

## Report of the Special Committee on Legal Aid Reform 2010

1. This Committee has attended Legislative Council Panel on Justice and Legal Services hearings on about 7 occasions since the major submission (which we call Round 1, Bar Submission 24<sup>th</sup> September 2009 of which Appendix I has the Bar Association's Note on SLAS. We continue to rely on this basic paper. Main Points
  - (a) Stalled for 7 years (now 8 years) but continuing support for reforms,
  - (b) Unmet needs proved,
  - (c) Unrepresented litigants are a pervasive problem, see CJR Reports and continuing Judiciary comments,
  - (d) SLAS Fund had \$87million and grossly underused,
  - (e) LASC made proposals for expanding scope of Legal Aid/SLAS in 2002, 2003, and this was based on that work,
  - (f) Raising SLAS eligibility limit or FEL to \$2m.
  - (g) Special Provision for Elderly or unemployed, see LASC Book, 2006,
  - (h) Reversing the decline in Legal Aid,
  - (i) LegCo has powers to amend the FELs by simple Resolution under Section 7.
2. Round 3, Legco Panel meeting of 29<sup>th</sup> March 2010. We got the HAB 3 Proposals on 26<sup>th</sup> March 2010. There had been no consultation with Bar or Law Society, or anyone except maybe the LAD. These proposals derived from submissions, some made years before, so this was a welcome surprise after previous negative papers.
3. Round 4, Bar's Paper for the Legco Panel Hearing of 24<sup>th</sup> May 2010, was a substantial paper 20<sup>th</sup> May 2010. **Bar put forward improvements on the 3 HAB Proposals summarized below.**
4. **Proposal 1**, Replacing the 35% percentile household expenditure by a Median household expenditure.
  - (a) LASC had proposed this in about 2002.
  - (b) Bar submits, following the original LASC advice, that it should be 66% percentile for OLAS and 75% percentile for SLAS which should be adopted by Legco to be more fair and consistent with declared policy.
5. **Proposal 2, Raising the FEL for OLAS.** Why did the Government choose an increase of 50% to \$260,000? No explanation from HAB. This arbitrary approach was criticized by several Members.
  - (a) Several LegCo Members said it was Too Low.
  - (b) Not logical nor consistent, and should at least be 100% like SLAS and so should be raised to \$350,000.
  - (c) This was justified by case examples provided by Bar at Appendix A in May Paper that household of 2 adults and 2 children with worker earning \$35,000 per month (figure used by HAB) would be well over the HAB new OLAS FEL and Not eligible for Legal Aid.
6. Raising the FEL for SLAS by 100% to \$1 million was no longer adequate now.
  - (a) This was the figure the Bar Association suggested way back in 2003 or earlier. Since then, the Bar's Submission of 24<sup>th</sup> September 2009 suggested \$2 million which was supported by Law Reform Commission in 2007 Report on

Conditional Fees. The LASC in 2010 thought it should be \$1.3 million based on the average cost to the Plaintiff of a SLAS case at \$1.29 million.

- (b) \$1.3 million for costs per LASC was only half the costs bill a Legal Aid applicant/litigant faces if he lost the case and had to pay the Defendant's bill as well, or hence as per Scott Report, if he were not protected "against the liability to pay heavy costs to the other party should they fail in their action." Hence the limit should be either \$2.6 million or reasonably \$3 million, hence the Bar's position was that the FEL for SLAS should be raised to \$3 million in order to meet the Scott Report Principles, see para 2.11-2.13, 2.33.
- (c) SLAS cases are known and accepted to be more costly and complex, especially Professional Negligence cases covered by SLAS, see LAD Access to Justice 2000.
- (d) Bar May 2010 Paper Appendix A gave example showing a worker on \$90,000 per month (figure used by HAB) would be outside the new \$1m or \$1.3 million limit, and closer to \$3m if he had a nest egg small investment flat worth \$2million.
- (e) Thus using 2 methods of calculation, the legal costs method and the example method, the figure of \$2.6 to \$3million was supported.
- (f) The legal basis for the \$3million figure was understood and supported by some LegCo Members, some of whom remarked that there may be 2 Defendants separately represented so costs and "undue hardship" could be even higher.
- (g) The \$3m SLAS FEL limit based on costs of both parties to a litigation, not just the Plaintiffs costs, is right in law and is backed up per Scott Report. The figure of \$3 million is prudent to allow for contingencies and more difficult cases which go to appeal to CA or CFA.
- (h) This point has been omitted by HAB September 2010 Paper.

7. **Proposal 3**, Special Provision for the Elderly, starting at 65 now improved to 60. This originally was another LASC suggestion from 2002, repeated in Chapter 8 of LASC Book 2006, and in Bar 2009 paper.

- (a) At age 50 many ought to have made financial provisions for retirement. At age 50 a litigant would not be in a position of rebuilding his savings if he lost his nest egg on litigation.
- (b) The Special Provision is targeted at the hardship of the target group who had built-up retirement assets or a nest egg, which would be "undue hardship" to lose on litigation expenses, so that the Special Provision should commence at age 50, not as late as 65. You have as much to lose and as little chance to rebuild your capital at age 50 as at age 65 if you spend much of it on an average \$3m SLAS case.
- (c) Especially there is "undue hardship" for those civil servants who retire at 55 and HK Government is the largest employer.
- (d) The Bar proposed that the savings disregarded in SLAS cases must be the new SLAS limit, ie \$3m.
- (e) If the approach is "one size fits all", then the age brackets have to be wide enough to cover those who suffer undue hardship at a younger age, hence age 50 is reasonable.

8. The Bar set out the proper principles for SLAS with References, repeated below. HAB continues to mis-state the criteria, making requirements contra to Section 10(3) of the Legal Aid Ordinance which only requires that the **applicant "shows he has**

**reasonable grounds”** for legal proceedings, not the burden of proving a high chance of success as HAB assert. **The proper principles for 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, see above.
9. So, the SLAS principles are clear
- (a) Government should not slide out of the promise to expand the scope and types of claims when SLAS scheme was financially capable of expansion.
  - (b) Government should not slide out of the intention to expand SLAS when the Class Action procedures had been improved, as is now under Law Reform Commission proposals.
10. Round 5, Legco Panel meeting on 21<sup>st</sup> July 2010, and the Bar submission dated 20<sup>th</sup> July 2010 entitled “Expansion of SLAS is just and Feasible and Needed. The **Insurance** worries of HAB were dealt with. **This proves that SLAS can be expanded in scope as per Proposed Amendments to the Legal Aid Ordinance** since there are reasonable prospects of recoverability of damages via insurance. This work was noted with approval by LegCo Members. Bar provided Appendix I, **Proposed Amendments** to the Legal Aid Ordinance Cap 91 in respect of amending the FEL for OLAS to \$350,000, amending the FEL for SLAS to \$3 million and amending the scope of SLAS.
11. This Bar Submission and Proposed Amendments were welcomed by most persons at the Legco Meeting. At the meeting the Bar made the point that the proposals for the expansion of SLAS were actually initiated by the LASCs Interest Group on the scope of Legal Aid in 2002 so the proposals have been in the pipeline for many years.
12. At the end of the hearing, the Motion was moved unanimously **“That this Panel considers that the Government should, based on the Hong Kong Bar Association’s proposal for amending the Legal Aid Ordinance, conduct a study**

**as soon as possible on the implementation of measures to expand and improve Legal Aid Services.”**

13. The HAB said that the Administration hope to submit to Legco the Legislative amendments for these improvements at the beginning of the 2010/2011 Legislative Session. The Administration was requested to revert to the Panel on its consideration of the proposals put forward by the Bar Association for expanding the scope of SLAS and its proposed amendments to LAO as set out in its submission as well as specific measures to assist employees in the filing of winding-up/bankruptcy petitions against insolvent employers and appeals lodged by their employers against Labour Tribunal awards.

### **Stopping the downward spiral of Legal Aid**

14. The Bar’s Note on SLAS of September 2009 identified a confluence of factors leading to the Decline in Legal Aid including
  - (a) unmet needs;
  - (b) the SLAS Fund being grossly underused;
  - (c) the failure to take advantage of unmet needs and scope for expansion;
  - (d) recovery agents taking advantage of the unmet needs, resulting in some prosecutions or litigants suffering poor results and high deductions;
  - (e) the failure to raise the SLAS means test/FEL to cover the target group, the Middle or Sandwich class; and
  - (f) the current decline in Legal Aid (for example shown by spending figures or as compared to increases seen in Department of Justice Civil Division), could be reversed by these reforms.
15. One result of all this work was that the 2010-11 Policy Address Policy Agenda document of October 2010 at p.57 had new initiatives as follows:

“Enhance access to Legal Aid and free legal advice service to benefit more people who cannot afford private legal fees  
Earmark \$100 million for injection into the Supplementary Legal Aid Scheme (SLAS) Fund when necessary 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.”

Similarly, the Policy Address of 13<sup>th</sup> October 2010 at paragraphs 148-150 stated:

“To make Legal Aid Services more accessible, the Government has recently decided to substantially increase the financial eligibility limits of the ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme. Or over the age requirement for exempting part of the savings in calculating disposal capital will be relaxed from the age of 65 to 60.”

16. These demonstrations of Government’s goodwill and sincerity are welcomed. It is now hoped that the LASC and the HAB consider the Bar’s proposed amendments as requested by the LegCo Panel and implement them. This is part of a process of consulting and reporting from about 2002, involving the Legal Aid Services Council and many others, where after considering priorities, the decision was that a main priority was the expansion of SLAS. The Bar has provided a timetable for phased

action to implement the reforms and a paper setting out the principles for SLAS and has received the LASC Interest Group Further Report. This does not address some of the matters above and we currently await the LASC Report for the next meeting on 21<sup>st</sup> December 2010.

17. The Special Committee has produced several important papers and wishes to thank all those who took part and also the Legislative Council Panel for its understanding and support through repeated meetings so as to ensure progress. There is much work ahead. The Special Committee has welcomed the active help (including attendance in LegCo hearings) by the Chairman, Vice-Chairman and Secretary, and in particular Nicholas Pirie, Christina Lee, Raymond Leung and Valentine Yim who have helped with drafting. Those on the Committee are:-

Ruy Barretto, SC (Chairman)  
Neville Sarony, SC  
Philip Dykes, SC  
Joseph Tse, SC  
Selwyn Yu, SC  
Nicholas Pirie  
Jeevan Hingorani  
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Christina Lee  
Robert Pang  
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Ruy Barretto, SC  
Chairman  
Special Committee on Legal Aid Reform

8 December 2010