

Hong Kong Bar Association Submission for the Legislative Council Panel on  
Justice and Legal Services Meeting on 30<sup>th</sup> September 2010

A Summary Paper on Reform of OLAS and SLAS based on existing principles

1. **Introduction.** The Bar's Submissions have been based on **following long-established principles** for Ordinary Legal Aid and SLAS together with the **long promised policy for the expansion of SLAS.**
  - (a) By contrast, the HAB in previous and latest Paper for 30<sup>th</sup> September 2010 paragraph 15 misstate and misunderstand the principles for deciding on the expansion of SLAS.
  - (b) It is contrary to Section 10(3) of the Legal Aid Ordinance to assert that SLAS is for cases with high chance of success, because the test is for "reasonable grounds" not high chance,
  - (c) It is wrong for HAB to assert that SLAS is for cases with good damages to cost ratio, when in fact SLAS is for difficult types of cases such as medical negligence cases which are more costly to fight than ordinary running down cases.
  - (d) The test is not high chance of recovery, but reasonableness, hence the selection of types of cases where there is likely to be insurance following the types of case initially selected by LASC and now in the Bar Association's Proposed Amendments.
  - (e) Using current expertise, careful scrutiny under the Merits Test and Section 9 opinions, the Proposed Amendments will lead to the expansion of SLAS and legal aid services generally, without undermining or jeopardizing it. SLAS has been an excellent service, a testament to decades of success and hard work by lawyers and LAD, and now is the time to build upon this and expand. This was the policy from the outset.
  - (f) HAB are now adopting the line of least effort and adopting the LASC figures for FEL, and are attempting to pass back the buck on expanding the scope of Legal Aid to LASC. Why delay again? LASC have considered this matter, its Interest Group made an Interim Report in 2002. Why not ask LASC to review and may be improve the Proposed Amendments per the LegCo Panel Motion?
  - (g) HAB have omitted the LegCo Panel Motion for action based on the Bar Association Proposed Amendment on 21<sup>st</sup> July 2010. It is now time for LegCo to act and for HAB to respond co-operatively and positively.
  
2. **5 year Review cycle. Action is needed now, not delayed again.** The current process shows official delays despite the needs to expand the scope of SLAS and make the eligibility limits more appropriate and fairer. The Bar Association, The Law Society and the LASC and others have been recommending the expansion of SLAS by updating the eligibility limits and expanding the scope for at least a decade. See for example, LASC Interest Group on the Scope of Legal Aid Interim Report 30<sup>th</sup> April 2002 and LASC Comments of 12<sup>th</sup> December 2003. See Hong Kong Bar Association Review of 22<sup>nd</sup> April 2002.

### **What has happened in the last 12 months?**

3. Round 1, Bar Submission 24<sup>th</sup> September 2009 of which Appendix I has the Bar Association's Note on SLAS. We continue to rely on this as the basic paper. Main Points
  - (a) Stalled for 7 years (now 8 years) but continuing support for reforms,
  - (b) Unmet needs proved,
  - (c) Unrepresented litigants are a pervasive problem, see CJR Reports and continuing Judiciary comments,
  - (d) SLAS Fund had \$87million and grossly underused,
  - (e) LASC made proposals for expanding scope of Legal Aid/SLAS in 2002, 2003, and this was based on that work,
  - (f) Raising SLAS eligibility limit or FEL to \$2m.
  - (g) Special Provision for Elderly or unemployed, see LASC Book, 2006,
  - (h) Reversing the decline in Legal Aid,
  - (i) LegCo has powers to amend the FELs by simple Resolution under Section 7.
4. Round 2, Legco Panel meeting of 25<sup>th</sup> January 2010. The above points were reiterated together with the sliding back in relation to independence of Legal Aid, the problems with Criminal Legal Aid, and the principle for Legal Aid namely "The objectives should be that proper remuneration is required to achieve those higher standards and quality by providing a credible Legal Aid Service which is competitive in quality and ability to the private sector so that the poor litigant is not disadvantaged." There was a need to revitalize the Legal Aid system.
5. Round 3, Legco Panel meeting of 29<sup>th</sup> March 2010. We got the HAB 3 Proposals on 26<sup>th</sup> March 2010. There had been no consultation with Bar or Law Society, or anyone except maybe the LAD.
6. Round 4, Bar's Paper for the Legco Panel Hearing of 24<sup>th</sup> May 2010, was a substantial paper 20<sup>th</sup> May 2010. **Bar put forward improvements on the 3 HAB Proposals summarized below.**
7. **Proposal 1**, Replacing the 35% percentile household expenditure by a Median household expenditure.
  - (a) LASC had proposed this in about 2002.
  - (b) Bar submits, following the original LASC advice, that it should be 66% percentile for OLAS and 75% percentile for SLAS which should be adopted by Legco to be more fair and consistent with declared policy.
8. **Proposal 2, Raising the FEL for OLAS**. Why did the Government choose an increase of 50% to \$260,000? No explanation from HAB. This arbitrary approach was criticized by several Members.
  - (a) Several LegCo Members said it was Too Low.
  - (b) Not logical nor consistent, and should at least be 100% like SLAS and so should be raised to \$350,000.
  - (c) This was justified by case examples provided by Bar at Appendix A in May Paper that household of 2 adults and 2 children with worker earning \$35,000 per month (figure used by HAB) would be well over the HAB new OLAS FEL and Not eligible for Legal Aid.

9. Raising the FEL for SLAS by 100% to \$1 million was no longer adequate now.
- (a) This was the figure the Bar Association suggested way back in 2003 or earlier. Since then, the Bar's Submission of 24<sup>th</sup> September 2009 suggested \$2 million which was supported by Law Reform Commission in 2007 Report on Conditional Fees. The LASC in 2010 thought it should be \$1.3 million based on the average cost to the Plaintiff of a SLAS case at \$1.29 million.
  - (b) \$1.3 million for costs per LASC was only half the costs bill a Legal Aid applicant/litigant faces if he lost the case and had to pay the Defendant's bill as well, or hence as per Scott Report, if he were not protected "against the liability to pay heavy costs to the other party should they fail in their action." Hence the limit should be either \$2.6 million or reasonably \$3 million, hence the Bar's position was that the FEL for SLAS should be raised to \$3 million in order to meet the Scott Report Principles, see para 2.11-2.13, 2.33.
  - (c) SLAS cases are known and accepted to be more costly and complex, especially Professional Negligence cases covered by SLAS, see LAD Access to Justice 2000.
  - (d) Bar May 2010 Paper Appendix A gave example showing a worker on \$90,000 per month (figure used by HAB) would be outside the new \$1m or \$1.3 million limit, and closer to \$3m if he had a nest egg small investment flat worth \$2million.
  - (e) Thus using 2 methods of calculation, the legal costs method and the example method, the figure of \$2.6 to \$3million was supported.
  - (f) The legal basis for the \$3million figure was understood and supported by some LegCo Members, some of whom remarked that there may be 2 Defendants separately represented so costs and "undue hardship" could be even higher.
  - (g) The \$3m SLAS FEL limit based on costs of both parties to a litigation, not just the Plaintiffs costs, is right in law and is backed up per Scott Report. The figure of \$3 million is prudent to allow for contingencies and more difficult cases which go to appeal to CA or CFA.
  - (h) This point has been omitted by HAB September 2010 Paper.
10. **Proposal 3**, Special Provision for the Elderly, starting at 65 now improved to 60. This originally was another LASC suggestion from 2002, repeated in Chapter 8 of LASC Book 2006, and in Bar 2009 paper .
- (a) At age 50 many ought to have made financial provisions for retirement. At age 50 a litigant would Not be in a position of rebuilding his savings if he lost his nest egg on litigation.
  - (b) The Special Provision is targeted at the hardship of the target group who had built-up retirement assets or a nest egg, which would be "undue hardship" to lose on litigation expenses, so that the Special Provision should commence at age 50, not as late as 65. You have as much to lose and as little chance to rebuild your capital at age 50 as at age 65 if you spend much of it on an average \$3m SLAS case.
  - (c) Especially there is "undue hardship" for those civil servants who retire at 55 and HK Government is the largest employer.
  - (d) The Bar proposed that the savings disregarded in SLAS cases must be the new SLAS limit, ie \$3m.

- (e) If the approach is “one size fits all”, then the age brackets have to be wide enough to cover those who suffer undue hardship at a younger age, hence age 50 is reasonable.
11. Bar proposed in May 2010 that Legco request that LASC continue their work on expanding the scope of SLAS and that HAB be requested to cooperate constructively and report within 3 months. That 3 months expired in August 2010.
12. Bar set out the proper principles for SLAS with References, repeated below. HAB September 2010 Paper continues to misunderstand the criteria and is contra to Section 10(3) of the Legal Aid Ordinance which only requires that the **applicant “shows he has reasonable grounds”** for legal proceedings, not the burden of proving a high chance of success as HAB assert.
13. **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.
14. **So, the SLAS principles are clear**
- (a) Government should not slide out of the promise to expand the scope and types of claims when SLAS scheme 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.
15. **Round 5, Legco Panel meeting on 21<sup>st</sup> July 2010, the Bar put in a further submission dated 20<sup>th</sup> July 2010 entitled “Expansion of SLAS is Just and Feasible and Needed. Insurance** worries of HAB were dealt with and HAB has no more comment on this. **This proves that SLAS can be expanded in scope as per Proposed Amendments to Legal Aid Ordinance** since there are reasonable prospects of recoverability of

damages via insurance. This work was noted with approval by LegCo Members. Bar provided Appendix I, **Proposed Amendments** to the Legal Aid Ordinance Cap 91 in respect of amending the FEL for OLAS to \$350,000, amending the FEL for SLAS to \$3 million and amending the scope of SLAS.

16. This Bar Submission and Proposed Amendments were welcomed by most persons at the Legco Meeting, HAB felt relieved that someone had done the groundwork for them and it did not seem so difficult after all. We were asked to provide a Chinese translation of the amendment.
17. At the meeting the Bar made the point that the proposals for the expansion of SLAS were actually initiated by the LASCs Interest Group on the scope of Legal Aid in 2002 so the proposals have been in the pipeline for many years.
18. At the end of the hearing, the Motion was moved unanimously **“That this Panel considers that the Government should, based on the Hong Kong Bar Association’s proposal for amending the Legal Aid Ordinance, conduct a study as soon as possible on the implementation of measures to expand and improve Legal Aid Services.”**
19. The HAB said that the Administration hope to submit to Legco the Legislative amendments for these improvements at the beginning of the 2010/2011 Legislative Session. One of the LegCo Members said there was now a need for expedition and no further foot-dragging by the Administration.
20. The Minutes note that the Administration was requested to revert to the Panel at that Special Meeting on its consideration of the proposals put forward by the Bar Association for expanding the scope of SLAS and its proposed amendments to LAO as set out in its submission as well as specific measures to assist employees in the filing of winding-up/bankruptcy petitions against insolvent employers and appeals lodged by their employers against Labour Tribunal awards.

#### **Stopping the the downward spiral of Legal Aid.**

21. The Bar’s Note on SLAS of September 2009, a year ago, identified a confluence of factors leading to the Decline in Legal Aid including
  - (a) unmet needs;
  - (b) the SLAS Fund being grossly underused;
  - (c) the failure to take advantage of unmet needs and scope for expansion;
  - (d) recovery agents taking advantage of the unmet needs, resulting in some prosecutions or litigants suffering poor results and high deductions;
  - (e) the failure to raise the SLAS means test/FEL to cover the target group, the Middle or Sandwich class; and
  - (f) the current decline in Legal Aid (for example shown by spending figures or as compared to increases seen in Department of Justice Civil Division), could be reversed by these reforms.

## Way Forward.

22. Round 6, the 30<sup>th</sup> September 2010 meeting.
- (a) The HAB Paper has failed to refer to or co-operate with the LegCo Motion and the whole sense of urgency and feeling of progress shown at the meeting of July 2010.
  - (b) HAB have not based themselves on the Proposed Amendments, and have not conducted any study on implementing them. They have just reverted with upped versions of their 3 Proposals with no studying.
  - (c) On widening the scope of Legal Aid/SLAS they have passed the buck to LASC. They omitted all reference to the Proposed Amendments.
  - (d) This is the 2<sup>nd</sup> time HAB have been so non-responsive to the LegCo Panel, see their July 2010 non-response.
  - (e) Still misstate the SLAS principles and criteria.
23. No more delay and foot-dragging. The work was initiated in principle by LASC in 2002 and is correct in principle.
24. There is support from LegCo Members, Law Society, Bar and others for many years, and if LASC continue their support from 2002 and lend more support then this will give the necessary confidence to HAB to do the right thing. LegCo can now take the lead with help from others and HAB will eventually co-operate.
25. The Proposed Amendments are simple, increase the FEL figures according to realistic needs and is not arbitrary, keep to tried and tested principles and practices, and increase the scope of SLAS to meet the proved un-met needs, all within the established principles for expansion of SLAS.
26. The Proposed Amendments are based on the reasonable assumption that LAD will be as successful as in the past on administering SLAS. The excessively negative approach of HAB is unfair to LAD or the lawyers involved and is not realistic. With a wider range of cases to provide more cases from which the SLAS Fund can earn via the Contribution Schedule a percentage on the value or property or damages recovered with which the Fund can be maintained or grow. If thought necessary, the original 15% Contribution figure can be restored or used for the new types of cases under the expanded scope. With CJR, Case Management by the Courts and more Mediation, there is less financial risk from hostile litigation as more cases can be settled before court, and still the Fund will earn its percentage.
27. **All in Favour say Aye...The Bar Association suggests a Motion:** That this Panel repeats its requests to the Administration that the HAB to provide a proposal and draft Amendments for increasing the FELs, the Special Provision for the Elderly, and the expanding the scope of legal aid and SLAS based on the Bar Association's Proposed Amendments of July 2010, and to revert to the Panel within one month.

Hong Kong Bar Association  
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