

Hong Kong Bar Association Submission for the Legislative Council
Panel on Justice and Legal Services Meeting on 24th January 2011

1. Introduction. Last year the Bar's Submissions included
 - (a) July 2010 draft Bill which was supported by a Legco Panel Motion.
 - (b) Timetable for action, in the Paper for the meeting 22nd November 2010.
 - (c) Comments on the LASC Reports, in the Paper for the meeting of 21st December 2010.

We have heard nothing since. This paper addresses the fundamental error of the proposal to divide SLAS into less risky and more risky schemes. It also deals with Class Actions and Protection of Minority Rights.

2. SLAS. See Paper for the meeting 21st December 2010 paragraph 14. It is fundamentally wrong both in a business sense and contrary to the Legal Aid Ordinance to attempt to divide SLAS into two comparative risk calibrated schemes comprising greater and lesser risk cases. Shifting Professional Negligence cases into the higher risk category cases is strongly opposed. 'Risk' should remain assessed professionally under the 'Merits' test with the option of Counsel's Opinion under section 9. We propose that the Interest Group's Report approach be adopted, namely have the current SLAS cases continue as they are but have the new cases administered separately. This will allow monitoring and enable comparison whilst allowing risk to be assessed in the conventional manner.
3. Appendix 1 explains why it is fundamentally wrong to divide SLAS in the way being proposed by the LASC. In essence, putting all the more risky cases in one basket is conceptually flawed. The 'Merits' test is designed to meet all categories of case. Creating a separate 'High Risk' basket suggests that the 'Merits' test criteria may be softened, leading to that basket having a higher risk of depletion of assets which could discredit the whole Scheme and the LAD.
4. The draft proposed Bill has a package of provisions which, by increasing the FEL limits, by a sensible provision for the elderly, coupled with the increase in the scope of SLAS will cumulatively serve to increase the pool of Legal Aid cases. This will achieve the necessary economies of scale as well as spread the risk across a wider spectrum so the SLAS income will increase and continue to be self sustaining. Hence the draft Bill of July 2010 is a package. We have pointed out that the LASC fails to address this package approach and thereby fails to grasp its built-in advantages.
5. With increased Mediation, the risks of the SLAS Scheme losing cases will be reduced as the Mediation process will vet the riskier cases earlier with a consequential settlement whereby the risks to SLAS will be reduced.
6. Company disputes, minority shareholders and class actions, in the proposed Bill Clause 4(g) and 4(i) were dealt with in the Paper for the 21st December 2010 meeting at paragraphs 21 and 23. Appendix 2 explains the importance of the expansion of Legal Aid and SLAS to these cases. The Court of Appeal has castigated the conduct of the majority shareholders against the minority as outrageous. Therefore, it is appropriate and apt that SLAS be provided for such cases. At the end of the day there

will be monetary claims and recovery of costs. In any event, the current damage to Hong Kong's corporate governance image will be reduced when SLAS is available to represent the public interest.

7. Unrepresented litigation is a serious problem and consumes a disproportionate amount of judicial time and resources. Currently 51% of District Court and 40% of the High Court, Court of First Instance cases are unrepresented. This degree of inefficient unmet needs results in reduced access to justice which can be largely ameliorated by the SLAS scheme coupled with Mediation.
8. The Bar Association therefore maintain its firm and principled stance:-
 - (a) that the package approach be adopted;
 - (b) that SLAS is not split into two categories of risk but the 'Merits' test be maintained consistently;
 - (c) that a firm timetable is required.

Hong Kong Bar Association
18th January 2011

[8027.rb]