

Hong Kong Bar Association Submission
For the Legislative Council Panel on Justice and Legal Services Meeting on 21ST
July 2010

EXPANSION OF SLAS IS JUST AND FEASIBLE AND NEEDED

We refer to the Bar's Submission dated 20th May 2010 for the Meeting of 24th May Paragraph 37 on Page 8, and the Bar Submission dated 24th September 2009, Appendix 1 Note on SLAS.

1. The prime source of funding for the SLAS scheme is a percentage of the costs recovered in successful cases. This Scheme has been in existence for 26 years, since 1984, and is successful. It has been copied in Commonwealth Jurisdictions, such as Northern Ireland. There are good reasons to expand it. Expansion was expressed in previous policy statements. It is essential to cover the community's unmet legal services needs, and help reduce the abuses from contingently funded litigation, run by un-authorized touts.
2. The Scheme has been so successful that the rate of contribution from recovered damages, has been lowered, rather than expanding the coverage. Now it is time for the Administration to consider expanding the coverage. It was initially capitalized in a modest way by the Jockey Club HK \$1 million, and the reserves have been standing at about HK 70 million or more for a number of years.
 - a. The Bar, the Law Society and the LASC have been calling for the extension of SLAS since at least 2003. This call has fallen on deaf ears.
 - b. It is surprising that the Home Affairs Bureau has already ruled out expansion, notwithstanding the obvious success of the scheme and unanimous call for its expansion, which has been echoed by:
 - i. Law Reform Commission Report on Conditional Fees 2007 Para 6
 - ii. Law Reform Commission Report on Class Actions Par 8.45, 47-54 Recommendation 6;
3. It is respectfully submitted that the Home Affairs Bureau's response lacks substance and does not accord with informed opinion and the experience of those in practice and was wrong about the insurance position. **This submission shows the true scope for expansion of SLAS having regard to Insurance and the Recoverability of Damages.**
 - a. We examine the areas which should be expanded.
 - b. Merit of course is the prime criteria for the grant of Legal Aid (subject to means). This should remain so for SLAS too.
 - c. Even if the sole criteria for granting SLAS was the recoverability of damages, then this Submission shows much exists by way of practice or law to ensure damages will be recovered.

- d. If the Administration is looking to see whether Defendants are insured, in the proposed expanded areas, then in the main, the Administration, if it had done its home work would have discovered that in most cases there is either compulsory cover, or voluntary cover already.

4. **Financial Products – Miss-selling (covered by insurance)**

- a. At present the HKMA reports that :-

There are 22,000 complaints of miss-selling of derivative products (including Lehman Brothers cases); there are about 2,500 complaints pending; not all complainants have taken the Lehman Brothers' package offers;

- b. The Complaints level is so bad, that the Financial Services Bureau has proposed an Investor Education Council, and a Financial Dispute Resolution Centre dealing with claims upto a maximum of HK \$500,000.00. If the Administration or HAB had taken on board the submissions in 2003, there would not be this large unmet need.
- c. There is obviously in the future going to be a large gap for cases above \$500,000 in which people have lost their life savings. HKMA reports that about 1/3rd of the complainants are over 50, and about 20 % are over 60 as there is no proper legal frame work or provisions in Hong Kong Law for pensions, save for Government Servants. (MPFO and ORSO Schemes only provide for Provident Funds distributed at retirement)
- d. This means there is a large unmet need for the elderly who have invested in derivatives. This accords with private civil practitioners' experience, who are instructed to advise in these complaints, many of whom are still be miss-sold today, even though they are in their 70s. There are reported cases on the High Court File which alleged derivatives are being sold to 83 year olds in nursing homes.
- e. So clearly there is a continuing need to provide free legal assistance to the old and indigent. Complainants are still sitting outside Citibank as we write, still complaining about the Lehman Bros., products they were mis-sold. Hardly a good advertisement for "Good Access to Justice" in Hong Kong.
- f. As yet the Government has not moved to ban selling of sophisticated financial products to private individuals. So there will be more complaints and cases coming through now. This ban existed in South Korea, Taiwan and the Philippines prior to 2007.

- g. Recoverability:
Most financial institutions carry professional indemnity insurance, which cover them and their staff. This has been confirmed by the HKMA
So successful recovery in these financial miss-selling should not be a problem;
 - h. However, the HKMA investigations and those of the SFC are way behind, with reported decisions being made 5-6 years after the complaints are made.
 - i. Thus recovery from financial institutions is likely to be substantially delayed, when legal aid is required now. Many complaints from the last financial crash will only be investigated beyond the time limitation period of 6 years, and leave people uncompensated for this time.
 - j. (see SFC Website of recent decisions for the delays involved)
(source material Letter to the HK Bar Association)
Financial Services Department working paper on the Investor Education Council)
5. The Consumer Council received nearly 10,000 complaints in 2008 about the provision of financial services, and in 2009 there were 4,968 complaints in relation to Financial Services to the Consumer Council, one of the highest categories of complaint. (See page 64 Financial Services Dept working paper on the Investor Education Council)

6. **Mis-selling of Insurance Products : (covered)**

There is a well established system of complaints being lodged through the Confederation of Insurance Brokers and the Professional Insurance Brokers Association. Complaints of upto \$800,000.00 are handled by the Insurance Claims Complaints Bureau for residents of Hong Kong. This is a non-binding informal complaints procedure. In 2008 ICCB handled about 480 cases, and they heard nearly 300 cases , only 49 of which were closed to the satisfaction of the complainants. The highest award was HK \$390,000.00 and the total amount of the cases that were thus settled was only \$2.14 million.

All insurance intermediaries have had to carry professional indemnity insurance pursuant to the Code of Practice issued by the Federation of Hong Kong Insurers See Section 67 of the Insurance Companies Ordinance Cap 41. The directors and managers all carry professional indemnity insurance too,. This has been in force as long ago as 1994.

If the broker who sold the policy is not an authorized insurance broker, the policy is avoided, and the premiums paid can be recovered.;

7. **Damage and Accidents in Buildings; multi-storey ownership (covered)**

As from 1st January 2011, all buildings the subject of the Buildings Management Ordinance will have to carry insurance coverage of at least HK \$10 million for 3rd Party coverage. All commercial buildings in Hong Kong carry 3rd party liability damage, for both property and personal injury. A new Regulation has been added to the Buildings Management Ordinance for this purpose. See LN 92 of 2007 and the Amendment to Section 41 of Cap 344.

8. **Estate Agents – Miss-selling of Property: (not covered)**

Large Firms of Estate Agents carry Professional Indemnity Insurance as the risks of being sued for negligence in Hong Kong are large. Although the HK Institute of Surveyors and Valuers does not require it as a condition of registration.

The Estate Agents Authority has been established and for some reason there is no requirement to obtain professional indemnity insurance as a requirement of obtaining a licence. We have checked with the Authority and the very limited Code of Conduct, which has been issued by the Authority.

Recent well publicized cases of abuse and continuing problems will probably lead to compulsory insurance and enforcement in due course.

9. **Claims arising from the Sale of New Flats or Offices for Sale (covered)**

- a. All New Buildings of Flats or Offices will be constructed according to the HK Institution of Architects Standard Forms or the equivalent Building Contract. The main contractor will have to take out a Contractors' All Risk Policy for the duration of the Building Contract, which will usually extend beyond the Certificate of Practical Completion into a Defects Liability Period; so if there is a defect in a new flat or office which arises from the construction or finishing of the flat within that period, and there is property damage caused to a purchaser, then primarily this policy will cover any damage which an owner may suffer for physical damage;
- b. If there is miss-description of the property, say as to size, which includes the management agents' offices, and his toilet, for example, then the government usually requires in a consent scheme to have reserves placed for such claims by the development company, and claims which extend the defects liability period.

Thus in most cases where new flats suffer from shoddy completion, then there will be a party of substance to sue for damages. The most common cases involve leakage etc., and Buildings Owners are usually good for the

money in paying these claims, and there is a high rate of recovery for them.

Usually the development companies are very substantial, and therefore recoverability should not be an issue. Anyway, the flats themselves provide good security and are of considerable value so there should be security there, if the flat's purchase cost is refunded.

10. **Claims against Independent Financial Consultants; (covered)**

These persons are regulated by the SFC., and there is a Code of Conduct which has been in force since 1996 which requires the individual IFC, or its firm to carry professional indemnity insurance. Thus in cases of alleged miss-selling, then there is usually insurance coverage in place. There are levels of coverage required, depending on the level of business being written. The minimum coverage requirements today are HK \$10 million

11. **Claims Against Professional People: (mostly covered)**

- a. Doctors and Hospitals – the recoveries in these cases are so good, as the defendants are insured, and the Hospital Authority is self insured;
- b. Barristers and Solicitors have to be insured since the late 1980's and the barristers' minimum coverage is \$2.5 million and a solicitor's is HK 10 million, with top up cover available. The Bar Code of Conduct is the source, and Solicitors' Professional Indemnity Scheme Regulations are the source as well.
- c. Dentists carry insurance as well. Other medical professionals also carry insurance voluntarily, such as occupational therapists and physiotherapists.

12. **Small Marine Boat Accidents- (previously not covered – now covered)**

Small vessels now have to be compulsorily insured since 2008 for HK \$3 million. Many pleasure junks, the 9,000 river trade vessels and modest sized kaidos were originally uninsured. Now they have to be covered as the Bar Association and the Marine Department have pushed successfully for that in 2007.

13. **Disputes Relating to Trusts; (covered)**

Most trust management companies cover two kinds of insurance: 1 for directors' liability insurance and 2 for professional indemnity insurance;

14. **Companies Disputes – Minority Shareholders Rights (covered)**

There is a crying need for proper shareholder protection in Hong Kong, either on an individual basis or on a class action basis. In fact very few cases get off the ground because of lack of funding, and firms of solicitors will not take on this litigation on a pro bono basis. With the Claims in damages provided in Section 168, now expanded since 2002 and/or the claims allowable in damages in lieu of other remedies, there is no reason why SLAS could not be extended to cover these cases. The Dispute over the PCCW Share Capital alteration was a perfect example of this.

If the directors attempt to force through resolutions which are ultra vires the company, then their directors' liability policy should cover that.

Modern Court Management demands group representation in these cases, and SLAS should step in for this type of Group Representation for a number of shareholders.

The Law Reform Commission on Class Actions has recommended that SLAS be extended to cover this area of law.

Public Companies will have substantial assets and their Directors will now have Directors' Liability cover. Their professional advisers, such as solicitors, or their auditors will also have professional indemnity cover.

15. **Sales of Goods and Provision of Services**

The Consumer Council has an action fund to assist aggrieved consumers. In 2008 the Consumer Council received over 38,000 complaints, of which only 3 % related to complaints about mortgages, financial services.

This is a vast area of law which is not presently covered by SLAS. The Consumer Council claims a 70 % resolution rate. What happens to the other 11,000 odd cases that are left unresolved each year? Source; Financial Services Dept Report Page 64.

16. **CONCLUSION**

- a. This part of the Bar's Submission shows that the Administration is out of touch with the lower and middle income sections of society, and there are large areas of unmet needs for ordinary people, which could be, and should be, covered by SLAS. Which is better - A legal action which pays for itself via the self funding tried and tested SLAS, or a proliferation of publicly funded and administered schemes, with relatively few teeth for enforcement, limited scope and which result in delay, uncertainty and dissatisfaction for many claims.

- b. If “recoverability” was the sole criterion, our researches indicate most of the would be Defendants are covered by Insurance, or would have substantial assets from which damages and costs could be recovered. There is no basis, therefore, not to allow this very successful scheme not to expand. If it had funded the Lehman Brothers settlement of say HK20 Bn x 60 % , at 10 % recovery on costs, this would have provided the SLAS account with \$1.2 billion.
- c. We would invite the LASC and the Legal Aid Department to work out the planned expansion of SLAS to cover these areas.
- d. We enclose as Appendix 1 the Bar Association suggested draft amendments to the Legal Aid Ordinance sections 5 and 5A(b) and Part I of Schedule 3, which could be moved by the Legislative Council pursuant to Section 7 for the expansion of SLAS. There is also a draft to provide an assessment of resources which mitigates the undue hardship for those aged 50 and above.
- e. We therefore invite the Administration’s response within the next 3 months, ie. By 21st October 2010;
- f. If the Administration requires more additional time and cannot achieve immediately the figures calculated in the Submission of 20th May 2010, the Bar Association would require the figures which the Administration selects to be clearly understood to be transitional and interim pending an increase to a more suitable figure within a period of 12 months.

Respectfully Submitted.

Hong Kong Bar Association
20th July 2010

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Appendix 1 to Hong Kong Bar Association Submission of 20th July 2010

Proposed Amendments to the LEGAL AID ORDINANCE CAP. 91

1. Amending the FEL for OLAS, Amended Section 5 (1) to read as follows:- “Legal Aid to which this section applies shall, subject to and in accordance with this Ordinance, be available for any person whose financial resources do not exceed ~~\$175,800~~, \$350,000, for the civil proceedings mentioned in Part I of Schedule 2, except proceedings mentioned in Part II of that Schedule.”
2. Amending the FEL for SLAS, Amended Section 5A(b) to read as follows:- “whose financial resources exceed ~~\$165,700~~ \$350,000 but do not exceed ~~\$488,400~~ \$3,000,000.”
3. Amending the scope of SLAS, The Amended Part I of Schedule 3 to read as follows :-

“1. In the Court of First Instance, the Court of Appeal **and the Court of Final Appeal**, civil proceedings brought by the aided person for damages in a claim arising from personal injuries or the death of, any person and proceedings incidental to such proceedings including the defence of any counterclaim.

2. In the District Court, civil proceedings brought by the aided person for damages in a claim arising from personal injuries to, or the death of, any person where the claim exceeds \$60,000 or where, in the opinion of the Director, the claim is likely to exceed \$60,000 and proceedings incidental to such proceedings including the defence to any counterclaim.

3. In the District Court, proceedings brought by the aided person under the Employees’ Compensation Ordinance (Cap. 282)

4. In the Court of First Instance, the Court of Appeal, **the Court of Final Appeal**, or District Court , civil proceedings brought by the aided person for damages :

- (a) for medical **(including the provision of ancillary medical services)**, dental or legal professional negligence **and/or any other type of professional negligence, such as the services provided by accountants, estate agents, surveyors, and engineers;**
- (b) in a claim by any person against financial institutions and insurance companies concerning financial products or the provision of financial services; this includes any other institution selling or offering for sale financial products or services whether the same be registered under the Securities and Futures Ordinance or not; and/or against persons who are so registered;

- (c) in a claim by any person against insurance companies concerning insurance policies;
- (d) in a claim by any person against property developers concerning purchase of newly constructed premises; including claims arising from the use or occupation of defective premises, where the aid person suffers personal and/or financial loss arising therefrom;
- (e) in a claim against trust management companies;
- (f) in a claim arising from the sale of, alteration and repair of goods, and in the provision of goods and services;
- (g) in a claim arising from loss or damage caused to an aided person who is a shareholder in a publicly listed company on the Hong Kong Stock Exchange in respect of loss or damage to his interests as a minority shareholder therein as provided under the Companies Ordinance Cap. 2, or otherwise under the law;
- (h) in any claim brought by the aided person against his employer whom insolvency proceedings have been instituted or are being instituted by another person or persons;
- (i) in any group or class action involving, 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;
- (j) in any other group or class action in which in the opinion of the Director of Legal Aid a certificate should be given to persons to pursue rights,

where in the opinion of the Director, the claim is likely to exceed \$60,000 including the defence of any counterclaim.”

5. Draft amendment to reduce undue hardship to persons approaching retirement age, is suggested as a new Section 8C of the Legal Aid (Assessment of Resources and Contributions) Regulations, Cap.91.

“Resources of persons aged 50 years and above.

For the purposes of determining the financial resources of a person aged 50 years and above at the date of application, the amount of savings or assets to be disregarded will be \$350,000 in respect of applicants for ordinary legal aid under Section 5 of the Ordinance and \$3,000,000 in respect of applicants for supplementary legal aid under Section 5A of the Ordinance.”

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