

**Hong Kong Bar Association Submission for the Legislative Council Panel on
Justice and Legal Services Meeting on 21st December 2010**

1. **Introduction.** This is the 8th Meeting this year but LASC have not attended most LegCo Panel Meetings and may not be aware of the progress and consensus being reached for the reform of Legal Aid. The Bar Association refers in particular to its submissions for 21st July [LC Paper No. CB(2)2105/09-10(01)] on Insurance and recoverability with Proposed Bill, for 30th September [LC Paper No. CB(2)2327/09-10(01)] a Summary, for 22nd November a Timetable [LC Paper No. CB(2)357/10-11(01)] and the Bar response on Principles for SLAS expansion [LC Paper No. CB(2)375/10-11(01)]. The LASC Report/submission of 13th December 2010, with 16 un-numbered paragraphs, is as disappointing and incomplete as it has been delayed.
2. The participation of some Bar Association Members in the later stages of the Interest Group discussions does not mean the Bar agrees with the Interest Group Report. In particular, it is noted with some regret that the reservations or alternative views expressed by the Bar Association Members, some of which are contained in the Interest Group Report, are omitted from the LASC Report. **Fundamental errors and changes which were avoided at the Interest Group stage have been introduced in the LASC Report, which departs from the Interest Group Report in important respects.**
3. **Omissions. LASC Report omits the Legco Panel Motion of 21st July 2010 towards which LASC, and all of us, should be working.** This motion, which was moved unanimously, declared that “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.” This was a reference to the Bar’s submissions, including that dated 20th July 2010 entitled “Expansion of SLAS is just and feasible and needed” which contained at Appendix I the Proposed Amendments to the Legal Aid Ordinance, Cap 91, the Proposed Bill.
4. **LASC thus omits to address the package of proposals.** The terms of reference are a package of proposals, dealing with the 3 proposals of the HAB which were derived from LASC and Bar proposals over many years. Such a package is needed to achieve optimum effect coupled with viability to provide more comprehensive access to justice. **These omissions could mislead the Chief Executive when he comes to consider the way forward.**
5. **OLAS FEL is not addressed.** Proposal 1, requests replacing the 35 percentile household expenditure with a 66 percentile for OLAS and 75 percentile for SLAS which was the advice LASC received in 2002. What this means is that “undue hardship”, based on the opinions expressed in Legislative Council, begins at a much higher figure nowadays. Thus the FEL for OLAS is far too low and needs to be raised not only by 50% to \$260,000, but by 100%, as in the HAB proposal for SLAS, to \$350,000. This is not addressed. See Summary submission of September 2010.
6. **SLAS FEL, failure to use correct principle.** Proposal 2, raising the FEL for SLAS by 100% to \$1 million or \$1.3 million is a start, but is wrong in principle. The LASC

failed to acknowledge the correct principles which have been followed by the legal profession in line with the Scott Report, so that - as LASC figures showed - half the cost bill of an average Legal Aid SLAS case is \$1.3 million, therefore the FEL for SLAS should be at least \$2.6 million or more reasonably \$3 million to take into account cases where there is more than one defendant and the “undue hardship” faced by the legal aid applicant is for a higher amount of costs. No timetable for increases to meet the correct principle.

7. **Elderly provision not addressed.** Proposal 3 was the special provision for the elderly which should commence at age 50. LASC has said that 65 is too high, but LASC has not said what the appropriate age for this special provision should be. We suggested 55 as an interim figure. LASC needs to address this. They have omitted this.
8. **The expansion of the Scope of SLAS** is the final area in this current package. We draw attention to our Response to HAB and LAD Papers dated 22nd November 2010 which sets out the relevant principles for SLAS.
9. **No timetable as required**, only said to be incremental changes which are vague or incompletely stated. We draw attention to our submission “Timetable for Legal Aid Reform” of 17th November 2010 and ask the LegCo Panel to bear this structure in mind as LASC have failed to provide a complete timetable.
10. **Action on consensus.** As noted before the Legislative Council Panel, since these reforms have been discussed in the last 14 months, there has been progress among participants until now. There is general recognition of the need for action on these reforms to meet the needs of the situation and the hardships of those who need legal aid. Hence, with the backing of the Policy Agenda and Address of 2010, this is the opportunity for a change which can make a difference. The degree of consensus which has been reached in the LegCo Panel meetings for these reforms is not reflected in the LASC Report.
11. **Fundamental conceptual error. LASC Report has muddled together the Merits testing done by LAD professionals in individual ‘case by case’ processing, with the Criteria for expansion of SLAS types of claim.** These errors are made despite the explanations with references contained in the Bar Submission for 22nd November 2010.
12. **The LASC fails to understand the importance of professional merits testing of each case as the key to financially sustainable legal aid.** Hence their 5th paragraph omits this merits testing as a main reason why SLAS has been financially sustainable. See Bar Submission for 22nd November paragraph 15 based on LASC book, Legal Aid in Hong Kong page 228 and the Interest Group Report paragraph 10.
13. The wrong conceptual approach is used in the LASC Report.
 - (a) It is Legal Aid Department *merits testing* of *each case* which is a key to financial viability by supporting winning or settling cases. **The risks of the litigation, ie the case**, are professionally assessed and taken into account at the processing stage.

- (b) Risk is based on factual and legal complexity and uncertainty. **These factors can be found in various degrees in all ‘types of claim’**, so one can have PI types which are either very difficult or not, and one can have Financial Product types which are either difficult or are not. Thus there is no such thing as a risky ‘type of claim’, but one can have risky individual cases. The LAD grants aid only to the cases (in OLAS and SLAS) which have *reasonable grounds* under S.10(3) of the Legal Aid Ordinance so the cases with unacceptable risks are excluded by the LAD professionals on a case by case basis. So assumptions of risk of a crude sort is *not* the criteria for SLAS expansion into other types of claim. See Bar Submission 22nd November 2010 paragraphs 5 and 6.
 - (c) For criteria for expansion of SLAS, the *choice of types* of claim is *not* based on assumptions whether ‘the type’ is risky or not risky, hence SLAS already covers professional negligence type cases, and some of these cases are relatively “risky” or factually complex or uncertain. The risk assessment is a matter for merits testing by LAD. But making assumptions of riskiness based on crude type-casting of types of claim is not appropriate and that is *not* the true test for expansion of types of claim for SLAS.
 - (d) **The relevant criteria for SLAS expansion** is *choice of types of claim* which have *reasonable prospects of recovery of damages and costs* because there are likely to be assets such as property which can be charged or insurance, see Bar Submission 22nd November 2010 paragraphs 7-12. Thus the risk of non-recovery of damages and costs is relatively lower. This process of *choice of types of claim with prospects of damages and costs* is what the Bar Submissions and previous LASC work has done over the years, and summarized in the Submission and Proposed Bill of July 2010.
14. The 6th to 8th paragraphs. **No justification is given for creating a Parallel Scheme or SLAS II.** It would appear from the 14th and 15th paragraphs that one of the reasons for wanting two schemes is to make SLAS Part I for less risky types of cases and SLAS Part II for more risky types of cases. **This is contra to the Interest Group Report, see generally and paragraph 38.**
- (a) This is not an appropriate division. If the LASC wants some division for monitoring and comparison purposes, as per IG Report paragraph 52, then the division should be old SLAS and new SLAS types of claim as the IG Report envisaged.
 - (b) It is wrong in principle and law to divide it into the new concepts of risky SLAS and non-risky SLAS. This would result in a radical change in the law and merits testing for Legal Aid and is not necessary. The IG Report paragraph 53 envisaged that old and new SLAS would be **merged eventually**.
 - (c) As noted above, there are cases without merit, ie risky, and meritorious cases or non-risky cases ie cases with merit, but *not* necessarily *risky types* of case and *risk free types* of cases. Individual cases of all types can be ‘difficult and complex’ cases but the legal test is still whether it has merits. Granting of Legal Aid by the Department under section 10(3) is merits based, not type based. Risk assessment mainly depends on the facts and law and merits of each case, not what type the case belongs to. This is the task of professional lawyers in LAD, with assigned specialists advising as needs be, based on there being reasonable grounds under S.10(3). It is not the task or criteria for legislators deciding on the expansion of SLAS.

- (d) There is no clear explanation about what risky and not risky mean in the LASC Report. If defined, it presumably means cases with merit and those without sufficient merit under Section 10(3). But as noted above, merits testing is a processing task for LAD. So this is *not* the criteria to be used by Legislators and decision makers choosing what types of claim have prospects of recovery of damages and costs so as to sustain the financial viability of the SLAS scheme and fund. The LASC Report muddles together and uses crude assumptions as a form of risk assessment/merits testing for the purposes of choosing SLAS types of case, which is wrong. **The LASC Report is thus following the wrong approach in SLAS expansion, as the HAB did before.**
15. **The criteria for expansion of SLAS is to choose types of claim**, for which there are unmet needs for access to justice, based on *the types of claim which yield damages or involve property which can be charged*, so as to provide *reasonable prospects for recovery and contribution to the SLAS fund because there is insurance or property involved*. These types of claim were identified by LASC and the Bar and put into the Bar Proposal of July 2010.
16. **Some Comments on the LASC Report of 13th December 2010.** This omits the reforms in the Proposed Bill Clauses 3 and 4.
17. The 10th paragraph, Claims Against Incorporated Owners etc. part of Proposed Bill Clause 4(d). The new exclusion of claims against individual owners is contrary to LASC's previous stance. The rationale is to provide legal aid to persons to force other persons, whether they be Incorporated Owners or a single individual, to do repairs. This is to prevent accidents to the general public caused by objects falling from neglected buildings, fires and other disasters which can arise from the failures of a single individual. The intended reform is to grant Legal Aid to Incorporated Owners or an individual so as to aid them or him to take action so as to enforce the machinery of the law against those IOs or individuals who refuse to participate in repairs of an old building. There will be property which can be charged. This is needed now.
18. The 11th paragraph. Estate agents, independent financial consultants and insurance agents, are an area of increased unmet needs for legal aid; deferred parts of Proposed Bill Clause 4(a) and 4(c). There are many abuses requiring access to justice for remedies. It is wrong to defer consideration of this to a later unspecified time.
- (a) Later stage is not defined. It was agreed that a timetable is necessary for incremental change, not something that is so incomplete and vague;
- (b) This is needed now.
- (c) the insurance or recoverability positions were considered in the Bar Association's Submission of July 2010. But LASC have not dealt with this.
19. Claims Against Developers and the Sale of New Flats; deferred Proposed Bill Clause 4(d). The poor results in a few past cases, is no reason why actions against developers should not be legally aided under proper criteria. Just because there is new Legislation is not a reason for refusing to expand SLAS. Just the opposite. SLAS is needed to maximize the benefits from the new legislation by providing access to justice via the new laws. The IG Report recorded "strong concerns" in paragraph 68. This justifies inclusion in Phase 1 and not deferred.

20. The 12th paragraph, it is wrong to exclude Trust Claims, Proposed Bill 4(e) on the basis that they are covered under Professional Negligence. This would omit situations where trustees are not professional men and thus persons more likely to cause an injustice requiring legally aided remedies. Non-professional trustees are bound to be involved as executors where trusts are set up under most wills.
21. Company disputes, minority shareholders, Proposed Bill Clause 4(g). The exclusion from OLAS is not a good reason for amendment in situations where there is unmet needs. See the reasoning and solution agreed by LASC to the reforms for Financial institutions and derivatives types of claims under Proposed Bill Clause 4(b). Cases could be chosen on the basis they do involve some element of monetary claims as many such cases normally will.
22. Sale of Goods and Provision of Services; on hold Proposed Bill Clause 4(f). It is not a valid reason to put this on hold pending further Legislation. Unmet needs exist. Further Legislation will strengthen the prospects and demands for access to justice and Legally Aided Cases. Again, no timetable, just incomplete and vague.
23. No mention of Class Actions and their benefits per Proposed Bill Clause 4(i) and 4(j).
24. 13th paragraph, **Fees and Contributions**. Previously, the SLAS contribution percentages had been 15% and 7.5% where a case settles prior to delivery of a brief. LASC does not explain what they regard to be the special complexities or the higher risks inherent and allegedly present in all actions against incorporated owners, derivative claims, estate agents etc but which are not present in current SLAS professional negligence or building accident cases. As noted before, risk and complexity, which are parts of the merits testing, is for LAD to decide under merits testing. If anything, the new SLAS cases can be less complex or uncertain than a big personal injury case under old SLAS. This again shows the criteria LASC uses is not appropriate for SLAS expansion.
25. Nevertheless, to reflect the extra work and novelty of the work for LAD, putting the SLAS Contribution back up to the original figures of 15% and 7.5% for all SLAS cases can be considered while the expanded SLAS is in its early years.
26. The 15th paragraph **deals only with the SLAS FEL** and fails to deal with the matter as a package or per existing principles. The result is contrary to principle and too low.
27. In summary, the LASC Report provides:-
 - (a) no complete package,
 - (b) no timetable,
 - (c) wrong criteria, contrary to principles and proper approach,
 - (d) no improvement to existing proposals,
 - (e) wrong or inadequate reasoning.
28. **Proposal**. The flaws and omissions noted herein should be addressed now so there is no problem with future legislative amendments. The LASC is urged to consult further and re-submit a package of proposals for reform within a further month.

29. Legislative Council Panel is requested to adopt a course of action along the lines of the Bar Association's Proposal of July 2010 which has the attributes which are lacking in the LASC Report, and the Timetable summary provided for the 22nd November 2010 meeting.

Hong Kong Bar Association
17th December 2010

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