and the Court in the administration of legal aid services. The time is ripe for a comprehensive review of the legal aid scheme in Hong Kong and to improve upon it.

3. In this paper we propose to address the issue, identified in the LegCo Panel on Administration of Justice and Legal Services paper 'Existing legal aid regime – time for review', of the adequacy of that regime in giving substance to the rights provided for in the Hong Kong Bill of Rights and the Basic Law. We propose to deal with Criminal and Civil Legal Aid separately.

REFORM OF LEGAL AID IN CRIMINAL PROCEEDINGS

4. The Rules Committee, has a complement of eight persons, chaired by the Chief Justice. The Rules Committee includes representatives from the Bar, the Law Society, the Judiciary and the LAD. In their form and substance The Rules have changed little during the last thirty years.

5. The following submissions are made in respect of the Rules and their application:

(a) General

(i) The Rules are antiquated, inflexible and inadequate to meet the exigencies and conditions of modern criminal practice;

(ii) The provisions of the Rules act as disincentive to the efficient and expeditious resolution of criminal litigation;

(iii) As presently administered the Rules create unfairness;

(iv) "unrepresented litigants" have been a perennial problem which is a cause for concern even for members of the judiciary;

(v) The payment for criminal litigation is almost entirely 'trial based' instead of providing properly for pre-trial work and preparation.

(b) Briefing Leading Counsel

(i) The Legal Aid Department rarely instructs leading counsel in criminal litigation. This not only applies to trials but also to the highest level of appeal. This fact has been commented upon adversely by senior judges of the High Court;

(ii) It is now commonplace for junior counsel, when instructed in trials and appeals for legally aided clients, to be opposed by leading counsel for the Government – the Prosecutions Section of the Department of Justice employs no less than 5 Senior Counsel and briefs Senior Counsel at the Bar on a regular basis;

(iii) There is not in existence a scale of fees for junior and leading counsel in criminal legal aid litigation;

(c) Appeals from refusals to grant Legal Aid

The Courts require greater power to grant legal aid, in the face of a refusal by the Legal Aid Department, if it be in the interests of Justice so to do. At present the power of a judge of the Court of First Instance to grant a Defendant legal aid and exempt him from making a contribution under Part III of the Legal Aid in Criminal Cases Rules is limited to cases of murder, privacy and treason [see Rule 13(2)]. No doubt, those Rules were made before the abolition of the death penalty.

But, given its abolition, what is the justification for limiting that power to those offences and not extending it to those that face very lengthy sentences of imprisonment such as those charged with drug trafficking in large quantities of dangerous drugs or armed robbery?

(d) Judicial Role in the Assessment of Fees

(i) There is a 'judicial' input in the assessment of counsel's fees in certain cases. This is contrary to the basic constitutional principle of the 'separation of powers';

(ii) The Rules provide that in cases, where the trial or appeal judge *'is of the opinion'* that the case is one of '*exceptional complexity or length*', the trial judge may grant a certificate. This certificate then permits the Director of Legal Aid to assess a fee above that mandated by the Rules. One judge's opinion may differ radically from another's. The judge is therefore placed in a position of influencing the quantum of fees paid to counsel. If there is to be a judicial trespass into the arena of fees paid to counsel, it should only take place after the DLA has assessed counsel's fees; in other words on taxation. Of course, taxation of fees must be judged in accordance with an objective scale of fees;

(e) Payment and Assessment of Fees

(i) The payment of fees, as authorised by the Rules, is governed by the formula: "*for work actually and reasonably done*". The application of this formula produces unfairness in the administration of criminal legal aid. In particular, it gives the Director of Legal Aid complete control over the assessment and payment for criminal legal aid. The Legal Aid Department has

never revealed to the profession or the public the bases or principles upon which legal aid counsel assess advocates' fees;

(ii) The advocate does not know, until he receives his 'assessment' what he will be paid for his work;

(iii) The advocate has no right of appeal, to a taxing master, (as he has when conducting civil legal aid litigation/work), if dissatisfied with his assessed fee;

(iv) There is a complete lack of transparency of the process, (if any), as to how fees are assessed and on what principles, if any, (outside of any internal guidelines), they are quantified;

(v) There is no provision for the taxation of fees, in criminal appeals, in the Court of Final Appeal. There is no scale of fees for such work;

(vi) Solicitors, whether in their capacity of instructing counsel or as an advocate, are very poorly paid. For some classes of work, such as would be considered to be the normal function of a solicitor, in the proper conduct of his practice, no payment is made at all. An example is the taking of instructions from the lay client. All the solicitor is allowed is 'travel expenses'. In many cases, a solicitor may spend several hours in a prison taking a 'proof' from a client, in a very serious matter but he will not receive any payment for this work;

(vii) The fees paid to counsel in appeal work are so low that many senior juniors will not do the work. The maximum fee payable to counsel for settling a Notice of Appeal following upon a conviction is $2,800 notwithstanding the fact the counsel did not conduct the trial and the transcript is voluminous [See Rule

21(o)]. In recent years much more is required of counsel in pre-hearing preparation by way of written submissions in an appeal case, no allowance has ever been made for this extra work;

6. Proposed Reforms – A Holistic Approach

(a) A system of marked Briefs ought to be introduced;

(b) The Rules should be entirely recast, to bring them in line with modern day conditions;

(c) There should be much more emphasis on preparation. For example, there should be allowance made for reading and negotiation work. It is in the public interest that criminal litigation should be conducted properly and expeditiously. The better a case is prepared the shorter it will be. Thus, public money is saved and valuable Judicial time and resources can be redeployed. The Rules, as presently framed, provide an incentive for the less scrupulous advocate to 'drag out' a trial and no incentive for him to spend the extra time in preparing more complicated cases;

(d) Senior Counsel ought to be instructed in cases of appropriate complexity and seriousness.

(e) The judicial process of 'certifying' exceptional complexity and length should be abolished. What fee is paid to counsel should not be the business of a trial or appeal judge.

7. As to the payment of fees, if the system were to be retained, the process should be transparent

(a) The advocate should know, with a higher degree of certainty, what he will be paid for a given piece of work;

(b) The advocate should have the right to appeal to a taxing master, if he is dissatisfied with the assessment of his fees;

(c) The principles relating to the remuneration of solicitors, either as instructing solicitor or as advocate, should be incorporated into a proper scale of fees, which should be comprehensive and should allow for the proper preparation of the defence or appeal;

(d) Allowance should be made for "cracked trials". That is for trials, which after extensive preparation, do not take place or "go short". In such cases, counsel will have committed his diary, at the behest of the DLA, for several days even weeks. Quite often the issues in a trial have been crystallized through the hard work and commonsense of counsel. For this effort he/she is penalized: counsel is only paid for "*work actually and reasonably done*". He/she is paid nothing for the 'lost days';

(e) A proper scale of fees should laid down for work in the Court of Final Appeal.

REFORM OF LEGAL AID IN CIVIL PROCEEDINGS

8. We will address 3 main issues relating to provision of legal aid in civil proceedings, viz :

(a) Unjustifiable Denial of Legal Aid - At times, access to justice is denied contributing to the problem of un-represented persons in the courts. There are various remedies.

(b) Supplementary Legal Aid Scheme – It is in the public interest to increase the use of and expand the Supplementary Legal Aid Scheme to procure the greatest benefit for the public. This self funding scheme has been a success.

(c) Costs and Taxation – The cost, delay, and uncertainty in the current system is not acceptable and can be reduced.

Unjustifiable Denial of Legal Aid

9. S.9 Opinion

(a) The current Legal Aid Regulations provides legal representation in principle, the basic tests of eligibility relate to (a) the applicant's means; and (b) the merits of the applicants' case. The Regulations provide for an Appeal to the Registrar of the High Court when an application for Legal Aid is refused.

(b) Section 9(d) of the Legal Aid Ordinance, empowers the Director of Legal Aid to refer an application to counsel to investigate the facts and/or the law and give an opinion on the application.

(c) It appears that more often than not, Counsel opinion is only sought after a decision has been taken by the Legal Aid Counsel to refuse legal and the decision is subject matter of an appeal to the Registrar. It may create the impression that Counsel is asked to render an opinion to reinforce the decision.

(d) No doubt, Counsel would approach the merits of case afresh and objectively. Whether or not the incidence of instructions to counsel to provide a section 9 opinion has declined, the reference to counsel for an independent evaluation is a substantial safeguard of the public interest and brings transparency to such decisions.

(e) Far greater use should be made of this provision. This has to be viewed against the following experience of the Bar:

(i) A substantial number of applicants are being refused Legal Aid in circumstances where the practitioners take the view that the case has merit or at least deserves to be investigated further;

(ii) the rate of success for an un-represented appeal against a decision of the Director to refuse Legal Aid is about 9%.

(f) Legal Aid is not available to an applicant mounting an appeal against the decision of the Director who himself is represented by a Legal Aid Counsel. Administrative reforms have recently made the system less unfair and more transparent to applicants. Despite these improvements, the existing gap in the system cannot be filled by current *pro bono* representation by the Bar. Applicants need informed legal input prior to mounting an appeal.

(g) It is suggested that a scheme whereby section 9 assistance is expanded to include appearance at the appeal would be of great assistance to the Registrar or Masters dealing with such appeals.

Withdrawal/Refusal of Legal Aid during the course of litigation

10. A different aspect of unjustifiable denial of Legal Aid is encountered when the Director's perception is that, despite the legal merits of a case, the costs of establishing those merits is potentially high. This is of especial significance where either the Defendant or one of the Defendants is a government Department or body. There are, regrettably, an increasing number of illustrations of this occurring.

Other observations

11. The perception of practitioners, drawn from these and other kindred examples of unjustifiable denial of legal aid, is that:

(a) budgetary considerations marginalize legal rights; and

(b) whether warranted or not, there is a growing public perception that the Director is apprehensive of litigation against government;

(c) on the pretext of reducing expenditure, work is handled in-house by Legal Aid Counsel, as a consequence of which both independence and transparency are subject to the risk of being compromised. Another example, which is denied by the District Court, is the practice of refusing to grant a certificate for Counsel in District Court cases is noted. The fact that this perception is so widespread amongst practitioners constitutes a dangerous threat to the twin concepts of the Division of Powers and the Independence of the Judiciary. The LAD values independence in its mission statement. It should strive to act accordingly.

The Supplementary Legal Aid Scheme

12. A review on this subject is at Appendix A.

13. In brief, the Supplemental Legal Aid Scheme (SLAS) is created under s.5A of the Ordinance. It is a self-financing scheme with a starting capital borrowed from the Lottery Fund. The scheme has been a major success.

14. The Administration has indicated in the past that the scheme could be revised and expanded to cover a wider array of cases worthy of public support. The major constraint then was the size of the SLAS fund.

15. The SLAS fund has now grown to over $75m. It is time to consider expanding the scheme to cover other types of cases or litigations not previously covered e.g Product Liability cases, Environmental Damages cases where the individual damage may not be high but the damage to many could be considerable, Class or group litigation arising from major incidents such as

disasters, insolvency of a corporate employer, Building Management Ordinance type cases, Claims against developers for defective workmanship of new flats, etc.

Costs and Taxation

16. The need for taxation of costs stems from the provision in the Legal Aid Regulation that Solicitors and Barristers are only entitled to the fees as allowed by the Court on taxation.

17. Prior to 1998, there were few concerns about taxation of Legal Aid Costs in civil cases, as a consistent pattern of taxation had emerged over the years since 1968. Quite why a sea change took place in mid 1998, has not been explained by the Judiciary.

18. However, there has been a determined effort by Masters to reduce fees allowable on taxation, for both solicitors and barristers. Whether they had power to do so, rather than allowing reasonable fees based on the current market rate, is questionable.

19. Certainly the Civil Justice Reform Interim Report has criticised the levels of legal costs, and the court has attempted to reduce levels of fees.

20. So far as barristers' fees are concerned, discussions came to abrupt halt after July 1999 Mr. Justice Cheung had introduced proposed Scales or Bands of Fees in the Personal Injuries List to the Civil Court Users Committee, but the Judiciary has not advanced the matter further.

21. The inconsistent approaches of different masters in taxation hearings has compounded the uncertainty inherent in the current system. It has also led to arguments between solicitors and barristers as to the former's responsibility for the payment of fees for work done. Masters should have been reminding

solicitors in cases where work is asked for by solicitors, such should be paid by them, unless objected to.

22. In Assigned Out cases, having not disputed Counsels fees, the DLA does not usually comment upon the bills presented for taxation, nor in respect of counsel's fees. Whilst appearing on reviews, his representative, usually does not take an active part, except to ask for the Director's Costs to be paid by the losing party and to try to prevent costs being moved to the Common Fund, despite the fees being "reasonable" and "necessary".

23. The public interest is not properly served by the current system. Some major complaints are :

(a) Delays to Plaintiffs in getting the balance of their damages until the taxation is complete;

(b) Large amounts of court time being wasted in hearing contesting taxations : as much as 40% of the Masters Special List time currently;

(c) Inconsistency in taxation practice between masters;

(d) Masters not allowing counsel fees for work undertaken at all, notwithstanding the fact that the solicitor has requested it and the work is both "reasonable" and "necessary";

(e) Where Masters views a barrister's work, as "solicitors work" they have taxed off the items altogether. Here the solicitor or the client benefits unduly, and possibly the paying parties too;

(f) Solicitors not paying the fees taxed off, notwithstanding they have not queried the quantum thereof, or the quality of the work, or the level of barrister assigned on the certificate;

(g) Great variation in the quality of and level of interest by firms of solicitors who present the bills for taxation;

(h) Failure by solicitors to inform barristers of the results of taxation, timeously or at all;

(i) Total uncertainty of the amount of fees to be allowed on taxation when a Legally Aided Case is taken on;

(j) Little or no support for barristers in the taxation of these fees by the Director of Legal Aid, notwithstanding the fact that the Director assigned the particular barrister in the first place, and has not challenged his fee note before taxation. Such often takes place 2 or more years after the work is done.

24. Much Masters' time is spent dealing with taxation of bills and unnecessary costs expended on law costs draftsmen, probably 6-8% of the total bill;

(a) the **Civil Justice Interim Report** (CJIR) shows in general civil cases according to **Appendix B, Tables 1 & 2** and the figures (if correct) show **11%** is taxed off as a median in the $600,000 to $1 million range (of damages recovered), and **0% in the higher ranges**, though there was one bill in the latter range which had 50 % taxed off;

(b) In Personal Injuries, the range is **14% to 21%** in the ranges above $600,000.00 See Appendix B Table 18, with maxima of **50% to 57% taxed** off. So it would appear that the High Court has taken a view that greater amounts should be taxed off in Personal Injuries cases.

25. Much has been made of the allegedly high fees which some barristers charge. The taxation of the general civil bills seems not to bear this out during the period of the survey from July 1999 to June 2000. Nor from the comments passed by solicitors, DLA, the Department of Justice in response to Mr. Justice

Cheung's consultation exercise in July 1999. There is a remarkable congruity, and we believe these figures should be regarded as indicative of a reasonable level of fees to be paid in average personal injury cases.

26. To reduce costs, delays and uncertainty it is proposed that legal aid briefs be marked with agreed fees in future.

Areas for Reform

27. The Bar recommends that the follows areas of reform be explored :

(a) Marked briefs be delivered in Legal Aid cases in future;

(b) Acceptance of the principle that if a barrister's bill is not challenged by the DLA or the instructing solicitor within 3 months' of presentation, then prima facie, it ought to be paid by the solicitor requesting the work to be done;

(c) Better Drafted Regulations clarifying responsibility for payment of fees;

(d) Extended rights and time for review;

(e) New Regulations dealing with Offers made in the Taxation Process.

CONCLUSION

28. The Bar emphasizes :

(a) Properly funded access to Criminal Justice is essential to the Rule of Law.

(b) The need for broader public funding of meritorious claims as suggested in the Civil Justice Reform Interim Report is best achieved by

expanding the SLAS / Self funding parts of the Legal Aid Scheme, with increased income / capital limits.

(c) Legally aided parties being able to obtain payment of damages / resolution of cases more expeditiously.

(d) The taxation and payment process should be more certain and equitable.

Dated this 22nd April 2002.

Hong Kong Bar Association

Appendix A

Hong Kong Bar Association's Views on A Review of the Supplementary Legal Aid Scheme (SLAS)

1. Background. The statutory basis for SLAS is Section 5A and Schedule 3 of the Legal Aid Ordinance Cap.91. SLAS was introduced by the Legal Aid (Amendment) Ordinance No 54 of 1984. In its original form in 1984 the criteria was disposable monthly income which did not exceed $15,000 per month, and a disposable capital figure which did not exceed $100,000.

2. This was a considerable amount of money in 1984. It is thought that solicitors earned about $15,000 per month at that time and the $100,000 would have bought a very decent flat which would be roughly the equivalent of a say a $1 million flat nowadays. This was also a much higher limit than Ordinary Legal Aid. In 1984 a person was eligible for Ordinary Legal Aid if his income did not exceed $1,500 per month and capital did not exceed $15,000.

3. The upper means limit was increased to $280,000 in 1992, $400,000 in 1995 and the present figures are over $169,700 to not exceed $471,600 in 1997. However Ordinary Legal Aid extends upto financial resources of $169,700.

4. The original principles for SLAS. Originally SLAS was very innovative being started with the benefit of a loan of $1 million from the Lotteries Fund. The history can be seen in the Consultative Paper on Legal Aid of 1993 at page 8 which states inter alia "because of the need to enable the SLAS to remain self-financing, the scope of the Scheme is confined to only those actions involving monetary claims and which have a good chance of success. (For this reason, the proceedings included under the SLAS have been confined to personal injury cases and, with effect from 1st July 1992) Employee Compensation claims."

5. Paragraph 22 of that Government Paper stated that the principles governing SLAS should be that it is for proceedings which

   a. ".. 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";

   b. "which involve monetary claims and have a reasonably good chance of success....."

6. The degree of significance of injury and injustice can be seen from the requirement that the case should be worth at least $60,000 as currently contained in Schedule 3.

7. That Paper went on to support expanding SLAS to include medical and dental negligence claims and claims involving professional negligence on the part of lawyers.

8. After consultation, the July 1994 Report of the Reconvened Working Group on Legal Aid Policy Review at page 31 notes the Bar Association and Law Society objections to this stating "...such actions are of a more expensive nature than those for which legal aid was originally intended. Whilst the SLAS fund has earned a respectable balance, it would only take one or two judgments against aided litigants for the fund to be jeopardised particularly since it is required to be self-financing." The Government's response to this contains another important principle, the Report at page 32 states para 6.6 "While acknowledging that these claims are of a more expensive nature (hence its exclusion from the original scope of SLAS), the Reconvened Working Group is of the view that the costs should not be an overriding argument against expanding SLAS to cover more justified claims...."

9. The Reconvened Working Group Report at page 32 para. 6.7 further went on to leave open the possibility of expanding the Scheme further to include negligence claims on the part of our professionals such as accountants, architects and planners, stating "nevertheless, these claims would be worthy candidates for inclusion when the scheme is financially capable for further expansion."

10. In these circumstances the principles presently governing SLAS now appear to be:-

    a. Significant injury or injustice to the individual;

    b. Involve monetary claims and have a reasonably good chance of success;

    c. Expense and difficulty and cost is not an argument against expanding SLAS to cover more justified claims, Report para 6.6;

    d. Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion, Report para 6.7.

    e. The purpose of SLAS is to help the sandwich class so that applicants whose means exceed the statutory maximum fall outside the target group and therefore should pursue litigation with their own means. Any discretion to grant legal aid to those above the statutory maximum would be open to abuse and unduly increase the workload of the LAD, Report para 6.8.

    f. Class actions or groups of citizens were excluded because as noted in paragraph 19 onwards of the 1993 Paper, Hong Kong's legal system does not provide for class actions, there were obstacles and stringent tests to comply before there could be representative proceedings in Hong Kong, as a result there was limited scope. Alternatively an individual, if qualified for legal aid, could bring proceedings so that once liability was established, others somehow could take advantage or

benefit from the proceedings funded by Legal Aid.

11. Class action rules are now being proposed by Civil Justice Reform Interim Report at Section K12, paragraph 377 to 403. This is a long recognised need. It is therefore likely that Legal Aid will be needed to provide access to Justice using any such new rules.

12. Discretion now has been acknowledged as a proper way to provide for Bill of Rights cases where the Director may waive the upper limit of the Means Test, see Section 5AA added a year later in 1995. In Criminal Legal Aid the Director has a discretion to grant Legal Aid to applicants over $169,700 if satisfied that it is in the interests of justice to do so subject to the payment of a higher contribution, Rule 15 of the Legal Aid in Criminal Cases Rules Cap 221, D13. In special cases such as murder an applicant can even apply for exemption from the means test and contribution.

13. It is clear that the problem of unrepresented litigants is a pervasive problem despite the reforms of the past. This can be seen from the Civil Justice Reform Interim Report at paragraph 156 in which it is stated "Nonetheless, it is to be hoped that in ongoing reviews of the scope of legal aid, notice will be taken of the growing phenomenon of unrepresented litigants and of the impact on the civil justice system, prompting consideration of broader public funding of meritorious claims by such litigants...."

14. The Bar associates itself with these comments and suggests one way whereby "broader public funding of meritorious claims" can be assisted is by the expansion of the SLAS Scheme in various ways.

15. The following criteria are therefore proposed:

a. Persons or classes of persons who have suffered significant injury or injustice or who are otherwise deserving of legal aid in cases involving facts or principles which should be supported in the public interest; Examples of classes are consumer or product liability cases, environmental damage cases where the individual damage may not be high but the damage to many could be considerable.

b. Class or group litigation; Examples are cases involving
   i. disasters,
   ii. insolvency situations such as non-payment of wages and entitlements,
   iii. labour disputes,
   iv. Building Management Ordinance type cases and
   v. cases involving fraud on a minority or oppression in company situations as a consequence of defective corporate governance;

c. Cases which involve monetary claims and which have a reasonably good chance of success;

d. Cases with reasonable prospects of recovering damages and the costs so that there is relatively little risk to the SLAS Fund of an unsatisfied judgment or orders for costs;

e. Examples of this include
   i. claims by flat buyers against property developers in relation to poor workmanship in premises,
   ii. claims against insurance companies;
   iii. claims against listed companies in employment disputes which have been transferred by the Labour Tribunal to the District or High Court;
   iv. claims against financial institutions such as banks and deposit-taking companies concerning or relating to financial services but not speculation etc.)

f. The Means Test upper limit should be increased to not exceed $1 million in relation to individuals.

g. There should be a discretion in the DLA for cases over that Means Test figure to be exercised on specified grounds. A discretion already exists for Bill of Rights type cases. Special provisions are made for those under disability such as minors and the mentally disordered, and could be extended to some types of cases involving elderly people whose main source of income is derived from their investments e.g. a small flat yielding rental income, other cases of hardship or difficulty which may or may not be of a temporary nature;

h. The contributions could be on a sliding scale on the amounts recovered. This was originally the case. Alternatively this could depend on where the plaintiff is of limitedin terms of means, those with means between say $500,000 to $1 million could be arguably be expected to pay a bigger percentage;

i. other criteria can be considered.

16. Access to SLAS should be not only by way of the existing way of application. A Master or Judge should be expressly given the power, at any stage of the proceedings to direct unrepresented litigants either to the community legal service centres or direct to the Legal Aid Department and SLAS certifying the merits and that SLAS would assist the Court. As a result the case would be adjourned and stayed until the unrepresented litigant was provided with an opportunity to have SLAS or whatever assistance was considered appropriate after investigation.

17. At present in Criminal cases under the Legal Aid in Criminal Cases Rules, Rule 8, if Legal Aid is refused by the DLA on merits, a Judge can order Legal Aid and there are examples where cases have been adjourned and the defendants referred to the LAD. However it appears that if the DLA refusal was on Means and the DLA was not satisfied the applicants resources did not

exceed the limits in Rule 4 or Section 5 of the Legal Aid Ordinance, then the Judge cannot order legal aid this way. This means the Judge's power is limited to cases where the refusal was on Merits.

18. Legal Aid by Section 5 is confined to a few types of Court or tribunal as listed in Schedule 2 Part 1. Consideration should be given to expanding SLAS to cover other types of Tribunal such as the Housing Appeal Tribunal under the Housing Ordinance Cap 283.

19. It is submitted that an improved and expanded SLAS Scheme would thus provide

a. A broader public funding of meritorious claims;

b. Would provide such assistance at relatively little cost and risk to the public purse, meaning the SLAS Fund;

c. Would be far better than any conditional fee system whereby loss of the case can result in no payment to the applicant's lawyer which in turn is likely to engender undesirable pressures and temptations;

d. Is based upon a scheme which is currently working satisfactorily;

e. Appears to be in line with Government policy for expansion when the scheme has reached sufficient maturity, the fund has reached sufficient size and the staff concerned have reached sufficient experience and ability.

20. Amending the Ordinance. Pursuant to Section 7 of the Ordinance Legco can make some of these amendments by resolution. It can by resolution amend the financial resources in Section 5 and income and financial resources in Section 5A and amend the Schedules 2 and 3. This indicates it was contemplated that expansion of Legal Aid including SLAS should be facilitated.

Appendix II

THE SCOTT REPORT

In 1985, the Chief Secretary set up an internal Working Party of the Administration under the chairmanship of Mr. Allan Scott, then Deputy Chief Secretary. The ensuing report of the Working Party came to be known as the "Scott" Report.

In Chapter VI of the Report, an examination was made of the structure and of the level of fees then paid for criminal legal aid work. In paragraphs 6.4 to 6.12 of Chapter 6 of the Report the Working Party examined the level of fees and, what it termed the "*inadequacies of the criminal legal aid system*". The Report, in paragraphs 6.8, summarised the major criticisms made of the system by the legal profession.

In particular, reference was made in the Report to three areas of complaint. Firstly, (and most obviously), the fees paid were too low, secondly, there was a lack of any appeal regime against the assessment of fees made by the Director of Legal Aid and, thirdly, the payment of fees was too heavily weighted in favour of court attendance. There was thus a disincentive to conduct adequate preparatory work. None of these complaints has been remedied to date. The authors of the Report, make this statement, at the end of paragraph 6.8: "*There can be little doubt that time spent properly in preparation can substantially reduce time taken during the trial, and expenditure reduced as a result*."

In paragraph 6.9 the Report refers to a suggestion that advocates should be paid on an hourly rate, and that he/she should be paid during necessary adjournments. Such a system would encourage skilled advocates to increase their productivity. In paragraph 6.10 the authors of the Report expressed the view that the criminal legal aid fee structure requires reform, so as to, "*to remedy the inadequacies of the existing system*". It was suggested that there should be greater flexibility in deciding the fee level and there should be provision for properly remunerating the advocate for preparatory work.

In paragraph 6.11 it is recommended that there should be a "*procedure for taxation by a Taxation Master of fees claimed by Counsel or Solicitor dissatisfied by an assessment made by the Director of Legal Aid*". In paragraph 6.12, the authors of the Report note that these matters were not "*specifically*" within the terms of reference of the Working Party. On the other hand it was recommended that they should be referred to the "Advisory Committee on Legal Aid", when it was set up.