Consultation Paper on Class Actions

The Law Reform Commission of Hong Kong

Submission of the Hong Kong Bar Association

1. The Class Action Sub-committee of the Law Reform Commission ("the Sub-committee") published a Consultation Paper on Class Actions ("the Consultation Paper") in November 2009.

2. The Hong Kong Bar Association ("HKBA") submits its views on the recommendations put forward in the Consultation Paper.

3. The HKBA supports as a matter of principle any initiative that would allow greater access to justice and facilitate the pursuit of legitimate civil claims in the courts. The HKBA believes that access to justice should not be fettered by inadequate or limiting provisions in civil procedure. The HKBA acknowledges that access to justice may also be achieved through the exercise of regulatory power; and other means, such as alternative dispute resolution.

4. The Sub-committee follows the terms of reference below:

> "To consider whether a scheme for multi-party litigation should be adopted in Hong Kong and if so, to make suitable recommendations generally" (Preface, para 3).

5. While the terms of reference are concerned with the broad and generic rubric of "a scheme of multi-party litigation", the Consultation Paper is focused on the different, if not narrower, topic of "a class action regime", the definition of which the Sub-committee appears to have adopted from Professor Rachael Mulheron's work, *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004) and is as follows:

"A legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation" (Preface, para 8)

6. The HKBA does not support any purported limitation in the terms of reference of the Law Reform Commission that the scope of the Consultation Paper might suggest.

7. The Sub-committee is concerned, in its study for "a class action regime" for recommendation, with the need to deal with two main situations that may give rise to cases involving numerous potential litigants:

"The first is where a large number of persons have been adversely affected by another's conduct, but each individual's loss is insufficient to make undertaking individual litigation economically viable. The second is where a large number of similar or related claims (each of which may be individually viable in financial terms) are instituted at the same time, which presents problems for the court in disposing efficiently with the various proceedings" (Preface, para 7).

These are situations that the Chief Justice's Working Party on Civil Justice Reform had identified in its *Interim Report and Consultation Paper* (2001).

Chapter 1: Recommendation 1

8. Chapter 1 of the Consultation Paper critiques the current Rules of the High Court (Cap 4 sub leg A) Order 15 rule 12 and its inadequacies in dealing with multi-party litigation, setting the scene for the main introduction of the discussion of "a class action regime" for recommendation. Development of "representative actions" under this rule had been limited due to the

interpretation given by the English courts in the early twentieth century (see Duke of Bedford v Ellis [1901] AC 1, HL; and Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 KB 1021, CA (Eng)). While the chapter does refer to the judicial efforts in England to further develop the rule away from the rigidity of earlier interpretations and acknowledge that these efforts "have provided some key features and a framework for multi-party litigation" (para 1.25), the Sub-committee was attracted to the desirability of a comprehensive "class action regime" apparently for the reasons advocated by Professor Mulheron in her article *From Representative Rule to Class Action: Steps Rather than Leaps* (2005) 24 CJQ 424 at 445.

9. While Professor Mulheron's article, written for an English readership, understandably discussed the similar English representative rule in the Civil Procedure Rules, rule 19.6 and the associated jurisprudence, that approach scarcely mentioned the Australian jurisprudence on the similar representative rule, which may be more relevant to a thorough discussion on how representative actions under RHC Order 15 rule 12 may be further developed.

10. In Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398, the High Court of Australia unanimously overturned a judgment of the New South Wales Court of Appeal striking out an action on the basis that it was not within the Supreme Court Rules 1970 (NSW), Part 8, rule 13(1), which was in terms identical to those of RHC Order 15 rule 12. Mason CJ, Deane and Dawson JJ, in their joint judgment, considered that all that the sub-rule –

'requires is numerous parties who have the same interest. The sub-rule is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions. It has been suggested that the expression "same interest" is to be equated with a common ingredient in the cause of action by each member of the class (note 5 *Prudential Assurance v Newman Industries* [1981] Ch 229 at 255). In our view, this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognized that persons having separate causes of action in contract or

tort may have "the same interest" in proceedings to enforce those causes of action.'

McHugh J was of the view that the test for determining whether an action was within the scope of the sub-rule was "whether the plaintiff and the members of the represented class have a community of interest in the determination of some substantial issue of law and fact". Brennan J agreed. Toohey and Gaudron JJ, having gone through the English and Commonwealth authorities that the Sub-committee has discussed in the chapter, considered that "a significant question common to all members of the class" was sufficient for being in the same interest in proceedings for declaratory relief.

11. Mason CJ, Deane and Dawson JJ further made the point that the absence of a detailed legislative prescription by statute or rule of court regulating the incidents of representative action –

"does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice".

Toohey and Gaudron JJ expressed a similar view:

'[It] is true that r.13 lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires" (note 50 *Taff Vale Railway Co v. Amalgamated Society of Railway Servants* [1901] AC 426 at 443). The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.'

12. The HKBA believes that the Sub-committee should find the above Australian jurisprudence valuable. While the HKBA appreciates the considerations (in terms of benefits, advantages and protections) put forward by Professor Mulheron to favour a statutory or regulatory class action regime, as Dr Peter

Cashman indicated in his work, *Class Action: Law and Practice* (Federation Press, 2007), the lack of procedural guidance "should not be seen as inhibiting the efficient management of cases". Rather the general powers of the court as revitalized following the Civil Justice Reform should be looked to in managing the variety of representative actions that may be instituted. Dr Cashman indeed referred to the acknowledgement by Gleeson CJ (who was the principal member of the majority of the NSW Court of Appeal in Carnie (above)) in Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386, HC Aust that –

> "The inadequacy of the [representative action] rule in making no prescription as to whether or not consent was required from borrowers who were represented, or as to procedures for opting in or opting out of the action, or as to notice to represented persons, or as to settlement or discontinuance of the proceedings, was treated by this Court [in Carnie] as a matter affecting only the discretionary decision as to whether the proceedings should continue as discretionary proceedings, and not as affecting the initial engagement of the rule" (at [8]).

The discretion under RHC Order 15 rule 12 of "unless the court otherwise orders" serves as a vital control mechanism for representative actions. Apart from the obvious use of preventing a case from continuing as a representative action, it may also be used to convert the proceedings from an opt-out procedure to an opt-in procedure. See the examples in Chapter 2 of Dr Cashman's book.

13. A recent judgment of the New Zealand Court of Appeal, a jurisdiction having only a representative action procedure similar to RHC Order 15 rule 12, adopted the generous approach: Saunders & Ors v Houghton & Anor [2009] NZCA 610 (18 December 2009).

14. The Sub-committee considered that "even with the adoption of a more liberal view by the court of Order 15, rule 12 of the RHC, there remains a substantial degree of uncertainty in using the current representative action procedure" (para 1.35). The HKBA believes that there is as always a degree of uncertainty over the judicial exercise of discretion in light of the circumstances of a case.

The desirability in having a "comprehensive regime for multi-party litigation" lies more on structuring the exercise of judicial discretion to an extent, providing some clarity to litigants, lawyers and judges and is no replacement for judgment informed by experience, examples and facts.

15. The HKBA notes the Sub-committee's Recommendation 8(1) that "a class action regime" should be introduced by primary legislation. The HKBA is concerned that if primary legislation were to be introduced, there would be a distinct risk that it would be narrowly drafted to permit only "class actions" of a very specific type that would satisfy specific criteria. The existence of legislation for one form of multi-party legislation could be construed as prohibiting other forms falling outside that "class action regime", which may otherwise satisfy the wide scope and purpose of the existing RHC Order 15 rule 12. The HKBA does not consider such a situation to be desirable.

16. The HKBA therefore considers that the Sub-committee should further explore building on RHC Order 15 rule 12 in light of the above discussion and also view its case for "the introduction of a comprehensive regime for multi-party litigation" as an enlargement, extension or supplementation of the representative action provision in Order 15 rule 12, as opposed to a replacement of or breaking away from it. The HKBA notes that while the Sub-committee appeared not to have expressed a firm view in para 9.17 of the Consultation Paper, its Recommendation 8(3) on the other hand suggests replacement of Order 15 rule 12 with a separate Order. While the Sub-committee might simply have meant that the separate Order to be introduced would encompass comprehensively all types of multi-party proceedings and thus include representative actions that could have been conducted on the terms of Order 15 rule 12, the HKBA believes that if specific legislation were to be introduced for "a class action regime", it is essential that existing provisions for representative actions are in no way curtailed. The HKBA thus urges the Sub-committee to revisit the issue.

Chapter 3: Recommendation 2

17. Chapter 3 of the Consultation Paper examines how best to further three policy objectives underlying a system and process of civil justice. They are: (a) the civil justice process should be made more accessible to plaintiffs who are able to bring deserving claims; (b) the civil justice process facilitate the binding resolution of civil disputes and thereby eliminate the need to revisit issues or claims in separate proceedings; and (c) the civil justice system should promote judicial efficiency (para 3.1). The Sub-committee has found that:

> "there is a convincing case for reform of the existing procedures governing multi-party actions in Hong Kong, so that the policy objectives set out at the start of this chapter can be better achieved. In our view, appropriate reforms could enhance access to justice and offer people without means an avenue to redress wrongs. In addition, it could be argued that a class action regime would redress the imbalance between the consumer and the corporate sector. There are in Hong Kong a number of companies which are powerful in terms of market share and resources, but there are no organised consumer groups with comparable funding and capacity, although the Consumer Council partly fills the void. Our deliberations therefore lead us to the position that reform is needed and we recommend that reform take the form of a regime which can deal with potential class actions in Hong Kong and achieve equal access to justice for all" (para 3.33).

The Sub-committee has reached this conclusion after considering the risks that a class action regime in Hong Kong may pose, including undue promotion of litigation, on the basis of a study of the risk assessments of various overseas law reform agencies and academics (para 3.34 and Annex 3).

18. The HKBA is drawn to the report of the Civil Justice Council of England and Wales on *Improving Access to Justice through Collective Actions* (December 2008) (which was written with the assistance of a paper prepared by Professor Mulheron entitled *Reform of Collective Redress in England and Wales: A Perspective of Need* (February 2008) and referred to by the Sub-committee in para 2.67) and the response of the United Kingdom Ministry of Justice (July 2009) (paras 8-13). Firstly it pointed out that the evidence of need relied on was put forward without consideration of the wider economic, social and legal contexts, as well as wider economic impacts. Secondly it expressed the view

that the introduction of a generic right of action across all sectors should not be supported and that a sector based approach to the introduction of collective action rights is likely to produce a better outcome overall and to be more achievable. Representative rights of action should be introduced only where there is clear evidence of need. Policy makers for the relevant sector should be satisfied that access to justice can be achieved more cost-effectively and proportionately by collective court-based litigation, rather than through individual claims or by other options, such as enhanced regulatory powers. A full assessment of the likely economic and other impacts would be necessary before any reform is implemented. The approach taken by the United Kingdom Government was based on the following view of civil litigation (with which the HKBA agrees):

> "The purpose of civil litigation should be to secure redress for individuals or groups whose private law rights have been breached. The Government accepts the CJC's conclusion that there may be circumstances where cases could be brought more efficiently on a collective basis. Where common issues of fact or law exist it should in general be more cost effective, for both the parties and their funders and the courts, if they are dealt with only once. That said, adversarial civil litigation is inherently risky and can be very costly. For this reason, both the Government and the courts view litigation as, in general, the dispute resolution system of last resort. Before proceeding to look at court based solutions it is important to consider alternatives and, in the context of problems affecting a large number of people to examine in particular whether there are viable regulatory alternatives. The scope for ADR (alternative dispute resolution) should also be explored before resorting to court. If court proceedings are appropriate, it will be vital to ensure that there is a strong case management and filters in place to safeguard against weak or trivial litigation and control costs."

19. The Sub-committee may need to address the considerations raised in the United Kingdom Government response above, which the HKBA believes to be pertinent to how convinced one can be of the case for the establishment of "a general procedural framework for class actions in Hong Kong courts". This suggestion is reinforced by the fact that the risk assessment in Annex 3 of the Consultation Paper is a review of competing arguments and not an impact assessment on the economy and societal concerns that the United Kingdom Government had in mind.

20. Nevertheless, the HKBA makes further submissions on the Sub-committee's other Recommendations on the qualification that what is sought to be introduced is a more rule-based "comprehensive regime for multi-party litigation" in enlargement, extension or supplementation of RHC Order 15 rule 12.

Chapter 4: Recommendation 3

21. Chapter 4 of the Consultation Paper tackles the issue of probably the most controversial question in the design of a multi-party litigation regime, namely the choice between an opt-in and an opt-out regime. As stated in para 4.1 –

> "Under an "opt-out" scheme, persons who hold claims concerning questions (of law or fact) which are raised in the class proceedings are bound as members of the class and their rights will be subjected to any judgments made in the class proceeding unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of the resulting judgment. ... In contrast, under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. A person will not be bound by the judgment or settlement unless he has opted in to the proceedings."

22. The HKBA has reviewed the arguments presented in the chapter, which happens to be in the format of for/against an opt-out regime. This format obviously does not appear to highlight the arguments for/against an opt-in regime. Those arguments are not necessarily mirror images of the arguments for/against an opt-out regime.

23. The HKBA also notes that the arguments presented in the chapter do not include those concerned with the costs of the litigation and the burden of allocation of costs, especially where there is access to public funding of legal costs. Such matters have been shifted to later chapters and discussed on the assumption that an opt-out regime is chosen.

24. On balance, and bearing in mind the judicial experience in overseas jurisdiction that the HKSAR courts will inevitably have to draw on in implementing a multi-party litigation regime, the HKBA would *tentatively*

accept the opt-out approach, subject to the powers of the court to order otherwise.

25. The tentative stance of the HKBA is due to the proposal of alternative "hybrid opt-in" models in the United Kingdom Government's response to the Civil Justice Council of England and Wales's report, which is as follows (at para 33) –

"the distinction between opt-in and opt-out is not necessarily as clear cut as the above arguments suggest. In order to receive any compensation, a claimant would have to opt in sooner or later, if only to claim a share of a pot of damages that has already been determined (which is likely to be subject to a time limit). A better way of looking at the issue is to consider the stage in the process by which people have to come forward. The group or class to be compensated is effectively defined and closed and that point. The key cut-off points to be as shown in the alternative models described below.

A. Before the claim is issued. The representative action would be brought solely on behalf of identified group members. This would be more restrictive than under the Competition Act and GLO regimes; the latter allows new claimants to be added to the register during the litigation. This is a pure opt-in system.

B. Before the common issues of liability are decided. The action would be brought initially in terms of a defined class with a minimum number of identified members. Other members of the class could opt-in (confirm participation) at any time before the decision on liability and could then have a say in running the case and be included in any judgment or settlement. Claimants opting-out or unidentified (not coming forward) by that point would not benefit from or be bound by the outcome. They would still be able to bring separate claims after that date, although the decision in the collective action might operate as a precedent. This is a modified opt-in, or hybrid system.

C. After the decision on liability but before the quantification of damages. The issue of liability would be *res judicata* for any claimants who had not expressly opted-out before it was decided. But those class members who had not opted in or out could still bring separate claims for damages if the liability decision was favourable. As with example B, this is essentially a hybrid system. It involves modifications of the opt-in approach designed to avoid its perceived disadvantages in the early stages of cases, while also avoiding the issues that arise with an opt-out approach at the stage when damages are quantified.

D. After the quantification of damages. Damages would be assessed for all claimants who had not expressly opted out before that point, on the basis of an estimation of the total size of the class. Unidentified claimants can still come forward later to claim their share of the damages. Later claimants would lose their rights if the pot proved inadequate. More

likely, there would be a surplus which, after a defined period, would either be returned to the defendant or distributed on a *cy-près* or some other prescribed basis (e.g. used to fund other collective litigation or surrendered to the Treasury). This is a fully-fledged opt-out model."

The Sub-committee is requested to consider the hybrid systems.

26. The tentative stance of the HKBA is also due to its appreciation of the arguments based upon constitutional provisions of the Basic Law of the HKSAR and Hong Kong Bill of Rights that an opt-out regime in multi-party litigation may attract. Some of those arguments are discussed in Annex 4 of the Consultation Paper. The HKBA agrees with the Sub-committee that both Article 35 of the Basic Law and Article 10(1) of the Hong Kong Bill of Rights are engaged with respect to an opt-out regime in multi-party litigation, but by reason of two basic features of an opt-out regime, namely (a) that the persons represented are bound by the outcome of the litigation at least in respect of the issues of commonality without them participating as parties either personally or through legal representatives of their own choice and also possibly without them knowing of the matter and giving express consent to how it is being conducted (bearing in mind that personal notice may not be a requisite and that personal notice is sometimes impossible); and (b) that the person sued is bound by the outcome of the litigation knowing only the very few facts underlying the issues of commonality and of the representative plaintiff (and possibly at a relatively high level of generality), and not of each and every represented person. The HKBA also agrees with the Sub-committee that whether an opt-out regime may be a justified limitation to the rights guaranteed under Article 35 and Article 10(1) can only be determined by taking into account the procedures to be adopted. Further study and evaluation is required, particularly with respect to the notice requirements, the sufficiency of pleadings and the permissible extent of discovery.

27. The Sub-committee has considered the Australian case of Femcare Ltd v Bright (2000) 172 ALR 713, Fed Ct Aust (Full Ct) in so far as it raised the issue of deprivation or acquisition of property. The HKBA has also studied this case over the arguments therein concerning judicial power. The HKBA

believes that these arguments should be studied with some thoroughness bearing in mind Hong Kong's system of checks and balances with the courts being vested with independent judicial power to adjudicate cases in accordance with the laws in force in the HKSAR. Legislative power may not extend to the making of a law which requires or authorizes the courts to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power; see Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, HCt Aust. It is contrary to the judicial process and is no part of the judicial power, to effect a determination of rights by applying the law to facts neither agreed nor determined by reference to the evidence in the case; see Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, HCt Aust. The Australian experience of judicial power jurisprudence placing some significance on historical practice (see Chu Kheng Lim (above) at 67 (per McHugh J) and also Femcare (above)), there seems to the HKBA some credence, at least for the purpose of disposing of a constitutional query, of developing any scheme of multi-party litigation for Hong Kong as an extension of the pre-existing RHC O 15 r 12 representative action provision.

28. In addition, there is room for argument that the constitutional language of the courts of the HKSAR "adjudicating cases" may become the basis for constitutional challenge of a scheme of multi-party litigation for Hong Kong where such a scheme is designed to incorporate third party funding possibilities, the award of aggregate damages and the management of the aggregate award for the represented group, so that the involvement of the courts and lawyers may be queried for being more policy-making than adjudicative, more litigious manufacturing than determining an immediate right, duty or liability, and undesirably substituting private for public enforcement of the law; see Femcare (above); Fencott v Muller (1983) 152 CLR 570, HCt Aust; Fostif (above).

Chapter 5 and its Four Options

29. Chapter 5 of the Consultation Paper deals with the treatment of public law cases in a class action regime for Hong Kong. The Sub-committee considers that there should not be any change to the application for judicial review procedure under s 21K of the High Court Ordinance (Cap 4) and Order 53 of the Rules of the High Court (Cap 4 sub leg) for the purpose of catering for group litigation in public law cases. The HKBA agrees with this view.

30. The Sub-committee has put forward four options for the treatment of public law cases in a class action regime without specifying a preference. On the other hand, the Sub-committee has preferred the maintenance of the present separation between public law and private law cases and expressed concern that the constitutional position of the HKSAR under the Basic Law may present difficulties for public law cases to be suitable for a class action regime.

31. The HKBA prefers Option Three, which provides that public law cases should follow the same opt-out model that is recommended for general application, with additional certification criteria to be put in place to filter out public law cases that are not suitable for class action proceedings.

32. Public law cases can essentially be categorized into four kinds of issues: (1) those involving the interpretation of a provision of the Basic Law of the HKSAR; (2) those involving the constitutionality or interpretation of legislation; (3) those involving the constitutionality or interpretation of a policy; and (4) those that involve none of the above. Categories (1) to (3) would involve general questions of law. The last category would be case specific.

33. The opt-out model under Option Three is preferred for the following reasons:

- A law is applicable to all. There is no option to be exercised in being bound by a decision of a court in interpretation of a law or a government policy.
- Persons in the same category should be treated the same.

- There is the benefit of a simpler procedure. Time and work for notification may be saved. Injustice due to lack of knowledge or inability to give notice to opt-in would be avoided.

34. The HKBA does not consider that the constitutional position of the HKSAR deems it not suitable for public law cases (including cases turning on the interpretation of a provision of the Basic Law of the HKSAR) to be capable of being litigated under a multi-party litigation scheme. The arguments expressing concern that such a scheme would lead to a "radical constitutional change" or "diminution of the effect of an interpretation of a provision of the Basic Law by the Standing Committee of the National People's Congress" (see paras 5.14 and 5.19) are unsound because (a) under Article 158(3) of the Basic Law, "judgment previously rendered shall not be affected"; and (b) as the Standing Committee indicated in the final paragraph of the Interpretation of 26 June 1999 on Articles 22(4) and Article 24(2)(3) of the Basic Law, the Standing Committee's interpretation takes effect from the date of the interpretation. Public law cases concerning HKSAR legislations and policies are obviously not affected by these arguments. The HKBA adds that "adverse consequences for the public" (see para 5.62) should not be a criterion to filter out cases; it has not been a criterion or factor under the leave requirement in respect of an application brought by an individual with sufficient interest, so it should not be where the same individual brings the application as a representative of others.

Chapter 6: Recommendation 4

35. Chapter 6 of the Consultation Paper is concerned with establishing procedural safeguards to tackle the concern over an indigent representative plaintiff. The HKBA agrees with the Sub-committee that deliberate selection of impecunious plaintiffs to act as representative plaintiffs is abusive of the court's process and also that in a scheme for multi-party litigation for Hong Kong the court should be empowered to order the representative plaintiffs to pay security for costs in appropriate cases. The HKBA also agrees with the

Sub-committee's view at para 6.13 for funding proof to be part of the certification enquiry.

Chapter 7: Recommendation 5

36. Chapter 7 of the Consultation Paper is premised upon the possibility that multi-party litigation in Hong Kong may involve parties from jurisdictions outside Hong Kong. The HKBA agrees with each of the four propositions in Recommendation 5. On the other hand, further exploration and discussion with all stakeholders will be necessary in identifying the appropriate institution to maintain the website of multi-party litigation in Hong Kong. On a preliminary basis, the HKBA respectfully suggests that the relevant list may be maintained under the Hong Kong Judiciary website.

Chapter 8: Recommendations 6 and 7

37. Chapter 8 of the Consultation Paper deals with the twin issues of costs and funding of multi-party litigation. One of the advantages of an opt-out regime for multi-party litigation is said to be that the represented persons get a "free ride" and have their legal rights and entitlements determined without any risk as to adverse costs. Yet it must be recognized that the representative plaintiff and his legal representatives are to have carriage of a piece of litigation more expensive than legal proceedings involving his own individual claim. The additional legal costs include additional interlocutory applications, giving notice to the represented group, resolving intra-group disputes and settlement or award administration. Funding of multi-party litigation and the incentive for the provision of such funding are accordingly matters of immediate, if not critical, concern in the design and implementation of a scheme of multi-party litigation.

38. However, the generalized view in the preceding paragraph ought to be qualified by reference to the two main situations that have been referred to as justifying the need for a "class action regime" or a scheme of multi-party litigation. It must be pointed out that the situation involving numerous small

losses, each of which is insufficient to make undertaking individual litigation economically viable involves different cost shifting considerations than the situation involving numerous substantial losses, the claim for each of which may be individually viable. Comparatively, it is the former situation that calls for a solution in funding.

39. Consideration of costs and funding of multi-party litigation for Hong Kong must, however, proceed on the basis of several more or less fundamental features of the local legal system. The "costs follow the event" rule is a basic tenet underlying the adversarial system. Maintenance and champerty remain common law offences attracting criminal prosecution in Hong Kong, with a recent example of enforcement against a solicitor (ie HKSAR v Cheung Oi Ping & Winnie Lo (DCCC 610/2008), with the defendants sentenced to 15 months' imprisonment and 16 months' imprisonment respectively). They are also torts enforceable before the courts of the HKSAR. Recovery agents are regarded by the Government and the legal profession as against the public interest. The Department of Justice has stepped up publicity through the mass media to enhance public understanding of the activities of recovery agents and the offences of maintenance and champerty. Both branches of the legal profession are of the view that it is undesirable to implement in Hong Kong conditional fee arrangements with lawyers, with the key concerns being the intrinsic conflict of interests involved if lawyers are to have a financial interest in the outcome of the litigation; and an adverse effect on judicial economy.

40. The Sub-committee suggests in paras 8.41 and 8.42 that conditional fees "should be re-examined in the class action context", claiming that with the recommended requirement of providing security for costs, "there may be scope for prospective claimants to seek private funding by way of contingency fee arrangements", though it makes no recommendation to that effect, merely exploring the possibility of further research.

41. The HKBA, in its position paper on conditional fees in response to the Law Reform Commission's Consultation Paper on Conditional Fees in 2006 (available at http://www.hkba.org/whatsnew/submission-position-

papers/2006/20060428.pdf), made the point that that consultation paper had not considered the question of why the legal profession should have the responsibility to finance litigation, presumably from financing individual members of the profession obtains from financial institutions (the availability of which for that purpose is itself highly questionable). The potential responsibility of lawyers who finance litigation for the successful parties' costs (pursuant to Arkin v Borchard Lines Ltd [2005] 1 WLR 3055, CA (Eng)) is a matter of legitimate concern. Implementation of conditional fee arrangements would also disable the application of the cab-rank rule for barristers and may not necessarily broaden access to justice. As stated in the position paper, "[the] HKBA simply cannot see any valid grounds that can justify the Government in passing this responsibility to the legal profession in the name of widening access to justice" (para 25). There is no merit in the Sub-committee seeking to revive this proposition in the pretext of multi-party litigation.

42. The Sub-committee then discusses in paras 8.43 to 8.46 the option of establishing a conditional legal aid fund for multi-party litigation. The HKBA agrees with the conclusion of the Sub-committee at para 8.46 that there are significant drawbacks in the option and wishes to reiterate its position on conditional fees that the best way forward in widening access to justice is expansion of the Supplementary Legal Aid Scheme. The HKBA attaches as an Appendix to this Submission a note to the Legislative Council Panel on Administration of Justice and Legal Services in September 2009 putting the case for expansion of the Supplementary Legal Aid Scheme.

43. The option of legal aid for multi-party litigation, particularly the representative plaintiff, was considered in paras 8.47 to 8.54. The Director of Legal Aid has expressed his view on the matter. The HKBA agrees that the current framework under the Legal Aid Ordinance (Cap 91) does not make provision for a representative plaintiff to be legally aided for all incidents of the multi-party litigation; if legal aid is granted, the costs coverage extended would be limited to such costs that would be incurred where the aided person had conduct of the action in a personal as opposed to a representative capacity.

The HKBA also agrees that the Director has a legitimate concern on principle that public funding should not be expended to have the effect of benefitting well-off represented persons. The HKBA therefore supports Recommendation 6(1), though the consequences of implementing this recommendation, including whether amendments should be made to the Legal Aid (Scale of Fees) Regulations (Cap 91 sub leg C) should be explored. On the other hand, the HKBA questions whether it is advisable to amend the Legal Aid Ordinance "to accommodate legal aid for class actions", bearing in mind the matters set out above and the failure on the part of the Sub-committee to indicate "accommodation" it has in mind. As to Recommendation 6(2), the HKBA expresses concern as to the practicality of the proposed disaggregation of common fund costs and questions whether implementation of this recommendation can only be achieved by legislation. For the reasons stated above, the HKBA does not support Recommendation 7(2).

44. The Sub-committee examines three overseas examples (one of which only in proposed form) of special funds set up to finance class actions in paras 8.55 to 8.69. The Sub-committee is of the view that the concept of such a fund is useful but its implementation would require public funding (see paras 8.69 and 8.123). Thus the Sub-committee examines the option of utilizing existing and already proposed sector-based funding mechanisms for "testing out" the regime it is minded to recommend; see paras 8.124 to 8.154. In the end, the Sub-committee reaches the view that the Consumer Legal Action Fund could be expanded to cover multi-party litigation with increased resources. The HKBA agrees with the Sub-committee that the suggested first step with the Consumer Legal Action Fund should be taken, with parallel action taken for the parameters of the across-the-board special public fund to be the subject of further and specific consultation, bearing in mind that the examination undertaken in paras 8.55 to 8.69 has not been sufficiently detailed.

45. Last but not least, the Sub-committee has devoted paras 8.70 to 8.122 to a sustained study of private funding of multi-party litigation, particularly by litigation funding companies in Australia.

46. The HKBA considers the topic of recognition of litigation funding companies in Hong Kong to be controversial.

47. The Sub-committee adopts the following definition of litigation funding companies:

> "... commercial entities that contract with one or more potential litigants. The LFC pays the costs of the litigation and accepts the risk of paying the other party's costs if the case fails. In return, the LFC has control of the action and, if the case succeeds, is paid a share of the proceeds (usually after reimbursement of costs" (para 8.70).

48. The HKBA's study of "recovery agents" in 2005 (available at: http://www.hkba.org/whatsnew/submission-position-papers/2005/LASC%20on%20Recovery%20Agents%20-%20Submission.pdf), found that recovery agents operated under a "no win, no charge" approach, with the claimant only liable to pay a fee to the recovery agent if his claim was successful. Contracts that the HKBA had seen indicated that the recovery agent would finance the claimant's claim and charge fees ranging from 20% to 25% of the compensation recovered by the claimant whether by way of settlement or litigation. The HKBA opined that a contract between a recovery agent and a potential litigant was clearly champertous for the following reasons: (a) The recovery agent would be responsible for all the expenses and disbursements including legal expenses, court's filing fees and the fees charged by expert witnesses. In other words, it would be financing the litigation; (b) The recovery agent would provide active assistance (for example, preparing witness statements and liaising with the solicitor) to the potential litigant in connection with his personal injuries claim and in the event that any monetary compensation is recovered by the litigant, there should be a sum payable to the recovery agent in the region of 25% of the compensation; (c) The conduct of the recovery agent was not governed by any rules of professional ethics. They had no interest in the litigation apart from profiting from it; and (d) In the circumstances, there was a real tendency for a recovery agent to inflame the damages and/or to suppress evidence and/or to suborn witnesses for personal gain. The HKBA added that even if a

champertous agreement could be justified as a matter of law on the ground of the existence of a legitimate interest, there was on the material on the arrangements between recovery agents and their "clients" no such legitimate interest. Such agreements could not be enforced in a court in Hong Kong. Further, lawyers acting in the related case with knowledge of the champertous agreement were liable to be prosecuted for the offence of aiding and abetting the crime of champerty.

49. The HKBA is unable to agree with the Sub-committee's claim at para 8.96 that "it is clear that LFCs should not be equated with recovery agents". The Sub-committee's discussion between paras 8.70 to 8.88 has mainly been of caselaw in Australia and England and Wales, and academic arguments for and against litigation funding companies, but not of how litigation funding companies actually operate in those countries. From what the Sub-committee has utilized to describe litigation funding companies, it appears to the HKBA that litigation funding companies and recovery agents do share a similar, if not common, business model, with the latter being more aggressive in marketing and control. Both types of operation are, it must be admitted, not subject a code of professional ethics.

50. The Sub-committee considers in para 8.93 that the Australian case of Fostif (above) "has clarified the position at common law and it is suggested that there is no longer a justification for maintaining a legislative prohibition [of maintenance and champterty]. Most recent jurisprudence suggests that access to justice is now a paramount concern and the court has sufficient means at its disposal to protect its processes from abuse". It must be pointed out that Ribeiro PJ had considered Fostif (above) (which was not an unanimous judgment in a jurisdiction that had abolished maintenance and champerty by legislation) in Unruh v Seeberger (2007) 10 HKCFAR 31, CFA and had not endorsed that case, choosing instead to make the point that "[the] development of multi-party litigation or class actions raises questions concerning the conduct of promoters and funders of such action".

51. The Sub-committee recognizes in para 8.94 that even if the Australian case of Fostif (above) is considered to represent the common law, the involvement of litigation funding companies in Hong Kong to finance multi-party litigation would necessitate a change in the law on champterty and maintenance and consideration would have to be taken to repeal the current law against champerty and maintenance. The Sub-committee also reaches the view at para 8.122 that litigation funding companies, if properly managed in Hong Kong, would enhanced access to justice for a wide range of people, especially when the legal costs are likely to exceed the amount of a single litigant's claim.

52. The HKBA replies that it is far from clear that Fostif (above) represents the law of the HKSAR. Although the New Zealand Court of Appeal in Saunders (above) decided that, "like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortuous or otherwise unlawful maintenance and champerty where: (a) the court is satisfied there is an arguable case for right that warrant vindicating; (b) there is no abuse of process; and (c) the proposal is approved by the court", it did so motivated by "powerful reasons to minimize any unnecessary differences in the ways we deliver justice from those of our close friend and partner in most kinds of activity in which litigation can arise", namely Australia.

53. Maintenance and champerty are common law offences punishable in criminal proceedings in Hong Kong, as well as torts enforceable before the courts of the HKSAR. Consideration of public policy in Hong Kong must begin from this starting point. The Secretary for Justice has expressed the view on 27 January 2010 before the Legislative Council that "attempting to provide rigid statutory definitions of champerty and maintenance may not be required or desirable" since in deciding whether such an offence was committed, the court has to take into account competing public policy considerations. Therefore the Sub-committee's suggestions must be regarded as radical.

54. In concluding the discussion of the important topics of costs and funding, the HKBA recognizes that there is no merit in a "wait and see" or "step by step" approach if that serves to delay consideration and implementation of funding

options to complement a scheme for multi-party litigation. It is more desirable that a claimant will have a choice of funding sources.

Chapter 9: Recommendation 8

55. Chapter 9 of the Consultation Paper raises for discussion a number of detailed procedural issues related to the establishment of a scheme for multi-party litigation in Hong Kong. The HKBA has earlier dealt with Recommendation 8(3) relating to RHC Order 15 rule 12.

56. The HKBA is not persuaded that the procedural framework for a scheme for multi-party litigation in Hong Kong necessarily requires establishment by primary legislation and therefore does not endorse Recommendation 8(1).

57. The HKBA is generally in agreement with Recommendation 8(2) that multi-party litigation in the extended form from RHC Order 15 rule 12 should be subject to certification as collective proceedings in accordance with rules of court. The detailed requirements of certification are for further consideration and debate.

58. The HKBA is also generally in agreement with Recommendation 8(4) on incorporating features of active case management in a scheme of multi-party litigation in Hong Kong.

59. The HKBA is also generally in agreement with Recommendations 8(5) to (6). It is of importance that caselaw be allowed to be developed under a specialist list in the Court of First Instance.

60. While the HKBA is also generally in agreement with Recommendation 8(7) that the Small Claims Tribunal should not become part of the court system that operates a scheme of multi-party litigation, the HKBA observes that numerous claims may be filed in the tribunal complaining of small losses but with a commonality in fact and/or law. Adjudicators of the Small Claims Tribunal have to manage such claims. A mechanism or matters of guidance may have to

be explored to enable adjudicators to channel suitable claims into the scheme of multi-party litigation so that judicial economy and efficiency may be achieved.

Chapter 10: The 19 Questions

61. The HKBA approaches the 19 questions raised in Chapter 10 with caution. The issues raised in the Consultation Paper are complex and it is difficult, if not impossible, to frame short and yet comprehensive answers to each question without the answers or individual answers being taken out of context or otherwise misunderstood. Further, the HKBA notes that some of the questions are framed in a manner different from the recommendations, which ought to have been the focus of discussion and commentary. Accordingly the HKBA provides the answers below with the proviso that the HKBA's position on the relevant issue or matter is best understood by considering the paragraphs above.

62. The HKBA answers the 19 questions as follows:

Question 1: The HKBA considers that the Sub-committee should further explore building on RHC Order 15 rule 12 and also view its case for "the introduction of a comprehensive regime for multi-party litigation" as an enlargement, extension or supplementation of the representative action provision in Order 15 rule 12, as opposed to a replacement of or breaking away from it.

Question 2: The HKBA declines to answer this question and would refer the Sub-committee to its discussion of Recommendation 2.

Question 3: The HKBA tentatively accept the opt-out approach for a multi-party litigation regime in Hong Kong, subject to the powers of the court to order otherwise.

Question 4: The HKBA chooses Option Three.

Question 5: The HKBA answers the question in the affirmative.

Question 6: The HKBA answers limb (b) of the question in the affirmative. The HKBA declines to answer limb (a) and would refer the Sub-committee to its discussion of Recommendations 6 and 7.

Question 7: The HKBA answers all three limbs of the question in the affirmative.

Question 8: The HKBA answers limb (a) of the question in the affirmative, though the consequences of implementing the associated Recommendation 6(1) should be explored. As to limb (b), the HKBA is concerned that it may not be practicable to disaggregate common fund costs as proposed and that the associated Recommendation 6(2) can only be implemented by legislative amendment. As to limb (c), the HKBA questions whether it is advisable to amend the Legal Aid Ordinance "to accommodate legal aid for class actions".

Question 9: The HKBA does not support Recommendation 7(2).

Questions 10 and 11: The HKBA agrees that the Consumer Legal Action Fund should be expanded to cover multi-party litigation with increased resources. On the other hand, parallel action should be taken for the parameters of the across-the-board special public fund to be the subject of further and specific consultation. The HKBA does not draw any conclusion at the present stage whether the eventual aim should be the establishment of an across-the-board special public fund.

Question 12: The HKBA considers that the Sub-committee's suggestions regarding litigation funding companies are radical, bearing in mind that the position of the common law of the HKSAR is far from clear in the context that maintenance and champerty remain common law offences and torts in Hong Kong, with recent examples of criminal investigation and enforcement.

Question 13: The HKBA is not persuaded that a scheme of multi-party litigation in Hong Kong necessarily requires establishment by primary legislation.

Question 14: The HKBA agrees that multi-party litigation in the extended form from RHC Order 15 rule 12 should be subject to certification as collective proceedings in accordance with rules of court.

Question 15: The HKBA disagrees. The existing provision in RHC Order 15 rule 12 should be retained. The Sub-committee should view its case for "introduction of a comprehensive regime for multi-party litigation" as an enlargement, extension or supplementation of the representative action provision in Order 15 rule 12.

Question 16: The HKBA agrees that features of active case management should be incorporated in a scheme of multi-party litigation in Hong Kong.

Question 17: The HKBA agrees that it is of importance that caselaw be developed under a specialist list in the Court of First Instance.

Question 18: The HKBA agrees that the District Court should have the power to transfer multi-party cases to the Court of First Instance.

Question 19: The HKBA agrees that the Small Claims Tribunal should not be part of the court system that operates a scheme of multi-party litigation. On the other hand, a mechanism or matters of guidance may have to be explored to channel suitable claims into the scheme of multi-party litigation.

Dated 28th July 2011.

Hong Kong Bar Association

Appendix I

Note on SLAS
for Bar Association's Position Paper to Legco Panel on
Administration of Justice and Legal Services, September 2009

An Introduction

1.1 **The expansion of SLAS has been stalled for at least 7 years.**
For many years the Hong Kong Bar Association, The Law Society, and the Legal Aid Service Council (LASC) and others have requested the expansion of the Supplementary Legal Aid Scheme (SLAS).

The Hong Kong Bar Association Review of the position of Legal Aid of 22nd April 2002, Appendix A provided the detailed background and applicable principles, showing how SLAS has expanded, but very slowly, since its inception in 1984. The LASC position can be seen in comments on the 12th December 2003 under File Reference LASC/CR2/2/1 Part 3. The expansion of the scheme is assured as it's surplus rose to about HK$102 million and currently is about HK$87 million.

1.2 **Continuing support for reforms.**
Moving forward 7 years to the present, the LASC continues to support the expansion of SLAS as do other sectors of the legal community. In the course of the consultation on recovery agents and conditional fees it was noted that unlawful recovery agents had a detrimental effect on SLAS. The LASC has recently noted that the Law Reform Commission in July 2007 when publishing its Final Report on Conditional Fees, had formally recommended, in its Recommendation 2, that the SLAS Scheme be expanded by raising the financial eligibility limits and raising the types of cases covered by the scheme, having regard to maintaining its financial viability. The LASC states that this LRC recommendation tallies with the thinking of the Council. **It is only Government that is dragging its feet on this issue.** The reasons for no action by the Administration lack substance. They are inconsistent and fail to increase Access to Justice.

1.3 **Unmet Needs proved.**
The validity of the reasons for expanding SLAS continues to the present day. Current examples crying out for the expansion of SLAS include the **Lehman Brothers cases and mini bond cases.** Minority shareholder disputes could also be covered, to prevent people demonstrating e.g. PCCW case. This was precisely one of the types of cases proposed by the Bar Association and by LASC some 7 years ago.

1.4 **Action in the streets or in the courts?**
Instead of sensible reforms enabling access to justice under our rule of law for our law abiding population, we have seen our lower middle class becoming emotive or desperate. They have taken to the streets blaming the government for lax administration, and we have seen the relevant authorities blaming each other. It is better governance to avoid

the political remedies and bailouts. These matters could be argued in court rather than on the streets or in the offices of the Hong Kong SAR Government. It is a far safer alternative to provide a legal outlet for such frustrations. Thus the actual wrong doers will be made to pay. In default of Legal Aid, the government will become the target.

1.5 No Legal Aid for Co-owners in Badly Managed Buildings or Illegal Structures. The dangers from badly maintained buildings owned by persons without the means for expensive repairs or the means to take legal action to enforce repairs against refusing co-owners, continue to provide hundreds of examples of preventable personal injury accidents or deaths which are waiting to happen. The same is true of illegal structures.

1.6 When the accidents do happen, a recent case has found that Incorporated Owners may be liable for damage caused by illegal structures, so there are even better prospects for recovery of damages for this sort of litigation. But this means the accidents have to happen first. There should be legal aid to enable maintenance to reduce accidents by preventive legal action.

1.7 **Other Cases.**
There are many examples of other types of cases and involving other types of applicant which are deserving of and appropriate for SLAS expansion and which fall within the Reforms proposed in 2002. These unmet needs can be met with little financial risk to Government. The groups at risk and the gaps in legal aid identified 7 years ago match up well with the continuing needs and show that the reforms are justified and long overdue.

2. **Unrepresented litigants are a pervasive problem.**
This can be seen from the Civil Justice Reform Interim Report at paragraph 156. 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. The cost provision for the Resource Centre for Unrepresented Litigants of the Judiciary is $2.8 million in 2009, but the problem remains that much valuable judicial and court time is lost and not accounted for. Historically the LAD actually developed from the judges providing assistance to 'paupers' some 40 years ago. Should the Judiciary be reverting to running its own system of legal aid when this ought to be the LAD function? The CJR Report requested "Re-consideration of broader public funding of meritorious claims by such litigants...." The Bar has associated itself with these comments and suggested a better way is by the expansion of the SLAS Scheme. The CJR Final Report of 2004 pages 459 onwards listed the appropriate action required was getting such persons representation by the Legal Aid Department.

3. **The CJR Final Report emphasized the need for multi party litigation and class action procedures. This was Recommendation 70, at page 239**
Such was regarded as a pressing need, for example by the Consumer Council, and supported by many such as the DOJ. This would have enabled test cases to be tabled in the Lehman Minibond cases and in the PCCW case. Again this has been a long standing Proposal. It is now the turn of Government, to act on this so that greater representation can be achieved. Then the objectives of widening access to justice in the Civil Justice

Reform can be implemented. Reforms to Legal Aid are needed now to meet the anticipated new rules in the next stage of reforms.

4. **Expansion of types of Cases to be covered by SLAS.**
Some of the principles and reasoning underlying SLAS can be seen in the Consultative Paper on Legal Aid of 1993 and the Report of the Reconvened Working Group on Legal Aid of July 1994. The principles are extracted and summarized below such as from pages 31-32 of the Report. It advocated "a wait and see approach" so the Scheme and its Fund could grow. Now 15 years later the Scheme is well established.

5. **The Fund has over $87 million sitting around.**
The Fund had over $80 million in 2002. There was an established record of reasonable results and expertise so it is clear the Scheme is capable of further expansion. Action is long overdue. The Fund rose to about $102 million in 2007 but declined to about $87 million in 2008 for various reasons including the reduced contributions as a result of the SLAS percentage contribution being cut from 15% to the low level of 10% in 2005. If the Fund needs to be rebuilt to $100 million, this can achieved by restoring the contribution percentage and other appropriate measures. The main purpose of this Fund is not achieved by doing little with it. **This Fund is grossly underused**. With the existence of proved unmet needs, this money should be used to further the objectives of Legal Aid, to increase access to justice. This would enhance the Rule of Law and continue to maintain our strong common law based jurisdiction in the HKSAR.

6.1 **The Current Principles currently governing SLAS appear to be as follows:**

a. Significant injury or injustice to the individual, currently reflected in the case having to be worth $60,000;
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 types of claims;
d. Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion;
e. The purpose of SLAS is to help Athe sandwich class@ so those above the line are excluded and discretionary inclusion would be subject to abuse and increase LAD workload;
f. Class actions were only excluded because the Hong Kong legal system does not yet provide for class actions. Now see CJR Final Report 2004 page 461 on plans to change this, see above.

6.2 **The Legal Aid Services Council proposals of 2003 are endorsed and amended in this paper as follows:**

6.3 Monetary claims by individual owners against property developers concerning or relating to purchased premises, for example disputes over compensation for repairs due to defective or poor workmanship or building materials where the claims are not resolved within the repair warranty period or not covered by the repair warranty conditions;

6.4 Monetary claims by individuals against insurance companies concerning or relating to

insurance policies, such as disputes when insurance companies purport to disclaim liability under the insurance policies;

6.5 Monetary claims by employees (including class actions) against listed or substantial companies employers in relation to employment disputes which have been transferred to the Labour Tribunal to the District or High Court;

6.6 Monetary claims by individuals against financial institutions e.g banks, deposit taking companies, concerning or relating to financial services.

Other important Reforms for SLAS

7. **Raising the SLAS Means Test Limit to $2 m.** The general consensus is that the SLAS limit is now set too low at only $471,600. The figure is based on 1984 figures when the criteria was $15,000 per month disposable income and a capital figure of $100,000 which was increased to $280,000 in 1992, $400,000 in 1995 and the present figure $471,600 in 1997. A more realistic figure to reflect the value of say a property worth $100,000 in 1984 would be say $2 million nowadays. This is linked to our aging population and the decline in Legal Aid noted herein.

8. **Good corporate governance being regarded as essential to Hong Kong as a place for business, there is increasing merit in SLAS being available for partnership and shareholder litigation**

This will lead to the company legislation and articles of association being enforced and hence more respected and less abused. If the funds are available to satisfy judgments and pay costs. The SLAS fund should be relatively secure whilst rendering a public service. Such actions are either personal claims by minority shareholders or derivative actions by minority shareholders in the name of the company who have been affected by the misconduct or fraud of the majority. If the SLAS assistance is limited to cases which have resulted from the frauds on the minority, and the defendants are persons of financial means, then if the case succeeds the SLAS fund will be assured of financial recovery. Section 168, the Companies Ordinance Cap. 32 was radically amended in 2002, and individual shareholders have small resources to fight in these cases.

8.1 **PCCW was a case in point.** In default of Legal Aid it was left to the SFC to take statutory action. This is more limited, when more realistic remedies and damages for those who have actually suffered loss could have been obtained, if Legal Aid could have been given to minority shareholders. This would have had an additional benefit of protecting the public interest, and Hong Kong's reputation as a financial centre, with good governance.

9.1 **The elderly and retired or unemployed require special provisions.**

Such provision are currently made for those under "disability", such as minors and the mentally disordered. Similar special provision can be devised and extended to elderly or

retired or sick and unemployed. Often these are persons whose main source of income is derived from their investments e.g. a small flat yielding rental income. If they are forced to sell such an asset to fund their litigation, their future could be at serious risk.
Hong Kong has a dramatically greying society. This was emphasized by the Commissioner for Census and Statistics, SCMP 7th September 2009 who stated that each year 100,000 people reach 60 in Hong Kong. We are told that in 10 years some 49% of the Hong Kong population will be over 60. Currently the Legal Aid Department has a history of very slowly responding to society changes and needs.

9.2 **LASC has shown how <u>the current means test system is particularly harsh and hence unfair against the elderly or retired applicants</u>.**

The elderly, like all young and working applicants, are expected to draw on their limited means until depleted enough and they are made poor enough to make them eligible for Legal Aid. Unlike the young and working, the hardship for elderly persons is far greater than a younger person in employment. The inevitable consequence of that policy for elderly or retired people with no salary or earning power is that they will be permanently financially crippled from the initial expenditure on front loaded and critically important first steps in litigation required by CJR. Unlike ordinary working people who are expected to re build their savings in the rest of their normal life, for litigants at 60 or 65 this is not possible. Undue hardship is clearly proved, but this built in unfairness is currently the underlying principle for means testing under current Legal Aid. It must be changed to level the playing field. See generally the book <u>Legal Aid in Hong Kong, 2006</u>, published by the LASC, and see Chapter 8.

9.3 Other reforms to reduce the undue hardship suffered by this type of applicant would be to exclude from means testing their funds required for survival in retirement such as MPF, ORSO funds and provident or pension funds. Practitioners often experience other examples and cases of restrictive and unreasonable interpretations of the legislation which create hardship or deny Legal Aid to various types of deserving people which need to be addressed either administratively or by a review of the system.

10. **Reversing the current decline in Legal Aid.**
The Commissioner for Census and Statistics recently said that Hong Kong is rich enough to support its aging population. On World Bank figures, Hong Kong has a GDP per Capita ranking 11th in the World, ahead of Canada, Australia and Britain, which are the very countries examined by the comparative LegCo study.
In this context, the decline in Legal Aid has been marked. **There was an average 15% decline in civil legal aid certificates across the board in the 2007 LAD Report.** This and other factors indicate SLAS is also shrinking year by year instead of expanding. Recent SLAS figures indicate that the ratio of successful applications has dropped from 75 to 50%. Further enquiry is needed. Recent figures show that the total Legal Aid costs of the Department have remained almost static and the Legal Aid costs of Criminal Cases have even markedly declined. The decline in Legal Aid will get worse with our ageing population who tend to have more savings and property.
Our very low per capita Legal Aid expenditure when compared with comparable

countries is lamentable.

As our population ages, the low per capita expenditure on Legal Aid revealed in the LegCo study will get even lower. The current low levels of Legal Aid expenditure per capita plus the proved need, shows the proposed reforms are long overdue and necessary.

11. **The Proposed Revised Criteria:**

11.1 As a matter of policy
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 such cases are consumer or product liability, environmental damage cases where the individual damage may not be high but the damage to many could be considerable.

11.2 **Class or group litigation;** Examples are cases involving
i. disasters, environmental damage, consumer and product liability,
ii. insolvency situations such as non-payment of wages and entitlements,
iii. labour disputes,
iv. Building Management Ordinance type cases and

11.3 **Cases involving fraud on a minority or oppression in company situations as a consequence of defective corporate governance;**

11.4 Other cases which involve monetary claims and with reasonable prospects of recovering damages and the costs, when there is relatively little risk to the SLAS Fund of an unsatisfied judgment or orders for costs, see paragraph 6.4 to 6.8 above; these can be assessed on a case by case basis on some criteria.

11.5 Another consideration, which is linked to a Merits type factor, is whether the Defendant has the money to pay damages and costs when the funded litigation succeeds. If this is to be a factor in future, it should depend on a thorough case by case enquiry as to whether the Defendant has insurance or some assets to make the litigation broadly worthwhile, even if total recovery is not possible.

11.6 **The Means Test upper limit should be** increased to not exceed $2 million in relation to individuals.

11.7 **There should be a discretion in the DLA for cases over that Means Test figures** to be exercised on specified grounds. A discretion already exists for Bill of Rights type cases.

11.8 **Elderly or retired and unemployed people should have special provision.**

11.9 **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 limited

means, those with means between say $500,000 to $2 million could be arguably be expected to pay a bigger percentage. The percentage contribution can be restored upwards from 10% to the previous 15% if the Fund needs to be strengthened to maintain a sensible balance to cover assessed litigation needs.

11.10 other criteria can be considered.

12. **Access to SLAS should be not only by way of the existing application procedure.** 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 them 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 and report.

13. **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 Appeals Tribunal under the Housing Ordinance Cap 283.

14. **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. Ensure cost effective and better use of the under-used SLAS Fund;

    d. 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;

    e. Is based upon a scheme which is currently working satisfactorily;

    f. Is in line with stated 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.

15. **Amending the Ordinance.** Pursuant to Section 7 of the Ordinance Legislative Council can make some of these amendments by merely passing a resolution. It can by resolution amend the financial resources in Section 5; and income and financial resources in Section 5A and also Schedules 2 and 3. This indicates it was contemplated that expansion of Legal Aid including SLAS should be facilitated by resolution of the Legislative Council. **We would accordingly request the administration to move the Legislative Council accordingly.**