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. <u>Proposed Reforms – A Holistic Approach</u>

(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

28. 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

29. 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. <u>Amending the Ordinance.</u> 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.