

Report of the Special Committee on Legal Aid Reform

1. The 7 “rounds” in the Legislative Council Panel on Justice and Legal Services were summarized in the Report of 8th December 2010, which also welcomed the Chief Executive’s 2010- 2011 Policy which promised expansion and improvements to Legal Aid Services. This year there has been less activity and the ball is in Government’s court awaiting reports, drafting and action.
2. The LASC Interest Group Further Report on SLAS dated 16th November 2010 was valuable in acknowledging that reform was necessary. The Bar responded by letter 7th December 2010 with suggested amendments and a suggested meeting but the LASC issued their Report to the Chief Executive on the 13th December 2010. The Bar provided a detailed submission to the Legislative Council Panel on Justice and Legal Services meeting on the 21st December 2010. LASC had not attended several of the meetings so were not directly aware of the consensus and support for reform in the Legislative Council Panel. There was no complete package, no time table, wrong criteria, principles and approach, no improvement to existing proposals, and defective reasoning. The reforms which LASC either deferred or rejected include as follows:
 - (a) Claims Against Incorporated Owners - a new exclusion of claims against individual owners.
 - (b) Estate Agents, independent financial consultants and insurance agents - deferred.
 - (c) Claims Against Developers and the Sale of New Flats- deferred.
 - (d) Trust Claims- rejected.
 - (e) Company Disputes, Minority Shareholders- rejected.
 - (f) Sale of Goods and Provision of Services- deferred or on hold.
 - (g) Class Actions- omitted.
3. Round 9, the Legislative Council Panel Meeting on 24th January 2011, was again attended by us with a Submission. Appendix 1 explained how it was fundamentally wrong to divide SLAS into 2 comparative risk calibrated schemes comprising greater and lesser risk cases. Appendix 2 explained the need for SLAS in company disputes, minority shareholders and class actions. On 24th January 2011, the Bar put forward a Note with the amendments compared with the LASC position in simplified format.
4. We pointed out that 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 unmet needs results in reduced access to justice which can be largely ameliorated by SLAS coupled with Mediation. By letter 14th January 2011, the Bar Association informed the Judiciary about the expansion of Civil Legal Aid. Their response commented on the challenges to the Judiciary posed by the increase in litigants in person and welcomed discussion of any proposal for the expansion of Legal Aid.
5. A summary of the situation and lack of progress on the draft Bill and Proposals put forward by the Bar Association in July 2010 and mostly endorsed by the

LegCo Panel is as follows. The LegCo Panel Meeting on the 28th March 2011, considered the HAB's Review Paper of 22nd March 2011, 15 pages. The Bar explained the need for each of the reforms and the expanded scope, refuted the HAB arguments for no action, welcomed some reforms, and requested that there be an annual review of SLAS. Legislative Councillors expressed support for the expansion of the scope of SLAS. Instead of a package of reforms, a piece meal approach is seen. On 30th March 2011 a Resolution of the Legislative Council, LN 51 of 2011 set out the changes to the FEL, for OLAS from \$175,800 to \$260,000, and for SLAS from \$488,400 to \$1.3million. By LN 83 of 2011 this came into operation on 18th May 2011.

6. The Legislative Timetable was for the Administration to submit Legislative Proposals for LegCo's scrutiny after the Summer Recess with a view to implementing the proposed expanded SLAS before the end of 2011. The Chairman of the Panel requested that this be submitted in October 2011, members agreed to monitor closely this work and requested that the Administration should provide a Progress Report in June 2011. Members would also follow-up in the next Legislative Session on other proposals not supported by the Administration such as claims against Property Developers in respect of Compulsory sales, and Claims in respect of Sale of Goods and Provision of Services.
7. What was requested and promised in March 2011 has not been produced. At the last Panel Meeting of 20th December 2011 we discovered, by questioning, that the Administration had excluded the Lehman Brothers/Derivatives cases from the SLAS reforms but had only agreed to remove the exception in Cap 91, Schedule 2, Part II, para 11, so aid would now be available for OLAS only. This was contrary to the LASC Reports of 16th November and 13th December 2010, the views of the LegCo Panel and others. The current position, without explanation, continues the lack of access to justice for the 'sandwich class' who are the main victims of such products. The Administration has not kept to the timetable but much has been achieved thanks to the efforts of the Panel and its Chairman, Hon Margaret Ng.
8. A Checklist of the Reform position.
 - (a) HAB principles for the expanded SLAS are contrary to past principles and not consistent with Article 35 of the Basic Law nor Section 10(3) of the LA Ordinance – the key principle of expanding legal aid scope to increase access to justice and the rule of law was identified by LegCo members;
 - (b) HAB Failed to see the Reforms as a Package – however, proceeding piece meal is better than nothing provided there is continuous progress in reform; the \$100 million injection was promised on the assumption there was a coherent package of reforms giving wider access to justice.
 - (c) No sound reason given for refusing to adopt the Financial Eligibility Limits (FELs) proposed by the Bar for OLAS \$350,000 and for SLAS \$3m – HAB contrary to Scott Report principles,- but better than nothing. (On 30th March 2011 a Resolution of the Legislative Council, LN 51 of 2011 set out the changes to the FEL, for OLAS from \$175,800 to \$260,000, and for SLAS from \$488,400 to \$1.3million. By LN 83 of 2011 this came into operation on 18th May 2011.)

- (d) Proposal for Age related exemption for assets test, should be age 55. However, the age 60 compromise proposed by Administration is a reasonable beginning, However, there is only partial exemption of assets of only up to \$260,000 given per LN 35 of 2011 dated 15th February 2011. Such a limited exemption is mean spirited and is contra to the intention of the reform, which is to protect the assets of the elderly from having to be 'used up' in litigation before they become "eligible" and when they cannot earn back those monies because they are approaching the end of their working life.
- (e) Amendments to cover CFA cases still needed: see Bar draft Bill of July 2011;
- (f) Expansion of scope of Professional Negligence: - accepted but too limited. No sound reason provided to exclude Independent Financial Advisors, especially since a new tribunal is being proposed for cases upto \$600,000. Accordingly, SLAS should be available for cases valued from \$60,000 upwards both in the Financial Services Tribunal, and District Court and High Court for higher value cases - but a welcome beginning to the expansion of scope;
- (g) Sale of insurance products- accepted, - but should include Insurance Intermediaries, brokers and agents;
- (h) Claims against Developers in sale of first hand Residential properties- accepted – but too narrow. It should cover all New properties as often properties are presold or "flipped" before completion and should be wider since estate agents are being included for professional negligence; some defects in new buildings do not appear for years, so the claims could be for cases within 6 years to cover contract claims and subsequent purchasers within 6 years per Section 4 of the Limitation Ordinance Cap.347.
- (i) Employees claims on appeal from the Labour Tribunal- accepted, but should include Enforcement of awards;
- (j) Derivatives etc – HAB wished to defer and study any detailed proposal next legislative session, but this has been advocated since 2002, long before Lehman Brothers, and there is public need and strong LegCo and LASC support. The current position is to only remove the exception from OLAS but not to reform SLAS to include such cases. The 'sandwich class' have been the main victims of such products so excluding such cases from SLAS makes no sense. Limitation periods are running so action is needed soon to avoid prejudice to the victims.
- (k) Claims against Incorporated Owners – HAB reject this but LegCo support;
- (l) Claims from small marine accidents – HAB reject but provide no adequate reason;
- (m) Claims against Property Developers by minority owners in compulsory sales – HAB reject this LegCo proposal which LegCo strongly supported; and see SCMP Leader "Social justice is more than hollow words" dated 4th April 2011.
- (n) Claims in respect of Trusts – HAB reject but LegCo support;
- (o) Claims involving disputes between Limited Companies and their minority shareholders – HAB reject despite "outrageous" PCCW example;

- (p) Claims arising from Sale of Goods and provision of services – HAB reject for no valid reason, but LegCo support;
 - (q) Class Actions which are an important adjunct to the above and part of future CJR reforms, were also omitted from the HAB Paper. The Bar had put forward 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; and
 - (r) A special discretion should be repositied in the Director of Legal Aid in appropriate class action cases to grant legal aid in appropriate cases.
 - (s) Thus 7 out of about 16 reforms are under way in some form, but only 4 of the 14 SLAS reforms are partly accepted. There is much room for further reform.
9. Robert Pang was involved in the proposals for increased civil free legal advice and pro bono work. It was noted that advice is a valuable adjunct towards access to justice, but it is not a substitute for drafting papers and actual legal representation at hearings. There needs to be a built-in referral system to statutory Legal Aid, whereby pro-bono advisers and judges involved in the cases can put up cases with merit for Legal Aid. Failing this, there will be often be disjointed bits and pieces of paper work and no aid where it is crucial, namely in the tribunals concerned and litigants and judges will still continue to feel either aggrieved or burdened. The recognition of the need for more free legal advice reflects the unmet needs identified by the SLAS and FEL reforms proposed by the Bar and this point is well understood by the LegCo Panel.
 10. Nicholas Pirie spent much time preparing a summary of legal aid in Hong Kong in response to the World Bank's inquiry and providing suggestions for keeping the reform work going. Some members have joined the LASC Interest Groups so it is hoped better co-operation can be achieved.
 11. The Special Committee has welcomed the active help, including attendance in LegCo hearings, by the Chairman of the Bar and in particular Nicholas Pirie, Raymond Leung, Ashok Sakhrani, Valentine Yim, Robert Pang and others who helped in the drafting process. Those on the Committee are: Neville Sarony SC, Philip Dykes SC, Russell Coleman SC, Selwyn Yu SC, Nicholas Pirie, Jeevan Hingorani, Tim Kwok, Valentine Yim, Ashok Sakhrani, Robert Pang, Raymond Leung and Cindy Lee.

Ruy Barretto SC
 Chairman
 Special Committee on Special Legal Aid Reform

Dated: 9 January 2012