

Hong Kong Bar Association Submission for the Legislative Council Panel on
Justice and Legal Services Meeting on 22nd November 2010

Phased Action and Timetable for Legal Aid Reform.

1. **Background. This is the 7th Meeting in about a year.**
 - (a) LASC and Bar Association work and reports from 2002 led to **expanding scope of SLAS being defined as the Priority area.**
 - (b) Whilst the HAB said they would await the advice of LASC Interest Group, the Bar's proposed Amendment attracted general LegCo Panel support in July, and this was followed in October by the Policy Agenda and Policy Address which provided valuable policy commitments by the Chief Executive.
 - (c) The input from LASC may be delayed but their details should not delay the creation of a timetable for future action. This is because it is hoped that with Policy support at the highest level and LegCo support, the nature of the reforms needed will be common ground. Progress is being made. In general the consensus is:
 - (d) FELs have been too low, but current proposals are getting better, and with a solid commitment to substantial increase;
 - (e) an Elderly exception at 60 which is a better figure, but still set at too old an age to benefit the target persons, and
 - (f) the solid commitment to expand scope of SLAS is welcomed,
 - (g) and an injection of \$100million to fund SLAS expansion.
2. **To facilitate orderly implementation, a phased approach and timetable is proposed.**
3. **The reasons for Legal Aid Reforms are summarized in the papers for the 1st and 6th meetings on these topics.** There is additionally solid political support for redressing the social and legal imbalance which is reflected in the "undue hardship" experienced by litigants both in the OLAS and in the SLAS for the middle class. Because these reforms are so overdue, and the Administration acknowledges the pressing need, there is merit for requesting retrospective effect for these provisions. In any event, further **delay is not acceptable**. Standards and public expectations have been rightly raised by Chief Executive's Policy Agenda of October 2010 at page 57 where he commits \$100m **"to facilitate expansion of the scope of SLAS so that legal aid will be made available to cover more types of cases and benefit more needy in the middle class."**
4. **Bar position on FELs .** The Bar proposed OLAS FEL figure of a 100% increase on current levels to \$350,000 is fairer than the Government's 50%. There is widespread support for this. If OLAS FEL is set too low, then the coverage of Legal Aid is too narrow and limited and this is politically not acceptable as well as socially not acceptable. Lawyers and LegCo need to provide for those who

suffer undue hardship in the lower and lower middle class. Why should the SLAS be increased by over 100% and OLAS only increased by 50%? This difference only serves to worsen the divisions between the lower and sandwich class. Now the Policy Agenda page 57 says the Administration wishes to **“enhance access to legal aid and free legal advice to benefit more people who cannot afford private legal fees.”** The Policy Address at paragraph 148 said **“the Government has recently decided to substantially increase”** the FELs of OLAS and SLAS. Thus the public expects that LASC and HAB will now support the OLAS FEL of \$350,000 as have Law Society and most others in the LegCo Panel meetings. **Thus the Bar Association Proposes to maintain the increase of OLAS FEL to \$350,000** based on doubling the current OLAS just as HAB and LASC doubled the SLAS straight off without consultation because it was so obviously needed. This was supported in the Press. No phased introduction is appropriate as this is badly needed and politically unacceptable. Timetable is that this reform be introduced now, as it is 8 years overdue.

5. Bar Position on FEL for SLAS is \$3m based on \$1.3m x 2 sides costs at least. The \$1.3m is derived from LASC figures for one side of an average SLAS action. This is only Half of what is needed to avoid “undue hardship” to the aided person litigant. This FEL of \$3m is supported by Law Society, is based on Scott Report Principles, and most people in LegCo Panel Meetings, and has been widely reported and supported in the Press. The Lehman Brothers Settlement cases were only for relatively small investors. Thus **Bar Association Proposes a phased approach with a timetable for introduction so that the SLAS FEL should rise to \$1.5m now and to \$3m in November 2011.**
6. **The Expansion of Scope of SLAS was the PRIORITY area identified by LASC and others back in 2002,** and then endorsed by LegCo Panel and LRC in Conditional Fees Report in 2006. Phases and timetable are suggested for bringing in the Scope changes per the Bar Proposed Amendment Bill of 20th July 2010, which has LegCo support. LASC and Bar have already gone through a process of pruning out the many other types of case which merit legal aid but which do not yield percentage benefits to the SLAS fund.
7. The reason for phasing in the expansion is so that LAD can adjust to the work. LAD has had a declining work load so current staff numbers may be adequate. LAD needs to develop expertise in assessing applications for Legal Aid with Assigned lawyers able to assist.
8. **Phase 1.** Current needs show that SLAS merits expansion NOW to:-
 - (a) Clarify position of grant of Legal Aid for the CFA, Bill Clauses 3 and 4,
 - (b) Expand areas of professional negligence claims, Bill Clause 4 (a)
 - (c) Include Claims against financial institutions in various ways, Bill Clause 4 (b), (c), (e)
 - (d) Include Claims against property developers and managers, Bill Clause 4 (d)
 - (e) Include Class actions etc, Bill Clause 4 (i)

- (f) Insolvency problems, Bill Clause 4(h). Additionally, we have been informed of a special category of employer related claim to be specified under Clause 4 (h). This is to expand Legal Aid to include appeals from the Labour Tribunal to the High Court in respect of claims such as for unpaid wages where the employer is not yet insolvent.
9. **Phase 2** would be other needs in the Bill, to begin from November 2011:-
- (a) Claims arising from the sale of goods, product liability etc. Bill Clause 4(f)
 - (b) Class actions for share holders under the Companies Ordinance, Bill Clause 4 (g)
 - (c) Other class action types with discretion to Director per Bill Clause 4(j)
10. **The Elderly Persons Special Provision.** Government acknowledges that the undue hardship can begin much earlier when it cuts into the life savings of a 50 year old who cannot make back what he spends on litigation at that stage in life. Government have come down from 65 to 60. LASC said this needed to be lower but have not yet specified their figure. **The Bar Association proposes a phased introduction, so now it should be 55**, as this is the retirement age for many occupations in Hong Kong, especially for Police and disciplined services. In November 2011 it can be reduced to 50.
11. **Contribution percentages under SLAS.** They have been reduced over the years and are now very low at 6% for cases settling before trial and 10% for cases going to trial. They are much lower than Recovery Agents at 25% plus.
- (a) There is scope for increasing the contribution percentages across the board for all SLAS cases while still leaving the Legal Aid Schemes competitive against the Recovery Agents percentages.
 - (b) There is also scope for a higher percentage to begin with for the expanded scope cases.
 - (c) Nowadays, the lower percentage for cases which settle before trial may be less appropriate as with Mediation etc there is more work done earlier on and especially for Mediation. These changes can be considered later.
 - (d) Bar Association proposes to maintain the percentages for the current SLAS categories but increase the contribution for the new scope cases at 10% and 15%, but with these figures to be reviewed as indicated above in November 2011.
12. We have not yet seen any paper from LASC for the Meeting of 22nd November 2010 and may supplement this in due course.

Hong Kong Bar Association,
17th November 2010.
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