

SUBMISSION OF THE HONG KONG BAR ASSOCIATION

ON THE RECOMMENDATIONS MADE BY THE LEGAL AID SERVICES COUNCIL TO THE
CHIEF EXECUTIVE OF HKSAR ON THE ISSUE OF THE ESTABLISHMENT OF AN
INDEPENDENT LEGAL AID AUTHORITY

INTRODUCTION

1. Legal aid is a pillar of our society to ensure equality and enhance "Access to Justice". The principle and importance of having an Independent Legal Aid Authority ("ILAA") has a deep-rooted foundation since the Scott Report (1986) and supported by consistent policy ever since.
2. Despite a motion passed by the Legislative Council in July 1993 in favour of independence of legal aid, the Administration decided to defer the establishment of an ILAA. Instead LASC was established in 1996 as a *"half-way house"* charged with the duty to *"advise the Government on the feasibility and desirability of the establishment of [an ILAA]"* (see s.4(5)(b) of Legal Aid Services Council Ordinance (Cap. 489).
3. By September 1998, the LASC (under the Chairmanship of Mr. J.P. Lee) recommended on the basis of sound principle the establishment of ILAA upon the findings made by the firm of Coopers & Lybrand, which was commissioned in 1996 to look into the issue. Notwithstanding the strong recommendations of the LASC, Mrs. Anson Chan (the former Chief Secretary) declined to adopt the recommendation on the ground that legal aid has an **"uncapped" budget** and should remain a government department for financial accountability. In short, the rationale was no cap, no independence.
4. Over the years, the deficiencies of a moribund legal aid service operated by civil servants became more obvious. By way of examples:
 - (a) Since 2002, the HKBA and the Law Society and the Interest Groups of LASC have alerted Legal Aid Department (LAD), then under the Chief Secretary, of the inadequacy of legal aid in terms of coverage due to the low Financial Eligibility Limits (FELs) and the types or scope of cases included.
 - (b) It was only through the heightened efforts of HKBA and the Law Society and other stakeholders, particularly between 2009 and 2012 that the Administration reacted by increasing the FELs (with reference to changes in societal conditions rather than only with reference to inflation) and introducing some piecemeal reform to expand the coverage in terms of the types of cases.
 - (c) Meanwhile, amidst strong opposition and representations from the legal profession, LAD was put under the portfolio of the Home Affairs Bureau (HAB) in 2007. At an AJLS Panel meeting on the discussion of expansion of legal aid, HAB promised to continuously review the reform on legal aid coverage but that has not materialized.

5. Without any consultation, by a letter dated 16th October 2009, the past Chairman of LASC, advised the then Chief Executive of HKSAR that there was "*no pressing need to de-establish LAD and substitute it by an [ILAA]*". Despite request from the AJLS Panel, LASC refused to produce the Report of the Working Party, which apparently led to the recommendation.
6. Against this background, Deloitte Consulting (Hong Kong) Limited ("Deloitte") was commissioned in 2011 to conduct a review. When they had almost finalized their report representatives of Deloitte met the HKBA and the Law Society on 12th September 2012 and they were alerted to a number of issues, facts and avenues of investigation pertinent to the study. Neither LASC nor Deloitte reverted to the HKBA or Law Society to discuss further although this was clearly needed.
7. By a letter dated 2nd May 2013, LASC provided HKBA with a copy of its letter to the Chief Executive of HKSAR dated 30th April 2013 (the "Letter") containing some recommendations based on a report furnished by Deloitte claiming "*there is no immediate need to establish an [ILAA]*". HKBA was asked to give its views on the recommendations, which had already been made to the Chief Executive.
8. The Letter contained an attachment of the extract of minutes showing the **contrary view** expressed by Miss Josephine Pinto questioning the legality and the need for the study by Deloitte and the change of stance since the recommendation of the LASC made in 1998 without any reason. However, in the Letter, there was no discussion of such contrary view whatsoever.
9. Only an Executive Summary was provided to HKBA. The full version of the Report was not provided to HKBA until 14th June 2013 after specific request.
10. In the said meeting on 12th September 2012 and thereafter through Mr. Dennis Kwok (Legislative Councilor from the Legal Constituency), LASC was required to produce the "Terms of Reference" for the study. This was not forthcoming. Another request was sent on 14th June 2013 and it was not until 19th June 2013 that HKBA was provided a copy of "Consultancy Brief" by LASC.

OVERVIEW

11. LASC relies heavily on the Report and adopts its recommendations **without its own additional independent reasoning**.
 - (a) No consideration was given to the established principle pertinent to the desirability of an ILAA, which is a **long-standing aspiration**.
 - (b) No justification or explanation was proffered for the about-turn from its own recommendation in 1998.
 - (c) LASC has misunderstood and misstated its statutory duty in advising the Administration as to "*desirability*" and "*feasibility*".
 - (i) It has never been doubted, nor could it be disputed, that an ILAA is desirable.

- (ii) However, in the Consultancy Brief, LASC has wrongly instructed Deloitte to equate "*feasibility*" with "*practicability*" (see Para.4(d) of Consultancy Brief).
 - (d) This has resulted in Deloitte erroneously splitting "*feasibility*" into the "*conceptual*" stage (Para. 169) and an unavowed "*practical*" stage (see Paragraphs 48 to 51 and 194 to 195 of the Report and Para. x below). **This added an extra and non-statutory consideration or obstacle to independence, which they heavily relied upon.**
 - (e) The mistakes and lack of logic were not removed by LASC (see below).
12. Some examples of the errors contained in the Report are as follows.
- (a) The clear views expressed by the HKBA and Law Society were appended to the Report. However, apart from the brief paraphrasing (Pages 39 to 43 of the Report), the issues identified by the legal profession as to "*desirability*" and "*feasibility*" are not discussed or considered.
 - (b) Repeated reliance is placed on the alleged benefit of the so-called "*uncapped*" budget for LAD whereas in fact it is clear even in the Report that there is a ***de facto capped budget*** and there has been no application for supplementary funding for the last 10 years. Taking into account inflation, there has been minimal growth in the LAD budget in real terms.
 - (c) No or no adequate consideration was given to the following factors as clear evidence of the deficiencies of the LAD, which LAD/HAB has failed to properly tackle over the last decade.
 - (i) Unmet needs for legal aid services with people still patronizing recovery agents (particularly in personal injury claims);
 - (ii) The large and increasing number of unrepresented litigants in various levels of courts.
 - (d) Despite the Consultancy Brief requiring an approach from the "*broadest perspective*", and at para 4(d) stating "*The primary concern is that the current scope and quality of legal aid services provided must be preserved and/or enhanced.*" Deloitte failed to consult relevant parties such as the:
 - (i) the Judiciary Administrator on the seriousness of the unrepresented litigants problem;
 - (ii) Administrators of the independent non-LAD schemes (such as the Duty Lawyers Service and the Bar Free Legal Service Scheme and its counterpart operated by the Law Society) on the unmet needs for access to justice and their experiences in running successful independent schemes for people who lack LAD support.

- (e) The sampling of objects for the study is illogical. The persons from whom the views were sought and acted upon are far from being representative (see Paragraphs 17 and 18 below).
- (f) The Questionnaires are designed in such way that they produced unhelpful and distorted answers. For instance, a "Yes" or "No" answer is not sufficient to gauge and express the opinion on the issue as to whether *"the LAD currently operate sufficiently independent of government?"* (see Questionnaire at Page 141).
- (g) Statistical results are distorted, misrepresented and/or misused (see Paragraph 19 below).
- (h) Whereas an ILAA is *"feasibile"* at what is called *"conceptual"* stage, there is no basis to suggest that it is not feasible at the unavowed *"practical"* stage (a non-statutory criterion), which is dictated by irrelevant considerations such as:
 - (i) the expenses and time involved in the transition from LAD to an ILAA;
 - (ii) the morale and views of LAD staff.
- (i) If the factors identified by Deloitte (as set out in sub-paragraph (h) above) are to dictate the answer to the question of *"feasibility"*, there is no point in conducting another review in the future since those so-called *"practical"* difficulties (though not insurmountable) will always be there. On this sort of reasoning, the review in the future as recommended in the Report will be a pointless exercise (see Para. 194 of the Report).

THE FAULTY APPROACH - FINDINGS LACKING IN RELIABILITY AND VALIDITY

- 13. Deloitte failed to understand from their Consultancy Brief and Section 4(5)(b) of the LASC Ordinance that the establishment of the LASC was not to be a permanent arrangement, and they were to examine the *"feasibility"* of establishing an ILAA and to suggest *"enhancements"* to the current system
- 14. Deloitte further failed to understand from the 1998 LASC Report and the decision of Mrs. Anson Chan, the then Chief Secretary, **the main reason why an ILAA was not established in 1998, was the assertion that the LAD budget was genuinely un-capped leading to the thinking that continued non-independence was justified** by the argument that LAD with an uncapped budget must remain within the institution of Government in the name of financial accountability, i.e. *"he who pays the piper calls the tune"*.
- 15. Thus logically, if there is a cap, there can be no longer any opposition to independence. The Report proves that in reality LAD has in effect been operating on a capped budget for many years (see Paragraphs 22 to 25, 31, 38 to 40 and 64 of the Report). Deloitte was clearly informed in their Consultancy Brief that:
 - (a) in 1998 LASC conducted a consultancy study and it was concluded that an ILAA should be established;

- (b) in 2003 again, LASC conducted a new review and confirmed the need for an ILAA, as LAD was not then dealing with the pressing needs of poorer litigants (as shown by the papers of the HKBA and Law Society put before the AJLS Panel in September 2002).
 - (c) The objectives of the study by Deloitte (see Paragraph 4 of the Consultancy Brief) were:
 - (i) to examine the feasibility and desirability of establishing an ILAA;
 - (ii) to compare various operational models;
 - (iii) to recommend the best model for HK;
 - (iv) to propose an implementation plan;
 - (v) to consult as widely as possible.
16. Deloitte has basically avoided the key issues. They made a bare assertion that the LAD should continue (as is) without proper justification or valid reason.
- (a) They have muddled together “*feasibility*” with “*practicability*”.
 - (b) They have not in fact consulted widely.
 - (i) They have not examined or apparently understood the existence of the Duty Lawyer Service (including its Free Legal Advice Scheme), which is a good example of an independent Legal Aid Scheme operating in Hong Kong, albeit funded by the Administration.
 - (ii) They have failed to consult the Administrator of the Bar Free Legal Services Scheme, which provides free services to litigants who have been denied legal aid.
 - (iii) They have failed to consult the Judiciary Administrator notwithstanding information given by HKBA and Law Society during the meeting on 12th September 2012 that there is a rising number of unrepresented litigants (see Annexure 3 & Letter 3rd August 2012 from the Judiciary Administrator at pp. 218 to 221 of the Report).
 - (iv) They have not consulted Mr. JP Lee (former Chairman of the LASC) and former members of the LASC on advancing LASC along the path to the establishment of an ILAA given the earlier views of LASC in 1998 & 2003.
17. Further, the sampling and interview methods adopted by Deloitte were flawed. One would have thought more useful information can be elicited from the unsuccessful legal aid applicants. Their perception of the “*independence*” of legal aid (or otherwise) should carry more (if not equal weight) to that of the successful applicants.
- (a) In the survey of legal aid applicants, no proper consideration was given to the *ratio* of samples taken from the pool of successful applicants (N=64, accepted applicants) and unsuccessful applicants (N=23, unaccepted applicant) notwithstanding its knowledge that

from 2006 to March 2011, there were 105,095 applicants of whom 57,276 were successful and 47,819 were unsuccessful (i.e. almost 1:1) - see p.215 of the Report.

- (b) Only 110 legal aid applicants were surveyed, which is an incredibly small sample.
 - (c) Of the 110 legal aid applicants in the sample, **only 1 was interviewed** (see P.19 of the Report).
 - (d) Apparently, of the 110 legal aid applicants in the sample, 19 withdrew their applications for some reason. However, Deloitte had not ascertained the reasons for the withdrawals.
18. The design of the questionnaires is flawed or calculated to steer towards particular results. By way of examples:
- (a) Telephone Interviews of General Public (pp. 138 to 145 of the Report)
 - (i) Deloitte conducted 1010 telephone interviews (see pp.19 & 151 of the Report) and discarded the respondents over 65 for no reason (see p.138 of the Report).
 - (ii) With the aging population, the views of elderly people are becoming more significant as they are recognized as likely users of legal aid service requiring special FEL allowance for the means test.
 - (iii) The interviewees were forced to answer "yes" or "no" on the question as to whether "*LAD currently operate sufficiently independent of government*" and some possible neutral answers were not offered (p.141 of the Report).
 - (iv) As a result, the data is overly simplistic and misleading.
 - (b) In the interviews with Legal Aid Applicants (pp, 130 & 136 and p. 164 of the Report).
 - (i) There is a rating from 1 to 10. According to Deloitte, rating from 1 - 5 is equated with no desire for the establishment of an ILAA (see pp.136 and 164 of the Report). That is illogical and has led to distortion of the opinion.
 - (ii) The mistake in (i) above is compounded by Deloitte lumping together "*No Comments*" with "*Undesirable*" which has the effect of further distorting the number of negative answers.
19. The results of the surveys and interviews have been misrepresented or misused. By way of examples;
- (a) Without prejudice to the observations in Paragraph 17(a) above as to ratio between accepted and unaccepted applicants in the sample and Paragraph 18(b)(i) as to the errors in the rating, on the question of desirability for institutional independence (at p.164):
 - (i) Instead of 59%, only $(59\% - 24\%) = 35\%$ of the accepted applicants answered it was not desirable;

- (ii) Likewise, instead of 39%, only $(39\% - 5\%) = 34\%$ of unaccepted applicants answered it was not desirable.
- (b) At p.156, it is stated on the question "*Do you agree that the LAD is currently sufficiently independent*" that "*67% of those who answered in the affirmative were legal aid applicants*". This figure of 67% cannot possibly be correct.
- (i) The numbers of persons interviewed are Legal Practitioner (112), General Public (1010) and Legal Aid Applicants (110), i.e. a total of 1,232 (see p.19 and p.151).
 - (ii) Even assuming all legal aid applicants (accepted or unaccepted and those who withdrew their application) had answered in the affirmative, it could only be $110/1232 \times 100\% = 8.9\%$.
 - (iii) Likewise, the assertion that "*76% of those who answered in the affirmative were legal practitioners*" cannot possibly be correct. Even assuming all legal practitioners answered in the affirmative, it could only be $112/1232 \times 100\% = 9\%$.
- (c) Again at p.157, "*no comment*" is equated with "*undesirable*" when it comes to the question "*Who would wish to see an institutionally independent LAD*"?
- (d) At Para. 72 of the Report, it is stated that:
- "The most controversial dimension of independence among legal practitioners is institutional independence"*.
- (i) This comment suggests that institutional independence is controversial or the main issue amongst Legal Practitioners.
 - (ii) In fact, on the question of "desirability", the figures also show institutional independence (79%), financial independence (77%) and operational independence (77%). **This means that the majority of Legal Practitioners indicated it is desirable to have independence of legal aid in all 3 aspects** (see Diagram 12 at p.42 of the Report).

20. Deloitte set out the options at pages 68-84. At pages 98 to 107, they state why they choose the *status quo*, but they do not state why they do not recommend the other options.

NO VALID BASIS FOR LASC TO ADOPT THE REPORT

The Bare Assertion of "No Immediate Need"

21. These numerous errors were not picked up by LASC before they uncritically accepted the Report. In Paragraph 3 of the Letter, it is said "*The Council agrees with the consultant that there is **no immediate need to establish** an independent Legal Aid Authority.*"

- (a) Nowhere does the Executive Summary state this.

- (b) A **bare assertion** to that effect is made in the Report (at Paragraph 194) on the mistaken reliance on the non-statutory and irrelevant consideration that:
 - (i) although an ILAA is desirable (Para. 160) and feasible (at a conceptual stage) it was not feasible (at the unavowed "*practical*" stage) because of the expenses and time for the transition;
 - (ii) there was no perceived need for an ILAA according to the statistics, which as demonstrated above contain material flaws and distortions.
- (c) What the Report does show is, that most informed professional persons with experience of dealing with LAD (i.e. the Legal Practitioners) have consistently affirmed the need for independence. Deloitte did not rate this as important.
- (d) LASC also omits to mention these reasoned contrary views. The Letter is one sided.

Assumed Non-Intervention by Government on LAD v. Assumed susceptibility of ILAA to political inference

22. Paragraph 4 of the Letter suggests that reasoning for the assertion of "*No Immediate Need*" is that "*No Government Interference – therefore independence not necessary*". This is an upside down form of reasoning showing "*expediency*", and "*inertia*" has triumphed over principle and demonstrable evidence that LAD as a government department has not been functioning as it should.

- (a) LASC may have developed this idea from Deloitte's unsubstantiated and subjective assertion that there is no substantiated example of Government interference so the current defective situation can continue. Anecdotal evidence from practising lawyers contradicts this. There is the serious example of the Vietnamese refugees cases in the Report, which seems to be brushed aside on the assumption that recurrence can be prevented.
- (b) Apparently, Deloitte considers that a subjective "*perception*" of no government interference is sufficient to justify the assertion of "*No Immediate Need*" or that support for such assertion can also be drawn from the purported survey findings, for instance, that:
 - (i) to the question of "*Do you agree that the LAD is currently sufficiently independent*", "*67% of those who answered in the affirmative were legal aid applicants*" (see p.156 of the Report); and
 - (ii) "*Approximately 60% [rounded up from 59%] of the accepted applicants do not desire institutional independence for legal aid*" (see p.164 of the Report).
- (c) As demonstrated in Paragraphs 17 to 20 above, these purported findings referred to in sub-paragraph (b) lack reliability and validity since the underlying survey is tainted by faulty design and biased sampling. Deloitte has also misinterpreted, misused and

misapplied the data collected in the survey, such as lumping together 'No comment' with 'No desire'.

23. Deloitte said that an ILAA could be at risk of pressure and interference by external bodies and Government. This demonstrates the one sided arguments. Deloitte identifies the risk of improper influence when legal aid is independent but on the other hand refuses to see any risk of improper influence by Government or others whilst it is a part of Government when logic indicates it is subject to even greater risk of influence. Politics are unavoidable. That is all the more reason to establish an ILAA with institutional safeguards against interference from those in power. This Report is not even-handed and is not to be relied upon. The Report has no material to support the **bare assertion of "No Immediate Need", which is deployed to condone more procrastination.**
24. In making this bare assertion of "No Immediate Need", neither LASC nor Deloitte:
 - (a) ranks LAD's failure to institute reform, and widen the scope of Legal Aid, and raise the FELs for Legal Aid, to match inflation and societal demands in the last decade, to give representation to the sandwich class, as worthy of a mention still less a reasoned discussion of the failures to provide access to justice to those of limited means, which is the core objective of the legal aid system;
 - (b) offers any explanation for departing from the reasoning given by the LASC on 2 previous occasions in 1998 and 2003 that the introduction of an ILAA was long overdue (see "Summary of Ms. Josephine Pinto's View" annexed to the Letter but with no discussion whatsoever).

Downgrading of the established principle of "independence"

25. The principle of independence is the underlying premise of the LASC Ordinance. The ultimate objective is the establishment of an ILAA to replace the LAD now partly supervised by LASC, which is meant to be a half-way house.
26. The inertia shown by LAD and HAB in enhancing access to justice over the last decade demonstrates the half-way house system is not working. There was no growth in the LAD costs (in real terms) and the declining (or stagnant) number of certificates granted between 2001 and 2011 shows a failure to meet growing societal needs and expectations for justice (see Diagram 7 at p.26 of the Report) **Neither LASC nor Deloitte addresses the concerns arising from the failure of LAD to enhance "Access to Justice".**
27. In 2007, the Administration decided to transfer LAD from the portfolio of the Chief Secretary to that of HAB amidst strong opposition of the legal profession and other stakeholders. This was seen as a downgrading of the well-established principle of "independence". In effect the model recommended by Deloitte (at Para. 190) is just a reversal of the transfer to HAB. It demonstrates that the move in 2007 is ill-advised. The reversal of the transfer of LAD from HAB back to the Office of the Chief Secretary is not enough. At best, it can only correct the mistake of back-tracking in 2007.

28. More fundamentally, Deloitte has not addressed the issue as to the realization of the well-established principle of "*independence*" and fulfillment of the aspiration for an ILAA already mapped out in 1998 and 2003. As pointed out by Miss Pinto, LASC cannot do a U-turn without good reason. Up to now, no valid reason is given to prefer the *status quo* of LAD remaining as a government department. The Letter downgrades independence as a key principle to a matter of a mere perception gap, which can be papered over by moving LAD from HAB back to the Office of the Chief Secretary within the hierarchy of the government.
29. Apparently, the thinking of LASC and Deloitte is that to put LAD back under the Office of the Chief Secretary is good enough in addressing the concern of "*independence*". It is clearly not.
- (a) The record will show that while under the Office of the Chief Secretary nothing was done in reality from 1997 through to 2007 (when HAB became the supervisor).
 - (b) Minor progress with reform to increase scope and eligibility levels was made under HAB since 2007 at the behest of the HKBA, the Law Society, the Interest Group of LASC and other stakeholders. Perhaps even at their level, HAB could see how out of date and unjust the Legal Aid limits had become. Deloitte give no proper reasoning for a change back to the old supervisor. Nor do LASC.
 - (c) HAB promised to continuously review and carry on with the reforms propounded by HKBA back in July 2010. They did not.
 - (d) The decline in the grant of certificates since 2006 is a concern. In fact, even with the increase of the FEL under OLAS (from 175,800 to \$260,000) and under SLAS (from \$488,400 to \$1.3m), there has only been an increase in the grant certificates under SLAS, by about 40% which is accounted for by the expansion of the scope of SLAS.

Silence on enhancing "Access to Justice"

30. Both LASC and Deloitte are silent on the primary concern of enhancing "Access to justice". The increasing number of unrepresented parties before the higher courts has a serious effect on the administration of justice. According to updated information provided by the Judiciary Administrator (dated 12th March 2013), the levels of unrepresented parties remain very high.
- (a) In Criminal Appeals, around 50% and for civil trials it has improved slightly from 30 % to 27 %. But for cases involving appeals from Tribunals and Masters, the figure has shot up from 52 % to 67 %.
 - (b) In Magistracy Appeals in 2012, some 64 % of these cases have an unrepresented party, up from 58 % in 2011.
31. These are very worrying trends, and there is no evidence that Deloitte took heed of the figures (up to 2011) provided to them in the meeting with the HKBA and Law Society on 12th September

2012 to consider the need to seek up-dated figures from the Judiciary Administrator to inform themselves of the unmet needs in legal aid services.

32. There is no room for complacency. This worry arising from the large number of unrepresented litigants is heightened by the numbers of people using recovery agents, operating illegally in parallel to LAD. There are many seeking help from the Bar Free Legal Service Scheme (or the counterpart operated by the Law Society) as a last resort and after much delay. Legal aid should be regarded as a right, part of the right to access to justice and representation, not just a charity.
33. This phenomenon is far from an issue of "*resource allocation*" as portrayed in Paragraph 193 (iii) of the Report. Instead, it is a reflection of the entrenched bureaucratic mode of operation of LAD (as a government department) characterized by inertia and the lack of response to public needs and expectations in an advancing and maturing society. It is fairly and squarely an "*institutional*" issue.
34. LASC and Deloitte have not dealt with the complaints of lack of improvement of legal aid services over the years as a consequence of the "*institutional*" problem. Their lack of understanding of this in the context of SLAS can be demonstrated as follows. There is a purported summary of the HKBA's Submission (at p.38 of the Report). It is suggested in Para. 69(i)(b) of the Report that the HKBA supports the view that:

"To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damage to cost ratios".
35. The HKBA's submission is annexed to the Report (at pp.178 to 207) but Deloitte have misread and misunderstood the position of HKBA on SLAS. It is clear from HKBA's Submission (Para. 33 to 39 at p.187 of the Report) that the HKBA is at pains to point out the faulty assertion made by LAD and HAB as to the purpose of SLAS. This and other mistakes and omissions demonstrate the lack of understanding on the part of LASC and Deloitte of the impact of the inertia exhibited by LAD/HAB (between 2009 and 2011) when the expansion of SLAS was debated in no less than 11 sessions before the AJLS Panel. Precisely, it was this self-imposed (but erroneous) criterion of SLAS, which gave rise to the resistance of LAD/HAB to bring about changes to expand SLAS.
36. Further, it is unknown whether (under the model recommended by Deloitte), the need to continuously review the scope of legal aid for future expansion to cover unmet needs previously promised by HAB will be honoured by the Chief Secretary. There is no mention of this, nor the logic for the choice of the preferred option of reverting LAD to the Office of the Chief Secretary fully explained.

The "uncapped budget" is a myth

37. The LAD budget can be discerned from the information provided to Deloitte in its joint meeting with the HKBA and Law Society on 12th September 2012 (see Annexures at pp.215 to 217 of the Report) and also Diagram 7 (at p.26 of the Report). Over the last 10 years, legal aid costs (apparently not including staff costs) was about HK\$400m to HK\$500m. In contrast, the budget

of the Department of Justice, which used to be on a par with LAD, is now HK \$1.7 billion. This demonstrates an effective and stultifying cap.

38. As explained, Deloitte has confirmed that during the last 10 years, LAD has not applied for supplemental funding despite the demonstrable unmet needs in the provision of legal aid services. In effect, there is and has always been a *de facto* capped budget for LAD (see Paragraphs 22 to 25, 31, 38 to 40 and 64 of the Report).
39. In short, the stated objection to the setting up of an ILAA in 1998 (i.e. no cap budget for LAD and hence no independence so as to secure financial accountability) no longer holds true. **The obstacle created by the uncapped budget, portrayed as an unusual benefit, in the Report is just a myth.** There is no reason why ILAA cannot take over the work of LAD and operate within a capped budget. It will enable a move from "*no cap and no independence*" to "*cap and independence*".
40. As matters now stand, the public gets the worst of all worlds i.e. a *de facto* capped budget, no independence, no timely progress to meet needs for access to justice. It seems that the price to pay for ILAA to operate within a capped budget is a small one. **Therefore, now is the time to have an independent ILAA (albeit on a capped budget)** and more timely response to meet the unmet needs and to enhance Access to Justice.
41. Last but not least, the reference to other jurisdiction (such as United Kingdom) moving towards a tighter control by government of the provision of legal aid services is wholly inapt. In the case of United Kingdom, the cutting of legal aid budget is part of the austerity program to reduce national debts (see "Austerity Justice" in Legal Aid Handbook (2013/14) published by the Legal Action Group).
42. Further, there is no equivalent of the SLAS in UK. The selective presentation of the legal aid services in other jurisdiction such as UK betrays the understanding of Deloitte of the real situation on the ground.

"Feasibility" not to be equated with *"practicability"* - *Difficulty of transition from LAD to ILAA and problems with staff morale, etc. much exaggerated*

43. As explained, LASC initiated the mistake of equating *"feasibility"* and *"practicability"*. Deloitte compounded the mistake by adding practicability as a non-statutory and irrelevant consideration to the issue of LAD becoming independent.
44. If *"feasibility"* (at the unavowed or implicit *"practical"* stage) is to be equated with *"practicability"* (as suggested in Para. 4 of the Consultancy Brief), there is no point in recommending the future review at all (at Para. 194 of the Report) since the practical difficulties in transferring LAD to ILAA will always exist no matter how much further down the line (say 10 years, 20 years or whenever).

45. If the practicability (i.e. practicable difficulties) is used as a reason to justify the bare assertion "*No Immediate Need*", there will never be an ILAA.
46. In any event, there is no reason for LASC not to take stock of what was recommended as being feasible in the Cooper & Lybrands Report (1998) instead of commissioning a study afresh conducted by Deloitte.
47. It would appear that Deloitte has exaggerated the practical difficulties for establishing a totally independent ILAA, which have already been previously addressed by Cooper & Lybrands in 1998, as rightly pointed out by Miss Josephine Pinto. By way of example:

- (a) "*Timeframe for a seamless transition launch is expected to be no less than 36 months*" (Table 13 at p.91 of the Report).

This is not excessive at all. A transition period is necessary whenever the transfer from LAD to ILAA is to take place. This does not make it non-feasible or non-practicable.

- (b) Disestablishment Costs of HK\$41m to HK\$600m (Table 13 at p.91 of Report)

In 1998, Cooper & Lybrand (at F.11-12) opined:

"The staff related costs. . . would be in the range of HK\$40m to HK\$430m in NPV (net present value) terms. . . In practice, a significant proportion of staff might transfer to the new body, leading to costs significantly below the higher figure."

Further, costs of retrenchment will be accounted for (in part) in the savings on pension liability of the government in respect of the staff who decide not to accept the transfer.

- (c) Operating Costs including Rent of HK2.38m to HK\$7.51m per month.

In 1998, Cooper & Lybrand (at F.7) advised on the basis of:

"Physical location, if new office provided"
(meaning that it is not inevitable since it is just a matter of accounting).

"The accounting treatment of certain current costs might change for example accommodation and personal fund costs, but this would not affect the real costs to the Government."

48. In short, the alleged problems with "*practicability*" in terms of resources as identified by Deloitte are unfounded or exaggerated. The alleged problems have been considered in 1998 and did not then warrant delay in establishing an ILAA. There is no excuse for more procrastination.

CONCLUSION

49. LASC has not pointed out to Deloitte the major omissions in failing to properly consult the Judiciary Administrator, the Administrators of the Duty Lawyer Service, the Bar Free Legal Advice Scheme and that of the Law Society.
50. Deloitte did not understand the Consultancy Brief in that the 1998 report and LASC's stated views were that the establishment of an ILAA was long overdue, and there are no really good reasons to postpone its establishment further.
51. The issue Deloitte tried to deal with, is the alleged "*mere perception*" problem. This is why they have conducted the surveys. However, the data collected from their survey is neither reliable nor valid. Hence, the results of the survey are flawed and their conclusions and recommendation are not supported by the results for the reasons stated above.
52. The LASC and Deloitte have failed to understand that Mrs. Anson Chan did not accept the recommendation of LASC for the establishment of ILAA in 1998 on the assumption that there was an "*uncapped*" budget for LAD and it would be a real benefit to the public. The Report evidences that in fact there is (and has always been) a cap on LAD spending.
53. Once a capped budget is in place, as now, the previously perceived obstacle to the establishment of an ILAA has been removed.
54. The high figures of unrepresented litigants contrasted with the lack of growth in legal aid figures despite serious unmet needs, coupled with the resistance to reform to meet those needs shows there has been a "*dead hand on the tiller*" for the past decade. This is an institutional problem contributed to by legal aid being a Government department. An ILAA is the answer to these perennial problems and the lack of progress in enhancing legal aid services.
55. The better way forward is not a belated request for yet "*further views*" and more procrastination, but to withdraw the Letter and Report.
56. The saving grace is that the evidence within the Report, on a proper analysis, demonstrates that an ILAA is "*desirable*" and "*feasible*". The alleged practicable difficulties are surmountable and have been addressed by LASC in 1998. There is no more reason to delay the establishment of an ILAA now.
57. The HKBA takes the view that the Letter should be withdrawn and that new recommendations are to be made to the Chief Executive for the establishment of an ILAA so that preparation work can begin without more delay.

Dated 24th June 2013

The Hong Kong Bar Association.