

Hong Kong Bar Association Submission
for Legislative Council Panel on Administration of Justice and Legal Services Meeting
on 24th May 2010

1. **Background.** See the **Bar's Submission of 24th September 2009** [LC Paper No. CB(2)357/09-10(01)]
 - (a) Main Submission and Appendix I the Note on SLAS;
 - (b) Independence, see Appendix II;
 - (c) The LegCo papers for 29th March 2010 meeting, the HAB March Paper should be contrasted with the LASC 26th March 2010 letter to HAB.
 - (d) There was no attempt at wider consultation by either HAB or LASC
 - (e) Now see HAB LAD April 2010 Paper which adds little.
 - (f) All along there is no reference to the Bar Association's Submissions from 2002 onwards.

2. **Independent Legal Aid Authority and steps backward.** The letter from the new Chairman of LASC Mr Paul Chan dated 19th March 2010 explains their letter to the Chief Executive, Donald Tsang, dated 16th October 2009 and which generated criticism at the LegCo Panel Meeting of 25th January 2010.

3. **Transparency and Accountability versus Refusal to provide Report.** Despite request, the actual Report has been refused because the Chairman says it contains views of the LAD staff which were submitted for internal reference only. It had been agreed with staff that it was to be kept in strict confidence! The LASC is a statutory body. It had a reputation for being transparent as seen in the LASC Values, see the book Legal Aid in Hong Kong 2006 by LASC page 61. It is possible to protect the private views of those consulted by deleting names. There is no valid reason to keep stakeholders and LegCo in the dark. In the past LASC provided its consultation reports to the Bar Association etc. We request that the Report be provided and LASC can make deletions if necessary to protect identities.

4. The LASC Chairman stuck to his promise of secrecy to LAD staff and LASC, creating financial excuses for Government non action, only consulting and listening to HAB or staff with their special interests, and thus lost credibility for carrying out its statutory duty to enhance the independence of legal aid, see LASC Mission at page 61.

5. **Flip Flops on Perception.** In LegCo the argument used against an independent authority was that it was basically the lawyers who had raised this as a matter of perception and now as an about-turn from their LASC 1998 Report on Independence, the LASC considered there was no perception of this being a problem and it was the Bar who was concerned. This omits to realize that it was initially Government who had considered that the lack of independence was "only a perception problem", but that the perception was a reality but that it was because of the cost of disestablishment, c \$430m, and staff views they would make no change at that time in 1998.

6. Legislators Albert Ho and others made the point that perception is reality and is important. Mr Paul Chan conceded that perception was important and was a problem, the LASC did support independence, but not now, that it could wait until they did a Review at the End of 2011 or beginning of 2012. Ms Grace Lui of HAB said it was "Just a matter of perception" showing she had not realized that LASC Chairman had already abandoned the stance of downplaying the problem.

7. However it was LASC's view 12 years ago in **1998** **“that it was an institutionally flawed arrangement for Legal Aid to be administered by Civil Servants, as there was a risk of pressure from the Government and a perception of lack of independence.”** Thus the LASC considered that Legal Aid under a Government department was an inherently flawed structure and should be reformed. LASC should not backtrack on this principle contained in its 1998 Report on Independence.
8. Flawed structure – Just because it is alleged there is no evidence that improper or political type pressures are being applied to LAD staff at the moment does not mean it is wise to leave in place a defective structure which is inherently flawed and which, when there are pressures, may succumb to pressure. It is vitally important that access to justice via an institution, which is asserted by LAD and the Administration, to be a pillar protecting the rule of law in Hong Kong, should not be susceptible to succumbing to pressure or the even the risk of pressure or indeed the perception of pressure and undue influence. If the structure is inherently flawed and wrong in principle and at risk, it should be rectified whilst Hong Kong is going through a calm and stable period, not at a time when pressures are built up and being expressed and strong defences of the rule of law and our cherished principles underpinning our way of life are required. Sensitive cases can be a focus for precedent which could challenge our expected way of life, basic rights and cherished principles. We cannot afford to be complacent.
9. The LASC Chairman did not deal with some of the points in the Legco Briefing paper at paragraph 5 which summarized the LASC's own view in its 1998 Report on Independence which included
 - (a) LASC having limited powers;
 - (b) LASC reliance on LAD for information and analysis;
 - (c) its exclusion from involvement in reviewing individual cases had constrained its effectiveness in safeguarding LAD's independence.
10. A step backwards in operational independence took place when HAB replaced the Director of Administration. Instead of enjoying a special status as a cornerstone of the administration of the justice system in Hong Kong under the Director of Administration, LAD became downgraded and subject to HAB budgeting with competition for funding with other HAB departments such as sports and other program areas. The previous relative independence of action conveyed by non capped funding is under pressure. The future of Legal Aid independence seems to be taking a step backwards yet again. This was not the statutory intention of the LASC Ordinance nor that of LASC Vision, Mission and Values.
11. **Review of independence issues should begin immediately, not delay to 2012.** The LASC Chairman says they will seek a fresh examination of the independence issue in late 2011/early 2012. This is only 16 years after LASC was set up as an interim step to independence, and about 19 or 20 years since independence had been an active issue with Legco. See for example the 1986 Scott Report and 1993 Legco debates. The Bar will take part in this Review but it should be earlier.

12. **Bar proposal.** At this stage the Bar proposes that LegCo and LASC and HAB examine all methods to enhance and buttress the perceptions of independence in decision making on granting or refusing Legal Aid by means of reforms designed to make the Operation of the Legal Aid Department and the performance of its staff more independent of the influences of HAB and the Government promotion based hierarchy.
13. The HAB should be removed from decision making on LAD staff performance and assessment and promotion and such powers and assessments moved to a separate more independent body analogous to a Judicial Officers Recommendation Commission. This task could be done by the LASC as a modification of the 1998 Independence Report. This falls short of an independent LAA employing the LAD staff, but is an interim compromise to provide more independence in the exercise of decisions and discretions in legal aid operations.
14. LASC is potentially an important body to assist in more independence for the operation and administration of Legal Aid. It requires a mandate for management coupled with adequate resources to actually supervise. At present the Chairman and the Council are required to devote much time to this technically demanding job and the Chairman and the LASC Members should be remunerated adequately like other statutory bodies responsible for complex legal issues such as privacy, ombudsman, and equal opportunities.
15. This Review should begin immediately, there is no need for delay to 2012. A report within some months is reasonable.
16. **The 3 HAB Proposals.** The HAB made a brief announcement on the 23rd March 2010. We received the papers on the 26th March 2010. This lateness and lack of consultation is regrettable for something which is relatively complex and with a long history of public interest.
17. The LASC Chairman letter of 26th March 2010 to HAB setting out the LASC position shows the HAB have distorted the LASC position in HAB Paper to LegCo. Whereas HAB paragraph 27 says that LASC do not recommend any expansion of SLAS, the LASC letter 8th paragraph, shows the expansion of SLAS is still under consideration by LASC. LASC positive approach to expansion is consistent with LASC action for many years such as in LASC 2003 paper advocating the expansion of SLAS, and is consistent with Government policy and principles of expanding SLAS as summarized herein.
18. **Financial Eligibility Limits** are now proposed to be expanded. This is belated and not yet adequate but still welcomed as a significant shift in principle to partly catch up with policy and logic for Legal Aid for the target groups.
19. **Proposal 1** or Per HAB paragraph 6(a), replacing the 35 percentile household expenditure will be **median or 50 percentile household expenditure** as a deductible component in calculating disposable income is welcomed as a beginning. This is a matter of principle linked to the FELs.

- (a) This 50 percentile was initially raised by Government in its 1997 Review but eventually rejected by the Administration in favour of 35 percentile. However 50 percentile was later proposed by LASC in 2002 for OLAS. LASC obtained an expert opinion from Dr Wong Hung of Chinese University in July 2003 who had advised OLAS should be based on 66 percentile to be consistent with the Government's declared policy objectives or "target group of legal aid" for Ordinary Legal Aid, OLAS, should be the Lower Middle Class households of Hong Kong and below. The Director of Administration having clearly chosen the target group of legal aid to be the Lower Middle Class and below households, it was absurd and contradictory that 35 percentile be used for Lower middle class and below as this logically implied that 65 percentile of Hong Kong households were Upper Middle Class and above. See Legal Aid in Hong Kong by LASC, 2006, Chapter 8, pages 186-190. 50 percentile though an improvement, is not yet in accordance with principle and policy to cover the Lower Middle Class and below.
 - (b) LASC proposed 75 percentile for SLAS, but this was also rejected by Government, see pages 189-190.
 - (c) This is an example of "the one size fits all" approach to assessing expenditure between different classes which generates injustice and fails to meet the declared policy objectives of SLAS which is intended for the Middle class target group or sandwich class, NOT the same target group of Lower middle class and below which is the target group of OLAS.
 - (d) **The Bar submits that the 66 percentile for OLAS and 75 percentile for SLAS should be adopted by LegCo as being more fair and consistent with declared policy.**
20. Proposal 2, HAB paragraph 6(b) to raise the Financial Eligibility Limit (FEL) for OLAS from 175,800 by about 50% to 260,000 , and the SLAS from from \$488,400 to by about 100% to \$1million, illustrates the long overdue need to catch up.
21. **No transparency and accountability and information.** Why \$260,000? Why \$1million? How calculated? What figures were used to justify \$1 million chosen by Government? No information provided despite requests.
22. Raising the FEL for OLAS by 50% is not logical and it should at least be 100% to raise it to \$350,000. This can be justified by examples, see Scenario 3 in Appendix A.
23. Raising the FEL for SLAS from \$488,400 by about 100% to \$1 million was proposed by the Bar Association in 2002. The Bar Association's Submission 24th September 2009, Note on SLAS, paragraph 7 brought the figures up to date and suggested raising the limit to \$2 million.
- (a) There is no reference to the Bar 2009 Submissions or \$2m figure in the HAB Paper.
 - (b) The Law Reform Commission Report on Conditional Fees of 2007 para 7.32 showed the general view that eligibility limits were too low and at 7.33 that the Bar had proposed \$2 million for SLAS to start with. This is omitted by HAB.
 - (c) HAB paragraph 26 says the LASC supported raising the FEL for SLAS to \$1.3 million. Paul Chan's letter shows LASC used the principle of

affordability, see Legal Aid in Hong Kong by LASC Chapter 8, and the average cost of a SLAS case at \$1.29m.

24. There is no reasoning for the HAB 100% increase so far, but it reflects our arguments over the years that the FEL limit was far too low. We and LegCo are still not really told anything, contrary to the guiding principles of Legal Aid for transparency and accountability. We hoped documents would shed light on the way the 50% increase was calculated. LASC Chairman's letter shows they were NOT told how it was worked out. This implies non transparent and subjective administration.
25. Based on past Reviews of Legal Aid,
 - (a) Government worked on the basis of inflation and expenditure see pages 187, note 9, per Legal Aid Policy Review of 1997. This is not asserted now.
 - (b) Previously Government considered the percentage coverage of 58% of the total number of households in Hong Kong, see page 188 and Note 14. This is not asserted now.
 - (c) It appears that this 2010 unexplained increase is offered in the hope of keeping things simple, rather than fair, as we can see with some of the later refusals to expand the scope or types of claims or persons who should be eligible on a fairness and need basis. This is to keep to the HAB legal aid principle of "one size fits all", despite injustice and unfairness in individual cases, for the sake of administrative expediency and simplicity.
26. In LegCo on 29th March 2010 Ms Grace Lui, Deputy Secretary for Home Affairs told LegCo that no formula for the increases of 50% for OLAS and 100% for SLAS was taken into account. This means it was an HAB unreasoned and subjective judgment, which implies their guess is as good as LegCo or the Bar or Law Society. This implies the door is now open for a major revision to consider stake holder subjective and objective opinions having regard to declared policies and past practice.

Proper principles and criteria do exist as per the policies in the Scott Report of 1986.

27. The Bar submits that LegCo should use the principles and rationale per those policies as summarized in the Bar Submission of September 2009 and herein and use this chance **to increase eligibility for Legal Aid to meet public needs and expectations.** Some **unmet needs** are set out in paragraphs 1 -3 of the Bar's 2009 Submission Appendix I Note on SLAS.
28. Although HAB April Paper asserts when FELs were first introduced, no formula was used, a number of criteria have been used in fact by Government. These include, according to HAB:
 - (a) Percentage of cases with litigation costs below the revised FELs, What percentage and figures are being used? No information is so far provided.
 - (b) The levels of financial resources of the prospective candidates eligible for legal aid. What levels and figures are relied upon?
 - (c) The financial implications arising from the adjustments, What are the implications and figures arising which HAB have relied upon?
 - (d) **For transparency and accountability in Legal Aid, this and all related information relied upon by Government is requested.**

29. Omitted by HAB are some of the **well known and long followed principles and criteria set out in the Scott Report of 1986**. Per the Scott Report 2.10, “persons of limited means” have been defined solely by reference to levels of income and capital. Per Scott Report 2.11, eligibility for legal aid “should be related to the cost of the legal proceedings if the individual were to employ lawyers privately.” The factors , are
- (a) “ the cost of a case if a person employs lawyers privately; and
 - (b) “a person’s total financial resources, ie his income and capital.”
 - (c) Based on this, it can be seen the LASC reasoning to refer to a cost of a case is based on the long accepted policy of affordability, see Legal Aid in Hong Kong, Chapter 8. LASC should apply this to OLAS as well as SLAS.
 - (d) Unfortunately by using the average costs of SLAS cases for example, as \$1.3 million, LASC have only looked at the Plaintiff’s half of the costs, but they have failed to consider that the true affordability test covers the costs of the legal proceedings, the full cost of the case as a whole, which must also include the cost of paying for the other sides costs if the Plaintiff is employing lawyers privately and not protected by Legal Aid “against the liability to pay heavy costs to the other party should they fail in their action.” see Scott Report 2.13 and 2.33 at page 15. Thus the average should not be based on the average winning SLAS cases but should be based on the average losing SLAS cases where the Plaintiff would, but for Legal Aid protection, be exposed to paying all the costs.
 - (e) Thus depending on what was included to make up the LASC average figures, the LASC figure for SLAS should logically be doubled to some \$2.6 million or more reasonably \$3 million as the Defendant’s costs using private practitioners without Legal Aid constraints, could easily be more.
 - (f) Thereafter the test per Scott 2.12 is that reasonable criteria for eligibility for legal aid are “guided by the principle that a person should have access to legal representation without undue financial hardship...” Per Scott 2.18 he is expected “to draw upon his income and capital to meet his legal costs to the extent that he can do without suffering undue hardship.”
 - (g) To avoid such undue hardship, per Scott 2.21, the objective was “to ensure that no one is placed in a position that his standard of living is reduced below acceptable levels...”
 - (h) A purpose of SLAS was to provide legal aid for “long, complex and costly proceedings such as those in personal injury cases.” see Access to Justice, LAD 2000, page 30. Such cases often have 2 or more defendants so the costs of the opposing sides could be far higher than the Plaintiff/Applicant costs, thus making the \$3million figure an under estimate of the Plaintiff’s exposure in many SLAS cases.
 - (i) **The Bar proposes that LegCo consider the reasonable Limit for Legal Aid in 2010 at \$350,000 for OLAS and \$3 million for SLAS based on an applicant who faces \$3 million costs for a case and who will either suffer undue hardship if he litigates, or else if he does not, he will be denied access to justice.**
 - (j) Clearly, for the Middle Class or sandwich class, SLAS must have a FEL which is about \$3 million in order to meet the Scott principles and meet the target group of the SLAS policy. See Scenario 4 in Appendix A.

30. **Proposal 3, at HAB para 6 (c) to make special provision for the elderly** who are Legal Aid applicants, is a welcome advance in principle on the road to reform to provide a flexible and fair Legal Aid system. It was brought up by the LASC in about 2002 and raised by the Bar's Submissions of 24th September 2009, Introduction paragraph 8(f) and in Appendix I, Note on SLAS paragraph 9 and 11.8. See Legal Aid in Hong Kong 2006 by LASC page 191-192.
31. **The Bar submits the provision should more accurately be targeted at the hardship of the target group who have built up retirement assets, which would be undue hardship to lose, so that the provision should commence at age 50, not 65.**
32. Whereas HAB at para 6c restricts the provision to OLAS, in HAB paragraph 13 the provision is for SLAS also. The provision should apply to both OLAS and SLAS.
33. HAB para 6c and para 14 states that the OLAS limits be used even for SLAS cases, so that a SLAS applicant would only have savings disregarded up to the new OLAS limit of \$260,000. No reason is given for this anomaly, but this contributes to unfairness, inconsistency and undue hardship. **Bar proposes that the savings disregarded in SLAS cases must be the new SLAS limit.**
34. The HAB Annex A contain Scenarios 1 and 2 of the impact of the proposed increase on a household of relatively young 2 adults with heavy expenditure from 2 children and a heavy mortgage, and appear to be constructed to justify the arbitrary low figures of disposable income and the low FELs chosen by HAB.
- (a) The Average MPF holding in HK is now \$180,000 so the Middle Class should be higher, and higher still for some one of 50 years.
 - (b) However, no scenario is provided by Government to deal with the case of someone who is 50 years old, who has nearly a lifetime of savings to have some prospect of a decent retirement, who has no mortgage expenses to pay, and no dependency expenses to pay and reduce his disposable income.
 - (c) Such a person will not be in a position to defend or take legal action costing \$3 million without "undue hardship" such as in respect of unfair dismissal if that would risk him having to spend most of his savings before he becomes eligible and poor enough for Legal Aid.
 - (d) Such a person may have his savings invested in another flat, which is rented out for a modest income. He should not be put in a position where he has to dispose of such a capital asset and income stream so as to jeopardise his retirement nest egg.
 - (e) He faces undue hardship. He has little or no freedom of choice. In effect, such a person is being deprived of access to justice. This affects many people, and this will increase, by 2020 over 50% of the population will be over 60.
 - (f) Once the principle is accepted, the extra 15 years coverage will not likely result in significantly more expenditure by Government. Many cases will be guided by the precedents set by other cases and thus can be settled quickly.

35. Policy justifications support a provision to start at age of 50 by which time most Hong Kong people would have savings if they have followed Government policy to encourage savings and prudent conduct.
- (a) The age of 65 is too high. Age 50 is a good start, and brings in many who are thinking about retirement and actively making provisions by that age.
 - (b) Many Government servants retire at 55 and they are the largest employer in Hong Kong.
 - (c) They are the age bracket who have been hardest hit by Lehman Brothers type cases. Of the HK Monetary Authority Lehman Brothers 22,000 complaints, one third or over 7,000 complaints were from people between ages 50-60.
 - (d) This would be a genuine step forward to enhance access to justice. Those who are retired, or approaching retirement and who have built up savings through their own prudence, do not have the years ahead to rebuild their savings and should not have their prudence penalized and face undue hardship without Legal Aid or else be denied access to justice.
36. This is LASC's position too, per their Chairman's letter 26th March. He wrote that "According to local customs and culture, it is a common phenomenon that people have saved something for their retirement well before they are 65." LASC urged the age requirement of 65 be relaxed. **The Bar submits the special provision should start at age 50 and should be for both OLAS and SLAS at their respective new limits.**

Expansion of SLAS is just and feasible and needed.

37. LASC Chairman's letter states the LASC are still studying the expansion of SLAS.
- (a) LASC have been proposing the expansion of SLAS from at least 2003, see the Bar's Appendix I Note on SLAS at paragraph 6.2 which in paragraph 6 reflected the LASC Proposals for expansion of SLAS of 2003.
 - (b) The Law Reform Commission Report on Conditional Fees 2007 para 7.36 recorded that LASC supported the expansion of SLAS to cover more types of civil cases.
 - (c) The Law Reform Commission Consultation Paper on Class Actions 2009 noted the position of SLAS in possible funding, para 8.45 and recommended reforms to Legal Aid to facilitate class actions, paras 8.47-54 and Recommendation 6.
 - (d) HAB has thus prematurely ruled out expansion in scope despite LASC still considering expansion as part of their statutory duty.
 - (e) **The Bar proposes that LegCo request that LASC continue their work on expanding the scope of SLAS and that HAB be requested to co-operate constructively and report within 3 months.**
38. **The principles for SLAS.** The Bar Appendix I Note on SLAS paragraph 6.1 set out the principles currently governing SLAS. These were distilled from previous Government papers over the years as SLAS was developed and expanded. The specific reference for each principle were set out in the Bar Association's submissions on a review of SLAS of April 2002.
39. The HAB Paper, paragraph 17, either uses wrong criteria by mistake or is seeking, without providing due notice, to introduce a more restrictive set of criteria namely "to

maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to cost ratio.” This was given emphasis by Ms Grace Lui in LegCo and is wrong. This may have been a good result as a consequence of cautious case management by Legal Aid Department and the legal teams involved, careful examination of merits, and using high quality legal expertise to win cases, but such unduly restrictive and different merits criteria was never the objective nor the stated criteria for granting Legal Aid applications. Such a change would be contrary to the Legal Aid Ordinance section 10(3) which only requires the that the applicant “shows he has reasonable grounds” for legal proceedings. If this is how DLA has been refusing SLAS cases, then there may be a JR issue here. Does HAB require that DLA use these restrictive criteria? Does the DLA use the HAB new restrictive criteria when he grants or refuses Legal Aid in SLAS cases?

40. It is certainly wrong that SLAS was intended to be confined to cases “that carry a high chance of success”. This is also contra to the relevant 1993 Paper, para 22. If so, SLAS would never have been expanded to cover Medical Negligence or Professional Negligence cases.
41. It was never a criteria to confine SLAS cases to cases “with good damages to cost ratio”. SLAS would never have been expanded to Professional Negligence cases if that had been the situation, nor Human Rights types cases.
42. **The proper principles for SLAS are as follows:**
 - (a) Significant injury or injustice to the individual, currently reflected in the case having to be worth \$60,000; See Schedule 3 of SLAS.
 - (b) Involve monetary claims and have a reasonably good chance of success; see 1993 Government Consultative Paper on Legal Aid, para 22 and Section 10(3) of Legal Aid Ordinance.
 - (c) Expense and difficulty and cost is not an argument against expanding SLAS to cover more justified types of claims; see July 1994 Report of the Reconvened Working Group on Legal Aid Policy Review, para 6.6
 - (d) Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion; 1994 Report, para 6.7
 - (e) The purpose of SLAS is to help the sandwich class so those above the line are excluded and discretionary inclusion would be subject to abuse and increase LAD workload; 1994 Report para 6.8.
 - (f) Class actions were only excluded because the Hong Kong legal system does not yet provide for class actions. See 1993 Paper para 19 onwards. Now see CJR Final Report 2004 page 461 on plans to change this, see above.

43. What we are seeing in HAB Paper paragraph 17 is an attempt to re-write and restrict the criteria for SLAS and move the goal posts without warning and contrary to the Ordinance.
- (a) Government should not slide out of the promise to expand the scope and types of claims when the SLAS was financially capable of expansion.
 - (b) Government should not slide out of the intention to expand SLAS when the Class Action procedures had been improved, as is now under Law Reform Commission proposals.

Stopping the the downward spiral of Legal Aid in Hong Kong.

44. The Decline of Legal Aid. Paragraph 19 refers to the poor performance of the SLAS cases recently and attributes this to cuts in the contribution rate from 15% eventually down to 10% and the claims have become smaller. These are not the only reasons.
45. The Bar's Submission and Note on SLAS of September 2009 shows a confluence of factors leading to the Decline in Legal Aid including
- (a) unmet needs;
 - (b) the SLAS Fund being grossly underused, see paragraph 5;
 - (c) the failure to take advantage of unmet needs and scope for expansion per paragraph 6;
 - (d) the failure to raise the SLAS' means test to properly bring in the target group, the Middle class, see paragraph 7; and
 - (e) the current decline in Legal Aid could be reversed by these reforms, see paragraph 10.
46. One size fits all is the approach preferred by HAB paragraph 24. Rather than taking the time and work to ensure fairness in the application of Legal Aid they prefer simplicity across the board, the "one size fits all" approach, even if it causes unfairness in individual situations. This is not a principled way forward for the development of Legal Aid. Legal Aid in Hong Kong has a history of some 40 years, and has developed to a maturity where it can should become more flexible and fair.
47. **HAB Objections to expansion are confused and wrong.** Lack of principle is also seen in the HAB Annex B list of objections against expanding the scope of SLAS to cover other types of claims. **HAB have confused the merits of a case with the type of the case and the HAB objections are misconceived.** Most of the objections are based on the alleged risk of poor merits but these issues can be adequately met by using the current policy on assessing Merits, see Scott Report Chapter 3, 3.1 and 3.2, Section 10(3) (a) of Legal Aid Ordinance, and obtaining counsel's opinion on Merits under Section 9 of the Legal Aid Ordinance.
48. Matrimonial cases. The argument against expanding to matrimonial cases is that lump sum payments could attract recovery under SLAS but could not properly be recovered in the form of a matrimonial home. This is therefore used as the HAB excuse not to expand Legal Aid for any matrimonial cases. Legal Aid could have a first charge over the recovered property, the matrimonial home, which the applicant

could repay over time. If she sold, the first charge would apply to the proceeds. There is no difficulty, it just means the file has to be kept open pending payment.

49. Product Liability Cases. The paper has failed to consider this in the context of the reform of Class Actions proposed by the Law Reform Commission. Product Liability cases obviously cover more than personal injury but cover loss and damage spread over many members of the community. What about a series of cars with accelerator problems and a buildings or Government roads are damaged by crashes? MIB does not cover property damage.
50. Commercial Cases. The HAB arguments here are feeble. Under Section 9 a counsel's opinion can be obtained to consider the merits as usual. If there are no merits then the Director of Legal Aid would have no trouble refusing Legal Aid. The current system would vet the case appropriately.
51. The HAB have ignored the Bar 2009 Submission 1.3 on Unmet Needs such as Lehman Brothers of mis-selling financial products. In most cases the Bank or Independent Financial Advisor will be insured because they are required to be insured since probably 1994. The HK Monetary Authority has provided the information that many thousands of middle aged people have suffered. Many middle class and middle aged people have lost their savings, and having been financially crippled, they should not be expected to become more crippled on a long term basis before getting Legal Aid. All directors of financial institutions have insurance and so do most banks and financial institutions.
52. Probate Cases. The HAB reason against this is not actually understood. Again, Section 9, Counsel's opinion on the merits would help remove this obstacle.
53. Insolvency Cases. The reason for not expanding SLAS is because currently employees can find and nominate a poor representative who maybe eligible for Legal Aid and carry the burden of the case. This is an unprincipled approach. Why should Hong Kong tolerate and encourage a piggy-back situation? Why use a backdoor? Why not be fair to all who have a legitimate grievance. What if the person who is used as the nominee litigant achieves a favourable deal leaving the other victims unprotected?
54. Claims by a flat buyer against a property development company. Again, feeble non-reasons. If the case is simply hopeless, it can be refused on merits. If it is reasonable, it can have Legal Aid. This is another example of unprincipled and piggy-back type Legal Aid.
55. Wages Claims. Just because 5 cases led to a cumulative loss does not mean that Legal Aid over the 40 years of its existence has been a dead loss. We all know that by example and reputation, cases involving disputes over wages which have attracted Legal Aid support will be settled on a reasonable basis by the employers concerned. There must be hundreds of satisfactory resolutions out of court as a result of a few tough and hard fought or relatively expensive cases. Merely having the precedent and the ability to take legal action will force some employers to become more reasonable.

The expenditure will be worthwhile for the general protection afforded to workers.
The existence of a comprehensive system will cause employers to be more reasonable.

56. Free Legal Aid or Advice Scheme. Preliminary chats over the phone on a general basis and only providing advice but not actual drafting, case specific work and advocacy, are of limited use if one is facing a company equipped with legal advisors on the other side. Specific continuing advice and advocacy and representation by legal professionals in the appropriate tribunals are what is required for effective access to justice.
57. Expansion of Legal Aid into specific tribunals has been considered by LASC in the past. This work needs to continue.
58. **Conclusion.** The Bar invites LegCo Members to consider in detail these Submissions and welcomes professional and constructive consideration on each and every one within the next 3 months.
59. These proposals have been the input of many experienced practitioners over the years, either in the Bar Association and Law Society or within the LASC since at least 2002. It is requested that the time to put them into action to revitalize Legal Aid in Hong Kong so it can meet the current policy objectives.

Hong Kong Bar Association
20th May 2010

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Scenario 3 : Household of 2 adults and 2 children	
Disposable Income : Income \$420,000/year (\$35,000 p/m) <i>Less</i> - Mortgage Payment : \$0.00 - Salaries Tax : \$25,000/year - MPF payment : \$10,500/year - Expenses on dependents : \$30,000/year - Personal Allowance (\$11,120 p/m x 12 months): \$133,440 = \$221,060	Disposable Capital : 1 HOS Flat (fully paid and self-occupied) \$2 million (disregarded) + Saving in bank account \$100,000 + one car \$65,000 = \$165,000
Total Financial Capacity : \$221,060 + \$165,000 = <u>\$386,060</u> (Exceeding the proposed FEL for OLAS of \$260,000)	
Note : (1) On any view, the applicant for legal aid in this scenario is not well off as compared the one in Scenario 1 (see Annex A in HAB's paper dated March 2010) and yet he will fail the means test for OLAS even if it is increased to \$260,000. There are many households in Hong Kong like this one. <u>This demonstrates that the OLAS limit needs to be increased by 100% to at least \$350,000.</u> (2)The applicant in Scenario 1 may have equity in the mortgaged house to the extent of (say) \$2.5m, which is likewise disregarded. <u>It demonstrates that the "one size fit all" approach is flawed.</u>	

Scenario 4 : Household of 2 adults and 2 children

Disposable Income :	Disposable Capital :
Income \$1,080,000/year (\$90,000 p/m)	1 residential flat (self-occupied) \$6 million newly purchased with 30% deposit paid from savings and \$4.2m funded by mortgage (disregarded)
<i>Less</i>	1 small investment flat worth \$2m (to provided for retirement, fully paid and rented out for the time being)
- Mortgage Payment : \$360,000	+ Saving in bank account \$200,000
- Salaries Tax : \$67,500/year	+ one car \$150,000
- MPF payment : \$27,000/year	+ stocks and shares \$100,000
- Expenses on dependents : \$30,000/year	
- Personal Allowance (\$11,120 p/m x 12 months): \$133,440	
= 462,060	= \$2,450,000

Total Financial Capacity : \$462,060 + \$2,450,000 = \$2,912,060
 (Exceeding the proposed FEL for SLAS of \$1,000,000)

Note :

(1) On any view, the applicant for legal aid in this scenario is not well off as compared the one in Scenario 2 (see Annex B in HAB's paper dated March 2010) and yet he will fail the means test for SLAS even if it is increased to \$1,000,000. There are many middle (or sandwich) class households in Hong Kong with financial capacity like the applicant in this scenario, including professionals and middle-ranking civil servants. This scenario demonstrates that the limit for SLAS should be \$3 million.

(2) Again, the applicant in Scenario 2 may have equity in the mortgaged house to the extent of (say) \$4m, which is likewise disregarded. This scenario also exposes the flaws in the "one size fit all" approach.

(3) On the figure provided by LASC, it appears that the average costs of one party in a SLAS case is about \$1.3m. The total costs exposure would be about \$1.3m x 2 = \$2.6m or more, if one is to take into account the costs of both parties. Additionally, many SLAS cases are more complex than ordinary cases and involve 2 or more opposing parties. In those cases, the total costs and hence the financial exposure of the litigant of limited means would be more.

(4) Even with Financial Capacity of \$2,912,060, the applicant in this scenario would be deterred by the prospect of undue hardship to take part in any litigation taking into account the total costs exposure if he is to lose the case. He would be most reluctant to sell the small flat and it is likely that he cannot raise enough money by way of mortgage.

(5) Therefore, the revised FEL should be set at about \$3 million in order to provide the access to justice of the middle (or sandwich) class for whom SLAS was originally designed or intended.

(6) Further, this scenario illustrates that if one FEL is to be applied across-the-board, it should be set at a level as generous as possible so that people of limited means in the middle (or sandwich) class would not fall outside the net.