Memorandum of the Hong Kong Bar Association for the Meeting of the Legislative Council Panel on the Administration of JUSTICE and Legal Services to be held on 20th December 2011

1. HAB's LC Paper No.CB (2)600/11-12 (01) provided on 14th December 2011 was as usual too late to enable a Submission within the time requested by the LegCo Panel.

2. **Administration's Current Paper Paragraphs 2 and 12-13 continue to misstate the principles.** The correct guiding principles for the expansion of SLAS were set out in the Bar Association's submission for the Meeting of 22nd November 2010, a year ago, at paragraphs 7-12 (as amended) states :

> " **The proper principles for expansion of SLAS** are as follows:
>
> (a) Significant injury or injustice to the individual, currently reflected in the case having to be worth $60,000; See Schedule 3 of SLAS.
>
> (b) Involve monetary claims and have a reasonably good chance of success; see 1993 Government Consultative Paper on Legal Aid, para 22 and Section 10(3) of Legal Aid Ordinance.
>
> (c) Expense and difficulty and cost is not an argument against expanding SLAS to cover more justified types of claims; see July 1994 Report of the Reconvened Working Group on Legal Aid Policy Review, para 6.6
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> (d) Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion; 1994 Report, para 6.7
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> (e) The purpose of SLAS is to help the sandwich class so those above the line are excluded and discretionary inclusion would be subject to abuse and increase LAD workload; 1994 Report para 6.8.
>
> (f) Class actions were only excluded because the Hong Kong legal system does not yet provide for class actions. See 1993 Paper para 19 onwards. Now see CJR Final Report 2004 page 461 on plans to change this, see above.
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> 8. **Principles for Expansion of SLAS.** Thus when considering SLAS Expansion as a matter of policy, law makers and HAB can and should consider **criteria and factors** which are not in the Legal Aid Ordinance provided they are relevant to and consistent with the objects and principles of the Ordinance. **However, they cannot be inconsistent with the Legal Aid Ordinance in undertaking such an exercise.** Thus, it cannot be right to demand of the new types of SLAS cases that the Legal Merits or prospects of success be a very high chance of success, i.e. a much higher threshold than the processing test

for considering applications for OLAS and SLAS cases contained in S.10(3). The reasoning is simple. If the operation of the Ordinance and the processing of cases by Legal Aid Department only requires a test of "reasonable grounds" for taking proceedings it must be inconsistent and therefore wrong in principle for policy and law maker decision-makers to so circumscribe the scope of the potential cases only to those with "a high chance of success" when deciding on expanding the scope of legal aid to the new types of cases.

9. **Only sure winners should get SLAS?** Additionally, there is no such thing as a "type of case" which has "a high chance of success", i.e. only winning cases. Some PI cases have more factual and legal merit and consequently a higher chance of success; on the other hand, there are some that do not. Some financial product cases will have more factual and legal merit and hence a higher chance of success and some will not. It all depends on the review of the Legal Merits to be conducted by the processing LAD and the assigned lawyers.

10. **Contrary to precedent**. As a matter of precedent in terms of policy making, the new HAB demand for only types of cases with a high chance of success has, with respect, the wrong focus and approach. Professional negligence types of cases were an expansion of the SLAS scheme. Such a threshold demand was not raised as an obstacle by the Administration then. These type of cases do not necessarily have a high chance of success whether in terms of high chance of winning a case or whether in terms of high chance of recoverability of damages. So demanding such criteria now is new, unwarranted and wrong in terms of both principle and policy. The above analysis shows that HAB are seeking to put in place obstacles to this long overdue expansion of legal cover without any justifiable foundation.

11. It is our submission that when considering expansion of the types of case, the test is and should be the same in processing as it is in policymaking, namely reasonable grounds for taking proceedings. **Thus, policy makers and law makers should be considering the types of cases for SLAS which have reasonable grounds for initiating proceedings.**

12. **However, in policymaking and law making, Recoverability is a relevant factor for examining expansion of types to cases for SLAS** so that the SLAS Fund can benefit from a flow of contributions and thereby enable the victorious Plaintiff to contribute 6% or 10% into the coffers of the SLAS Fund. Therefore, it is reasonable for policymakers and lawmakers such as HAB and Legislative Councillors to consider expansion in those types of cases where there is either insurance or otherwise reasonable prospects of recovering damages. Once those factors or reasonable prospects for recovery are satisfied, then ipso facto, those types of case are appropriate and fit for SLAS expansion."

3. **Comments on current Administration Paper. P**aragraph 4. The decision, after study, to take forward Derivative type claims i.e. Lehman Brothers type cases is welcome, although belated. Unless there is faster action, the 6 year Limitation period may time-bar some claims for the sale of products in 2007 and prejudice some victims even more.

4. Paper paragraphs 5-7. The refusal to consider Minority Owners' Compulsory Sale Order cases is based on illogical reasoning. Just because 26 out of 27 applications were approved by a tribunal where there is no Legal Aid does not prove that Legal Aid should not be granted to 1 out of 27 applications, one of which may have merits, and which merits could be detected on the merits testing done under normal Legal Aid processing, and which adjudicated result could be used as a fairer precedent. Just because an application is approved does not imply that the right sum was achieved, especially in cases where the developer is fully represented and the individual is not adequately represented. In such situations, the individuals lose out and are aggrieved. An unsatisfactory result is almost forced onto the individuals. Mediation, without the sanction of legal action, in case the developer is not reasonable, is a toothless strategy with little or no credibility.

5. As noted before, "high chance" of success is not the correct criteria for expansion of Legal Aid. Hence, HAB decision making is based on erroneous criteria. This proposed reform, made by the LegCo Panel, has clear merits and should proceed.

6. Paper paragraph 8-11. The rejection of claims for Sale of Goods and Provision of Services is based on an error. Just because the Administration objects to Legal Aid for cases with small amounts of money, this is not a valid objection since Schedule 3 of SLAS classifies $60,000 or above as being cases of significant injury or injustice. Small cases are thus excluded anyway from SLAS accordingly this is not a valid or justifiable objection.

7. The inference from paragraphs 10 and 11 is that "significant consumer interests or issues of a substantial impact on consumers" are responsibilities which are being ducked by the HAB. They are attempting to pass the buck to the Consumer Legal Action Fund which may not have the ability or resources to take on significant cases. The lack of resources has already hampered litigation in financial services cases. It is obvious that such significant cases of injury or injustice with substantial impact on the community or society ought rightly to be eligible so that once the individual case's merits are established, Legal Aid can be granted. The Government's reasoning is again not logical and contradicts the Legal Aid Department's own mission (and Schedule 3) which is to provide access to justice for significant cases or those with impacts on society.

8. This is linked to the reform proposal for Class actions so, for example, SLAS can be granted in the groups of cases of heart pacemakers which have broken down. These are not personal injury cases and so access to justice is being denied.

9. The Annex containing the Administration's Proposals demonstrates lack of adequate action. This demonstrates the Administration is not responding to LegCo panel's views. A year has passed and there is nothing except repetition mostly of what has been said before, save for the concession that Lehman Brothers type cases will now

be covered. Where is the draft Bill? Where is the timetable? This lack of action/inaction by the HAB shows little effort to implement the Chief Executive's Policy Address of 2010.

10. **A summary of the situation and lack of progress** on the draft Bill and Proposals put forward by the Bar Association in July 2010 and mostly endorsed by the LegCo Panel is as follows. The LegCo Panel Meeting on the 28th March 2011, considered the HAB's Review Paper of 22nd March 2011, 15 pages. The Bar explained the need for each of the reforms and the expanded scope, refuted the HAB arguments for no action, welcomed some reforms, and requested that there be an annual review of SLAS. Legislative Councillors expressed support for the expansion of the scope of SLAS.

11. A brief Checklist of the Reform position.

(a) HAB principles for the expanded SLAS are contrary to past principles and not consistent with Article 35 of the Basic Law nor Section 10(3) of the LA Ordinance – the key principle of expanding legal aid scope to increase access to justice and the rule of law was identified by LegCo members;

(b) HAB Failed to see the Reforms as a Package – however, proceeding piece meal is better than nothing provided there is continuous progress in reform; the $100 million injection was promised on the assumption there was a coherent package of reforms giving wider access to justice.

(c) No sound reason given for refusing to adopt the Financial Eligibility Limits (FELs) proposed by the Bar for OLAS $350,000 and for SLAS $3m – HAB contrary to Scott Report principles,- but better than nothing. (On 30th March 2011 a Resolution of the Legislative Council, LN 51 of 2011 set out the changes to the FEL, for OLAS from $175,800 to $260,000, and for SLAS from $488,400 to $1.3million. By LN 83 of 2011 this came into operation on 18th May 2011.)

(d) Proposal for Age related exemption for assets test, should be age 55. However, the age 60 compromise proposed by Administration is a reasonable beginning, However, there is only partial exemption of assets of only up to $260,000 given per LN 35 of 2011 dated 15th February 2011. Such a limited exemption is mean spirited and is contra to the intention of the reform, which is to protect the assets of the elderly from having to be 'used up' in litigation before they become "eligible" and when they cannot earn back those monies because they are approaching the end of their working life.

(e) Amendments to cover CFA cases still needed: see Bar draft Bill of July 2011;

(f) Expansion of scope of Professional Negligence: - accepted but too limited. No sound reason provided to exclude Independent Financial Advisors, especially since a new tribunal is being proposed for cases upto $600,000. Accordingly, SLAS should be available for cases valued from $60,000 upwards both in the Financial Services Tribunal, and District Court and High Court for higher value cases - but a welcome beginning to the expansion of scope;

(g) Sale of insurance products- accepted, - but should include Insurance Intermediaries, brokers and agents;

(h) Claims against Developers in sale of first hand Residential properties- accepted – but too narrow. It should cover all New properties as often

properties are presold or "flipped" before completion and should be wider since estate agents are being included for professional negligence; some defects in new buildings do not appear for years, so the claims could be for cases within 6 years to cover contract claims and subsequent purchasers within 6 years per Section 4 of the Limitation Ordinance Cap.347.

(i) Employees claims on appeal from the Labour Tribunal- accepted, but should include Enforcement of awards;

(j) Money claims in Derivatives etc when fraud etc is involved – HAB wished to defer and study any detailed proposal next legislative session, but this has been advocated since 2002, long before Lehman Brothers and there is public need and strong LegCo support. This reform has now been accepted!! Limitation periods are running so action is needed soon to avoid prejudice to the victims.

(k) Claims against Incorporated Owners – HAB reject this but LegCo support;

(l) Claims from small marine accidents – HAB reject but provide no adequate reason;

(m) Claims against Property Developers by minority owners in compulsory sales – HAB reject this LegCo proposal which LegCo strongly supported; and see SCMP Leader "Social justice is more than hollow words" dated 4th April 2011.

(n) Claims in respect of Trusts – HAB reject but LegCo support;

(o) Claims involving disputes between Limited Companies and their minority shareholders – HAB reject despite "outrageous" PCCW example;

(p) Claims arising from Sale of Goods and provision of services – HAB reject for no valid reason, but LegCo support;

(q) Class Actions which are an important adjunct to the above and part of future CJR reforms, were also omitted from the HAB Paper. The Bar had put forward class actions for disasters, environmental damage, consumer or product liability, claims by employees against employers where insolvency proceedings have been instituted or are being instituted and building management disputes; and

(r) A special discretion should be reposited in the Director of Legal Aid in appropriate class action cases to grant legal aid in appropriate cases.

(s) Thus 7 out of about 16 reforms are under way in some form, however, only 5 of the 14 SLAS reforms are partly accepted. There is much room for further reform still.

12. The Legislative Timetable was for the Administration to submit Legislative Proposals for LegCo's scrutiny after the Summer Recess with a view to implementing the proposed expanded SLAS before the end of 2011. The Chairman of the Panel requested that this be submitted in October 2011, members agreed to monitor closely this work and requested that the Administration should provide a Progress Report in June 2011. Members would also follow-up in the next Legislative Session on other proposals not supported by the Administration such as claims against Property Developers in respect of Compulsory sales, and Claims in respect of Sale of Goods and Provision of Services. Much has been achieved thanks to the efforts of the Panel and its Chairman, Hon Margaret Ng.

13. What was requested and promised in March 2011 has not been produced. Just a rehash of what was provided. The Administration has not kept to the timetable. We propose there be a new timetable, no more delays.

14. We urge the Administration to expand the Proposals to bring them into line with the law and the views expressed by the LegCo Panel and the proposals of the Bar Association of July 2010 and thereafter.

Hong Kong Bar Association

19th December 2011

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