

**Submission 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 7th November 2012**

1. This is a Summary so new Members of Legislative Council have a picture of the **package of proposals** which have been made by the legal profession as a result of many meetings of this Panel and endorsed by this Panel. However the Administration has opted for a partial and piecemeal approach, but has significantly agreed to keep the reforms under constant review.
2. It is over 2 years since the Bar's Submission entitled **"Expansion of SLAS is Just and Feasible and Needed"**, together with a Draft Bill which was considered and endorsed by LegCo Panel Resolution on 21st July 2010. This Submission provided a realistic and viable road map as to how each reform for increased scope of SLAS was backed by recoverable assets, such that each claim was covered by insurance or involved preservation or recovery of property or damages so that there would be recoverable assets from which SLAS could derive its percentage and be replenished.
3. For the record, 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 at paragraphs 7-12 (as amended) which stated:

" **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
- (d) Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion; 1994 Report, para 6.7
- (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. . . "

4. A Checklist of the Reform position.

- (a) HAB's 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 Legal Aid 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 piecemeal is better than nothing provided there is continuous progress in review and 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 was given for refusing to adopt the increases in Financial Eligibility Limits (FELs) proposed by the Bar, i.e. from 175,000 to \$350,000 (for OLAS) and from \$488,000 to \$3m (for SLAS).

On 30th March 2011, upon the recommendation of HAB, a Resolution of the Legislative Council (LN 51 of 2011) set out the changes in FELs, which came into operation on 18th May 2011 (LN 83 of 2011). The FELs were only increased to \$260,000 for OLAS and \$1.3m for SLAS, which did not take into account costs of the opposing party - contrary to the Scott Report principles - but was better than nothing.

The overall number of Certificates from 2006 through to 2011 has remained much the same (See Summary Sheet by the Legal Aid Department dated 1st August 2011 - Annex A).

Even with the increased FELs since 18th May 2011, the number of legal aid applications and the number of certificates granted have not increased significantly (see Letter from Legal Aid Department dated 28th June 2012 - Annex B).

The continuing unmet needs are demonstrated by the Judiciary Administrator's Letter of the 3rd August 2012 (Annex C), reflecting the under-representation in civil cases in both the District and High Courts.

Further, inflation over the last 2 years since we started this process is in the order of 10-12 % in any event.

In the circumstances, we would respectfully invite the Sub-Committee to revisit the issue of FELs in due course.

- (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 (LN 35 of 2011 dated 15th February 2011). Such a limited exemption is mean-spirited and is contrary to the underlying 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 2010.
- (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 now exists for claims up to \$500,000. 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 pre-sold or "flipped" before completion. Further, it 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) Derivatives etc – HAB wished to defer and study any detailed proposal next legislative session, but this has been advocated since 2002, long before Lehman Brothers. There is public need and strong LegCo and LASC support. The current position is to only remove the exception from OLAS but not to reform SLAS to include such cases. The 'sandwich class' have been the main victims of such products so excluding such cases from SLAS is neither sensible nor logical. Limitation periods are running from 2007 so action is needed soon to avoid prejudice to the victims.
- (k) Claims against Incorporated Owners – HAB reject this but LegCo support;
- (l) Property Damage 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. The Bar believes this form of minority protection is required (see Paragraph 5 below).
- (n) Claims in respect of Trusts – HAB reject but LegCo support; there is additional reason to support this initiative, now that the Trustees Association have introduced a Code of Professional Conduct, and most, if not all, have Professional Indemnity Insurance Cover.

- (o) Claims involving disputes between Limited Companies and their minority shareholders – HAB reject this probably through lack of understanding. See the PCCW Case [2009] 3 HKC 292 – the judgment of the Court of Appeal - This was a case of vote manipulation where there was an unaccountable drop in value of the shares, and privatisation was put forward so as to deprive the shareholders of the true value of their shares. The Court refused to sanction the Scheme of Arrangement – this would have been a fraud on the minority. See Section 166 of the Companies Ordinance and the Court always has the power to award costs in favour of minority shareholders. This is similar to its powers under Section 168 A.
 - (p) Claims arising from Sale of Goods and provision of services – HAB reject for no valid reason, but LegCo support, see paragraph below.
 - (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; Class Actions are now being actively considered, public interest litigation must be covered by Legal Aid; and the Court does grant costs to persons who have been affected, as well as those who have a legitimate interest in pursuing say an application for judicial review e.g. the Harbour Protection Litigation, where the court ordered costs against the Government. See further Submission below on Class Actions.
 - (r) A special discretion should be reposed 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, but only 4 of the 14 SLAS reforms are partly accepted. There is much room for further reform.
5. HAB LC Paper No. CB (2)600/11-12(01) provided on 14th December 2011 for LegCo Panel, 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. Because there has been a mediated result, does

not mean there has been a “successful mediation”, as parties are often made “all or nothing offers” in these cases. Note there was no “exit poll” conducted to see how satisfied or dissatisfied the 26 were.

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

7. 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 the Legal Aid Ordinance concerning SLAS classifies \$60,000 or above as being cases of significant injury or injustice. Small cases are thus excluded anyway from SLAS and accordingly this is not a valid or justifiable objection.

8. 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 which impact on society.
9. This is linked to the reform proposal for Class actions. As an 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.

Legal Aid Department and Home Affairs Bureau negative attitude frustrates Class Action proposals in Report by Law Reform Commission of May 2012

9. **Established policy.** For at least 20 years Government policy has considered Class Actions as being suitable for SLAS but this has only been excluded because the Hong Kong legal system does not yet provide for Class Actions, see 1993 Government Consultative Paper on Legal Aid, paragraph 19 onwards. It has long been considered by most independent observers and the Law Reform Commission in other Reports that Legal Aid and SLAS is the most suitable choice for providing access to justice so as to reduce the use of illegal recovery agents and as a preferable method for funding in Class Actions.
10. **Reversal of policy by LAD/HAB.** It is thus with shock and regret one reads the LRC Report of May 2012 at paragraph 8.45, page 201, stating “The Legal Aid Department has made clear in its response to the Commission’s earlier consultation paper on this subject that it did not favour an expansion of the existing Supplement Legal Aid Scheme....” **This negative attitude had led to the reform of public funding of**

Class Actions on this topic being frustrated so that access to justice to those of limited means via Legal Aid and Class Action is to be denied.

11. It is surprising that the LAD did not make it known to the LRC Sub-Committee that the Bar Association via a series of meetings with the LegCo Panel on Administration of Justice and Legal Services had been noting this future reform repeatedly since 2009. It is notable that whereas LAD and HAB expressed negative views, the LASC is not referred to in the Report. This is even more regrettable as the LASC Interest Group Report of 2002 had also proposed SLAS be extended to Class Actions.
12. **The public interest derived from Class Actions has been lost sight of by the LAD/HAB stance.** Instead of seeing the public interest element in Class Actions which benefit not only the legally aided Applicant but also the rest of the class as well as society as a whole, the LAD adopt and persist with a narrow-minded approach seen in paragraph 8.51 which reads:

“In response to our enquiries as to whether the DLA could be given more discretion to take into account the public interest element and to grant Legal Aid in appropriate cases, the DLA stressed that the underlying policy of Legal Aid was to help those who could not afford to get access to justice. As a matter of principle, well-off class members should not be allowed to ‘free ride’ on the legally aided representative of the class.”
13. The Law Reform Commission did not expose the fallacy of the negative arguments which prevented reform towards improved access to justice on Class Actions. Sadly one sees at paragraph 8.54 at page 204 that as a result of the DLA’s attitude the LRC concluded that Legal Aid schemes should not be extended to cover Class Actions. Thus, they only proceeded with recommendation 6(1) and 6(2), now renumbered 7(1) and 7(2) but not recommendation 6(3) which proposed that *“if the Legal Aid Ordinance (Cap 91) were amended to accommodate Legal Aid for Class Actions, mechanisms should be devised to ensure that those who are not legally aided should share equitably in the costs.”*
14. **LAD/HAB have failed to protect the public interest or consider the wider picture namely that Class Actions bring benefit to one and all in that class of society** so that applicant and society benefit from the correction of injustices and the creation of good law and precedent. Society gains. It is money spent, not for a free ride with no benefit to the community, it is access to justice for the benefit of society as a whole. That is why such litigation is often called public interest litigation.
15. What is the alternative if there is ‘no ride’ to provide access to justice? The result is no justice for the applicant nor to the class of society of which he is part so that the malpractice or fraud or pollution or damage or danger continues to cause more impacts and more costs to society as a whole.
16. **Abdication of responsibility.** LAD have failed in principle as revealed by their attitude saying their position is a matter of principle at 8.51 at page 203. It is not an expression of principle which fits in with the LAD or LASC Missions. It betrays an attitude showing the LAD is primarily a Government department, which is not in

tune with the needs of society and yet another reason showing the need for independence.

17. The result is the Law Reform Commission has passed the responsibility to a different but more independent body, the Consumer Council, see paragraph 8.98, page 223 onwards, so that they become the provider of services instead the Legal Aid Department. It is through this organization one sees the equitable sharing of benefits and costs, see page 233. At paragraph 8.134, page 237, the principle is - if you want to get the benefit of Class Action, you must identify yourself and pay an equitable share of the costs.
18. **Identify parties for Legal Aid cases.** One way of approaching this for a Legal Aid Class Action case is for the Judge to order in appropriate cases that this should be a reason to not adopt the default “opt out” case but a case where some or all parties must positively “opt in” so that the parties are identified to some extent so some of the objections voiced by LAD are met.
19. At paragraph 8.139, page 237, one sees the reversal of policy so that as a result of the Legal Aid Department and Home Affairs Bureau’s objections we see the chance of expansion, not only of SLAS but also of OLAS to Class Actions for public interest litigation has been so negatively approached. Such is the degree of “reservations” expressed by the LAD, they abdicate responsibility so that the LRC chooses to use another more flexible and community minded organization namely the Consumer Council to provide access to justice albeit in a limited area, only consumer cases. **LAD intransigence is hindering the proper reform and development of the law.**
20. Part of the faulty reasoning of HAB seen at 8.138 is a repetition of the mistake repeatedly made by HAB about the principles for expanding SLAS. The test is not a high success rate, the test is as set out in paragraph 2 of the Bar’s Paper, namely “*involve monetary claims and have a reasonably good chance of success*”. **The LRC at para. 8.129 page 233 states “...public funding should be available where there is a public interest in litigating issues with significant legal implications, even though the chances of success are no better than even...”**. This seems a more appropriate test and principle for Legal Aid in Class Actions.
21. It is unreasonably negative of HAB to say that “*Class Actions would inevitably prejudice the financial viability of the Scheme.*” This assumes that the merits test would always fail, (implying no faith in the LAD and its system) and that Class Actions in which there was a legally aided applicant would always fail, (implying no faith in the lawyers in or assigned by the LAD) which is an unnecessarily negative view but regrettably typical of governance which is not independent.
22. **The Bar Association urges the New Administration to revisit this with a more enlightened public interest eye, and champion the original policy of nearly 20 years ago whereby SLAS would be extended to Class Actions when the law was reformed. That time is now.**
23. The Annex to the HAB Paper containing the Administration’s Proposals demonstrates lack of adequate action. This indicates that 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 partly covered ie for OLAS only. There is only a drafting and timetable for the limited original items agreed by HAB but nothing more. Where is the timetable for future reform as outlined in the Package? This lack of action/inaction by the HAB shows little effort to implement the Chief Executive's Policy Address of 2010.

24. **The Panel Meeting of 20th December 2011 showed the consensus for more expansion of SLAS** and concluded that after the implementation of the proposals by the Administration the Panel should further discuss other proposals not supported by the Administration with a view to mapping out the way forward for the next term of LegCo to follow up. Neither the Bar Association nor the Law Society, have been shown any new "road map", or "plan" to consider the other amendments on a logical or rational basis. To date we have seen no proposals at all despite the passage of 7 months.
25. The Bar puts forward the rest of the Package as summarized herein so that unmet needs for relatively ordinary people, for access to justice are addressed expeditiously and the decline in Legal Aid is halted. **We urge the New 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.**
26. **The Bar states that the need for an Independent Legal Aid Authority is clear when viewed in the light of the lack of progress on needed reforms to meet the expanding needs of society for access to justice.** The LASC Monitoring system is just not working, and any such progress is essentially dependent upon the free services provided by members of the Board of LASC, and no professional establishment to speak of. The Bar Association's Submission on the need to establish an Independent Legal Aid Authority of June 2012 is attached herewith.
27. **Equality before the law provided by equal access to justice via Legal Aid is a key component of our justice system** where the gulf between the powerful and the victim or complainant can be considerable. Access to dispute resolution systems, negotiations, mediation are helpful but are not a substitute for genuine access to justice unless the victim or complainant of limited means has legal representation so that there is equality in the access to justice. Pro bono schemes are not a substitute for Legal Aid as it does not provide equality before the law in the access to justice. Negotiation and mediation systems are an inadequate remedy unless Legally Aided litigation is available.
28. In summary, **Legal Aid must be reformed** by a process including reforms to provide for (a) unmet needs; (b) access to justice and equality before the law; (c) SLAS expansion, and (d) independence. An objective for a new statutory authority could be to provide access to justice and equality before the law to those of limited means. **These four limbs provide a reasonable policy approach for the new Administration.**

29. **The Administration on 7th November 2012 seeks views on the piecemeal approach and the raised figures for SLAS cases.** The Bar Association is of the view that this demonstrates the lack of a co-ordinated and joined up thinking in the HAB instead of a comprehensive package as drafted and supported for over 2 years.
30. Raising the percentage deduction from SLAS victim's damages will have an adverse effect on SLAS whose applicants may consider that the high percentages of 25% demanded by unlawful recovery agents is not so outrageous after all, having regard to Legal Aids demands for 20%. The high figure will act as a deterrent to access to justice by the middle class, which is contrary to the objective of the SLAS scheme.
31. Deterring applications for SLAS by high deductions from damages coupled with a relatively narrow scope of types of cases eligible for SLAS will reduce the chances of SLAS achieving the level of turnover of cases and profit required to keep the fund self sustaining in future years.
32. We advise keeping the figures at the present rates while expanding the scope of SLAS and reviewing the effects on the SLAS fund are before crippling the potential of SLAS by high deductions in this way.
33. **We request a timetable for consideration of further reforms based on the package summarized herein.**

Hong Kong Bar Association
5th November 2012



HADDY PY
LEE/LAD/HKSARG
01.08.2011 15:58

cc
bnc

Annex A

Subject Legal aid statistics

High Importance Return receipt Sign Encrypt

Dear Mr Pirie,

I refer to our telephone conversation and set out below the information requested:

No. of legal aid applications

Year	Civil	Criminal	Total
2006	17 422	3 779	21 201
2007	15 598	3 765	19 363
2008	15 314	3 413	18 727
2009	17 357	3 816	21 173
2010	15 124	3 907	20 031
2011 (up to March)	3 759	841	4 600

No. of legal aid certificates

Year	Civil	Criminal	Total
2006	9 356	2 357	11 713
2007	7 937	2 507	10 444
2008	7 513	2 235	9 748
2009	9 031	2 800	11 831
2010	8 263	2 740	11 003
2011 (up to March)	1 939	598	2 537

Legal aid costs

Year	Civil (\$m)	Criminal (\$m)	Total (\$m)
2006/2007	313.199	105.489	418.688
2007/2008	331.031	97.181	428.212
2008/2009	347.302	82.809	430.111
2009/2010	377.546	108.221	485.767
2010/2011	390.103	115.205	505.308

Website of Legal Aid Department

<http://www.lad.gov.hk/eng/home/home.html>

<http://www.lad.gov.hk/eng/ppr/publication/ldr.html> (LAD Annual Reports from 2006 to 2008)

Website of the Law Society of Hong Kong

http://www.hklawsoc.org.hk/pub_e/default.asp

Haddy Lee
PS to DDLA/ADM
(Tel: 2867 3011)



法律援助署
Legal Aid Department

本署檔號 Our Ref: LA GR/1-2007/12

來函檔號 Your Ref:

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28 June 2012

Mr. Nicholas Pirie
Barrister-at-law
11/A, Baskerville House
13 Duddell Street
Central, Hong Kong

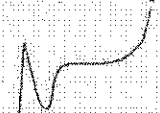
Dear Mr. Pirie,

Re: Expansion of the Scope of Legal Aid in Civil Cases

I refer to your letter dated 15 June 2012 and set out in the table below the information requested:

	Number of applications			Number of certificates granted		
	OLAS (Civil)	SLAS (Civil)	Total	OLAS (Civil)	SLAS (Civil)	Total
2010 (Jan - Dec)	15,981	143	16,124	8,157	106	8,263
2011 (Jan - May)	6,536	56	6,592	3,124	40	3,164
2011 (Jun - Dec)	9,783	105	9,888	5,069	64	5,133
2012 (Jan - May)	6,450	76	6,526	3,356	57	3,413

Yours sincerely,


(Ms. Juliana OY Chan)
for Director of Legal Aid



香港司法機構
司法機構政務處



JUDICIARY ADMINISTRATION
JUDICIARY
HONG KONG

本函檔號 OUR REF:

來函檔號 YOUR REF:

電話 DU: 2825 0486

圖文傳真 Fax: 2523 2042

3 August 2012

Mr Nicholas Pirie
Member of the Bar Association Special Committee
c/o 11/F, Baskerville House
13 Duddell Street
Central
Hong Kong

Dear Mr Pirie,

Statistics on Unrepresented Litigants

I refer to your letter of 27/7/2012 requesting for the figures of the first 6 months of 2012 on this subject. Please find below the figures asked for which have been incorporated in the table on this subject sent previously on 9.2.2012.


Statistics on Civil Appeals/Trials involving Unrepresented Litigants * in the High Court and District Court 2007-2012 (up to 30/6)

Year	2007	2008	2009	2010	2011	2012 (up to 30/6)
High Court (Civil Appeals & Trials)	38%	42%	41%	42%	36%	38%
District Court (Civil Trials)	47%	51%	55%	53%	51%	65%

* Any one of the parties not legally represented in the hearing will be counted as hearing involving unrepresented litigants.

2. Thanks for your attention.

Yours sincerely,


(Roger LAW)
for Judiciary Administrator