

14 July 2017

Clerk to Panel on Administration of Justice and Legal Services
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
[By Email: panel_ajls@legco.gov.hk]

Dear Sir or Madam,

Re: Misuse of Legal Aid System

I am a barrister in private practice regularly assigned by the Legal Aid Department (LAD) practicing primarily in public, civil and family law.

2. I write to express my concern about the recent unwarranted attacks against the LAD and the system of legal aid:
 - a. There are adequate checks for abuse of the system but it can be difficult in some deserving cases to obtain legal aid.
 - b. A careful comparison of the statistics relating to contribution reveals that legal aid is expensive to obtain for many who may not be able to afford legal services in the private market.
 - c. Hong Kong spends far less per capita than England & Wales, despite its similar GDP per capita.

Difficulty in Obtaining Legal Aid

3. In order to obtain Legal Aid, it is necessary for Applicant's to understand and present a reasonable claim to the LAD. However, although many Applicants will appreciate the loss or damage they have suffered, few will understand or be able to articulate the factual or legal basis for a legal claim.
4. If the basis or merits for a legal claim is not well articulated, an Applicant will often have his or her claim rejected by the LAD. It may be difficult to demonstrate a good case before a High Court Master on appeal – unless the master is *au fait* with the relevant area of law. The result is that most Legal Aid Appeals fail if the Applicant has no legal assistance. In my experience, the success rate will dramatically improve if counsel and solicitors assist the Applicant's application or appeal. However, this work is unpaid and most Applicants are unable to obtain such assistance.

5. In one recent case, I was assigned to assist a non-refoulement claimant whose claim was refused by the Immigration Department, was subsequently refused assistance on appeal on the basis that his claim lacked merits, and was initially refused legal aid. That case involved specialist issues relating to human trafficking. It was only after he was referred to specialist solicitors (Daly & Associates) who assisted him on a pro bono basis to reapply and obtain Legal Aid. After careful preparation, the merits of the case were so strong that (after the filing of the Application for Leave) the Government settled the case, granting him leave to remain in Hong Kong. This case demonstrates how meritorious claims can fall through the cracks – sometimes with devastating effects.
6. Counsel and solicitors are not reimbursed for the free assistance they give in preparing and obtaining legal aid for such persons (even if successful). As a result, few lawyers are prepared to assist. For those who do assist to maintain a legal aid practice, they may have to rely on subsequent assignments for successful cases. Limiting assignments would result in solicitors and counsel refusing to assist further clients to obtain Legal Aid in meritorious cases.
7. The statistics produced also fail to distinguish between areas of practice. Such analysis is revealing. It is notorious that certain areas are prone to high but fluctuating numbers of claims, and varying success rates, whereas others are low and consistent. For example, the number of immigration related cases is directly tied to narrow issues related to legal developments and numbers of persons being processed through new processing schemes. This is a major source for increased legal aid applications. It has nothing to do with changes in the legal aid system, the strength of its screening mechanisms, or alleged ‘ambulance chasing’ lawyers.
8. The importance of righting major injustices warrants a lower success rate. This is the price we pay for the rule of law in a just society. In this regard, I commend to the Panel William Blackstone’s great formulation:

“It is better that ten guilty persons escape than that one innocent suffer”.
[Commentaries on the Laws of England, 1765]

Expensive to Obtain Legal Services

9. Applicants must now show financial resources under HK\$36,297.50 to avoid paying a contribution. When the amounts of contribution are compared with current, actual levels of pay and disposable income against the Legal Aid Financial Eligibility Limits, *it is clear that legal services are expensive* (especially in section 5AA and Bill of Rights exceptional cases). See **Appendix A** (which compares advertised civil service and police pay levels with estimated contribution levels and eligibility).

10. Contribution can be a strong deterrent for many cases involving matters of great public importance. However, the eligibility limit is the strongest deterrence. The FEL has not kept pace with the inflation in costs of legal assistance in the open market. This has left many Applicants stranded, unable to pay for private assistance but ineligible for legal aid.

Cost of Legal Aid System: Comparison

11. It has been suggested that Hong Kong's Legal Aid system is too generous. However, the picture may be more complicated.
12. Published statistics reveal that per capita spending on legal aid is considerably higher in England and Wales than in Hong Kong (more than 2.4 times more for non-family civil legal aid, almost 3 times for per capita net legal aid spending), see **Appendix B** (Legal Aid Per Capita Spending).
13. Regrettably, the public debate has not been informed by careful analysis and comparison. The LAD is staffed with hardworking and public minded civil servants who deserve our respect and protection. Our Legal Aid system, though it may have faults, is something for which we can have great pride. It should be improved and strengthened – not maligned for political purposes.
14. I wish to express my appreciation to the Panel for considering my submissions on this very important issue.

Sincerely,

Azan Marwah
Barrister-at-Law
Gilt Chambers

Appendix A: Legal Aid Eligibility and Contribution Estimates (2016-17 tax rates, 30% rent)

Master Payscale	Gross monthly income (HK\$)	Deductions (personal, rent, MPF, tax)	Financial resources (HK\$)	Contrib. rate	Contrib. (HK\$)	Jobs in Public Sector
0	11,395	10,328.3	58,381	2%	1,167.62	
1	12,120	10,592.3	66,813	2%	1,336.26	
2	12,890	10,876.3	75,724	2.5%	1,893.10	
3	13,735	11,188.2	85,502	2.5%	2,137.55	
4	14,625	11,516.6	95,801	2.5%	2,395.03	
5	15,605	11,902.8	106,847	2.5%	2,671.18	Chainman *(starting)
6	16,590	12,313.0	117,684	5%	5,884.20	
7	17,685	12,769.0	129,732	5%	6,486.60	
8	18,840	13,261.8	142,299	5%	7,114.95	Chainman *(top end), ~Fireman/woman *(starting)
9	20,060	13,827.8	155,026	10%	15,502.60	~Aircraft Technician *(starting)
10	21,255	14,382.3	167,493	10%	16,749.30	
11	22,560	15,009.4	180,847	10%	18,084.70	~Police Constable *(starting)
12	23,970	15,730.6	194,753	15%	29,212.95	
13	25,415	16,469.8	209,003	15%	31,350.45	
14	26,700	17,127.0	221,676	20%	44,335.20	Assistant Programme Officer in Chinese Radio *(starting), Accounting Officer II *(starting)
15	28,040	17,812.4	234,891	20%	46,978.20	~Fireman/woman *(top end)
16	29,455	18,536.2	248,846	20%	49,769.20	
17	30,945	19,259.1	264,011	25%	66,002.75	
18	32,470	19,975.8	279,810	25%	69,952.50	~Police Constable *(top end)
19	34,085	20,734.9	296,541	30%	88,962.30	~Aircraft Technician *(top end)
20	35,780	21,531.6	314,101	30%	94,230.30	
21	37,570	22,372.8	332,646	30%	99,793.80	
22	39,350	23,209.5	351,086	30%	105,325.80	~Nature Conservation Officer
23	41,200	24,079.0	370,252	30%	111,075.60	Police Inspector
24	43,145	24,993.1	390,403	30%	117,120.90	
25	45,120	25,921.3	410,864	30%	123,259.20	
26	47,240	26,917.8	432,827	30%	129,848.10	
27	49,445	27,954.1	455,671	35%	159,484.85	Plant Taxonomist, Clinical Psychologist, Scientific Officer (IT Commission), Assistant Programme Officer in Chinese Radio *(top end), Accounting Officer II *(top end)
28	51,780	29,051.6	479,861	35%	167,951.35	~Vietnamese Interpreter
29	54,230	30,203.1	505,243	35%	176,835.05	
30	56,755	31,389.8	531,402	35%	185,990.70	~Contract Doctor (Family Medicine)
31	59,425	32,644.8	559,063	35%	195,672.05	
32	62,225	33,960.8	588,071	40%	235,228.40	Intellectual Property Department Solicitor
33	65,150	35,335.5	618,374	40%	247,349.60	
34	65,740	35,612.8	624,487	40%	249,794.80	
35	67,460	36,421.2	642,306	40%	256,922.40	
36	70,585	37,889.9	674,681	40%	269,872.40	
37	73,930	39,458.5	709,378	40%	283,751.20	~Contract Dentist (Orthodontics)
38	77,320	40,984.0	745,312	45%	335,390.40	
39	80,905	42,597.3	783,313	45%	352,490.85	
40	84,385	44,163.3	820,201	45%	369,090.45	English Language Writer
41	88,020	45,799.0	858,732	45%	386,429.40	
42	91,815	47,506.8	898,959	50%	449,479.50	
43	95,760	49,282.0	940,776	50%	470,388.00	
44	99,205	50,832.3	977,293	50%	488,646.50	
45	105,880	53,836.0	1,048,048	55%	576,426.40	
46	109,670	55,541.5	1,088,222	55%	598,522.10	
47	113,660	57,337.0	1,130,516	55%	621,783.80	
48	117,745	59,175.3	1,173,817	60%	704,290.20	
49	121,985	61,083.3	1,218,761	60%	731,256.60	

Assumptions:

1. Individual applicant
2. 30% of gross income spent on rent (includes all residence related allowable deductions)
3. No dependants
4. Disposable capital of 4 months gross income
5. Civil Service Master Payscale as of October 2016
6. Tax rates as of 2016-2017 (personal allowance of HK\$132,000, standard rate of tax at 15%).
7. Legal Aid FEL, personal allowances, contribution as of October 2016

Bold line represents Ordinary Legal Aid Scheme Limit

Appendix B: Legal Aid Per Capita Spending

	Population Mid-2015	Total Legal Aid and DLS Expenditure (including administration)	Per Capita Legal Aid and DLS Expenditure	Legal Aid and DLS (Non-Subvention) Income	Net Legal Aid and DLS Spending (excluding Subvention)	Per Capita Net Legal Aid and DLS Spending	Total <i>Civil</i> Legal Aid Expenditure	Per Cap <i>Civil</i> Legal Aid Expenditure	Total Non-family <i>Civil</i> Legal Aid Expenditure	Per Capita Non-family <i>Civil</i> Legal Aid Expenditure	Nominal GDP Per Capita
England & Wales	57,885,400	HK\$19,920,000,000	HK\$344.13	HK\$2,376,000,000	HK\$17,544,000,000	HK\$303.08	HK\$9,312,000,000	HK\$160.87	HK\$7,116,000,000	HK\$122.93	USD 43,734.00
Hong Kong	7,305,700	HK\$1,071,080,000	HK\$146.61	HK\$301,062,768	HK\$770,017,232	HK\$105.40	HK\$445,900,000	HK\$61.03	HK\$372,326,500	HK\$50.96	USD 42,422.90

See Table A1, Page 44 of Census and Statistics Department, "Population and Household Statistics Analysed by District Council District" (March 2016).

See Page 3 of Office for National Statistics (UK), "Population Estimates for UK, England and Wales, Scotland and Northern Ireland: mid- 2015" (23 June 2016).

See Appendix 1: Revenue and Expenditure of Legal Aid Department Annual Report 2014.

Pages 4, 9 and 21 of Ministry of Justice Statistics Bulletin, "Legal Aid Statistics in England and Wales April to June 2015" (24 September 2015).

Figures for non-family civil legal aid exclude matrimonial (HK) and family private and mediation (UK).

Figures for DLS expenditure are taken from the 2015 DLS Annual Report at paragraph 8.1. The income figures are taken from Appendix E1 (the Auditor's Report for the year ending 31 March 2015).

Figures for DLS income exclude subvention income (i.e. they include interest income and handling fees).

GDP (Gross Domestic Product) per capita figures are retrieved from the World Bank's figures published at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>

Exchange rate pre-"Brexit" estimated at 1GBP = 12 HKD.

	Population Mid-2015	Total Legal Aid and DLS Expenditure (including administration) (GBP and HKD)	Per Capita Legal Aid and DLS Expenditure	Legal Aid and DLS (Non-Subvention) Income (GBP and HKD)	Net Legal Aid and DLS Spending (excluding subvention) (GBP and HKD)	Per Capita Net Legal Aid and DLS Spending	Total <i>Civil</i> Legal Aid Expenditure (GBP and HKD)	Per Cap <i>Civil</i> Legal Aid Expenditure	Total Non-family <i>Civil</i> Legal Aid Expenditure (GBP and HKD)	Per Cap Non-family <i>Civil</i> Legal Aid Expenditure (GBP and HKD)	Nominal GDP Per Capita
England & Wales	57,885,400	£1,660,000,000	£28.68	£198,000,000	£1,462,000,000	£25.26	£776,000,000	£13.41	£593,000,000	£10.24	USD 43,734.00
Hong Kong	7,305,700	HK\$ 1,071,080,000	HK\$ 146.61	HK\$ 301,062,768	HK\$ 770,017,232	HK\$ 105.40	HK\$ 445,900,000	HK\$ 61.03	HK\$ 372,326,500	HK\$ 50.96	USD 42,422.90