

**Further Submission of the Hong Kong Bar Association
on the Need and Benefits of having an Independent Legal Aid Authority
(now that Legal Aid Expenditure is shown to have been capped de facto)**

(For AJLS Panel Meeting of the Legislative Council on 24th June 2014)

1. By a letter dated 11th September 2013, the Home Affairs Bureau ("HAB") sent to the Hong Kong Bar Association a copy of the **Information Paper** provided to the Panel on Administration of Justice and Legal Services ("AJLS Panel") of the Legislative Council concerning Legal Aid budget and expenditure as requested by the AJLS Panel at its meeting on 25th June 2013.
2. **This Information Paper reinforces a point in the Bar's submission** (dated 22nd June 2012) on "The Need to Establish an Independent Legal Aid Authority" (Paragraphs 7, and 61-69) and Bar's Submission (dated 24th June 2013) on "Recommendations made of the Legal Aid Services Council ("LASC") to the Chief Executive" (Paragraphs 37-42), which is that since Legal Aid Department ("LAD") operates with a *de facto* cap on expenditure now, there is no longer any reason for rejecting independence.
3. A reason given by Government for rejecting independence in 1998 was that funding accountability was needed. It was said that because there was no cap on the LAD budget for legal aid services, therefore no independence could be granted as financial controls were needed over expenditure. **The corollary would be that an Authority, having a cap or similar controls and similar funding accountability, would then be eligible for independence.**
4. **LAD expenditure is now de facto capped by budget and departmental controls, Financial Secretary control, procedure and law.** Individual Legal Aid cases costs are not capped as LAD by Legal Aid Ordinance has to pay for the costs of the individual cases for which it grants aid. That is only part of the picture. The Bar's Submission is that LAD expenditure as a Department is *de facto* capped by a combination of factors and this is confirmed by the Information Paper.
5. The Information Paper shows that LAD as a government department operates under a budget known as the LAD's Annual Estimates of Sub-Head 208 Legal Costs. Because it provides services subject to variable demands, like for example CSSA, the LAD is regarded as "*non cash limitable*". This is because by the Legal Aid Ordinance the LAD has a statutory duty to cover the legal costs of each of the cases for which it has granted Legal Aid as part of its statutory duty to provide some degree of legal service.
6. In this narrow sense, the Legal Aid cases individually can be said to be uncapped for legal costs by law. However the relevant point is that **the Information Paper and the facts show that LAD as a department has its total Expenditure de facto capped by law, the procedures, and the budgeting and expenditure controls of LAD and its decision makers.**

7. There are **controls over LAD expenditure by law and procedure** notwithstanding that Paragraph 10 of the Information Paper states that:

"in exceptional circumstances where the costs exceed the approved provisions within a financial year, supplementary provision would be sought according to the relevant provisions of the Public Finance Ordinance, PFO CAP 2, Section 6(3), to ensure no eligible Legal Aid applications would be turned down owing to lack of funds."
8. Further, the Information Paper reveals the pressures and constraints on the LAD decision makers to keep within the budget and the Public Finance Ordinance. If the budget is exceeded the Director of Legal Aid has to justify the "*exceptional circumstances*", and has to request the Financial Secretary to support and make a proposal for funds and obtain the approval of the Finance Committee of Legco.
9. This is an untested situation and the pressure to avoid the difficulties of explaining this would serve as an incentive on the Director of Legal Aid, the Legal Aid Officers and other decision makers in LAD to keep expenses under tight control, ie cut costs, cut work, cut services and thus cut quality and the provision of experienced lawyers and to cut the expansion of Legal Aid in ways which may drive up expenditure.
10. In Deloitte's Report on independence (full version March 2013, at Paragraph 39), it is **admitted that LAD had not sought supplementary provisions in the past 10 years**. According to LAD this is because of robust budgeting whereas others assert this is because of the tight control by LAD on legal aid spending. Whereas Deloitte's say at paragraph 38 that "*stable trends*" account for the stable expenditure, the Bar and the Law Society have noted the lack of increase in expenditure as symptomatic of a **moribund department** which is failing to expand access to justice and expand Legal Aid in the face of increasing unmet needs.
11. Even if both causes are involved, this shows that Legal Aid, though un-capped by law in relation to individual cases costs, the LAD as a department is *de facto* capped in actual practice. **It is capped by the budget** and tight control over expenditure by LAD over individual case expenditure. **It is capped by procedure**, unless and until the Director of Legal Aid can make out a case so as to persuade the Financial Secretary to make a proposal to permit more money. **Finally it is capped by law**, until LegCo agrees to the supplementary provisions. The Information Paper thus makes a distinction without a material difference and shows that LAD expenditure is *de facto* capped.
12. **If an Independent Legal Aid Authority were in existence, it could operate with similar controls with a *de facto* cap, under which LAD operates at the current time**. There would be adequate assurance from fiscal controls. This analysis shows that the former Chief Secretary, Anson Chan's reason to reject independence in 1998 on the basis that LAD's expenditure for individual cases was not capped was actually a reason without substance because of the controls which then existed and which could be put in place appropriately for

an independent Authority. This structure for controls for an independent Authority is explained in the LASC book, Legal Aid in Hong Kong, 2006, pages 236-237.

13. **More independence leads to better legal aid.** The main difference is that instead of expenditure being controlled by a civil servant with Director of Legal Aid and LAD officers in awe of the top ranking Financial Secretary and the like, it would be administered by professionals who are institutionally independent of Government and who would be robust in demanding the monies and resources needed to achieve the real objectives of the Legal Aid Ordinance. When the persons asking for more are no longer in an Oliver Twist situation of being a supplicant begging before a supervisor with power over him, but is an independent champion of the public interest, there is more chance of obtaining the resources needed to carry on the duties. This sort of reform would have the benefit of reducing the institutional and financial control and influence of Government, which currently exists over the operations of LAD as a government department.
14. **Currently, the departmental priority of reducing costs and having stable or non-growing budgets has adversely affected the delivery of legal aid services and their expansion to meet growing and new unmet needs.** Legal Aid has become moribund to the extent that there are excessive numbers of unrepresented litigants in civil and criminal litigation whilst the budgets and statistics show a decline in Legal Aid services when the need is higher than ever. As a government department, LAD is failing to provide legal aid to those of limited means in respect of unmet needs.
15. **In Conclusion, now that Legal Aid Department expenditure is recognized as *de facto* capped by various controls, there is no longer any obstacle to an independent Authority with appropriate controls to provide public accountability. This will lead to a service which better delivers legal services to those with limited means.**
16. Lastly, by a letter dated **24th March 2014**, the Hong Kong Bar Association invited LASC to respond to its submission (dated 24th June 2013), which was lodged before the AJLS Panel for its meeting on 25th June 2013, **raising specific queries on the reliability and validity of the Deloitte Report** relied upon by LASC as justification for not recommending the establishment of an Independent Legal Aid Authority. **A letter dated 26th May 2014 was received from LASC, which singularly fails to address any of the specific queries.**
17. For Ease of Reference of the AJLS Panel at its meeting on 24th June 2014, the Hong Kong Bar Association re-submit the following documents:
 - (1) HKBA's Submission on "The Need To Establish An Independent Legal Aid Authority with a "**Chronology of Events**" at Appendix 1 (22nd June 2012);

- (2) Letter from LASC to HKBA dated 11th September 2013 (enclosing the Information Paper);
 - (3) HKBA's letter to LASC (dated 24th March 2014) enclosing:
 - (a) Statement by the HKBA on "the Desirability of an Independent Legal Aid Authority" - the current situation is an **impediment to Access to Justice** for Personal of Limited Means and the "Sandwich Class" (dated 5th July 2012) - with enclosures.
 - (b) Submission of the HKBA on the "Recommendations made by LASC to the Chief Executive of HKSAR on the Issue of the Establishment of an Independent Legal Aid Authority (dated 24th June 2013) - **raising queries on the Deloitte's Report** - lodged before AJLS Panel on 25th June 2013.
 - (4) Letter from LASC to HKBA dated 26th May 2014.
18. The government represented by HAB has downplayed the fundamental principle and the real reason for an Independent Legal Aid Authority, which have been clearly identified and repeatedly canvassed by the Hong Kong Bar Association and many other stakeholders. The papers submitted by HAB for the forthcoming AJLS Panel meeting on 24th June 2014 fail to note and deal with the points repeated hereinabove.

Hong Kong Bar Association
19th June 2014

THE HONG KONG BAR ASSOCIATION'S SUBMISSION ON THE NEED TO ESTABLISH AN INDEPENDENT LEGAL AID AUTHORITY

I. INTRODUCTION

1. For decades the Hong Kong Bar Association (HKBA) has supported the establishment of an Independent Legal Aid Authority ("ILAA"), which has been proved to be all the more necessary by recent events. Institutional conservatism and lack of response to societal changes fostered by a lack of institutional independence has resulted in unmet needs and major shortfall in legal aid services to those in need.
2. Hong Kong is committed to the observance of the Rule of Law, and access to justice is essential to ensure that the Rule of Law is observed. The proper provision for Legal Aid is a key element to access for those who cannot afford the costs of legal representation themselves. This is a basic right.
3. We note that the provision of free or subsidized legal representation in criminal cases is a basic human right guaranteed by Article 14 (3) (d) of the International Covenant of Civil and Political Rights which is incorporated into Hong Kong Law, by Article 39 of the Basic Law, and the Hong Kong Bill of Rights Ordinance Cap. 383.
4. Article 35 of the Basic Law provides that Hong Kong residents shall have the right to access to the courts. This right should not be theoretical, and should be wide enough to cover those cases where because of complexity of the law and/or because of what is at stake, a lay person cannot and should not be forced to be his own advocate in his case.
5. The HKBA and the Law Society have long maintained for good reasons that there was a need for an ILAA (see, for instance, Submissions of HKBA dated 1st September 1998, 28th May 2007, 7th June 2007, 28th December 2007 and 4th September 2009).

6. The fact that there has *hitherto* been no ILAA established requires some examination of the issue. The history of the community effort to fight for an ILAA is outlined herein.

II. PREVIOUS ATTEMPTS TO ESTABLISH AN ILAA

7. The HKBA has outlined the moves towards an ILAA (see Chronology of Events at Appendix 1).

- a. The Working Party on Legal Aid recognized in its 1986 report (the "Scott Report") that giving the Legal Aid Department independent status would enhance its neutral position and recommended that the Department should be re-titled "*Legal Aid Commission*" with a status outside the civil service, like the Department of Audit (see Scott Report at Para. 5.14).

- b. In 1993, a motion was passed in Legislative Council in favour of independence of legal aid. On 21st July 1993, The Honorable Moses Cheng said the Government's role in legal aid, however effective and well-intentioned:

"[is] simply counter to common principles of independent judicial propriety. In most developed democratic societies the justice systems have evolved sufficiently to separate the role of Government and remove any lingering doubts over conflicting or self-serving interest . . . The powerful perception of "the fox guarding the hen-house" must be washed away from our justice system".

(see Report of the Sittings of Legislative Council of Hong Kong (Session 1993/94), pp. 4929-4931).

- c. The motion of the Legislative Council in 1993 was not carried into effect. Instead, the Legal Aid Services Commission ("LASC") was established on 1st September 1996 chartered with the function (under s.4(5) of the Legal Aid Services Council Ordinance, Cap. 489) to advise the Government on:

"(b) the feasibility and desirability of the establishment of an [ILAA]".

- d. Thereafter, in its report entitled "The Feasibility & Desirability of the Establishment of an Independent Legal Aid Authority" published in 1998 (the "1998 Report"), the LASC (then under the Chairmanship of Mr. Lee Jark Pui, JP) observed that:
- i. ". . .it is an institutionally flawed arrangement for legal aid to be administered by civil servants because of the risk of pressure from the Government. Moreover, the present institutional set-up encourages the perception of a lack of independence. Normal fairness principles require those who administer legal aid not only to be independent and impartial but manifestly seen to be independent and impartial. As the Government funds legal aid services, there may be an impression that "he who pays the piper calls the tune". Institutional independence for legal aid, therefore, is even more important." (at Para. 5.3 of 1998 Report)
 - ii. The establishment of an [ILAA] is the natural conclusion of more than three decades of debate in the community (see Para. 5.16 of the 1998 Report).
- e. Unfortunately, the recommendation of the LASC in 1998 was turned down by the Administration on assertions, in summary, that the payer *should* call the tune because most of the time the payer did not interfere, which was an unprincipled approach founded on complacency about the inherent risks from the few cases where rights could be compromised by decisions arising from lack of independence (see LC Paper No. CB(2)379/99-00(07) at Paras. 6 to 13). In particular, the Administration argued that:
- i. it was generally acknowledged that legal aid had been administered independently in the majority of cases, including many in which legal aid was granted to people with cases against the government;
 - ii. that an "uncapped" budget for legal aid services would mean that Legal Aid Department should remain within the institution of government in the

name of accountability (see Paragraph 10 of LC Paper No. CB(2)379/99-00(07), referring to the enactment of Administration of Justice Act 1999 (in UK) for the assertion that:

"contrary to common belief, an open-ended budget managed by an independent authority is not a viable option in the face of rapid growth of legal costs and ever-increasing demand for legal aid services" ;

- iii. staff morale of Legal Aid Department would be affected;
 - iv. there were sufficient safeguards to ensure independence of the Director of Legal Aid.
8. The reliance on the Administration of Justice Act 1999 (in UK) as justification for Legal Aid Department (with an uncapped budget) to remain within Government structure is wholly inapt. To start with, in UK there has never been the equivalent of SLAS in Hong Kong, which is self-sufficient, and the 1999 Act was aiming at cutting the legal aid budget, for instance, by introducing Conditional Fee Agreements. What is (or is not) done in UK is hardly an excuse to delay the establishment of an ILAA.
9. Incidentally, even after the Administration of Justice Act 1999, the lack of legal aid for the defendants in the case taken out by McDonald's Restaurant in UK was held by the European Court of Human Rights to be a violation of the entitlement to a fair hearing under Article 6 of the European Convention Human Rights and Fundamental Freedoms (see Steel & Morris v. The United Kingdom (2005) 18 BHRC 545). Notwithstanding that that case involved defamation, which, as matters now stand, would also not have been covered if it had happened in Hong Kong, the importance of 'equality of arms' or equal access to justice as a matter of human right is well demonstrated.
10. HKBA has for decades maintained the same stance as to the need for an ILAA. This is reflected in HKBA's submissions on divers dates in 2007 opposing the transfer of the Legal Aid Department to be under the "portfolio" of the Home Affairs Bureau ("HAB").

11. Despite the very strong opposition of the HKBA by its submissions dated 28th May 2007, 7th June 2007 and 28th December 2007, the Legal Aid Department was put under the "portfolio" of HAB. The *de facto* "downgrading" of the independence of the Legal Aid Department was completed. Instead of deriving and projecting a degree of independence from other departments by being under the aegis of the highest level Bureau with no particular exposure to litigation, it came under the control of a Bureau whose decisions affect those most likely to be applicants for Legal Aid and whose decisions are sometimes under challenge in the courts.

12. Thereafter, matters took place which demonstrated the adverse consequences of the lack of independence. The current situation has proved to be unsatisfactory and the disadvantages of being under a government department are not just a matter of perception but are matters of substance which go to the heart of lack of regard for public or professional opinion, poor decision making, poor governance, inefficiency, and lack of consideration for the unmet needs of society for Legal Aid. These are the hallmarks of a non-independent, non-accountable system. The need for reform became clear. On 16th October 2009, in the purported discharge of its function under s.4(5(b) of the LASC Ordinance, in the absence of any consultation with the legal profession or solicitation of public opinion by survey, LASC (under the chairmanship of Mr. Paul Chan, JP) issued a letter to the Chief Executive of HKSAR citing the same factors identified in 7(e) above concluding that:

"The Council acknowledges that it will be ideal for a separate entity to administer legal aid independent of the government to deal with the perception problem. However, in view of the very satisfactory service currently provided by the LAD, the views of the LAD staff on the matter, and having considered the present financial position of the government, the Council does not see a pressing need to disestablish LAD and substitute it by an [ILAA]. The perception problem is acknowledged but it is not a priority issue for legal aid in Hong Kong. The Council has concluded that it is not the opportune time to pursue with further study on the establishment of an [ILAA]".

13. The lack of public consultation before the LASC's recommendation and/or conclusion has attracted much criticism in the meeting of the Panel on Administration of Justice and Legal Services (the "AJLS Panel") held on 25th January 2010. Despite the request of the AJLS Panel, LASC refused to disclose the Report of the Working Party (of LASC), which apparently led LASC to the conclusion that there was no pressing need to establish an ILAA.

14. In the subsequent meeting of AJLS Panel on 29th March 2010, Mr. Paul Chan, whilst acknowledging the criticism for the handling of review, still refused to disclose the report compiled by the Working Party citing confidentiality agreement with the staff of Legal Aid Department in the course of consultation as the reason (see Minutes of Meeting of AJLS Panel (LC Paper No. CB(2)1581/09-10) at Para. 23(b)). However, it is inexplicable why the report of the Working Party could not be disclosed with names of staff (if any) obliterated.
15. Instead of producing the Report of the Working Party, LASC gave a summary of the findings and recommendation of the Working Party in a letter dated 19th March 2010 (LC Paper No. CB(2) 1156/09-10(04)). The HKBA notes with astonishment that in this letter, LASC claims that the working party "*invited comments from the legal profession*" (at p.2/7 of LASC's letter). This is incorrect. In any event, the lack of transparency and accountability arising from the non-independent set up was obvious. The failure to state the law and principles in favour of independence or refer to the LASC book Legal Aid in Hong Kong, 2006, Chapter 9, on the subject coupled with the degree of complacency towards the status quo made it appear that even the independent minded LASC had succumbed to the inertia which is the consequence of working with a government department under the current interim arrangement.
16. In fact, no comment from the HKBA was sought in 2008 or 2009 for the purpose of any review by LASC as to the feasibility and desirability of establishing an ILAA. It was fortuitous that around the same time (i.e. about July 2009), the Legislative Council published a "Research Report on Legal Aid Systems in Selected Places" (the "Research Report").
17. By a letter from the AJLS Panel (dated 10th July 2009), HKBA was invited to comment on the Research Paper. In reply, HKBA furnished a detailed written submission in September 2009 (with Appendix I - Note on SLAS and Appendix II - "The Authority Responsible For Providing Legal Aid" which highlighted the need for an ILAA).
18. Meanwhile, the Law Society also independently responded to the Research Report by way of a Submission (dated 1st September 2009) reiterating that:

"The Law Society has long advocated and continues to advocate for the establishment of an independent statutory Legal Aid Authority".

19. In the circumstances, it is not correct for LASC to assert in its letter to AJLS Panel (dated 19th March 2010) that:

"The Law Society of Hong Kong regarded the transfer of the legal aid portfolio in neutral terms. As to independence of legal aid, the Law Society believed that there were already sufficient statutory checks and balances to ensure that legal aid was administered justly. Notwithstanding the safeguards, the Law Society supported the call for an [ILAA] to be set up".

20. Pausing there, it is noteworthy that since the transfer of Legal Aid Department to HAB in about late 2007 or early 2008 (amidst the strong opposition from the HKBA), the financial tsunami had struck in October 2008. The Lehman Brothers cases involving the mis-selling of financial products (giving rise to close to 20,000 complaints lodged by investors with the Hong Kong Monetary Authority) and the manipulation of voting of minority shareholder in a meeting of PCCW on 9th February 2009 had caused major repercussions. All these events called for action, rethink and expansion of the legal aid system. Regretfully, nothing was done by LASC, HAB or the Legal Aid Department, prior to the publication of the Research Report.
21. The foregoing tends to show that the LAD and LASC were complacent, following the *status quo*, echoing the line of the Administration that there was no urgency to establish an ILAA. The lack of institutional independence was reflected in the lack of independent initiatives to identify the unmet needs for legal aid to provide access to justice to more people in more types of cases.
22. Events over the last decade have shown that the legal aid budget has shrunk in real terms, and the coverage has dropped. In contrast, the government is deploying seemingly disproportionate sums of public funds on infrastructure and other developments. Despite the theoretical "uncapped" budget, for a number of years the Director of Legal Aid has not applied (or would not apply) for supplemental funding from the Legislative Council

to fulfill unmet needs in the provision of legal aid services. By way of comparison, the budget of the Department of Justice has increased substantially.

23. The HKBA believes that the arguments for the establishment of an ILAA are all one way. They should be part of the New Administration's Programme to re-establish the commitment to access to the Rule of Law for people in need, public official's honesty and to help re-instill public confidence, which the current Administration has obviously lost.
24. If the ILAA is established, then there can be no question as to whether the ILAA's decision making can be influenced by pressure brought to bear on the authority. There is a distinct impression at present, whether through indifference, or through a policy feeling that "*everything is all right, don't rock the boat*" mentality, which seeks to uphold the *status quo*. This may have been the current Administration's policy, but it is now time to move on.

III. LACK OF AWARENESS OF HAB (AND LEGAL AID DEPARTMENT) AND INSUFFICIENCY OF LASC TO ADVISE GOVERNMENT ON EXPANSION OF SLAS

25. Despite the detailed recommendations of the Interest Group of the LASC on the desirability to expand the scope of SLAS, which was supported by HKBA by way of submission of HKBA before the AJLS Panel meeting on 25th April 2002, nothing was done by the Administration.
26. The issue of expansion of SLAS was only resurrected after the publication of the Research Report (in about July 2009), followed by submission of the HKBA in September 2009. It was only then that the LAD and/or HAB saw fit to look into the expansion of the scope of SLAS again.
27. This process has taken 2 years, and many meetings with the professions to achieve modest improvements in the provision of Legal Aid (see Chronology of Events at the Appendix 1 hereto). It seems that the HAB has had little experience about legal aid and

the present Legal Aid Department have felt initially threatened, and then co-operative with the professions' wishes.

28. It is possible that LASC has become less pro-active because it could see no prospect for reform and improvement within the non-independent set up. Nevertheless, despite the unmet needs being identified by the Interest Group of the LASC and supported by HKBA back in April 2002, nothing was done by LASC or Legal Aid Department over the years to seek to expand Legal Aid in order that timely legal assistance might be rendered to the thousands of Lehman Brothers retail bank clients, who lost modest sums on average less than HK\$200,000 through mis-selling of mini-bonds and other structured financial products.
29. The Administration had to step in to keep protestors off the streets, and set up the Compensation Scheme. These people could not afford to take on the banks in this mis-selling scandal. So Legal Aid should have been granted quickly. Legal Aid in the preceding decades, in the 1980's, and 1990's has always quickly responded to societal needs, by quickly expanding the coverage of legal aid to meet these needs.
30. Meanwhile, the Interest Group of LASC had been reconvened on 21st April 2009 to follow-up on the expansion of SLAS (see the Appendix to the "Further Report on SLAS" produced by Interest Group of LASC, November 2010).
31. Notwithstanding that the Government was supposed to seek advice from LASC, HAB informed the AJLS Panel on 29th March 2010 that it had decided that the increase in Financial Eligibility Limits (FEL) meant that there could be no expansion of coverage of SLAS. This astonishing position was taken by HAB without waiting for the results of an updated assessment by LASC and/or the Interest Group of LASC (see Minutes of Meeting of AJLS Panel held on 29th March 2010, at Para. 54).
32. The conduct of HAB, supposedly on advice of Legal Aid Department, has given rise to understandable concern as to the independence of legal aid services. In view of the lack of progress, at the AJLS Panel meeting on 21st July 2010, HKBA produced a draft amendment to the Legal Aid Ordinance (Cap. 91) to set the tone and pace of reform to bring about an expansion of coverage of SLAS. A motion was unanimously passed at the

AJLS Panel meeting and HAB was asked to follow-up on the "package" of reforms and improvements propounded by HKBA by way of the draft amendment.

33. In September 2010, contrary to previous understanding, HAB came up with a position out of the blue as to the criteria for expansion of coverage of SLAS (at Para. 15 of LC Paper No. CB(2)2298/09-10(01) dated September 2010) that :

"To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio".

34. This erroneous view was maintained by HAB throughout despite it being contrary to the LASC book Legal Aid in Hong Kong Chapter 9 page 227, and despite repeated submissions of HKBA to put the principles and the record straight (see HKBA's Submissions before AJLS Panel meetings held on 30th September 2010, 22nd November 2010, 21st December 2010 and 28th March 2011).

35. In the foregoing submissions, HKBA repeatedly emphasized that the principles for expansion of SLAS are as follows:

- a. Significant injury or injustice to the individual, currently reflected in the case of having to be worth \$60,000 (see Schedule 3 of SLAS).
- b. Involve monetary claims and have a reasonably good chance of success (see Government Consultation Paper on Legal Aid 1993, at Para. 22 and s.10(3) of Legal Aid Ordinance, Cap. 91).
- c. Expenses and difficulty and costs are not an argument against expanding SLAS to cover more justified types of claims (see Report of the Reconvened Working Group on Legal Aid Policy Review (July 1994), at Para. 6.6).
- d. Worthy candidates for inclusion can be considered when SLAS is financially capable for further expansion (Para. 6.7 of 1994 Report).

- 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 (Para. 6.8 of 1994 Report).
 - f. Class actions were only excluded because the Hong Kong legal system does not yet provides for class actions (see Para 13 onward of Government Consultation Paper 1993).
36. In light of the HKBA's submission as aforesaid, HAB eventually acknowledged the historical development of SLAS to cover "*monetary claims and have a reasonably good chance of success*" but in the same breath still maintained that "*The high chance of recovery of damages helps ensure, to a large extent, the financial sustainability of the scheme*" (see Paras. 12 and 13 of LC Paper CB(2)600/11-12(01) from HAB dated 20th December 2011).
37. Once again, HKBA had to reiterate the principles for expansion of SLAS in a written submission put before AJLS Panel meeting on 20th December 2011 (see LC Paper CB(2)648/11-12(01)).
38. In short, HAB has misled itself as to the underlying principles and the original design of SLAS and sought to elevate "*high chance of success with good damages to costs ratio*" - which is probably a misreading of the observations made of the past performance of SLAS in funding personal injuries claims (see Legal Aid In Hong Kong published by LASC (2006) at p.226) - to become a criteria for the expansion of SLAS and for identification of the additional types of cases to be covered.
39. Regrettably, despite repeated clarification by the HKBA, the same misconception has crept back in HAB's paper (HAB/CR 19/1/2) in March 2012. This misconception on the part of HAB has led to much and unnecessary delay in the determination on the scope of expansion of SLAS.

40. Labouring under the misconception of *"high chance of success with good damage to costs ratio"* as a criteria, the Legal Aid Department (at the behest of HAB) saw fit to rely on the dismal experience under OLAS (in respect of non-Personal Injury cases) to argue that non-PI cases (with a success rate of only 70%) did not have *"high chance of success with good damage to costs ratio"* and argue against expansion of SLAS (see HAB's paper put before AJLS Panel meeting held on 22nd November 2010).

41. The said argument of Legal Aid Department (and HAB) was only based on 5 non-PI cases (in 2008) and 8 non-PI cases (in 2009) funded by OLAS). Common sense dictates that the results of such small number of cases can hardly be representative. The fact that HAB (and LAD) sought to deploy such small statistics to argue against expansion of SLAS give rise to concern as to the conviction of the Administration.

42. After many rounds of discussion, a number of types of cases, in addition to the recommendations of LASC (dated 13th December 2010), have been included in the expansion of SLAS. Notably, upon the recommendation and insistence of the HKBA, the following categories of cases have now been included and consequential legislative amendments are in the pipeline.
 - a. Professional negligence claims against Planners (as defined in Planners Registration Ordinance, Cap. 418), Estate Agents (as defined in Estate Agents Ordinance, Cap 511); and Landscape Architect (under Landscape Architects Ordinance, Cap. 516);
 - b. claims arising from negligence of an insurer, insurance agent or authorized insurance broker as defined in s.2 of Insurance Companies Ordinance, Cap. 41;
 - c. claims arising from mis-sale of first-hand property.

43. The upshot of the outcry for expansion of SLAS is that it has now been proposed that OLAS be amended to allow legal aid to be granted for claims arising from the sales of derivatives and structured financial products where fraud, misrepresentation or deception is/or may be involved. This is however still not satisfactory, since such claims are not yet covered by SLAS. The "sandwich class" are most likely to be victims in such cases and most likely to be in need of Legal Aid to have access to justice, but would still be kept out of the Legal Aid umbrella.

44. The lack of conviction of the Administration and the lack of vigour of the LASC in promoting the expansion of SLAS give rise to serious concern that both the LASC and HAB are falling into a sense of complacency and are in a state of lethargy. This is typical of a government department which is not accountable to its client base or to the public.
45. It is most regrettable that in the initial process of deliberation on the expansion of SLAS, LASC tended to drag its feet and simply echoed the Administration's line. Again, the need for an ILAA is accentuated.
46. On a different note, on the issue of criminal legal aid, the same degree of reluctance to change is observable. Criminal procedure has now become more complex. In particular, in appeal case, in order to prepare proper grounds of appeal, counsel would invariably read through massive amount of court transcripts. It was not until very recently that some form of remuneration was provided to Assigned Counsel for the work.
47. The level of counsel fees paid for legally aided criminal cases is so out of tune with the prevalent economic conditions over the last few decades that the scheme could hardly attract and retain more experienced barristers to defend the legally aided defendants. Consequently the un-equal access to justice is aggravated and perpetuated. It is to the credit of the members of the legal profession that despite the derisory fees scale, they have nevertheless taken on the duties and shouldered the responsibility of representing those who otherwise cannot afford private representation.

IV. FAILURE TO MAKE TIMELY RESPONSES BY EXPANDING LEGAL AID TO COVER SOCIAL NEEDS

48. This was patently noted in the Lehman Brothers' Cases; Legal Aid should have been involved, either by an *ad hoc* scheme under SLAS or a quick amendment to the Legal Aid Ordinance to embrace these new types of claims, which would have brought 10% of a \$19 billion settlement into the SLAS Fund. There has been a failure to keep up with the needs of society, despite this being discussed in Legal Aid in Hong Kong, 2006 Chapters 7 and 8.

49. There was a public perception that the Administration had come to some arrangement with the Banks which mis-sold these products or where, in some cases, criminal offences were involved. The net result was there was a Compensation Scheme in which only the banks were required to pay back part of the principal to some investors (not the promised interest) in exchange for a quick payment, and no criminal prosecutions.
50. The perception was that Legal Aid was kept out of the picture deliberately by the Administration. The general perception is that if Legal Aid had been involved and test cases brought to the Courts, proper settlements could have been reached and full compensation achieved. The law would have been clarified and the number of further cases reduced.
51. Instead of the recent Legislative Council Sub-Committee Report blaming government officials and demanding political solutions, there would have been a legal solution and more justice. Protestors were on the streets until very recently in early 2012. This can hardly be the best advertisement or testament for the proper functioning of the Rule of Law and the due administration of justice and the image of Hong Kong being a safe and well regulated haven for investors.
52. The Consumer Council has only funded less than 10 of these cases and these are just coming to court now. Practitioners know that the numbers of other complainants are in the 1000s and many more have registered complaints, now that the time bar is drawing near.

V. BLINKERED PERCEPTION THAT EVERYTHING IS ALL RIGHT WITH THE SYSTEM

53. In the view of the HKBA, this is typical problem for a non-independent body or government department mindset. There was a promise to review the system every 5 years. This has not happened. When the HKBA initiated the last round of improvements since September 2009, there was strong resistance to the need to extend SLAS (see Letter from the LASC to the Chief Executive dated 13th December 2010). It has taken some 12 debates in the AJLS Panel to reach the proposed amendments to cover the additional type of cases (as identified in Paragraph 42 above) which were all along included in the

HKBA's recommendation but initially rejected by LASC and HAB without any valid reason (see also Paragraphs 73 to 74 below).

54. The HKBA believes that if there was an ILAA established, there would be a clear mandate to properly monitor and review its operations annually, deal with adjustments required to the Financial Eligibility Limits (FELs) and at the same time actively engage the professions in discussion about new areas for the provision of Legal Aid.
55. There would be a lesser need or frequency to go back to the Legislative Council, for an inquisition on the failures of government departments and to expose the inertia of those advising the government or failures of the Hong Kong Monetary Authority, etc. There would be no need to wait for the next scandal or issue to erupt, which will further expose the un-met needs for legal redress in our society.

VI. THE PROCESSES BY WHICH NEW AREAS OF LEGAL AID COULD BE EXTENDED

56. The HKBA believes that if our excellent system of administration of justice is to be fully utilized, then Legal Aid must develop and be engaged in the new areas of law as well as social, environmental and financial problems, which constantly come to the fore.
57. Members involved in the recent past discussions have come across repeated intransigence to accept that new areas of law and societal needs should be looked at. This is because, we suggest, that the Legal Aid Department is either out of touch with professional practice or has no section tasked at looking at new areas of law to cover and the unmet needs. Even if it did have such a section, and it suggested reform, it could find itself overruled by the senior officials in HAB who at that level have no mandate for independent thinking or action. It is therefore not surprising that there is neither incentive nor initiative to innovate, reform and improve.
58. By way of example, it is obvious that Class Actions should be covered (see Paragraph 35 above). The Consumer Council has taken very few of these claims over the past few years. The scathing observations made by Rogers VP in the PCCW Case (CACV No. 85

of 2009 (unrep) with Reasons handed down on 11th May 2009 following pronouncement of judgment on 22nd April 2009) shows that shareholders' rights are being abused.

59. If Hong Kong is to have a more credible financial regulatory system, then the establishment and protection of individual shareholders' rights should form an integral part of that system. Lamentably, HAB and Director of Legal Aid have hitherto still not accepted the value and social justice involved in funding minority shareholder cases.
60. Other public interest areas, such as environmental protection to protect the health and wellbeing of a cross-section of individuals and groups of people also come to mind, but they fail to have legal aid support. In consequence, Hong Kong's quality of life continues to fall behind other jurisdictions, despite we being parties to the obligations in various international conventions.

VII. THERE BEING NO CHANGE IN THE JUSTIFICATION AND ASPIRATION FOR AN ILAA, IS LEGAL AID SERVICES IN HONG KONG SADDLED WITH THE STARK CHOICE BETWEEN "UNCAPPED" FUNDING AND INDEPENDENCE ("HOBSON'S CHOICE")

61. Current experience shows the present system is failing the public in a number of crucial ways. The Administration and the LASC, have been extremely slow to respond to the need for timely responses and changes, and anyone who has been to the AJLS Panel debates over the last 3 years, senses there has been a lack of urgency in the whole process. The HKBA believes that this inertia is brought on by lack of accountability and the false sense of complacency that everything must be all right. A basic cause for this attitude and this unsatisfactory result is the lack of institutional independence of the LAD.
62. The basic aspiration for independence has not changed. Unless there is a change in the position of the LASC since the 1998 Report (see above), LASC should be (and should be seen to be) taking all necessary and pro-active steps to advocate and facilitate the establishment of an ILAA.

63. The fact that LASC issued the review report on 16th October 2009 (without seeking the views of the legal profession or any public consultation) adopting the same argument of the Administration in 1999 in rejecting the need for the establishment of an ILAA has reinforced the concern about the institutional flaw identified in its 1998 Report.
64. The HKBA believes that the LASC should take the lead to expose the lack of cogency in the Administration's position and the Hobson's choice between (a) an "uncapped" legal aid administered under government structure; and (b) an ILAA with a capped budget.
65. The transfer of Legal Aid Department to HAB (in 2007) was a retrograde step from independence. As a matter of common knowledge, all Bureaux of government operate under a budget. Although the legal aid fund is theoretically uncapped, it is unknown when was the last time the Legal Aid Department applied for supplemental funding. It gives rise to the perception that the benefits of an uncapped legal aid budget is more apparent than real.
66. It is a matter of fundamental principle that needs to be clarified once and for all. In short, the virtues and benefits of having an ILAA should not give way to the exigencies of administrative convenience and perceived better accountability of a government department. This is particularly so when in its present operation it is handicapped by the defects and shortcomings arising from being a government department discussed herein.
67. Conversely, if it is accepted that as a matter of principle, in order to enjoy the benefit of the so-called "uncapped" legal aid funding, the institution responsible for its administration has to be within the government structure, there is no point in LASC doing its periodical reviews on the "*feasibility and desirability for the establishment of an [ILAA]*" in the discharge of its function under s.4(5)(b) of Cap. 489.
68. To put it bluntly, if, contrary to its findings and recommendation contained in 1998 Report, LASC now subscribes to the Government's argument that Legal Aid Department should remain part of government in order to benefit for an uncapped budget, the HKBA believes that it is meaningless for LASC to purport to conduct periodical review on the establishment of an ILAA, since it would be a foregone conclusion.

69. Should the case be otherwise, LASC should take the stance that the sooner the Legal Aid Department is moved out of HAB and the government, the easier is the transition and the least is the cost and the impact on staff morale.

VIII. IS THE LEGAL AID SERVICES COUNCIL WORKING?

70. Clearly the LASC was set up as a stop-gap measure in 1996. Unfortunately, it appears to have also fallen into the same inertia groove of a government department, when instead it should have made a clarion call for public debate and a considered revision of the Legal Aid System by about 2006. No papers have been disclosed by the LASC that it even considered recommending the extension of Legal Aid to Lehman Brothers' Cases. Nor was there any evidence of LASC initiating reform proposals of its own during the period 2006-2010. It was prodded into action in late 2009, and its recommendations to the Chief Executive were then inappropriate.
71. The HKBA has the distinct impression over the last few years, that the members of the LASC, who are busy people, do not have independent legally trained support staff to be regularly reviewing the unmet legal aid needs in Hong Kong. Constant independent review should have been dealt with by a proper administrative and legal and technical team behind them. Doing LASC work requires a great deal of time and expertise and it takes much time to become conversant enough with the concepts and working procedures and problems of Legal Aid.
72. Members of the Bar who sit on LASC, give their time for free, and have been called upon to work and produce papers in the last current review period which went well beyond the call of unpaid members of this Council. They had to call for help from other members of the Bar to put up proposals in the LASC consultation paper. The HKBA is left with the impression that members of the LASC have been struggling to cope with the issues raised over the last 3 years, and their backup support has been minimal.
73. Certainly the LASC has had little time or inclination to deal with the new subject areas identified by HKBA in July 2010 (*c.f.* LASC's recommendation to the Chief Executive dated 13th December 2010). By way of example, in LASC's recommendation, consideration for areas of claims involving Professional Planners, Landscape Surveyor,

Estate Agents, Insurance Agents, Insurance Consultants, sales of new flats, Small Marine Accidents were *deferred* for no valid reason. Class Action was *ignored*, which would have been most relevant in cases involving sales of goods and provision of services and environmental cases. Claims involving Minority Shareholders' Rights was *rejected* mainly on the ground that it was also not covered under OLAS!

74. It was only at the insistence of the HKBA that some of the deferred or rejected types of claims have now been included in the expansion of SLAS (see Paragraph 42 above). There is an impression that the LASC members are too busy to deal with important matters of detail and policy and for the proper extension of the Legal Aid scheme. The HKBA is not being critical of the members of LASC per se because they contribute their free and unpaid time to undertake this public service. The problem is with the lack of independent backup and resources that LASC is provided with such that LASC does not have the ability to go ahead with reforms, which would appear not to be favoured by HAB and the Legal Aid Department.

75. Conclusion on the function of LASC: This kind of half way house arrangement does not command nor instill public confidence. Under Section 4 of Cap.489 the LASC is not permitted to direct staff and is remote from individual cases, which would provide live examples for needs of reform. It is difficult to monitor the day-to-day workings of the Legal Aid Department, and hence it is difficult for LASC to obtain the managerial material or data so as to form a realistic and informed view about its shortcomings and unmet needs, so as to advise on matters of principle (see Paragraph 3.6 of 1998 Report). The Legal Aid Department is under the HAB. In management terms it is not independent, and it is not accountable to LASC which is mainly advisory. The legal and professional resources allocated to it, are minimal. Hence the Recommendations in Chapter 6 of the 1998 Report. LASC should be abolished and replaced by a supervisory board of an ILAA. This is the way forward if the Rule of Law is to be maintained and preserved. The new Administration has a golden opportunity to show its commitment to the Rule of Law and to make access to justice a reality for the people of Hong Kong.

IX. THE IMPORTANCE OF PERCEPTION OF LACK OF INDEPENDENCE OF THE DLA

76. Legal Aid is a complex subject and takes years to understand, let alone reform. Unfortunately part-time LASC members with no legal knowledge are in the hands of Legal Aid Department, who influence the perception that everything is fine. The HKBA believes that the members of the public and the members of the professions have the perception that the Legal Aid Department does not act independently of the Administration. For the reasons set out above, this may be due to the *“everything in the garden is smelling roses and don’t rock the boat”* syndrome combined with complacency in outlook that is engendered by a government department, and also given the lack of time or expertise of those in the LASC.
77. We have mentioned the obvious lack of participation by the Legal Aid Department in the Lehman Brothers’ cases. Certainly in the 1980’s there was a perception that Legal Aid should take account of the then Administration’s views upon legal aid applications by Vietnamese Asylum seekers, see *Legal Aid in Hong Kong, 2006*, page 202-203. There are other less obvious instances.
78. The Administration may state that it does not interfere with the Legal Aid Department, but the fact is that it is a government department, manned by civil servants, and the head is now accountable to the Secretary for Home Affairs. No one suggests that the Secretary for Justice should be accountable to the Secretary for Home Affairs. He is independent and gives his own view of matters to the whole Administration. This gives the appearance of, and is in fact a downgrade of the independence of Legal Aid.
79. Putting Legal Aid under the HAB is against the international trend. In the view of HKBA, it is to misunderstand its constitutional and legal role. It poses an increased risk to both. The Director of Legal Aid should be free to report to the members of the public in the same way that the Ombudsman does; and not to report to the Secretary for Home Affairs. Budget expansion issues have obviously been put on the back burner for a decade or more.

80. This downgrade problem goes deeper, and in particular in cases where the individual litigant wishes to sue the government or bring judicial review proceedings in respect of administrative acts. His application to be provided with legal representation for seeking leave for judicial review is often turned down. Subsequently when he has managed to obtain leave then only he may be given legal aid. How can the Director of Legal Aid as a civil servant convince him, that his decision was dictated by legal principle of lack of merits (or means) rather than wishing to save the administration the trouble and expense of fighting a difficult and embarrassing case?

81. The importance of perceptions, lack of trust or credibility, and the potential for a conflict of interest was behind the decision of the UK Royal Commission on Legal Services in rejecting a state run legal aid scheme when it stated that:

"The main objection of principle is that legal aid services are required more and more by private individuals who are in dispute with authority in one of its many forms, and to protect the interest of clients in such cases, the independence of the legal profession is of paramount importance. If all the lawyers available to assist an individual at public expense depended upon the authorities for position and advancement, there would be a risk that an individual's case might be conducted not in the way which best served his interests or complied with his wishes, but in a way which avoided difficulties and gave least offence to those in authority".

82. Members of the HKBA who attended the AJLS Panel meetings formed the distinct view that the HAB were ill-prepared, and did not bother to report to the Bar or the Law Society on a timely basis. Again this gave the important impression that the HAB did not seriously consider proper consultation with stakeholders was required, and Legal Aid provision was not a matter of importance, with low appreciation of how important is access to justice in a society where the rule of law is the only redress against the government. It would appear that the HAB fails or does not consider that access to justice in an orderly manner promotes stability and confidence in government and is preferable to public demonstrations which emphasise the failings in other departments of government.

83. By way of example, following a brief public announcement on 23rd March 2010, the important proposals contained in HAB's paper "Five-yearly Review of the Criteria for

Assessing the Financial Eligibility of Legal Aid Applicants" (LC Paper No. CB(2)1148/09-10(01) were given to HKBA on the 27th March for an AJLS Panel meeting on the 29th March. The Law Society was not even given those papers until either the same day of the debate or at the earliest the night before.

84. These proposals would have to be discussed by each entity in Committee and a communal response prepared for the debate. How could that happen in these circumstances? This is a reflection of the importance that the administration places on consulting with the stakeholders on important matters of principle involving access to justice by the common man in Hong Kong society. Regretfully, on a number of occasions the HAB did not come prepared, as they had promised, on a number of issues, and appeared to treat the AJLS Panel meetings as if they were a boring irrelevance, or used the excuse of intervening holidays for not producing papers to the Legislative Council or interested parties for 5 months. This was a total downgrade in response by the Administration of the treatment of important issues-
85. In passing, at Paragraph 27 of the said LC Paper, HAB categorically asserted that "*The LASC's Interest Group on Scope of Legal Aid has looked into the issue of expanding the scope of SLAS and considered it not appropriate, for the time being, to recommend any extension. It is understood that the Group will continue to study all the issues relating to SLAS including its scope with a view to bring further improvements to the Scheme*".
86. This is in line with HAB's position at the AJLS meeting on 29th March 2010 that since the FELs were to be increased, there would be no room for "*expansion of its scope to cover other categories of cases*" (see Minutes of AJLS Panel Meeting on 29th March 2010 (LC Paper CB(2)1581/09-10), at Para. 54).
87. In fact, in a letter dated 26th March 2010, LASC stated that the expansion of SLAS was still being considered by its Interest Group. As a matter of fact, the Interest Group held 5 more meetings (between 10th June 2010 and 25th October 2010) and some recommendations on expansion of SLAS were made (see Appendix to "Further Report on SLAS" prepared by Interest Group of LASC in November 2010).

88. The conduct of HAB brings home HKBA's views expressed in their letter of the 28th December 2007 to LASC (opposing the transfer of Legal Aid Department to HAB) wherein it is said at Para. 3(a)(ii): "The potential for and the ramifications of an under-funded or under resourced Legal Aid Department are obvious."
89. When the HKBA called for the expenditure figures and the grant of applications in 2009, it was disturbing to see that in actual number terms between 1997 and 2008, the actual Legal Aid Department vote of fund was static, or had declined. This looks far worse when adjusted for inflation and when compared with the 50% increase in the Department of Justice/Secretary for Justice's vote or budget, when they used to be on a par with that of the Legal Aid Department.
90. In conclusion, in Paragraph 4 (b) in our letter of the 28th December 2007, we said that *"the Legal Aid Department has moved from being a beacon for the underprivileged who would be otherwise deprived of access to justice, to a bureaucracy whose procedures are an inhibition to people seeking legal recourse. These procedures typically include a lengthy process of repeated interviews, onerous demands for evidence, both as to means for the use in the prospective litigation. The result is that many are discouraged, rather than encouraged to exercise their basic legal rights. Others have turned to recovery agents"*. We see no reason to change this view.
91. Our experience is, that particularly in personal injury cases, the Legal Aid Department has given in to the machinations of recovery agents. Despite the efforts set out in Legal Aid in Hong Kong page 205, the Department has failed to stop litigants using them, and their "tied-in lawyers" who are nominated as being their "solicitors of choice". We have not seen any review or consultation process to try to stop this practice. Rather we have witnessed the considerable shrinking of this part of the litigation work of the Legal Aid Department, to its detriment.

X. PRACTICALITIES OF ESTABLISHING AN INDEPENDENT LEGAL AID AUTHORITY

92. The Legal Aid Department started as an organ of the Judiciary, with an assigned District Court Judge in charge, before it became a department reporting to the Chief Secretary. The downgrade to being in the portfolio of the HAB means dis-establishment of the Department will involve relatively little difficulty and expense. There will have to be revision of the establishment salaries to retain competitive professional officers of the highest calibre.
93. Despite the recommendations of the LASC in the 1998 Report, and subsequently in 2003, the Department has retained opposition to the proposed changes. Civil Servants may like the *status quo*, but the question the HKBA asks is, whether the public are being appropriately and adequately served by this attitude? In the light of experience in recent years, the answer is no. Furthermore, in the view of the HKBA there are broader issues at stake than just the question of cost and staff sentiments. The overriding principle of access to justice should not be sacrificed at the altar of administrative convenience and seeking to preserve and maintain a status quo that has lost its mandate and credibility.
94. Like the LASC in 1998, the HKBA sees no difficulty in setting up the ILAA, as staff can be seconded from the Legal Aid Department. Existing staff can apply for jobs with the new authority and presumably will be offered at least as favourable terms for transfer. This has happened in the establishment of the ICAC, the Office of the Ombudsman, the Housing Authority and the Hospital Authority.
95. We see no problems with the secondment of purely legal staff to the new ILAA, as it involves just one discipline. The establishment of the Housing Authority and Hospital Authority involved many professional disciplines, and has proved successful and worthwhile. We see the dis-establishment of the Legal Aid Department as much simpler.

XI. CONCLUSION

96. The reliance on the public opinion referred to in 1999 that legal aid services were administered independently without an updated survey is hardly convincing. Undue weight has been given to the obduracy to change *apparently and allegedly* expressed by the staff of the Legal Aid Department.
97. LASC is echoing the line of the government back in 1999 instead of having conducted an independent review. The refusal to release the report of the Working Group, on the ground of confidential agreement with the staff of Legal Aid Department only serves to add to the perception. This perception should cease and it should start now.
98. This concern is compounded by its lack of conviction in the review of expansion of SLAS. The approach of HAB and Legal Aid Department (with the ostensible acquiescence of LASC) is disturbing. As the results now demonstrate, it is feasible to expand SLAS to cover proved needs in a lot more types of cases, than that originally recommended by LASC in December 2010.
99. The initial outright rejection by HAB (in March 2009) of any expansion of SLAS to cover more types of cases without waiting for the completion of the Report to be submitted by the Interest Group of LASC demonstrates the lack of genuine consultation. One would expect LASC to be more astute to guard against usurpation of its function.
100. Importantly, in the process of debates as to the expansion of SLAS, it is inexplicable that LASC has made no effort to disabuse the Administration as to the original purpose and design of SLAS so that the Administration has continued to mislead itself as to the need for "*high chance of success with good damage to costs ratio*" in the identification of types of cases to be covered. Consequently much delays were caused and unnecessary debates engendered. It is hoped this high threshold is not being applied in other decision making processes within the Department so that hard decisions are being avoided to the detriment of litigants.

101. In short, both LASC and Legal Aid Department (under the behest of HAB) would appear to have lost their direction and have failed to adequately and timeously to respond to unmet social needs, which is well illustrated, for instance, in the Lehman Brothers and PCCW cases. These are matters of substance and not just perception.

102. The entrenched resistance exhibited by HAB and Legal Aid Department to embrace changes and support the long overdue expansion of SLAS demonstrates that institutional inertia has set in and it is time for reform. This is to be done by the establishment of an ILAA. The new Administration is in the unique position to bring about this long needed and necessary change for the benefit of the community at large.

Dated 22nd day of June 2012

Hong Kong Bar Association

CHRONOLOGY OF EVENTS

- 1993 In the early 1990's the Bar Association and the Law Society pushed for an ILAA. The Legislative Council debated the matter in July 1993 when it considered the Consultative Paper on Legal Aid. Out of 39 members of the Legislative Council, only 2 voted against it. So the case for the ILAA was firmly established by the legislature.
1995. Amidst the call for an ILAA, the Administration proposed the establishment of the LASC.
- 1996 The LASC was established and called for an investigation of an ILAA. Coopers & Lybrand issued a report, which was released in April 1998.
- 01.09.1996 LASC established.
- 15.09.1998 LASC presented to AJLS Panel the "Report on The Feasibility & Desirability of the Establishment of an Independent Legal Aid Authority" and made recommendations for the establishment of an ILAA in place of Legal Aid Department with detailed solution as to logistical arrangement including initial secondment of staff and costs implication (see Extract of Minutes of AJLS Meeting on 15th September 1998 in Appendix II to LC Paper No. CB(2)1907/00-01(04))
- 13.10.1999 Director of Administration formally rejected the recommendations of LASC made in the 1998 Report citing "uncapped" budget and accountability as a reason (see Extract of Minutes of AJLS Meeting on 13th October 1999 in Appendix III to LC Paper No. CB(2)1907/00-01(04)).

- 18.01.2000 Both the Chairman of LASC (Mr. Lee Jark Pui, JP) expressed his disappointment as to the Administration Decision. The HKBA, represented by Mr. Andrew Li recited the HKBA's position in support of an ILAA.
- Nothing further was done by the Administration but only an avowed commitment to Review Legal Aid System every 5 years.
- 16.04.2002 Interim Report of the LASC Interest Group on the Scope of Legal Aid submitted to AJLS Panel for meeting to be held on 25th April 2002.
- April 2002 HKBA submitted position paper "A Review of the Provision of Legal Aid
- 25.04.2002 AJLS Panel Meeting
2003. Further AJLS Panel Meeting. The LASC calls for the establishment of an ILAA.
- SARS and Decline in the Economy – the issue of ILAA dropped
- June 2006 Legal Aid In Hong Kong book published by LASC
- July 2009 In July 2009, following the publication of the Research Report - HKBA and Law Society made submission in September 2009 to resurrect the issue of ILAA
- 16.10.2009 Letter from Chairman of LASC (Mr. Paul Chan, JP) to Chief Executive concluding that there was "no pressing need to de-establish LAD and substitute it by an [ILAA]"
- 2009-2011 HKBA attended some 11 meetings of the AJLS Panel (also attended by representatives of the Law Society) to rekindle the debates with Home Affairs Bureau and DLA as to the need for an ILAA, raising Financial Eligibility Limits (FELs) under OLAS and SLAS and expansion of coverage of SLAS.
- 25.01.2010 AJLS Panel Meeting in which LASC was asked to produce Report of Working Party leading to the conclusion in its letter dated 16th October 2009.

- 19.03.2010 LASC's letter to AJLS Panel explaining the recommendation but refused to produce Report of Working Party
- 29.03.2010 AJLS Meeting in which HAB announced not to expand SLAS to cover other cases.
- 21.07.2010 AJLS Panel unanimously passed a motion requiring the Administration to look into the "package" of improvement to SLAS including increase in FELs and additional types of cases to be covered in accordance with a draft amendment to the Legal Aid Ordinance furnished by HKBA (dated 20.7.2010).
- Sept 2010 HAB wrongly asserted that *"To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio"* (see LC Paper CB(2)2298/09-10(01))
- 13.10.2010 Chief Executive announced HK\$100 million to be made available for the enhancement of the SLAS Scheme (see letters from HAB to HKBA and LASC both dated 13th October 2010).
- March 2011 Resolution passed for legal aid (FELs) to be increased (with effect from May 2011)
- \$175,800 to \$260,000 (for OLAS)
- \$488,400.00 to \$1.3m (for SLAS) - This was less than \$3.0m the HKBA contended for based on existing principles but was a start. ILAA issue shelved.
- 2012 Announcement that Deloitte has been commissioned to canvass views about setting up an ILAA.

March 2012 Proposed Resolution to amend the Legal Aid Ordinance (Cap. 91) to:

- (a) remove restriction under OLAS to allow monetary claims in derivatives of securities, currency futures contracts when fraud, misrepresentation or deception is involved
- (b) expand SLAS to cover claims against Architect, Professional Engineer, Surveyor, Planner, Land Surveyor, Estate Agents, Insurance Agents and claims from mis-sales of first hand property and Labour Tribunal Appeals.

Hong Kong Bar Association

Dated: 22 June 2012

政府總部
民政事務局

香港添馬添美道二號
政府總部西翼十二樓

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GOVERNMENT SECRETARIAT
HOME AFFAIRS BUREAU

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2 TIM MEI AVENUE,
TAMAR,
HONG KONG.

By Post
11 September 2013

Mr Paul Shieh, SC
Chairman
Hong Kong Bar Association
LG2 Floor, High Court
38 Queensway, Hong Kong

Dear *Paul*,



Information Paper on "Legal Aid Costs"

Arising from the meeting of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel) on 25 June 2013, which representatives from the Hong Kong Bar Association also attended, we have prepared an information paper on (a) the annual expenditure of the Legal Aid Department (LAD) in the past five years for the delivery of legal aid services; (b) the actual expenditure involved in the judicial review case of Hong Kong-Zhuhai-Macao Bridge; and (c) information in response to the assertion made by the Hong Kong Bar Association that LAD's budget on legal aid costs was "*de facto* capped", including how the provision of legal aid services will not be affected by financial constraints.

We welcome further discussion with the Bar Association, following our explanation at the AJLS Panel and supplemented by this information note to the Panel.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Aubrey Fung".

(Ms Aubrey Fung)
for Secretary for Home Affairs

c.c. Director of Legal Aid

For information

**Legislative Council Panel
on Administration of Justice and Legal Services**

Legal Aid Costs

PURPOSE

This paper briefs Members on the principles and operation of the legal aid services provided by the Legal Aid Department (LAD) and provides information relating to legal aid spending over the past five years.

BACKGROUND

2. At the meeting of the Legislative Council (LegCo) Panel on Administration of Justice and Legal Services (AJLS Panel) on 25 June 2013, the Administration was requested to provide (a) the annual expenditure of LAD in the past five years for the delivery of legal aid services; (b) the actual expenditure involved in the judicial review case of Hong Kong-Zhuhai-Macao Bridge; and (c) information in response to the assertion made by the Hong Kong Bar Association (HKBA) that LAD's budget on legal aid costs was "*de facto* capped", including how the provision of legal aid services will not be affected by financial constraints.

POLICY OBJECTIVE OF LEGAL AID

3. The provision of legal aid is an integral part of Hong Kong's legal system. Our policy objective is to ensure that no one with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means. To qualify for legal aid, a person is required by law to satisfy the means and merits tests as provided by the Legal Aid Ordinance (LAO) (Cap. 91).

4. At present, a person whose financial resources¹ do not exceed

¹ "Financial resources" means the aggregate of an applicant's yearly disposable income and disposable capital. A person's disposable income is his gross income minus deductible items as allowed under the LAO. A person's disposable capital is the sum of his credit balance, money due to him, the market value of non-money resources and the value of business or share in a company, minus deductible items as allowed under the LAO.

\$269,620 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (OLAS), which covers most civil proceedings at District Court level and above. The eligibility limit also applies to criminal legal aid under the Legal Aid in Criminal Cases Rules of the Criminal Procedure Ordinance (Cap. 221D). The corresponding limit for the Supplementary Legal Aid Scheme (SLAS) is \$1,348,100. The financial eligibility limits (FELs) of OLAS and SLAS are reviewed annually, biennially and five-yearly to take into account changes in the Consumer Price Index (C), litigation costs and the financial eligibility of legal aid applicants respectively².

5. Funding for OLAS and criminal legal aid is provided by the Government, while SLAS is a self-financing scheme and is mainly funded by the application fees payable by applicants, the interim contributions from aided persons and the final contributions from a percentage deduction of the damages recovered in successful cases. In recent years, the major improvements to civil and criminal legal aid are as follows –

- (a) **OLAS:** the scope was expanded in November 2012 to cover monetary claims in derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation or deception was involved in respect of the sale;
- (b) **SLAS:** in addition to claims relating to personal injuries, employees compensation and medical, dental and legal professional negligence, the scope of SLAS was significantly expanded in November 2012 to cover a wider range of professional negligence claims, negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products, and monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties. In December 2012, the Administration obtained the LegCo Finance Committee's approval to inject \$100 million into the Supplementary Legal Aid Fund to support the operation of the expanded SLAS; and

² Pursuant to the last five-yearly review, the FELs of OLAS and SLAS were increased substantially in May 2011 (i.e. from \$175,800 to \$260,000 for OLAS, and from \$488,400 to \$1,300,000 for SLAS). In June 2013, the FELs of OLAS and SLAS were further increased to \$269,620 and \$1,348,100 respectively in accordance with the results of the 2012 annual review. Preparatory work for the next biennial and five-yearly reviews is being conducted by the Home Affairs Bureau and LAD.

- (c) **Criminal legal aid:** following LegCo's approval, the Legal Aid in Criminal Cases (Amendment) Rules 2012 commenced operation in March 2012 to improve the payment structure of the criminal legal aid fees system.

BUDGETING OF LEGAL AID

6. The statutory means and merits tests have been the only criteria provided by the LAO since it came into operation in 1967 in assessing legal aid applications, and LAD officers need not be concerned with the financial provisions of the Department when processing applications. In other words, a person's access to justice would not be hindered by LAD's fiscal position, and an application for legal aid that has passed both the means and merits tests would not be refused due to insufficient legal aid funding.
7. LAD's annual estimates of Subhead 208 "Legal aid costs" are drawn up holistically taking into account past actual expenditure and estimated costs which mainly include the following factors –
- (a) amount of legal aid costs spent in the preceding fiscal year;
 - (b) number of existing on-going cases (including cases where it is expected that significant costs may be taxed against aided persons should the aided cases are lost in the appellate courts);
 - (c) estimated number of new applications / cases;
 - (d) changes, if any, to the FELs;
 - (e) changes, if any, to legal aid fees (e.g. solicitor costs and counsel fees); and
 - (f) changes, if any, to the scope of OLAS.
8. The estimates and actual spending in legal aid costs (covering both OLAS and criminal cases) in the past five years are as follows –

Estimates and actual spending in Subhead 208 "Legal aid costs" from 2008-09 to 2013-14

Financial year	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
	\$ million					
Approved estimate	528.0	516.1	519.1	545.5	538.8	571.0
Revised estimate	455.0	489.2	514.5	475.5	508.6	Not available
Actual expenditure	430.1	485.8	505.3	463.2	512.8	Not available

9. For administrative purpose, an approved funding amount is set at the beginning of each financial year. In the approved estimate for 2013-14, the provision for legal aid costs is set at \$571 million, representing an increase of 12% as compared to the revised estimate for 2012-13. The increased provision is mainly due to the anticipated increase in legal aid costs, including the additional provision for implementing the revised criminal legal aid fees structure. As far as OLAS is concerned, with the substantial increase in FEL since May 2011, together with the expanded scope as set out in paragraph 5(a) above, we expect that more people would be eligible for legal aid. However, the exact rate of increase in applications is difficult to estimate as legal aid applications are demand-driven. The need for litigation will neither arise automatically nor increase proportionately once more people become financially eligible or as more types of proceedings fall within the scope of legal aid.

10. As such, legal aid costs are highly demand-led and as demonstrated in the table above, adequate provision has all along been provided for the subhead to meet the potential costs. In exceptional circumstances where the costs exceed the approved provisions within a financial year, supplementary provision would be sought according to the relevant provisions of the Public Finance Ordinance (PFO) (Cap. 2)³ to ensure that no eligible legal aid applications would be turned down owing to lack of funds. This financial arrangement for OLAS and criminal

³ Section 6(3) of the PFO provides that expenditure for the financial year on the services of the Government shall be arranged in accordance with the heads and subheads and be limited by the provision in each subhead shown in the Estimates of Expenditure as approved. Under section 8 of the PFO, any subsequent changes to the approved Estimates of Expenditure can only be made with the approval of the Finance Committee (FC) of LegCo upon a proposal of the Financial Secretary, and the FC may delegate to the Financial Secretary the power to approve changes subject to such conditions, exceptions and limitations as specified in the delegation.

legal aid is a key underpinning of LAD's delivery of legal aid services, as the provision of legal aid is enshrined in law and the demand is beyond the control of the controlling officer⁴.

11. We do not agree with HKBA's observation that the LAD budget is "*de facto* capped". As explained in paragraphs 6 to 10 above, LAD's underspending in the past years shows that the Government has been providing sufficient provision in the Estimates for this demand-driven service all along. Based on its own understanding, HKBA has reached the conclusion that "the obstacle created by the uncapped budget, portrayed as an unusual benefit, in the Report⁵ is just a myth. There is no reason why [an independent legal aid authority] (ILAA) cannot take over the work of LAD and operate within a capped budget. ...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 ILAA (albeit on a capped budget)"⁶. We welcome further discussion with HKBA, following our explanation at the AJLS Panel and supplemented by this information note to the Panel.

JUDICIAL REVIEW CASE OF HONG KONG-ZHUHAI-MACAO BRIDGE

12. To ensure that only those cases with reasonable grounds for taking the proceedings are granted legal aid, all legal aid applications are processed by legal aid counsel appointed to serve in the LAD. In assessing the merits of an application, LAD will consider the background

⁴ In fact, up until 2005-06, LAD's Subhead 208 "Legal aid costs" was annotated with an asterisk in the Estimates, similar to other services such as the Comprehensive Social Security Assistance and Social Security Allowance schemes and student financial assistance, denoting that these subheads were not by definition cash limitable. From 2006-07 onwards, the practice of annotating subheads with asterisks was discontinued in a purely formatting change as the annotation itself did not obviate the need for the Government to seek LegCo Finance Committee's approval for any variation to a subhead exceeding \$10 million. That said, explanation was made in the Introduction to the Estimates for the same year that certain recurrent expenditure subheads are by nature non-cash limitable because the demand for the relevant services is beyond the control of the controlling officer.

⁵ "Final Report of the Consultancy Study on the Feasibility and Desirability of Establishing an Independent Legal Aid Authority" issued by Deloitte Consulting (Hong Kong) Limited in March 2013.

⁶ Extract from paragraphs 39–40 of the "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" (LC Paper No. CB(4)830/12-13(01)).

of the case, evidence provided and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted. Regarding legal aid applications for judicial review, legal aid will be granted, subject to means, if the applicant has a sufficient interest in the matter to which the judicial review application relates and the case has reasonable grounds. Insofar as Members' specific request concerning the amount of costs incurred in the judicial review case of the Hong Kong-Zhuhai-Macao Bridge, the costs in this case have not yet been agreed/taxed, while it is noted that the costs incurred up to July 2013 amounted to \$1.49 million.

ADVICE SOUGHT

13. Members are invited to note LAD's spending over the past five years, and the details of the provisions for legal aid services.

**Home Affairs Bureau
Legal Aid Department
September 2013**



HONG KONG BAR ASSOCIATION

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24th March 2014

Dr. Eric Li Ka Cheung, GBS, JP
Chairman
Legal Aid Service Council
Room 1601, Top Glory Tower
262 Gloucester Road
Causeway Bay
Hong Kong

Dear *Eric*,

Re : Independent Legal Aid Authority and Supplementary Legal Aid Scheme

All along, it has been the position of the Hong Kong Bar Association ("HKBA") that an Independent Legal Aid Authority is needed to ensure timely and effective improvement to the Legal Aid system in Hong Kong and that the piecemeal reform to the Supplementary Legal Aid Scheme ("SLAS") has left much to be desired.

In this connection, in a "Statement by the Hong Kong Bar Association" (dated 26th September 2012), the HKBA set out its views on the desirability of an Independent Legal Aid Authority ("ILAA") and made observations that the inadequacy and insufficiency of SLAS had given rise to an impediment to access to justice for person of

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香港大律師公會

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Mr. Derek C. L. Chan

陳政龍

Ms. Selina Kung

龔靖晴

Ms. Kim M. Rooney

甘婉玲

Mr. Ernest C.Y. Ng

伍中彥

limited means and the "Sandwich Class". Annexed to the Statement is a Checklist (dated 5th July 2012) of the status of reform on the causes of action covered by SLAS. We look forward to hearing from your Council as to the progress of the intended expansion of SLAS as previously foreshadowed.

Further, by a Submission (dated 24th June 2013) made in preparation of a meeting before the Administration of Justice and Legal Services Panel held on 25th June 2013, the HKBA raised queries as to the reliability and validity of the study conducted by Deloitte Consulting (Hong Kong) Limited from 2011 to 2013 on the issue of establishing an ILAA. Thus far, we have not received any response from your Council.

For your ease of reference, I enclose herewith the said "Statement" and "Submission".

I look forward to hearing from you on the progress of the two related subjects pertinent to the establishment of an ILAA and the further expansion of SLAS.

Yours sincerely,



Paul Shieh, SC
Chairman



**Statement by the Hong Kong Bar Association on the
Desirability of an Independent Legal Aid Authority - the current situation is an
Impediment to Access to Justice for Persons of Limited Means and
“the Sandwich Class”**

1. THE LEGAL AID DEPARTMENT IS NOT TRULY INDEPENDENT

The legal profession and Members of the Legislative Council have for decades been extremely concerned about the fundamental error in principle perpetrated by having the provision of Legal Aid administered by a Government Department staffed by seemingly unenlightened officials, who are appointed, promoted and paid by the Civil Service. This objection in principle was circumvented by previous Administrations arguing that the cases where pro-Government thinking in processing claims and handling cases were few or hard to prove. So the objection in principle and the risks of undetected cases of abuse, were down played to being nothing more than a mere perception or theoretical issue. Attempts were made in the 1990's to secure independence and the Legal Aid Services Council (LASC) was created as a *stop-gap measure* to secure operational independence, as a palliative for the lack of institutional independence. The objection in fundamental principle however remained unanswered or ignored. Empirical evidence clearly shows that lack of independence has led to a decline of Legal Aid coverage in real terms over the last 15 years. In consequence, independence is not only desirable but that it is essential now.

2. LEGAL AID IS NOT MEETING THE NEEDS OF HONG KONG PEOPLE

Since 2002 and more particularly since 2009, it is clear that the Legal Aid Department (LAD) under the umbrella of the Home Affairs Bureau (HAB) has not been responsive to societal demands for the increase in Legal Aid Provision in Hong Kong. An independent and strong judicial system has always been one of the main “selling points” for the Hong Kong SAR after 1997. Yet this has been rendered meaningless, as there has been a gradual

erosion of access to justice, through lack of proper provision of Legal Aid. Both sides of the profession have repeatedly been pressing and advocating for the increase in the Financial Eligibility Limits and a widening of the scope of Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS), to cover both inflation and the unmet demands and increasing need for access to justice for a decade. Having Legal Aid under a Government department, LAD, responsible to the HAB, has meant these needs are being neglected. Overall there has been reduced access to justice for persons of limited means or for members of the 'Sandwich Class'; i.e. the lower middle class.

See **Enclosure I**: attached Summary of the status of the reforms for the Legco Panel meeting on the 10 July 2012. The Bar's Draft Bill containing these reforms was approved by the LegCo Panel and a Resolution passed on the 22 July 2010. This amply demonstrates lack of action, support and disdain by previous the previous Administration(s).

3. THE LEGAL AID DEPARTMENT BUDGET IS EFFECTIVELY STATIC

The operational problems caused or contributed to by the lack of independence are evidenced by the following figures. From 1975 to 1997, the Department of Justice and the LAD generally always had budgets which were on a par: pre-handover these were typically in the region of HK \$5-600 million per annum mark. The Department of Justice now spends over \$1.3 billion annually, whereas the LAD only \$700 million in round terms over the last 15 years. So clearly Legal Aid has not matched this expansion, the financial eligibility limits have become more and more restrictive, as well as the lack of increase in the scope of the subject areas eligible for Legal Aid.

The most obvious omission in the last decade is in the failure to provide Legal Aid to those eligible out of the 22,000 people that lost money when Lehman Brothers went into liquidation in October 2008. Until recently, people were still demonstrating in the streets outside banks, complaining about their losses. Hardly the best example of access to justice provided by the legal system in Hong Kong. The Legal Aid SLAS Scheme could have helped eligible persons, and assisted persons to obtain appropriate compensation. The 10 - 15 % clawback out of the HK \$19 billion settlement could have funded SLAS for years, and it would have made eminent commercial sense for the LAD to have participated in the settlement process.

Ultra conservative management of SLAS funds can be seen in **Enclosure II**. SLAS should have given access to justice to the rightly aggrieved PCCW

Shareholders. See Re PCCW (2009) 3 HKC 292. The former Chief Executive in his Policy Address in October 2010 had already allocated \$100 million for the expansion of SLAS, but little progress has been made in this regard.

4. **WHAT EVIDENCE IS THERE TO DEMONSTRATE THIS DECLINE?**

I Number of Applications and Grants over the last decade

- (a) Financial Eligibility Levels (FELs) have not kept pace with inflation such that less and less people are coming within the levels for Legal Aid. See **Enclosure III**.
Overall Applications and Grants have remained more or less static from Jan 2006 to March 2011.
- (b) Expended OLAS Costs for Criminal Cases remained static for that period, whereas Civil Costs went up by 25 %.
- (c) We have had in the last decade 4 % inflation compounded, whereas FELs prior to 2011 remained the same as at 2002.
- (d) These were increased by 50 % in 2011 for OLAS and by a factor of 3 for SLAS.
- (e) This has now led to an almost static grant rate for OLAS – plus 3 % only. For SLAS, despite the large increase of FELs from \$488,000 to \$1.3 million, the increase was only 17 % in 2011/12. The Bar and the Law Society asked for a doubling of OLAS FELs and \$3 million FEL for SLAS; the increase in uptake rates is dismal. See **Enclosure IV** from DLA.
- (f) One would have expected a ballooning of the figures for 2011 (May to April 2012) and a leveling off from May 2012 to now. This however has not been the case at all.
- (g) The scope of Legal Aid has not kept up with the expectations of the Hong Kong people, and to better cater for the need for better governance enforced by access to the rule of law. This is amply demonstrated by the failure of both the LAD and HAB to bring Class Actions within the Scheme; the Harbour Front Case, SARS Cases, derivatives claims emanating from the collapse of Lehman Brothers in 2008. (The Hong Kong Monetary Authority state in July 2012 that there have been 22,000 complaints alone in relation to the Lehman Brothers fiasco) PCCW minority shareholders in 2009 + New Class Action Report to Legco.
- (h) The result is a moribund Legal Aid Department (see paragraph 89 of the Bar's Submission on the Need to Establish an Independent Legal

Aid Authority dated 22 June 2012), who do not meet the needs, so Legal Aid is declining.

II Examination of the Court User Statistics

(a) Unacceptably high numbers of litigants in person (LIPs) in Civil Cases in all levels of the Courts leading to the establishment of:

- Court Liaison Office in the High Court to assist unrepresented litigants;
- The Bar Association Pro Bono Scheme;
- HAB's LIPS – yet to commence operation.

(b) Looking at the figures provided by the Judiciary Administrator to the LASC Interest Group in **Enclosure V** (High Court) (& District Court) and to the Bar Association **Enclosure VI** (Letter dated 3 August 2012) in civil cases the figures have remained within the range of 37% to 43 % throughout the decade, notwithstanding the impact of mediation, which should have reduced the number of unrepresented cases significantly.

(c) Looking at the same figures for the District Court the number of civil trial cases with LIPs has reached almost crisis proportions, at 65 %. This clearly demonstrates that the Legal Aid Department is not granting enough certificates for District Court Cases, and the impact on the proper administration of civil justice in the District Court must be seriously affected.

(d) The LASC Interest Group show just how the Legal Aid coverage has not met the needs of people using the Courts by subject: See **Enclosure V**.

Legal Aid gives good coverage in Personal Injuries cases as only 7 % of cases have a party who is not represented, in both the High Court and District Court. Yet other cases have a much higher percentage of parties who are unrepresented. This is the area which Legal Aid has refused to move into.

5. **DEAD HAND AT THE TILLER OF LEGAL AID**

This is not a matter of mere perception or theoretical injustice, and so to be brushed aside. These adverse outcomes are supported by figures. The largely abortive attempts to introduce a Comprehensive Reform Package over the last 3 years show the dead hand at the tiller of Legal Aid.

6. **THE CONTINUING NEGATIVE + PIECEMEAL ATTITUDE TO REFORM**

As Legal Aid is under a Government Department, the Home Affairs Bureau, attitudes of complacency and inertia prevail. "Everything is alright" seems to be the mantra relied upon to do nothing. So there is little or no investigation undertaken to address the question of unmet needs for legal aid reform and/or improvements. Enclosure V illustrates the negative attitude shown to a package of reforms which originally were proposed by the Bar, the Law Society and endorsed by the LASC some 10 years ago. This shows the lack of progress as a result of the attitudes of previous Administration(s) and the de facto control over expenditure and staff of LAD.

7. **THE LEGAL AID DEPARTMENT HAS BECOME BUREAUCRATIC**

Solicitors and barristers are continually complaining about LAD not being responsive to clients or the public need. LAD is no longer perceived as being "customer friendly". Instead it is known to be typically bureaucratic. This contributes to increased numbers of LIPs, feelings of injustice from unsatisfactory outcomes. All this adds to dissatisfaction with the Government, which is not seen to be doing enough to uphold the Rule of Law and increasing access to justice. The new Administration has a golden opportunity to make amends now.

8. **LEGAL AID HAS NO DEPARTMENT DEALING WITH REFORM**

There is no section in LAD tasked to reform and improve services to address unmet needs. The LAD is supposed to be under the LASC for policy. In reality it looks to HAB for leadership on policy. Therefore it responds to them rather than the public or the LASC. This contributes to the problem because HAB is a non-specialist bureau and has been negative towards reform. It has little interest and experience in initiating any reforms. HAB is ultimately a dead hand at the helm of the rudder of Legal Aid.

9. LASC'S ATTEMPTS AT REFORM

On the other hand, LASC has tried to initiate reform but dealing with LAD/HAB has been difficult. LASC has no legally trained or independent research staff. It has to rely on Government paid executive staff. LASC are not experts, they have constraints of time, meetings are monthly and they are not paid for the time needed. The advisory/ supervisory system of the LASC does not function as hoped. LASC cannot manage the LAD adequately and properly because it is the HAB which appoints and promotes. LASC was supposed to be responsible for policy, yet experience has shown that it is really the HAB policy which is implemented, not that of the LASC. The LASC Ordinance was a defective compromise; it was regarded as a stop gap half-way house to establishment of an Independent Legal Aid Authority (ILAA). See Section 4 (5 (b) of Cap. 349.

10. THE REALITY OF FINANCIAL CONSTRAINTS ON LAD

The choice presented by Government in October 1999 was either "no-cap on expenditure by LAD", and therefore no independence, or there is a "cap" and there is independence. This was the "Hobson's Choice" presented by the then Administration, when LASC last mooted the establishment of an ILAA. It is tasked to do this under the Legal Aid Services Council Ordinance Cap. 489 Section 4(5)(b), namely to examine "*the feasibility and desirability of the establishment of an independent legal aid authority.*" Currently, the LAD Budget is not being exceeded anyway. So the "no-cap" situation is neither beneficial nor a need. Instead the public would be better served by the choice for independence and obtaining the operational and institutional benefits arising from not being a Government department.

11. CONCLUSION

The lack of an ILAA which can negotiate with other Independent Departments, such as, Home Affairs, the Department of Justice, etc. as well as the Judiciary, is clearly an impediment to access to justice and must be reformed now. No one would suggest that the Department of Justice should be subject to the HAB.

Long overdue expansion in scope of services, and coverage can then proceed. It is feasible, desirable, if not essential, to make these changes now. There has been long term support across the benches of the Legislative Council, as well as both branches of the legal profession. Control via HAB and LAD is a hindrance. The best choice is to transfer Legal Aid to an Independent Legal Aid Authority as advised by LASC in their Report of 1998.

The new Administration is invited to grasp this unique opportunity to demonstrate its abiding obligation to promote and uphold the rule of law by establishing an ILAA. This will demonstrate this Administration's commitment to providing greater and better access to the courts to the people of Hong Kong.

Hong Kong Bar Association

26th September 2012

3. 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, (must include costs of Defendants not only Plaintiff costs as the actual total cost of proceedings) - but better than nothing. The Take up Rate for OLAS occasioned by the increase in FELs from \$175,800 to \$260,000 has yielded only a 3.5 % increase in Applications and grants for Legal Aid. The increase in FELs for SLAS from \$488,000. To \$1.3 m has yielded a 14 % increase in applications and grants. (On 30th March 2011 a Resolution of the Legislative Council, LN 51 of 2011 set out the changes and . By LN 83 of 2011 this came into operation on 18th May 2011.) See Legal Aid Letter 28th June 2012 to NP

The Bar Association and Law Society had advocated a much bigger increase for OLAS to \$350,000 and SLAS to \$3 million, in view of the unmet needs. These are small percentage increases given the 50 % increase in OLAS Fels (3.5 %) only 15 % for SLAS when the FEL was raised 3 times. Therefore in the next session we would ask the Sub-Committee to revisit this, and the former Chief Executive committed HK \$100 million to this process. We have had inflation over the last 2 year since we started this process of the order of 10-12 % in any event.

The continuing unmet needs are demonstrated by the Judiciary Administrator's Letter of the 9th February 2012, demonstrated the under representation in civil cases in both the District and High Courts.

The overall number of Certificates from 2006 through to 2011 has remained much the same. See Summary Sheet by the Legal Aid Department to NP dated 1st August 2011. Marked Appendix F

- (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 from 2007 so action is needed soon to avoid prejudice to the victims.
- (k) Claims against Incorporated Owners – HAB reject this but LegCo support;
- (l) Property Damage 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. The Bar believes this form of minority protection is required, given that mediation in many cases is a process of head bashing.
- (n) Claims in respect of Trusts – HAB reject but LegCo support; There is no reason not to support this initiative. now that the Trustees Association have

introduced a Code of Professional Conduct, and most if not all have Professional Indemnity Insurance Cover.

- (o) Claims involving disputes between Limited Companies and their minority shareholders – HAB reject this probably through lack of understanding. If they read the Re PCCW Case 2009 3 HKC 292 – the judgment of the Court of Appeal – This was a case of vote manipulation where there was an unaccountable drop in value of the shares, and privatisation was put forward, so as to deprive the shareholders of the true value of their shares. The Court refused to sanction the Scheme of Arrangement – this would have been a fraud on the minority. See Section 166 and the Court always has the power to award costs in favour of minority shareholders. This is similar to its powers under Section 168 A. ;
- (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; Class Actions are now being actively considered, public interest litigation must be covered by Legal Aid; and the Court does grant costs to persons who have been affected, as well as those who have a legitimate interest in pursuing say an application for judicial review. E.g. the Harbour Protection Litigation, where the court ordered costs against the Government.
- (r) A special discretion should be reposed 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.

4. HAB LC Paper No. CB (2)600/11-12(01) provided on 14th December 2011 for LegCo Panel, paragraphs 5-7. The refusal to consider Minority Owners' Compulsory Sale Order cases is based on illogical reasoning. Just because 26 out of 27 applications were approved by a tribunal where there is no Legal Aid does not prove that Legal Aid should not be granted to 1 out of 27 applications, one of which may have merits, and which merits could be detected on the merits testing done under normal Legal Aid processing, and which adjudicated result could be used as a fairer precedent. Just because an application is approved does not imply that the right sum was achieved, especially in cases where the developer is fully represented and the individual is not adequately represented. In such situations, the individuals lose

out and are aggrieved. An unsatisfactory result is almost forced onto the individuals. Mediation, without the sanction of legal action, in case the developer is not reasonable, is a toothless strategy with little or no credibility. Because there has been a mediated result, does not mean there has been a "successful mediation", as parties are often made "all or nothing offers" in these cases. Note there was no "exit poll" conducted to see how satisfied or dissatisfied the 26 were.

5. As noted before, "high chance" of success is not the correct criteria for expansion of Legal Aid. Hence, HAB decision making is based on erroneous criteria. This proposed reform, made by the LegCo Panel, has clear merits and should proceed.
6. Paper paragraph 8-11. The rejection of claims for Sale of Goods and Provision of Services is based on an error. Just because the Administration objects to Legal Aid for cases with small amounts of money, this is not a valid objection since Schedule 3 of SLAS classifies \$60,000 or above as being cases of significant injury or injustice. Small cases are thus excluded anyway from SLAS accordingly this is not a valid or justifiable objection.
7. The inference from paragraphs 10 and 11 is that "significant consumer interests or issues of a substantial impact on consumers" are responsibilities which are being ducked by the HAB. They are attempting to pass the buck to the Consumer Legal Action Fund which may not have the ability or resources to take on significant cases. The lack of resources has already hampered litigation in financial services cases. It is obvious that such significant cases of injury or injustice with substantial impact on the community or society ought rightly to be eligible so that once the individual case's merits are established, Legal Aid can be granted. The Government's reasoning is again not logical and contradicts the Legal Aid Department's own mission (and Schedule 3) which is to provide access to justice for significant cases or those with impacts on society.
8. This is linked to the reform proposal for Class actions so, for example, SLAS can be granted in the groups of cases of heart pacemakers which have broken down. These are not personal injury cases and so access to justice is being denied.
9. The Annex to the Paper containing the Administration's Proposals demonstrates lack of adequate action. This demonstrates the Administration is not responding to LegCo Panel's views. A year has passed and there is nothing except repetition mostly of what has been said before, save for the concession that Lehman Brothers type cases will now be covered. Where is the draft Bill? Where is the timetable? This lack of action/inaction by the HAB shows little effort to implement the Chief Executive's Policy Address of 2010.
10. The Panel Meeting of 20th December 2011 showed the consensus for more expansion of SLAS and concluded that after the implementation of the proposals by the Administration the Panel should further discuss other proposals not supported by the Administration with a view to mapping out the way forward for the next term of LegCo to follow up. Neither the Bar Association nor the Law Society, have been

shown any new "road map", or "plan" to consider the other amendments on a logical or rational basis. To date we have seen no proposals at all 7 months later.

11. The Bar puts forward the rest of the Package as summarized herein so unmet needs for relatively ordinary people, for access to justice are addressed as soon as possible and the decline in Legal Aid is halted. We urge the New Administration to expand the Proposals to bring them into line with the law and the views expressed by the LegCo Panel and the proposals of the Bar Association of July 2010 and thereafter.

12. The Bar states that the need for an Independent Legal Aid Authority is clear when viewed in the light of the lack of progress on needed reforms to meet the expanding needs of society for access to justice. The LASC Monitoring system is just not working, and any such progress is essentially dependent upon the free services provided by members of the Board of LASC, and no professional establishment to speak of. The Bar Association's Submission on the need to establish an Independent Legal Aid Authority of June 2012 is attached herewith.

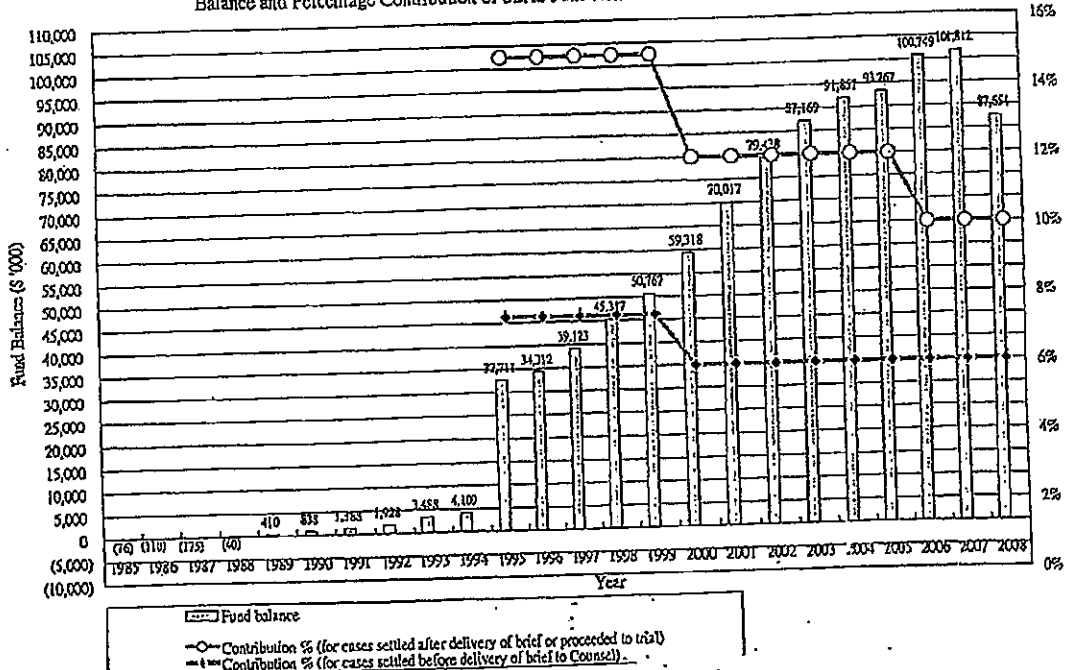
13. Equality before the law provided by equal access to justice via Legal Aid is a key component of our justice system where the gulf between the powerful and the victim or complainant can be considerable. Access to dispute resolution systems, negotiations, mediation are helpful but are not a substitute for genuine access to justice unless the victim or complainant of limited means has legal representation so that there is equality in the access to justice. Pro bono systems are not a substitute for Legal Aid as it does not provide equality before the law in the access to justice. Negotiation and mediation systems are a toothless remedy unless Legally Aided litigation is available.

14. In summary, Legal Aid must be reformed by a process including reforms to provide for unmet needs, access to justice and equality before the law, SLAS expansion, and independence. An objective for a new statutory authority could be to provide access to justice and equality before the law to those of limited means. These four limbs provide a reasonable policy approach for the new Administration.

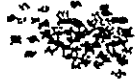
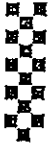
Hong Kong Bar Association

5th July 2012
[8290.rb]

Balance and Percentage Contribution of SLAS Fund from 1985 to 2008 (as at 30 September)



Note 1: The figures above are rounded up to the nearest thousand dollar.
 Note 2: For contribution % before the year 1995, please refer to the table "A" attached.



HADDY PY
LEE/LAD/HKSARG
01.08.2011 15:58

cc

bcc

Enclosure III

Subject Legal aid statistics

High importance Return receipt Sign Encrypt

Dear Mr Pirle,

I refer to our telephone conversation and set out below the information requested:

No. of legal aid applications

Year	Civil	Criminal	Total
2006	17 422	3 779	21 201
2007	16 598	3 765	19 363
2008	15 314	3 413	18 727
2009	17 357	3 816	21 173
2010	15 124	3 907	20 031
2011 (up to March)	3 759	841	4 600

No. of legal aid certificates

Year	Civil	Criminal	Total
2006	9 358	2 357	11 713
2007	7 937	2 507	10 444
2008	7 513	2 235	9 748
2009	9 031	2 800	11 831
2010	8 263	2 740	11 003
2011 (up to March)	1 939	598	2 537

Legal aid costs

Year	Civil (\$m)	Criminal (\$m)	Total (\$m)
2006/2007	313.199	105.489	418.688
2007/2008	331.031	97.181	428.212
2008/2009	347.302	82.809	430.111
2009/2010	377.546	108.221	485.767
2010/2011	390.103	115.205	505.308

Website of Legal Aid Department

<http://www.lad.gov.hk/eng/home/home.html>

<http://www.lad.gov.hk/eng/ppr/publication/ldr.html> (LAD Annual Reports from 2006 to 2009)

Website of the Law Society of Hong Kong

http://www.hklawsoc.org.hk/pub_e/default.asp

Haddy Lee
PS to DDLA/ADM
(Tel: 2867 3011)



法律援助署
Legal Aid Department

本署檔號 Our Ref: LA GR/1-200/7/2
來函檔號 Your Ref:
電話Tel: 2867 3096
圖文傳真Fax: 2869 0755

28 June 2012

Mr. Nicholas Pirie
Barrister-at-law
11/F, Baskerville House
13 Duddell Street
Central, Hong Kong

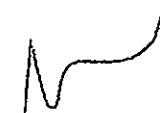
Dear Mr. Pirie,

Re: Expansion of the Scope of Legal Aid in Civil Cases

I refer to your letter dated 15 June 2012 and set out in the table below the information requested:

	Number of applications			Number of certificates granted		
	OLAS (Civil)	SLAS (Civil)	Total	OLAS (Civil)	SLAS (Civil)	Total
2010 (Jan - Dec)	15,981	143	16,124	8,157	106	8,263
2011 (Jan - May)	6,536	56	6,592	3,124	40	3,164
2011 (Jun - Dec)	9,783	105	9,888	5,069	64	5,133
2012 (Jan - May)	6,450	76	6,526	3,356	57	3,413

Yours sincerely,


(Ms. Juliana OY Chan)
for Director of Legal Aid

Statistics on Trial/Appeal involving Unrepresented Litigants in High Court (2002-2008)

Hearing nature	No. of hearings involving unrepresented litigant(s) / Total no. of hearings						
	2002	2003	2004	2005	2006	2007	2008
Trial/Appeal (All CA & CEI civils)	482/1123 (43%)	524/1162 (45%)	437/1039 (42%)	459/1113 (41%)	378/1021 (37%)	372/985 (38%)	406/960 (42%)
Civil Appeals (Appeals to CA)	106/231 (46%)	64/203 (32%)	72/211 (34%)	90/276 (33%)	97/282 (34%)	86/264 (30%)	108/308 (35%)
Civil Appeals (Appeals to CEI)	162/211 (77%)	227/308 (74%)	176/233 (76%)	157/202 (78%)	93/163 (57%)	100/151 (66%)	124/151 (82%)
Appeal against Master's decision	82/251 (33%)	91/218 (42%)	83/210 (40%)	93/253 (40%)	67/165 (41%)	77/189 (41%)	65/141 (46%)
Civil	132/430 (31%)	142/433 (33%)	106/385 (28%)	119/402 (30%)	121/411 (29%)	115/381 (30%)	109/360 (30%)

*If CA hearings on ROA cases in 2002 are taken into account, the total figures would be 6383/7032 (91%).

Statistics on Trial involving Unrepresented Litigants in District Court (2002-2008)

Hearing nature	No. of hearings involving unrepresented litigant(s) / Total no. of hearings						
	2002	2003	2004	2005	2006	2007	2008
Trial (ALLDC civils)	167/343 (49%)	162/347 (47%)	166/337 (49%)	174/324 (54%)	216/419 (52%)	193/411 (47%)	160/316 (51%)
Civil Action (non-TRD)	97/227 (43%)	111/250 (44%)	102/211 (48%)	127/217 (59%)	161/289 (56%)	98/210 (47%)	91/170 (54%)
Personal Injuries Action	15/27 (56%)	12/23 (52%)	10/36 (28%)	14/46 (30%)	18/69 (26%)	33/96 (34%)	24/76 (32%)
Miscellaneous Proceedings	2/3 (67%)	1/3 (33%)	6/8 (75%)	2/3 (67%)	4/6 (67%)	6/12 (50%)	3/8 (38%)
Other civils#	53/86 (62%)	38/71 (54%)	48/82 (59%)	31/58 (53%)	33/55 (60%)	56/93 (60%)	42/62 (68%)

#Other civils refer to Distraint Case, Estate Agents Appeal, Employees' Compensation Case, Equal Opportunity Case, Miscellaneous Appeal, Occupational Deafness (Compensation) Appeal, Pneumoconiosis (Compensation) Appeal and Stamp Appeal.



香港司法機構
司法機構政務處



JUDICIARY ADMINISTRATION
JUDICIARY
HONG KONG

本函編號 OUR REF:

來函編號 YOUR REF:

電話 TEL: 2825 0486

圖文傳真 FAX: 2523 2042

3 August 2012

Mr Nicholas Pirie
Member of the Bar Association Special Committee
c/o 11/F, Baskerville House
13 Duddell Street
Central
Hong Kong

Dear Mr Pirie,

Statistics on Unrepresented Litigants

I refer to your letter of 27/7/2012 requesting for the figures of the first 6 months of 2012 on this subject. Please find below the figures asked for which have been incorporated in the table on this subject sent previously on 9.2.2012.


Statistics on Civil Appeals/Trials involving Unrepresented Litigants * in the High Court and District Court 2007-2012 (up to 30/6)

Year	2007	2008	2009	2010	2011	2012 (up to 30/6)
High Court (Civil Appeals & Trials)	38%	42%	41%	42%	36%	38%
District Court (Civil Trials)	47%	51%	55%	53%	51%	65%

* Any one of the parties not legally represented in the hearing will be counted as hearing involving unrepresented litigants.

2. Thanks for your attention.

Yours sincerely,


(Roger LAW)
for Judiciary Administrator

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 *"feasible"* 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.



法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: () in LASC 5/4/2/3 Pt 8

Yr Ref :

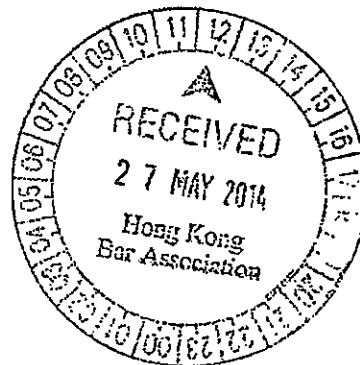
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26 May 2014

Mr Paul SHIEH, SC
Chairman
Hong Kong Bar Association
LG2 Floor, High Court
38 Queensway, Hong Kong



Dear Mr Shieh,

**Re: Independent Legal Aid Authority and
Supplementary Legal Aid Scheme**

Thank you for your letter dated 24 March 2014, the content of which is taken note.

The Council has set up a working group comprising members from the legal professions to review the scope of the Supplementary Legal Aid Scheme. The views of the Bar Association and other stakeholders expressed on the subject will surely be taken into account to draw up the proposals. The working group will submit its recommendations to the full Council for deliberation when the proposals are finalized. The Council will base on the working group's recommendations to form its views for making submission to the Government.

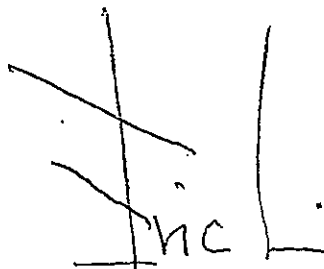
As to the independence of legal aid, the study on the feasibility and desirability of establishing an independent legal aid authority was conducted by an independent consultant who adopted a scientific approach to collect relevant statistical data and views from the stakeholders, and developed options on how to improve the condition with analysis. Given the methodology adopted is the usual practice of a consultant, the study results are considered, to a certain degree, reliable and the report has been served as a reference for the Council in the discussion of the subject.

/.....

In April 2013, the Council submitted its views on the independence of legal aid to the Chief Executive after careful deliberations of the consultancy report. In June 2013, on the invitation of the Legislative Council Panel on Administration of Justice and Legal Services, I and two other Council members together with the consultant attended the Panel meeting to brief the Legislative Council members on the Council's recommendations and the findings of the study as well as the methodology used in the consultancy study. During the Panel meeting, I have given the Council's response to the matters raised by the Legislative Council members and deputations including the ones from the Bar Association. The Council's recommendations on the independence of legal aid are now in the hands of the Government for consideration.

I thank you very much for your attention to the two matters.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eric Li', written over a faint grid or set of lines.

Dr Eric Li Ka Cheung
Chairman
Legal Aid Services Council