

**Hong Kong Bar Association's written submission
in respect of the Legal Aid (Amendment) Bill 1999**

1. The Bar's overall view is that so long as the Bill would assist more people who otherwise will not be able to gain access to justice due to their limited means and financial resources to qualify for legal aid (subject of course to the usual means and merit tests), the Bar would welcome any positive changes introduced under the Bill. If anything, we feel that the present Bill does not go far enough in helping those in the "sandwich class" who is at present not qualified under the Supplemental Legal Aid Scheme ("SLAS").

Recommendations which received no dissenting comments

2. We note the six different areas where the Government has not received any dissenting comments.
3. The Bar particularly welcomes the continuation of the current practice that (1) legal aid is granted to person who satisfied the means and merit test, regardless of their residency status and years of residence in Hong Kong; and (2) for infants disregard of their parents or guardians means. These the Bar considers as the corner stones of the legal aid system in Hong Kong and should not be removed under any circumstances.
4. We also welcome that legal aid is to be extended for persons who have already been issued legal aid certificates and who are required to attend coroner's inquests.

Recommendations which received dissenting views

(1) assessment of disposable income

5. While we welcome the increase on the personal allowances figures and that more households become eligible for legal aid under the new proposed revision on the assessment of disposable income (from the existing 48% to the proposed 58%), caution has to be exercised in the use of the expenditure patterns of households in the 35-percentile as benchmark. In our view, such ‘percentile’ has to be reviewed on a regular basis so as to ensure that at time of high inflation or fundamental economic changes in society, e.g. like general reduction of wages or high unemployment, it will not result in a situation where less households in Hong Kong will become eligible for legal aid than the 58% being envisaged at present.

(2) financial eligibility limit

6. We consider that the present limits on financial eligibility are still too low, in particular under SLAS. We note that often it is not only the poorest in our society who are in need of legal aid, but those who are in the “sandwich class” who need it most. The current financial limits imposed will not assist those who are caught in that category. The people fall within this category are often not poor enough to be eligible for the standard legal aid scheme nor are they qualified for the Supplemental Legal Aid Scheme. For example, in personal injury cases, as we do not allow lawyers to charge on a ‘contingency’ basis in our system (for good policy reasons), these people who would not be able to afford the legal costs will simply not be able to commence their actions within the prescribed statutory limits. Thus, we consider that there is still a strong case to raise the financial eligibility limit particularly under the SLAS.

(3) review cycle

7. The Bar considers that the financial eligibility limits should be reviewed annually instead of biennially. This will enable a better allocation of resources and maintain the real value of the limits. We note that such an annual review will not create a huge and cumbersome administrative burden on the part of the Director of Legal Aid but may potentially save a great deal of money on the Legal Aid Fund. In our view, the Administration has not made out a case why a biennial review cycle is more appropriate “for other factors”.

(4) legal assistance for persons required to attend coroner’s inquests

8. The Bar welcomes the proposal that the DLA will be vested with the power to grant legal aid to the next of kin in coroner’s inquest concerning cases of great public concern, regardless whether claims for damages are involved. We however feel that there should not be a limit to cases of ‘great public concern’ only. In our experience, often the family of the deceased is in an extremely vulnerable position in the Inquest. They are not familiar with the legal proceedings and are most of the time at a loss as to how to conduct any questions on witnesses or other interested parties who are often represented by lawyers at the Inquest. So long as the next of kin can satisfy the means test, we feel that legal representation in the form of Duty Lawyers Service should be made available to the next of kin. This should not create a great financial burden on the Legal Aid Fund.

9. We also welcome legal representation for persons ‘in jeopardy’ by the Duty Lawyer Service.

(5) means test for employees

10. At present, the Labour Tribunal does not allow the parties to have any legal representation in its proceedings. Thus the employer will not have an advantage over the employee when it comes to legal representation at any hearing at the Tribunal. Once the case goes to appeal, the situation changes. The employer usually can afford legal representation while the employee in most instances cannot.

11. The Bar accepts that while in most cases the employees will be able to satisfy the means test and therefore waiving the means test automatically does not seem to be warranted in such situations, there is a strong case to support that the DLA should be given a discretion to grant legal aid in cases involving with issues of great public concern or importance or if the appeal involves with an important point of law.

12. Supplemental Legal Aid Scheme should also be made available to applicants who wish to appeal against the decisions of the Labour Tribunal, if the same has not been made available already.

(6) basis for calculating contribution

13. The Bar does not support the amount of contribution payable by an aided person should be linked with the amount claimed. This will only encourage higher legal fees and more lengthy litigation. This may also create a situation where an aided person is encouraged to either

compromise his position in accepting a smaller amount of compensation in settlement because of a smaller contribution he is to make to the legal aid fund or to try to maximise his claim in order to get the best 'value' for his legal aid services. In our view, both situations will not be conducive to a fairer society nor better administration of justice.

14. The Bar supports that the current practice should be maintained.

(7) contribution under the standard legal aid scheme

15. The Bar notes that the proposed contributions set out under Annex C of the Government's Papers represents a worse off situation for the lowest income groups with limited financial resources than those under the current scale. We suggest that the contribution should start with the group of persons whose financial resources start in the \$80,000 to \$100,000 bracket in order to make it compatible with the current scale.

16. The proposed non-contribution level at \$20,000 is far too low. In our view, it is exactly the group of persons who fall within the \$20,000 to \$80,000 financial resources who are not able to afford to contribute to the Fund. In any event, the nominal sum of \$1,000 to 5% contributions proposed for persons with financial resources brackets of \$20,000 to \$80,000 will make little or no difference to the Legal Aid Fund but may mean a great deal to a poor and large family's budget.

17. In our view, one of the major problems regarding the present legal aid scheme is that the

current ceilings of \$169,700 set as eligibility for the standard legal aid scheme and \$471,600 for the SLAS respectively are too low and do not reflect the increases of the standard of living and the substantial increases in wages in the lower income groups in the 1990s prior to the current economic downturn. This in particular applies to the “sandwich class” family who often does not qualify under the SLAS. We would strongly urge a substantial increase in the ceiling under the SLAS so as to benefit more people under this category.

(8) Contribution under SLAS

18. The Bar in principle supports that legal aided persons under SLAS should be asked to make a contribution towards the SLAS Fund irrespective the outcome of the litigation. This is consistent with the principle that those who can afford should pay for the service. In addition, this will help to ensure that the SLAS Fund will maintain a healthy balance and will therefore will help any future applicants to the Scheme. In any event, if the aided person were to engage private lawyers, he will in any event have to pay an amount upfront at the outset of the case and will not be able to recover 100% of his costs even if he were to succeed in the litigation after taxation.

19. We consider that provides the maximum contribution amount is set at a reasonable amount and that the percentage of contribution is set at a reasonable level, such proposal should be supported. However, the proposed 12% contribution subject to the ceiling of \$42,425 in our view is still too high considering the relatively healthy state of the SLAS Fund. We would propose a contribution of no more than 10% should be introduced, with the rider that such

percentage should be reviewed from time to time taking into account of the prevailing economic situation and that the ceiling level should also be adjusted according to inflation.

It is not clear if under the proposed amendments a person who is required to contribute under the SLAS is to do subject to a maximum ceiling amount. We would strongly urge that any contribution should be subject to a maximum ceiling amount.

(1) contribution in Bill of Rights cases

20. The Bar considers that the present system where legal aid is granted to a person involved in Bills of Rights cases even though his financial capacity exceeds the eligibility limit for the standard legal aid scheme, subject of course to contribution according to a sliding scale should be improved. In most if not all the Bills of Rights cases, they inevitably involve with an important point of law affecting rights of not only the aided person but a much larger sector of the community. We would like to see that persons involved in the Bill of Rights cases should not be asked to contribute according to the sliding scale so as to deter any cases coming before the court. As the cases involved with the Bills of Rights are not high each year, such aided persons should in our view be exempted from contribution.

21. We would further urge the same should apply to cases involving with the Basic Law.

(10) protection of Legal Aid Fund

21. The Bar considers that the present common law remedy for negligence adequately protects the DLA from situations where assigned solicitors fail to remit money payable to aided

person to DLA. We are pleased to learn that the proposed power to recover any loss to the Legal Aid Fund from the assigned lawyer directly by the DLA is dropped.

(11) cost-effectiveness of our legal aid services

22. The Bar welcomes the continuation with the present practice where no ceiling is imposed on spending on legal aid cases. At the same time, we note the recent developments on the legal services in other jurisdictions such as England and Wales. We agree that before the removal of any ceiling on the spending on legal aid cases, an overall review of the structure of our entire legal system including that of the way lawyers charge their fees and the provision of legal aid services in different categories of cases should be conducted. There may be a case in Hong Kong to introduce conditional fee arrangements in certain type of cases like personal injury litigation. However, until such exercise is done, we consider that it would not be in the public interest to impose an artificial ceiling on the amount of spending in each case. There is simply no evidence to suggest that the present system is being abused.

Dated this the 28th day of January 2000.

Hong Kong Bar Association