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（只備英文本）
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(English version only)

Hong Kong Bar Association Submission for the Legislative Council Panel on Justice and Legal Services Meeting on 24th January 2011

1. Introduction. Last year the Bar's Submissions included
   (a) July 2010 draft Bill which was supported by a Legco Panel Motion [LC Paper No. CB(2)2105/09-10(01)].
   (b) Timetable for action, in the Paper for the meeting 22nd November 2010 [LC Paper No. CB(2)357/10-11(01)].
   (c) Comments on the LASC Reports, in the Paper for the meeting of 21st December 2010 [LC Paper No. CB(2)638/10-11(02)].

   We have heard nothing since. This paper addresses the fundamental error of the proposal to divide SLAS into less risky and more risky schemes. It also deals with Class Actions and Protection of Minority Rights.

2. SLAS. See Paper for the meeting 21st December 2010 paragraph 14. It is fundamentally wrong both in a business sense and contrary to the Legal Aid Ordinance to attempt to divide SLAS into two comparative risk calibrated schemes comprising greater and lesser risk cases. Shifting Professional Negligence cases into the higher risk category cases is strongly opposed. 'Risk' should remain assessed professionally under the 'Merits' test with the option of Counsel's Opinion under section 9. We propose that the Interest Group's Report approach be adopted, namely have the current SLAS cases continue as they are but have the new cases administered separately. This will allow monitoring and enable comparison whilst allowing risk to be assessed in the conventional manner.

3. Appendix 1 explains why it is fundamentally wrong to divide SLAS in the way being proposed by the LASC. In essence, putting all the more risky cases in one basket is conceptually flawed. The 'Merits' test is designed to meet all categories of case. Creating a separate 'High Risk' basket suggests that the 'Merits' test criteria may be softened, leading to that basket having a higher risk of depletion of assets which could discredit the whole Scheme and the LAD.

4. The draft proposed Bill has a package of provisions which, by increasing the FEL limits, by a sensible provision for the elderly, coupled with the increase in the scope of SLAS will cumulatively serve to increase the pool of Legal Aid cases. This will achieve the necessary economies of scale as well as spread the risk across a wider spectrum so the SLAS income will increase and continue to be self sustaining. Hence the draft Bill of July 2010 is a package. We have pointed out that the LASC fails to address this package approach and thereby fails to grasp its built-in advantages.

5. With increased Mediation, the risks of the SLAS Scheme losing cases will be reduced as the Mediation process will vet the riskier cases earlier with a consequential settlement whereby the risks to SLAS will be reduced.

6. Company disputes, minority shareholders and class actions, in the proposed Bill Clause 4(g) and 4(i) were dealt with in the Paper for the 21st December 2010 meeting

at paragraphs 21 and 23. Appendix 2 explains the importance of the expansion of Legal Aid and SLAS to these cases. The Court of Appeal has castigated the conduct of the majority shareholders against the minority as outrageous. Therefore, it is appropriate and apt that SLAS be provided for such cases. At the end of the day there will be monetary claims and recovery of costs. In any event, the current damage to Hong Kong's corporate governance image will be reduced when SLAS is available to represent the public interest.

7. Unrepresented litigation is a serious problem and consumes a disproportionate amount of judicial time and resources. Currently 51% of District Court and 40% of the High Court, Court of First Instance cases are unrepresented. This degree of inefficient unmet needs results in reduced access to justice which can be largely ameliorated by the SLAS scheme coupled with Mediation.

8. The Bar Association therefore maintain its firm and principled stance:-

(a) that the package approach be adopted;
(b) that SLAS is not split into two categories of risk but the 'Merits' test be maintained consistently;
(c) that a firm timetable is required.

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Appendix 1, Hong Kong Bar Association submission on two SLAS schemes, (SLAS I and SLAS II) for meeting on 24th January 2011.

1. This Note explains further the Bar Association's opposition to the suggestion to create two SLAS schemes, being divided on the basis of more risky cases and less risky cases and to transfer to the more risky scheme the professional negligence cases now under the original SLAS scheme. See Bar Association Submission for Meeting of 21st December 2010.

2. First and foremost, the creation of two schemes will be contrary to normal concepts of spreading risk across a wider and larger pool of cases so as to arrive at a more sustainable business model. It is noted that this mistake was not made by the Interest Group of LASC Report which only had the single scheme divided into 2 parts, old and new, administratively, and temporarily, for the purpose of better monitoring and comparison, whilst the new types of claim were being phased into the operations of the expanded SLAS.

3. Rightly the current and original SLAS was introduced on the basis that the eligible cases and litigants were entering a kind of "insurance pool" whereby the Scheme could balance out the risks through judicious case selection under the Merits Test by the professional expertise of the LAD. The LASC have not applied the principles involved, and SLAS II may fail and use up the HK $100 million if more risky cases are to become eligible for Legal Aid and put in SLAS II. This will bring the whole SLAS into disrepute. This will be a major blow to the prestige and morale of the Legal Aid Department in the long term, and leave the field open to recovery agents and touts who charge high percentages for services which are not monitored. The Bar Association believes the Scheme should remain a unified whole for sound reasons .

4. By way of illustration, in Life Insurance there is a balance in a given captive scheme, which the SLAS is. So that you have a whole range of "lives" to insure in one large pool, so the risk is evened out and the "risk" is minimized instead of the risk being aggravated by having separate pools of elderly at one of the end of the scale with very high premia, and separate pools of the younger insured, who have very low premia. Obviously if no younger lives are added to an insurance pool, then the original pool of lives ages, and the risks of more people dying increases as the years go by, and the premia will have to be constantly adjusted. However if younger lives are added to the pool, then these risks can be balanced out. Thus the premia remain the same, or if sufficient of younger people join the pool, the premia can be reduced.

5. By parity of reasoning, the pool of cases has to be sufficiently large in order to maximize the viability of the expanded SLAS. In the main, the types of cases included in the Legal Aid Bill proposed by the Bar in July 2010 are covered by

insurance or involve potential defendants who have the means to answer any judgment and thus meet the SLAS criteria of recoverability.

6. Having a larger pool of cases is a better way of achieving a true "risk/reward ratio". Statisticians have long been using the "law of large numbers", and what this means is that if you have a large enough sample of random events (cases), then evidence is collected to show those events (cases) which achieve the expected result. (Log Normal Result) So there will be a bell curve diagram of those cases (subject areas) which will achieve the normal result, for which the recovery ratio is designed. Then there is a sharp drop off at either extreme. In other words, there are fewer cases with spectacularly different results at either end of the scale, where the "volatility ratio" (risk) is much higher.

7. There is no such thing as a 100 % success rate in a group of cases, there is always the random one, which is lost, because someone's evidence is not believed, or for other good reasons. Practitioners know that, and even the strongest case on paper can still fail. Hence, the types of new cases to be included in the expanded SLAS should NOT be decided upon subjective perception of the chance of success of particular type(s) of claims or based on idiosyncratic experience in the conduct of cases in the past under the current SLAS or even OLAS.

8. The key to the success of the expanded SLAS scheme lies in the selection of viable cases through the conduct of professional merits testing and the suitable adjustment of the Rate of Contribution currently set at 6% of the recovery or 10% if the case is settled after delivery of brief to Counsel.

9. It is observed that the Pool has been declining so the Contribution needs to be adjusted upwards for the time being. From the figures, the financial pool has been declining, not only because of a single large lost case, ($17m) but also because the recovery percentages have been reduced and the pool of eligible legal aid applicants has been shrinking with the proliferation of recovery agents and declining FELs. This indicates that the "risk/return" (recovery percentages) may be wrong and need to be adjusted.

10. Over and above the normal risk/recovery ratio, there must be an additional "cushion" to cover the random event, so that LAD and LASC do not have to go back to the administration for "top ups" which will reduce the credibility of the administrators of the Scheme. This ratio or contribution is to balance risk amongst litigants. This is what it was designed to do in the first place. There is justification for adjusting the rate of contribution under the existing SLAS to (say) 8% and 12% respectively or slightly higher rates to provide for the random events as explained above. It is still lower than the 15% contribution imposed when SLAS was first introduced and certainly more attractive than the share of 25% known to be charged by and paid to recovery agents.

11. It is noted that the LASC proposed to set the rate of contribution under SLAS II at 15% for cases settled early and 20% for cases settled after delivery of brief to Counsel. These rates of contribution are lower than that charged by recovery agents. However, with such rates of contributions, the expanded SLAS should be able to absorb the risks attendant upon some socially deserving cases PROVIDED the Pool is big enough and includes as many of the types of financially viable cases as identified in the Proposed Legal Aid Bill.

12. So it would be more logical to introduce the new areas of cases into an existing pool where they can "manage the risk" best. Putting all the professional negligence cases into the perceivedly "risky pool – SLAS II", would not enable Legal Aid to manage the risks of the new intake of cases at all, and the notion is misconceived.

13. More importantly, the LAD would not be able to manage the "risk/return ratio", as they would have to constantly adjust the rate of contribution (either up or down) depending on the failure (or success) of the cases they took on in SLAS. Alternatively, the rate of contributions would have to be set at an exceedingly high level to ensure viability of the expanded scheme. There would be much less need for risk/return percentages to be constantly adjusted if the cases were put into a much larger pool of cases.

14. In short, there should be one pool of cases to which the new cases are added, as there will be far less risk of managing a pool "with known variance". To start up a new small pool called "SLAS II" where there will be no "historical variance" for which the risk/return ratio is known, is not prudent if one is trying to preserve the new fund at or around HK $100 million.

15. <u>There is no sensible basis for having two SLAS schemes divided along the lines of more risky and less risky cases</u>. This was not the basis and understanding for which the $100million was promised by the Administration and these new funds should not be put at risk by departing from the tried and tested administration of SLAS based on merits testing.

16. Using long accepted criteria for the expansion of SLAS, the types of cases shown in the draft Bill are chosen to provide a reasonable financial basis for recovery of the contributions. Provided merits testing of the risk of each case is done properly, as it is done now, the pool when enlarged will be able to absorb the risk of the new cases.

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Appendix 2. Hong Kong Bar Association. The need for SLAS to cover Class Actions and Protection of Minority Rights, per draft Bill Clause 4(g) and 4(i).

1. Hong Kong has recognized the world wide trend to increase corporate governance. Since 2000 Hong Kong has implemented important reforms in company law to enhance corporate governance. More improvements have been announced by the Administration recently. If minority shareholders do not have the means to take majority shareholders and the directors of companies to court, then these improvements are toothless, and worthless to the ordinary Hong Kong shareholder.

2. Company members can now apply for orders for inspection of the company records (S.152FA). Legislation has been enacted permitting former members of a company to claim relief for unfair and prejudicial conduct (S. 168A(2A) and providing for an expanded range of shareholders' remedies for unfair and prejudicial conduct including damages (S.168A(2) (b). The legislation has also created an entirely new remedy known as the Statutory Derivative Action (Part IV AA) and empowered members to apply for injunctive relief to prevent misfeasance (S.350B).

3. The Bar Association believes as Hong Kong has become a very major financial and listing centre, with hundreds of companies registering on the Hong Kong Stock Exchange in the last decade, and it is important that individual shareholders' rights should be seen to be protected.

4. Improvements in trading facilities has encouraged more and more Hong Kong residents to buy shares. Many banks now sell stocks and shares over their counters to ordinary individuals who have trading accounts. Thus the spread of share ownership in Hong Kong is much wider than 20 years ago. This means a wider spread of people need to be protected.

5. Many of these minority shareholders in public companies lack the substantial resources required to pursue these new and useful remedies. The management and/or majority shareholders who control the companies, often use the company's own resources to thwart minority shareholders' rights and actions, and this turns court actions into classic "David and Goliath" fights. Many companies only issue 25% of their shares and are thus closely controlled. Hence the need for assistance from SLAS to aid impecunious minority shareholders. Rarely, in derivative actions, a court can grant an advance order for an indemnity, to enable a plaintiff's costs to be paid out of company assets. However, the litigant would have to expend considerable sums to reach that stage, and this is where SLAS is needed.

6. Most of these new remedies are currently employed in private company actions, where the minority and majority shareholders are of comparable financial strength. See for recent examples Tsang Wai Lun, Wayland v. Chun King Fai [2009] 5 HKLRD 105 and Re Sun Hung International [2009] 2 HKLRD 418. Extending SLAS to such classes of litigants, will enable a wider class of minority shareholders in public companies to access justice via these remedies.

7. The Bar Association believes it is in the public interest that this "world class city" , has good corporate governance. The passing of the new legislation will not avail individual shareholders one iota if they do not have the means to exercise these rights.

8. This need was illustrated by the attempted privatization of PCCW in late 2008 and early 2009, which was described by one judge as "outrageous" . See In Re PCCW Ltd., 2009 CACV 85/2009 – 11th May 2009. This was a "blue chip" company, whose shares are widely held by individuals in Hong Kong and pension and ORSO Schemes. A number of minority shareholders were aggrieved at the conduct of the majority who attempted this privatization. Most of them had no resources to fight. There was an associated attempted "share manipulation scheme" in which 500,000 shares were issued to 500 Fortis Life Insurance agents. They were then invited to attend an a court meeting to approve the privatization scheme in order to force through the resolution. The Securities and Futures Commission had to intervene to prevent the privatization scheme coming into effect. It was only at the last moment that one shareholder was able to find funds to instruct counsel. Costs were awarded to intervening shareholders against PCCW. In the Court of Appeal there were 4 independent shareholders who appeared, and 11 others who made submissions in person. The minority shareholders' interests would have been better argued before the Court, and the Court of Appeal, if Legal Aid had been available to them. This case well illustrates the need for SLAS to be granted for "Class Actions", as well as for the protection of minority shareholders' rights. We request that the Administration and LASC reconsider their position, and read the judgment in this case, to realize why SLAS ought to be extended to "minority protection cases" where there is an affront to minority rights.

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