

**SPEAKING NOTE FOR THE ADMINISTRATION OF JUSTICE LEGAL SERVICES PANEL**

**(Meeting 26 November 2018 at 4:30pm, Agenda Item IV)**

1. Although both limbs of the legal profession have had only 4 working days to consider the 2 papers (**Papers**) from the Administration concerning delivery of free legal aid services, it is understood that these are simply presented by way of initial consultation at this stage. The following is by way of preliminary observation.
2. Developing enhanced provision of Pro Bono Services is a worthy objective. The position of the HKBA and the Law Society is that this should be done as part of the long overdue reform and updating of Legal Aid Services as a whole.
3. For many years now both limbs of the legal profession have been seeking, with no success, to engage in dialogue with the Legal Aid Services Council (**Council**) in order to kick-start the consultation process on such reforms [see eg letter 18<sup>th</sup> November 2015 which calls for such dialogue at **Attachment I**]. This apparent inertia on the part of the Council to date reinforces the view of the Law Society and the HKBA that the Administration needs to have an independent Legal Aid Authority monitoring overall policy on Legal Aid Services and Pro Bono Services.
4. However, it is hoped that positive discussions with the Director will now pave the way for the process of reform to advance in a meaningful way.
5. By way of comment on aspects of the Papers from that wider perspective:

(1) The Papers may give a reader the impression that the current Legal Aid regime is already providing sufficient coverage for court proceedings but this is far from the reality. The HKBA had obtained from the Judiciary in April 2017 statistics for the preceding 11 years showing instances of substantive hearings at which there was an unrepresented party – these show high numbers in the following areas [these figures have previously been provided to Legco Panel Meeting in June 2017]:

Magistracy Appeals	60%
District Court Civil Cases	50%
High Court Civil Cases	40%
Court of Appeal Criminal	50%
Appeals to Masters	65%+

(2) These statistics also tell the story of the very considerable delays inherent in unrepresented party cases, particularly so in matters as important as criminal appeals. This highly detrimental situation illustrates the lack of proper access to justice;

- (3) The HKBA takes the view, and these statistics illustrate, that for Legal Aid Services to operate properly it is no good adjusting Financial Eligibility Levels (FELs) by reference to the Consumer Price Index and by reference to just one set of litigation costs. Instead, assessments should be made on the basis of an applicant's ability to pay his own costs, plus the costs of an opposing party should he lose;
  - (4) Further, if one has regard to CPI for services, there has been a substantial rise in Professional Services Costs ie the costs of having to engage an outside solicitor, of nearly 10% for the recent period, yet only a 4% adjustment was made;
  - (5) There has been no basic Legal Aid reform for the past 3 to 4 years and there are issues which this Panel approved and passed 16 years ago in November 2002 which the Council has yet to get to grips with eg provision for class actions for minority shareholder complaints, sale of goods disputes and provision of services disputes;
  - (6) There have also been new areas to which Legal Aid Services could have been extended such as claims against property developers in the Lands Tribunal concerning compulsory sale cases. These areas will be addressed in an updated report to be delivered shortly once approved by the Bar Council;
  - (7) A feature that the Papers do not show is that the numbers of Legal Aid Certificates granted for OLAS have been declining, whilst those of SLAS increased significantly when the FELs increased also. This aspect supports the stance of the Law Society and the HKBA.
6. For Pro Bono Services to operate properly they must not operate in a piecemeal fashion, there must be effective follow up between the various advice providers and there must be supervision or checks on the quality of the advice provided. DLA Piper provided its own report on the issues in the middle of 2017 highlighting these and other issues concerning the Pro Bono Schemes.
  7. While Pro Bono Schemes are delivered at little cost to the Administration, they nevertheless require proper follow-through together with consideration of how they integrate with wider Legal Aid Services eg the lawyers who attend and contribute to the Free Legal Aid and Advice Scheme are prohibited from taking up the cases, or referring them to professionals outside the scheme. The Administration provides a kind of band aid solution via the Litigants in Persons Advice Scheme in courts, but the officers involved only provide procedural advice.
  8. HKBA has long been advocating a replication in Hong Kong of the English Green Form Scheme, whereby a person can go to see a lawyer in the Scheme and have an hour's advice. In the 1970s the rate was GBP 25.00 per hour. Obviously the rates would have to be changed.

9. In conclusion, it is respectfully submitted that the Chief Secretary and the Secretary for Administration should have regard to the following:

- (1) The worsening levels of legal representation in the courts over the past 10 years, leading to logjams and unacceptable delays in the courts, to the prejudice of the Judiciary, the public and all court users;
- (2) That the expansion of unpaid legal services via Pro Bono Services which deal only with advice and not representation will result in real quality and supervision problems;
- (3) That the development of Pro Bono Services should not happen piecemeal but should take place as part of the long-overdue reform of the over-arching Legal Aid Services;
- (4) Thus, the pressing need for the Council to engage and consult with the two limbs of the legal profession to address the reform of Legal Aid Services, which has been stalled for 5 years.

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**Hong Kong Bar Association**

**26 November 2018**



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18<sup>th</sup> November 2015

Ref: LM(1) to LASC/CR2/2/1

Dear Sirs,

### Re: Expansion of Supplementary Legal Aid Scheme

1. Thank you for your letter of 17<sup>th</sup> July 2015 and reminder of 30<sup>th</sup> October 2015. **We are happy that this work is continuing.** As far as I can remember this work has been going since at least 2002. Is the document sent the actual Report of the Working Group on Expansion of SLAS or is there a more fully reasoned document? You have sent us a document called the Preliminary Proposal of the Working Group. If there is an actual Report with more explanation, which the Bar Association and the Law Society could see, that would be most helpful, so we can compare this with past work done, as it would appear that past principles established over decades may have been omitted, or not referred to.
2. The Preliminary Proposal refers to the last or "previous reviews". Please could you provide us with copies for our consideration, in order that we can see what the relevant working papers were.
3. **What is the timetable for this work?**

### 香港大律師公會

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4. At some stage it would be useful to have a meeting with yourselves or the Working Group and the Law Society Legal Aid Committee, so that further improvements can be made.
5. **Undesirable obstacles.** Paragraph 1 of the Preliminary Proposal appears to set out numerous obstacles to expanding SLAS, some of which may not have been fully discussed with both sides of the profession. The Bar has previously shown how imposing additional hurdles which were not imposed in the past are not justified, the more particularly when they have not been discussed with either the Bar Association and the Law Society. So, for example, it goes against the basic principles of SLAS, that a particular type of case is to be self financing, and financially viable. This is not appropriate, and the Medical Negligence Class would have been closed down some years ago, when a very large costs award was made against the legally aided client. HK \$10 million plus was the figure.
6. **The Introduction of a Costs Ratio.** The primary objective of and the rationale for the setting up of SLAS, was to cover unmet needs for access to justice. This must be its prime objective, and not whether in a particular class of case, costs are recoverable over the whole class.
7. Recoverability has never been the prime criteria, and the establishment of a "costs recoverability and damages to cost ratio" is not appropriate, and certainly not for each and every particular class of case. So far as we are aware, the Legal Aid Department has adjusted the percentage of costs recovered in SLAS cases, out of damages on a yearly basis overall over the whole SLAS Scheme, on an *ex post facto* basis for statistic purpose. This so called "ratio" should not be using as an initial criteria or obstacle for widening classes of the class of case to which SLAS could be extended.
8. **Claims against Incorporated Owners of a Multi-Storey Buildings.** We are happy that this reform has been accepted. We agree that the absence of mandatory insurance cover should not be an obstacle. Individuals who are members of the Incorporated Owners will be owners of flats and those flats could be the subject of charging orders so that claims and costs can be satisfied and the fund reimbursed. Similarly, it is appropriate that claims for improprieties by the Incorporated Owners themselves, should be covered by SLAS as again, costs etc. can be recovered by charges against properties owned by the individuals. This has long been the practice by other Government Departments, where emergency repairs are needed, or expensive slope works have to be undertaken by the Lands Department. The Colonial Treasurer Incorporated, took a charge over the whole building. When an individual flat was sold, the due proportion of that charge had to be paid off. So there is no reason why in SLAS cases such a charge could be taken, where the Incorporated Owners are at fault for some defect in the building or its maintenance system.

9. **Independent financial consultants.** This is appropriate and this reform needs to be brought forward as a priority. It should not be limited to only those registered under the Commission and those persons, who were required to have insurance, but do not have effective cover. This could lead to the risks of consultants using unregistered subsidiary companies and exploiting a loophole.
10. **Derivative claims.** We are pleased that since OLAS was expanded therefore SLAS has been likewise expanded to cover these claims. This is a priority.
11. **Small Marine Accidents.** ( And other Marine Accidents) Property damage claims from small marine accidents have been rejected but with no adequate reasons. The Bar Association has in the past taken the lead in improving marine insurance cover for Small and other Vessels, and are about to recommence discussions with the Marine Department about this. Further consideration and reasoning is required and the Bar Association, and no doubt the Law Society too, would like to make further representations about this.
12. **Claims against property developers by minority owners in compulsory sales.** This has been rejected because it is said they normally do not involve monetary claims. This is not correct. Additionally money claims are not the sole criteria for SLAS as seen above in the case of claims against Incorporated Owners. Property is involved, this has monetary value, and can be easily attached to recover costs as appropriate. Funding access to justice will speed up the process of fair compensation and more efficient property development in future. Further consideration here is required.
13. **Trusts.** Trusts have been rejected because it is believed that this is recovered under Professional Negligence Claims Insurance. The required paid up capital of a Trust Company is only HK \$3 million, and it is in the HKTA Code of Conduct that these Trust Companies should have professional indemnity cover. So we understand that most HKTA members have this cover.
14. A claim for breach of trust can be much easier to prove than professional negligence, and most importantly, an Order for Indemnity or Common Fund Costs is usually awarded for breach of trust. So the recoverability should be the higher. These claims would have a much better prospect of recovering sums of money, than claims in Professional Negligence. In any event, both types of claims would be covered under the Professional Indemnity Insurance cover we believe. So there is no reason for this exclusion from SLAS and the reasoning does not stand up to analysis.
15. **Disputes between limited companies and their minority shareholders.** Again, the reasoning here is shallow, and is obviously made without reference to the judgment of Rogers JA in the Hong Kong Telephone Company Case, wherein he made an order for the provision of minority shareholders' costs under the previous Company Law provisions. The new provisions are to be found in Section 738 of Cap 622 . Remedies for fraud against minorities can be achieved, and damages and costs can be extracted from the companies and the directors concerned, and often upon either a Common Fund or an

Indemnity basis. See the judgment of Kwan J in Re F & S Express Ltd. [2005] 4 HKLRD 743 . The SLAS fund would therefore be protected. This is a major area of law where access to justice needs to be provided now. This was in the list of requests for expansion of SLAS in 2002, and there has been no major progress on this since then despite the advances in Company Law and Minority Protection in Hong Kong.

16. **Sale of goods and provision of services.** This is excluded because other quasi administrative or enforcement bodies may provide help on this. The record of the Consumer Council is poor, and relatively few cases get funded.
17. Access to justice is the key to quality of life through improved goods and services provision. Legal Aid ought to be granted in cases for example where pace makers go wrong, and need to be replaced, or there is a basic fault in the design and manufacture of motor cycles, and people are thereby injured. Members of this Association had to deal with a number of cases privately where accidents were caused by defective design on workmanship in the front forks in motorcycles.
18. It is wrong to deprive people of their rights at law and limit them to administrative type compromises and mediation which is ineffective because the defendants know actual litigation will be unlikely because it is not legally aided. Access to justice is vital in ensuring quality of life through higher standards in our consumer law. This area needs to be reconsidered.
19. **Class actions.** The Bar welcomes the Working Group's favourable consideration of this. The Bar has suggested specific types of 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. We commend these class action headings as part of the active consideration as soon as possible.
20. We also agree that the Director of Legal Aid should have **discretion to grant Legal Aid in appropriate class action cases** to allow flexibility to deal appropriately with an evolving situation and unusual circumstances. SARS cases and the HIV infected blood cases, are obvious examples in the past where Legal Aid should have been provided on a Class Action basis against the public authorities.
21. **Defamation proceedings and election petitions** have been rejected. This was not one of the Bar's list for reform from 2012 onwards. So we have no strong view on this conclusion.
22. **The Financial Eligibility Levels "FELs"**. We believe the LASC is acting under a mis-apprehension here in 2 respects. The figures currently in use were not based on the average legal costs of both parties but only the average legal costs of **one side only**. The FELs should not have been only \$1.3 million but more like \$2.6 million or \$3 million as advised by the Bar and the Law Society years ago. The Scott Report years ago pointed out this was the proper

approach which the Chief Executive accepted was the proper basis for averaging. Changing this principle without proper discussion is therefore inappropriate. The LASC has also failed to deal with the automatic adjustments required in the FELs to take account of inflation etc., and this should be a mandatory part of the LASC's duties.

23. **The Statistics continue to demonstrate the unmet needs for access to justice.** There has been no improvement. This was amply illustrated by the substantial increase in FELs in 2013/4, which resulted in about a 50 % increase in Applications and Grants for SLAS. This was a rise in disposable capital requirements from \$488,000 to \$1.3 million. We asked for a rise based on \$2 million plus, but this was turned down. We believe the FELs now are set at levels which are too low generally, and the LASC should be looking at this urgently.
24. Just based on inflation since 2012 when the FELs were last considered, there should be at least an uplift in the FELs now by 12.5 to 15%. This aspect should be considered
25. **Age Related Exemptions.** The Bar agrees that the **Age Related Exemption for Assets Test should be based on the age 55** so as to protect the assets of the elderly litigants from being used up in litigation when they are approaching the end of their working life and thus not able to save back the funds used up for litigation.
26. **Publicity.** It is essential that the public be aware of their right to access to justice and equality before the law. Enhanced publicity is important. We were all very disappointed by the low level of uptake in 2013/2014 when the FELs were increased. The Bar Association feels that the LASC should be looking at the budget provided for advertising the utility and benefits of our Legal Aid Scheme should be substantially increased.

#### **Conclusion**

27. The Bar Association commends the LASC for the work done so far under its new Chairman. However we do feel that the lines of communication should be open, and proper consultations made with both the Law Society and the Bar Association, before any of the proposals are properly considered and rejected. We do not want to see that amendments to SLAS are rejected, and these rejections are cast in stone, especially when there are demonstrated unmet needs, and reported cases which are not apparently considered by the LASC when considering future improvements in access to justice.
28. It is in this light that we make our requests for the information above. We suggest more open discussion with the Bar Association and the Law Society on the reasoning adopted for the various proposals for amendment of this excellent Scheme which has been copied in other common law jurisdictions. We are advised there have been no recent discussions with the Law Society



Legal Aid Committee either, and this has been confirmed by the Director of Practitioners' Affairs, Mr. Kenneth Fok.

29. Thus, we all need to be involved if there are to be changes in or deviation from basic principles. We need to be involved in the timetable and procedures to be followed. We wish to continue the search for reforms and improvements in SLAS to enable better access to justice to be provided for all potential litigants.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Ruy Barretto S.C.', written in a cursive style with a large loop at the end.

Ruy Barretto S.C.  
Chairman

Special Committee on Legal Aid Reform