

Bar Association Response to HAB and LAD Papers for the Legislative Council Panel on
Justice and Legal Services Meeting on 22nd November 2010

The Principles for SLAS Expansion

1. **New obstacles to expansion must not be allowed.** The HAB Paper of November 2010 at paragraph 7 shows a persistent attempt to introduce new limitations and obstacles to expanding the scope of SLAS which did not previously exist. Despite the Bar Associations papers which set out the true principles supported with references, the HAB attempts to put limitations which may reduce the chance of expansion of SLAS and reduce access to justice. **This is contrary to past policy and the spirit of the new Policy Address and Policy Agenda of October 2010.**
2. **HAB misunderstanding.** The Legco Panel meeting of 30th September 2010 revealed the degree of misunderstanding within HAB about the principles governing SLAS. We have in earlier submissions noted the HAB attempt to rewrite the SLAS principles as they go along and creating obstacles to expansion, and have tried to set the record straight. Our Summary Paper of 29th September 2010 at paragraph 13 set out the SLAS principles yet again, and again reproduced below.
3. Part of the HAB misunderstanding is because they have failed to consider Section 10(3) of the Legal Aid Ordinance which provides the factors and criteria for considering applications and processing of all Legal Aid cases, whether OLAS or SLAS, and the correct Principles for expansion of SLAS. It is clear and obvious that when considering expansion of SLAS, one has to ensure that this is compatible with the Legal Aid Ordinance S.10(3).
4. **Principles and criteria for Operation and Processing.** The factors and criteria for Legal Aid processing of applications for aid in individual cases are in S.10(3) as follows: “A person shall not be granted a Legal Aid Certificate in connection with any proceedings unless he shows that **he has reasonable grounds for taking**, defending, opposing or continuing such proceedings or being a party thereto, **and may also be refused** Legal Aid where it appears to the Director that –
 - (a) only a trivial advantage would be gained by the Applicant from such proceedings;
 - (b) on account of the simple nature of the proceedings a solicitor would not ordinarily be employed;
 - (c) it is unreasonable that the Applicant should be granted Legal Aid in the particular circumstances of the case;”
 - (d) (e), (f), (g) contain various exceptions.
5. **Legal Merits Test.** When considering merits, there are 2 aspects to consider namely Legal Merits and Reasonable Merits. The primary or Legal Merits Test for LAD to consider and when processing applications is founded on reasonableness.
 - (a) reasonable grounds for taking action based on the facts and law of the case.
 - (b) There is nothing in the Legal Aid Ordinance requiring a threshold as high as a “high chances of success with good damages to cost ratio” as per HAB September 2010 Paper paragraph 15.

- (c) Factors such as the amount claimed and the likely costs of the action are not directly relevant but are to be considered under a different test, the reasonableness test, see below. See Legal Aid in HK, page 117-118.

6. **Reasonableness Merits Test.** Under Section 10(3)(c) is the test which the DLA should establish, ie if it appears to the DLA that it is un-reasonable to grant legal in the particular circumstances of the case. As per Legal Aid in HK, 2006, pages 118-119, this is a wide and general and additional test under which the Director can take into account all the factors which would influence a private client considering taking proceedings. “One particular aspect of the “reasonableness test” involves consideration of whether the benefits to be obtained in any proceedings justify the likely costs, one of the most important factors for a private client considering litigation.” “In considering whether it is reasonable in the circumstances of a case to grant legal aid despite its obvious legal merits, the Director should take account of the following considerations:
- (a) The value of the benefit sought by the applicant, bearing in mind that benefit in this context is not confined to financial benefits but includes matters such as personal right, status, reputation and dignity of the applicant;
 - (b) The chances of succeeding in obtaining that benefit in the practical sense; and
 - (c) The costs of doing so.”
 - (d) This means the Director has to show that, despite the Legal Merits, it is un-reasonable to take proceedings because of the poor prospects of recovering damages or redress or property when the applicant wins the case.

7. **The proper principles for expansion of 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.

8. **Principles for Expansion of SLAS.** Thus when considering SLAS Expansion as a matter of policy, law makers and HAB can consider **criteria and factors** which are not in the Legal Aid Ordinance provided they are relevant to and consistent with the objects and principles of the Ordinance. **However, they cannot be inconsistent with the Legal Aid Ordinance in so doing.** Thus, it cannot be right to demand of new types of SLAS cases that the Legal Merits or prospects of success be a very high chance of success, ie a much higher threshold than the processing test for considering applications for OLAS and SLAS cases contained in S.10(3). The reasoning is simple. If the operation of the Ordinance and the processing of cases by Legal Aid Department only requires a test of “reasonable grounds” for taking proceedings it must be inconsistent and thus wrong for policy and law maker decision-makers to so limit the scope only to types with “a high chance of success” when deciding on expanding to new types of cases.
9. **Only sure winners should get SLAS?** Additionally, there is no such thing as a “type of case” which is a type of “a high chance of success”, ie only winning cases. Some PI cases have more factual and legal merit and hence a higher chance and some do not, some financial product cases will have more factual and legal merit and hence a higher chance and some will not, it all depends on the review of the Legal Merits to be conducted by the processing LAD and the assigned lawyers.
10. **Contra to precedent.** As a matter of precedence in policy making, the new HAB demand for only types of case with a high chance of success is also wrong. Professional negligence types of cases were an expansion of the SLAS scheme. Such a demand was not raised as an obstacle by the Administration then. These types of case do not have a high chance of success whether in terms of high chance of winning a case or whether in terms of high chance of recoverability of damages. So demanding those criteria now is new and wrong. The above analysis shows that HAB are making obstacles to expansion with no basis.
11. This shows that when considering expansion of the types of case, the test is the same in processing as it is in policymaking, namely reasonable grounds for taking proceedings. **Thus, policy makers and law makers should be considering the types of cases for SLAS which have reasonable grounds for taking action.**
12. **However, in policymaking and law making, Recoverability is a relevant factor for examining expansion of types to cases for SLAS** so that the SLAS Fund can benefit from a flow of contributions and so enable the victorious Plaintiff to contribute 6% or 10% into the SLAS Fund. Therefore, it is reasonable for policymakers and lawmakers such as HAB and Legislative Councillors to consider expansion in those types of cases where there is either insurance or otherwise reasonable prospects of recovering damages. Once those factors or reasonable prospects for recovery are satisfied, then those types of case are appropriate for SLAS expansion.
13. **Background.** SLAS was evaluated briefly in Legal Aid in HK Chapter 9, page 226. Operational efficiency by LAD and its SLAS Monitoring Committee showed that the sustainability of SLAS was due to
 - (a) a high success rate in litigation, which means the astute assessment of the merits of a case which demands a greater probability of winning the case, and

- (b) the recoverability of awards from the opposite party, which tends to attract cases where additional safeguards against non-recovery of damages are in place, such as insurance.
14. At page 227, the principles for expansion of SLAS as long ago as 1993 were set out, see our Principles above, and also set out the Government arguments in 2003 that expansion of new categories of claims to SLAS must not jeopardize its financial viability and noting that the majority of SLAS cases had insurance with good prospects of recovering monetary damages. Even in 2003, the Government were NOT demanding a very high chance of success in terms of winning a case or in terms of recovery. Therefore it seems HAB have taken out of context the comment in the book about the current high success rate and converted that attribute into a requirement before expansion can be considered. This is wrong.
15. The authors of Legal Aid in HK conclude at page 228 that the success of SLAS may be attributed to
- (a) Its narrow scope and being directed against parties with insurance or self owned resources and
 - (b) careful evaluation of merits to enable viable cases and
 - (c) prudent case monitoring.
 - (d) And at page 230 recommended the expansion of SLAS in preference to other ideas.
16. **The Proposed Amendments.** As a result of this, the Bar’s submissions and now the Proposed Amendment have mainly been on expansion of SLAS to types of cases where **normally there is insurance**, and where, even if there is only moderate damages, it is a situation with reasonable prospects for recovering damages.
17. Grace Lui in the Legco Panel referred vaguely to “a basket of factors” which were not explained despite questions, and which showed a lack of understanding. Perhaps she confused the processing and assessment of the Merits of the case, which should be done by Legal Aid Department and assigned counsel under S.9, and which is part of Legal Aid processing, with the task of Legislators and policymakers in deciding what types of cases SLAS should be expanded into. Hence it was correctly identified by Audrey Eu S.C. and others in the Legco Panel, that **the main factor for selecting new types of cases for expansion is the reasonable prospect of recovery, and insurance is an indicator of reasonable chance of recoverability. That is why the Bar Association’s proposed amendments mostly are types of cases with the attribute of reasonable prospects of recovery.**
18. It is possible that the HAB have fallen into error by using the word “success” which does not feature in this part of the LAO, and confused “success” in the context of Legal Merits and winning the case, with the use of “success” in terms of recovery of damages or property because of insurance. The reference to success is contained in Section 32 and 32(5) in relation of contribution to the SLAS Fund where “proceedings shall be deemed to be successful where property is recovered or preserved for the aided person..”. **There is of course, no requirement for a high degree of success in recovery.**

19. Thus, as noted above, when considering expansion of types of case for SLAS, types of case which have insurance is a valid factor or attribute for policy makers and law makers to consider. Hence, the Bar's Proposed Amendments are built around types of cases where there is likely to be insurance or reasonable prospect of recovery of damages so as to be able to provide payment of the percentage to the SLAS Fund.
20. Additionally, there is no requirement to demand "a good damages to cost ratio". SLAS can lead to recovery or preservation of property and thus success with no damages to cost ratio. The plaintiff only has an obligation to pay either 6% or 10% of the damages or value of the property recovered to the SLAS Fund. All that is required to protect the interest of the Fund is "reasonable" prospects, so as to enable the result to cover costs and to enable the percentage contribution to be paid. **The Fund is not in business to maximize its profit, it is a part of Legal Aid to provide justice to qualifying types of cases and legally meritorious cases and reasonable cases as processed according to law.** Hence in cases where only property is recovered, ie no damages to costs ratio at all, there is a provision for a charge on the property and the Director can issue a waiver under Section 18A in relation to the charge on property recovered.
21. Along side this the HAB ignore the fact that the LAD and assigned lawyers will be experienced enough and have professional duties to advise on the merits of the case and if in cases of doubt, LAD can obtain S.9 opinions so as to ensure that in each case the applicant has "reasonable grounds" for taking proceedings.
22. Thus the HAB have misunderstood the issues and the criteria for expansion of SLAS. Fortunately they have not made any decision. They have passed the task on responding to the Bar Association's Papers to LASC. This Note attempts to explain why insurance is a factor to be considered so they or LASC on their behalf can now get down to actually considering the July Bar Association Paper and its Proposed Amendments as requested by the LegCo Panel Motion passed at the July 2010 Panel Meeting.

Other points on HAB and LAD Papers of November 2010.

23. HAB does not address the FEL's
24. HAB does not address the Special Provision for the Elderly.
25. The LAD's Paper, Preliminary Analysis on the Proposed Expansion of SLAS of November 2010 needs much further work in order to provide a fair analysis of the problems and benefits from the expansion of SLAS.
26. It is the wrong approach to distort the figures and the results by only relying on one small case based on outdated and thus very low OLAS FEL figures. Of course OLAS figures are low because the FELs are so unfairly low.
27. If SLAS brought in the middle class based on the Revised SLAS FEL of \$3 million, there would be much higher damages yielding proportionate benefits to the SLAS fund.

28. In any event, this misses the point. Injustice comes in small figures as well as large figures and for ordinary people the small figures matter more. SLAS is mainly for access to justice, not just access to millions.
29. The attempt to downplay the need for access to justice by referring to a complaints handling procedures shows that the point is missed. Whilst complaints handling is are welcomed, it is essential that access to justice requires access to the courts. Complaints lack legal teeth. They are often slow, unsatisfactory, bureaucratic and do not set precedents.
30. The LAD Paper reveals that the proposed expansion areas according to the Bar's Proposed Bill of July 2010 are suitable for SLAS.
31. In some areas where there are claims of a small amounts of money such as Sale of Goods and Provision of Services, clearly Class Actions are the way forward to achieve economies of scale in such cases, hence these are important. Nevertheless, Class Actions as an expansion for SLAS have not been dealt with by the LAD analysis.
32. The Chief Executive having made a step forward by his recent commitments, and HAB having provided their timetable for implementation, **we now await the LASC Report so that there can be a substantial response to the Panel Motion of July 2010** that, based on the Bar Association's proposal, the Government should conduct a study as soon as possible on the implementation of measures to expand and improve Legal Aid Services.

Hong Kong Bar Association.
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