Submission of the Hong Kong Bar Association

LegCo Panel on Administration of Justice and Legal Services
Research report on "Legal aid systems in selected places

Introduction

1. By letter dated 10 July 2009 the Hong Kong Bar Association has been asked to provide views on a Research Report ("the Report") prepared by the Research and Library Services Division of the Legislative Council Secretariat.

2. The Bar is informed by the letter that the Report is prepared with a view to facilitate the discussion of the LegCo Panel on Administration of Justice and Legal Services ("the Panel") on various issues relating to the provision of legal aid services in Hong Kong.

3. The Report studies the legal aid systems of 3 jurisdictions i.e. England and Wales, the Province of Ontario of Canada and the State of New South Wales of Australia.

4. The particular areas that are the focus of the Report, and on which the Bar's views are invited, are the following:

   (1) scope of legal services;
   (2) authority responsible for providing legal aid;
   (3) eligibility for legal aid;
   (4) legal aid service fees for lawyers;
   (5) legal aid expenditure per capita; and
   (6) legal aid services at the community level.

5. The Bar welcomes the opportunity of responding to the invitation and has endeavoured in this paper to articulate as succinctly as possible its views on the above matters. It has taken the view that this is not the place to deal with all the "pros and cons" associated with the issues but advances rather a summary of its points and the principal reasons therefor. It is hoped that this will be of assistance to the Panel in its forthcoming discussions. If the Panel feels that it would be assisted by further submissions on any particular topic the Bar would be pleased to assist by arranging the appropriate members to attend the Panel discussions.

6. Before addressing the individual issues the Bar wishes it to be understood that Hong Kong is fortunate to have a legal aid system which, comparatively, is sound and which plays a very important part in the administration of a justice system which is the envy of many countries. There is nonetheless, room for substantial improvement in the system, as we endeavour to show in the remainder of these submissions.

Scope of Legal Aid Services / Eligibility for Legal Aid

7. An expansion of the Supplementary Legal Aid Scheme ("SLAS") is well overdue.

8. In particular the Bar notes:

   (a) that although substantial expansion was advocated by the Legal Aid Services Council (the Bar) as long ago as 2003 there has been no significant expansion adopted by the Administration;

   (b) a successful expansion of the scheme is assured, as is evidenced by the fact that its surplus at this stage rose to a high of some $102 million;

   (c) types of cases that should be covered by the scheme (as advocated in 2003) have since "come home to roost" (*vide* the Lehman mini bonds scandal and the PCCW case);

   (d) the matter of unrepresented litigants has become an even more pressing problem;

   (e) the means test is now seriously outdated;

   (f) an increasingly aging population needs to be catered for: the current assessment system is particularly harsh to the elderly.

9. For amplification of the Bar's position on these matters see Appendix I, prepared by members who have been closely associated with the operation of the SLAS scheme.

Authority Responsible for Legal Aid

10. The Bar has consistently maintained, and continues to maintain, that the authority responsible for providing legal aid should be truly independent of the government – it should not be a Government Department as is presently the case.

11. For amplification of the Bar's position, please see Appendix II.

12. The Bar is fortified in its position by reason of the fact that in each of the 3 jurisdictions studied in the Report the responsible body carries the independence that the Bar advocates.

Legal Aid Services Fees for Lawyers

13. The Bar's position is that legal aid fees for criminal cases are absurdly low and in some instances, derisory. The Bar is in a position to provide case examples which illuminate this, vividly.

14. A clear inequity exists in that whereas the quantum of criminal case fees is regulated by statute no such restriction exists for prosecution briefs.

15. A further systemic problem is that fees are calculated in the first instance by reference to the level of the court in which representation is provided and not by the nature and complexity of the case.

16. Fortunately, the same situation does not pertain to fees for civil cases. However, all is not well with the system here either, especially with regard to the current position in respect of the taxation of civil legal and fees. For amplification of this and suggestions for reform see Appendix III.

Legal Aid Expenditure Per Capita

17. This comparison of legal aid expenditure per capita gives a misleading impression that legal aid costs in Hong Kong amount to HK$75 per capita.

18. The calculation does not take into consideration the amount of costs recovered by the Department in legal aid funded litigation. Nor does it take into account the expenditure incurred by the operation of the Legal Aid Department.

19. It is our view that in order to show the true per capita cost of legal aid in Hong Kong both the above factors must be taken into account. The Bar has just obtained the latest figures for 2008/09 from the Legal Aid Department.

20. For that year total expenditure for the Legal Aid Department, inclusive of the amount expended on legal aid cases, was HK$661,110,000 and the actual costs that were recovered by the Department and assigned solicitors paid to general revenue was HK$196,498,000. Thus the "net" cost of legal aid amounted to HK$464,612,000 representing a per capita cost of HK$66.

21. If one omits the cost of running the Legal Aid Department and applies the same calculation to the actual amount expended on legal aid cases of HK$430,110,000 and deducts the revenue recovered of HK$196,498,000, the net amount divided by 7.04 million population discloses a "per capita" cost of legal aid of just HK$33.18.

22. The Bar also notes that the overall expenditure (aside from the costs of the Legal Aid Department itself) for criminal cases appears to be falling (from $105 million in 2006/2007 to $53 million in 2008/2009).

Legal Aid Services at the Community Level

23. The Bar notes that, aside from the Legal Aid system, the administration does fund some legal services at the community level. In particular there exist the Duty Lawyer Scheme and the Free Legal Advice Scheme (FLAS) operated by the Duty Lawyer Service.

24. The Bar notes however that the most substantial element of FLAS i.e. the provision of legal advice is provided by the profession free of charge to both the public and the Government.

25. Moreover, as the Report points out (paragraph 5.7.1) the Legal Aid Department does not fund other non profit organizations to provide legal aid services at the community level. It would appear that, in contrast, Government funded organizations, in this sphere, are common in the 3 jurisdictions studied.

Conclusion

26. The Bar commends the Panel for its work in commissioning the Report and its intention to consider further the provision of legal aid services in Hong Kong. It trusts that the foregoing will be of some assistance to its endeavours and reiterates its offer of helping further, should the Panel deem that appropriate.

Hong Kong Bar Association

Dated: 24 September 2009

Appendix I

Note on SLAS
for Bar Association's Position Paper to Legco Panel on
Administration of Justice and Legal Services, September 2009

An Introduction

1.1 **The expansion of SLAS has been stalled for at least 7 years.**
For many years the Hong Kong Bar Association, The Law Society, and the Legal Aid Service Council (LASC) and others have requested the expansion of the Supplementary Legal Aid Scheme (SLAS).

The Hong Kong Bar Association Review of the position of Legal Aid of 22nd April 2002, Appendix A provided the detailed background and applicable principles, showing how SLAS has expanded, but very slowly, since its inception in 1984. The LASC position can be seen in comments on the 12th December 2003 under File Reference LASC/CR2/2/1 Part 3. The expansion of the scheme is assured as it's surplus rose to about HK$102 million and currently is about HK$87 million.

1.2 **Continuing support for reforms.**
Moving forward 7 years to the present, the LASC continues to support the expansion of SLAS as do other sectors of the legal community. In the course of the consultation on recovery agents and conditional fees it was noted that unlawful recovery agents had a detrimental effect on SLAS. The LASC has recently noted that the Law Reform Commission in July 2007 when publishing its Final Report on Conditional Fees, had formally recommended, in its Recommendation 2, that the SLAS Scheme be expanded by raising the financial eligibility limits and raising the types of cases covered by the scheme, having regard to maintaining its financial viability. The LASC states that this LRC recommendation tallies with the thinking of the Council. **It is only Government that is dragging its feet on this issue.** The reasons for no action by the Administration lack substance. They are inconsistent and fail to increase Access to Justice.

1.3 **Unmet Needs proved.**
The validity of the reasons for expanding SLAS continues to the present day. Current examples crying out for the expansion of SLAS include the **Lehman Brothers cases and mini bond cases.** Minority shareholder disputes could also be covered, to prevent people demonstrating e.g. PCCW case. This was precisely one of the types of cases proposed by the Bar Association and by LASC some 7 years ago.

1.4 **Action in the streets or in the courts?**
Instead of sensible reforms enabling access to justice under our rule of law for our law abiding population, we have seen our lower middle class becoming emotive or desperate. They have taken to the streets blaming the government for lax administration, and we have seen the relevant authorities blaming each other. It is better governance to avoid

the political remedies and bailouts. These matters could be argued in court rather than on the streets or in the offices of the Hong Kong SAR Government. It is a far safer alternative to provide a legal outlet for such frustrations. Thus the actual wrong doers will be made to pay. In default of Legal Aid, the government will become the target.

1.5 No Legal Aid for Co-owners in Badly Managed Buildings or Illegal Structures. The dangers from badly maintained buildings owned by persons without the means for expensive repairs or the means to take legal action to enforce repairs against refusing co-owners, continue to provide hundreds of examples of preventable personal injury accidents or deaths which are waiting to happen. The same is true of illegal structures.

1.6 When the accidents do happen, a recent case has found that Incorporated Owners may be liable for damage caused by illegal structures, so there are even better prospects for recovery of damages for this sort of litigation. But this means the accidents have to happen first. There should be legal aid to enable maintenance to reduce accidents by preventive legal action.

1.7 **Other Cases.**
There are many examples of other types of cases and involving other types of applicant which are deserving of and appropriate for SLAS expansion and which fall within the Reforms proposed in 2002. These unmet needs can be met with little financial risk to Government. The groups at risk and the gaps in legal aid identified 7 years ago match up well with the continuing needs and show that the reforms are justified and long overdue.

2. **Unrepresented litigants are a pervasive problem.**
This can be seen from the Civil Justice Reform Interim Report at paragraph 156. Nonetheless, it is to be hoped that in ongoing reviews of the scope of Legal Aid, notice will be taken of the growing phenomenon of unrepresented litigants and of the impact on the civil justice system. The cost provision for the Resource Centre for Unrepresented Litigants of the Judiciary is $2.8 million in 2009, but the problem remains that much valuable judicial and court time is lost and not accounted for. Historically the LAD actually developed from the judges providing assistance to 'paupers' some 40 years ago. Should the Judiciary be reverting to running its own system of legal aid when this ought to be the LAD function? The CJR Report requested "Re-consideration of broader public funding of meritorious claims by such litigants...." The Bar has associated itself with these comments and suggested a better way is by the expansion of the SLAS Scheme. The CJR Final Report of 2004 pages 459 onwards listed the appropriate action required was getting such persons representation by the Legal Aid Department.

3. **The CJR Final Report emphasized the need for multi party litigation and class action procedures. This was Recommendation 70, at page 239**
Such was regarded as a pressing need, for example by the Consumer Council, and supported by many such as the DOJ. This would have enabled test cases to be tabled in the Lehman Minibond cases and in the PCCW case. Again this has been a long standing Proposal. It is now the turn of Government, to act on this so that greater representation can be achieved. Then the objectives of widening access to justice in the Civil Justice

Reform can be implemented. Reforms to Legal Aid are needed now to meet the anticipated new rules in the next stage of reforms.

4. **Expansion of types of Cases to be covered by SLAS.**
Some of the principles and reasoning underlying SLAS can be seen in the Consultative Paper on Legal Aid of 1993 and the Report of the Reconvened Working Group on Legal Aid of July 1994. The principles are extracted and summarized below such as from pages 31-32 of the Report. It advocated "a wait and see approach" so the Scheme and its Fund could grow. Now 15 years later the Scheme is well established.

5. **The Fund has over $87 million sitting around.**
The Fund had over $80 million in 2002. There was an established record of reasonable results and expertise so it is clear the Scheme is capable of further expansion. Action is long overdue. The Fund rose to about $102 million in 2007 but declined to about $87 million in 2008 for various reasons including the reduced contributions as a result of the SLAS percentage contribution being cut from 15% to the low level of 10% in 2005. If the Fund needs to be rebuilt to $100 million, this can achieved by restoring the contribution percentage and other appropriate measures. The main purpose of this Fund is not achieved by doing little with it. **This Fund is grossly underused**. With the existence of proved unmet needs, this money should be used to further the objectives of Legal Aid, to increase access to justice. This would enhance the Rule of Law and continue to maintain our strong common law based jurisdiction in the HKSAR.

6.1 **The Current Principles currently governing SLAS appear to be as follows:**

a. Significant injury or injustice to the individual, currently reflected in the case having to be worth $60,000;
b. Involve monetary claims and have a reasonably good chance of success;
c. Expense and difficulty and cost is not an argument against expanding SLAS to cover more justified types of claims;
d. Worthy candidates for inclusion can be considered when the Scheme is financially capable for further expansion;
e. The purpose of SLAS is to help Athe sandwich class@ so those above the line are excluded and discretionary inclusion would be subject to abuse and increase LAD workload;
f. Class actions were only excluded because the Hong Kong legal system does not yet provide for class actions. Now see CJR Final Report 2004 page 461 on plans to change this, see above.

6.2 **The Legal Aid Services Council proposals of 2003 are endorsed and amended in this paper as follows:**

6.3 Monetary claims by individual owners against property developers concerning or relating to purchased premises, for example disputes over compensation for repairs due to defective or poor workmanship or building materials where the claims are not resolved within the repair warranty period or not covered by the repair warranty conditions;

6.4 Monetary claims by individuals against insurance companies concerning or relating to

insurance policies, such as disputes when insurance companies purport to disclaim liability under the insurance policies;

6.5 Monetary claims by employees (including class actions) against listed or substantial companies employers in relation to employment disputes which have been transferred to the Labour Tribunal to the District or High Court;

6.6 Monetary claims by individuals against financial institutions e.g banks, deposit taking companies, concerning or relating to financial services.

Other important Reforms for SLAS

7. **Raising the SLAS Means Test Limit to $2 m.** The general consensus is that the SLAS limit is now set too low at only $471,600. The figure is based on 1984 figures when the criteria was $15,000 per month disposable income and a capital figure of $100,000 which was increased to $280,000 in 1992, $400,000 in 1995 and the present figure $471,600 in 1997. A more realistic figure to reflect the value of say a property worth $100,000 in 1984 would be say $2 million nowadays. This is linked to our aging population and the decline in Legal Aid noted herein.

8. **Good corporate governance being regarded as essential to Hong Kong as a place for business, there is increasing merit in SLAS being available for partnership and shareholder litigation**

This will lead to the company legislation and articles of association being enforced and hence more respected and less abused. If the funds are available to satisfy judgments and pay costs. The SLAS fund should be relatively secure whilst rendering a public service. Such actions are either personal claims by minority shareholders or derivative actions by minority shareholders in the name of the company who have been affected by the misconduct or fraud of the majority. If the SLAS assistance is limited to cases which have resulted from the frauds on the minority, and the defendants are persons of financial means, then if the case succeeds the SLAS fund will be assured of financial recovery. Section 168, the Companies Ordinance Cap. 32 was radically amended in 2002, and individual shareholders have small resources to fight in these cases.

8.1 **PCCW was a case in point.** In default of Legal Aid it was left to the SFC to take statutory action. This is more limited, when more realistic remedies and damages for those who have actually suffered loss could have been obtained, if Legal Aid could have been given to minority shareholders. This would have had an additional benefit of protecting the public interest, and Hong Kong's reputation as a financial centre, with good governance.

9.1 **The elderly and retired or unemployed require special provisions.**

Such provision are currently made for those under "disability", such as minors and the mentally disordered. Similar special provision can be devised and extended to elderly or

retired or sick and unemployed. Often these are persons whose main source of income is derived from their investments e.g. a small flat yielding rental income. If they are forced to sell such an asset to fund their litigation, their future could be at serious risk.
Hong Kong has a dramatically greying society. This was emphasized by the Commissioner for Census and Statistics, SCMP 7th September 2009 who stated that each year 100,000 people reach 60 in Hong Kong. We are told that in 10 years some 49% of the Hong Kong population will be over 60. Currently the Legal Aid Department has a history of very slowly responding to society changes and needs.

9.2 **LASC has shown how <u>the current means test system is particularly harsh and hence unfair against the elderly or retired applicants</u>.**

The elderly, like all young and working applicants, are expected to draw on their limited means until depleted enough and they are made poor enough to make them eligible for Legal Aid. Unlike the young and working, the hardship for elderly persons is far greater than a younger person in employment. The inevitable consequence of that policy for elderly or retired people with no salary or earning power is that they will be permanently financially crippled from the initial expenditure on front loaded and critically important first steps in litigation required by CJR. Unlike ordinary working people who are expected to re build their savings in the rest of their normal life, for litigants at 60 or 65 this is not possible. Undue hardship is clearly proved, but this built in unfairness is currently the underlying principle for means testing under current Legal Aid. It must be changed to level the playing field. See generally the book <u>Legal Aid in Hong Kong, 2006</u>, published by the LASC, and see Chapter 8.

9.3 Other reforms to reduce the undue hardship suffered by this type of applicant would be to exclude from means testing their funds required for survival in retirement such as MPF, ORSO funds and provident or pension funds. Practitioners often experience other examples and cases of restrictive and unreasonable interpretations of the legislation which create hardship or deny Legal Aid to various types of deserving people which need to be addressed either administratively or by a review of the system.

10. **Reversing the current decline in Legal Aid.**
The Commissioner for Census and Statistics recently said that Hong Kong is rich enough to support its aging population. On World Bank figures, Hong Kong has a GDP per Capita ranking 11th in the World, ahead of Canada, Australia and Britain, which are the very countries examined by the comparative LegCo study.
In this context, the decline in Legal Aid has been marked. **There was an average 15% decline in civil legal aid certificates across the board in the 2007 LAD Report.** This and other factors indicate SLAS is also shrinking year by year instead of expanding. Recent SLAS figures indicate that the ratio of successful applications has dropped from 75 to 50%. Further enquiry is needed. Recent figures show that the total Legal Aid costs of the Department have remained almost static and the Legal Aid costs of Criminal Cases have even markedly declined. The decline in Legal Aid will get worse with our ageing population who tend to have more savings and property.
Our very low per capita Legal Aid expenditure when compared with comparable

countries is lamentable.

As our population ages, the low per capita expenditure on Legal Aid revealed in the LegCo study will get even lower. The current low levels of Legal Aid expenditure per capita plus the proved need, shows the proposed reforms are long overdue and necessary.

11. **The Proposed Revised Criteria:**

11.1 As a matter of policy
Persons or classes of persons who have suffered significant injury or injustice or who are otherwise deserving of legal aid, in cases involving facts or principles which should be supported in the public interest;
Examples of such cases are consumer or product liability, environmental damage cases where the individual damage may not be high but the damage to many could be considerable.

11.2 **Class or group litigation;** Examples are cases involving
i. disasters, environmental damage, consumer and product liability,
ii. insolvency situations such as non-payment of wages and entitlements,
iii. labour disputes,
iv. Building Management Ordinance type cases and

11.3 **Cases involving fraud on a minority or oppression in company situations as a consequence of defective corporate governance;**

11.4 Other cases which involve monetary claims and with reasonable prospects of recovering damages and the costs, when there is relatively little risk to the SLAS Fund of an unsatisfied judgment or orders for costs, see paragraph 6.4 to 6.8 above; these can be assessed on a case by case basis on some criteria.

11.5 Another consideration, which is linked to a Merits type factor, is whether the Defendant has the money to pay damages and costs when the funded litigation succeeds. If this is to be a factor in future, it should depend on a thorough case by case enquiry as to whether the Defendant has insurance or some assets to make the litigation broadly worthwhile, even if total recovery is not possible.

11.6 **The Means Test upper limit should be** increased to not exceed $2 million in relation to individuals.

11.7 **There should be a discretion in the DLA for cases over that Means Test figures** to be exercised on specified grounds. A discretion already exists for Bill of Rights type cases.

11.8 **Elderly or retired and unemployed people should have special provision.**

11.9 **The contributions could be on a sliding scale on the amounts recovered.** This was originally the case. Alternatively this could depend on where the plaintiff is of limited

means, those with means between say $500,000 to $2 million could be arguably be expected to pay a bigger percentage. The percentage contribution can be restored upwards from 10% to the previous 15% if the Fund needs to be strengthened to maintain a sensible balance to cover assessed litigation needs.

11.10 other criteria can be considered.

12. **Access to SLAS should be not only by way of the existing application procedure.** A Master or Judge should be expressly given the power, at any stage of the proceedings, to direct unrepresented litigants either to the community legal service centres or direct them to the Legal Aid Department and SLAS, certifying the merits and that SLAS would assist the Court. As a result the case would be adjourned and stayed until the unrepresented litigant was provided with an opportunity to have SLAS or whatever assistance was considered appropriate after investigation and report.

13. **Legal Aid by Section 5 is confined to a few types of Court or tribunal as listed in Schedule 2 Part 1.** Consideration should be given to expanding SLAS to cover other types of Tribunal such as the Housing Appeals Tribunal under the Housing Ordinance Cap 283.

14. **An improved and expanded SLAS Scheme would thus provide**

    a. A broader public funding of meritorious claims;

    b. Would provide such assistance at relatively little cost and risk to the public purse, meaning the SLAS Fund;

    c. Ensure cost effective and better use of the under-used SLAS Fund;

    d. Would be far better than any conditional fee system whereby loss of the case can result in no payment to the applicant's lawyer which in turn is likely to engender undesirable pressures and temptations;

    e. Is based upon a scheme which is currently working satisfactorily;

    f. Is in line with stated Government policy for expansion when the Scheme has reached sufficient maturity, the Fund has reached sufficient size and the staff concerned have reached sufficient experience and ability.

15. **Amending the Ordinance**. Pursuant to Section 7 of the Ordinance Legislative Council can make some of these amendments by merely passing a resolution. It can by resolution amend the financial resources in Section 5; and income and financial resources in Section 5A and also Schedules 2 and 3. This indicates it was contemplated that expansion of Legal Aid including SLAS should be facilitated by resolution of the Legislative Council. **We would accordingly request the administration to move the Legislative Council accordingly.**

Appendix II

The Authority Responsible For Providing Legal Aid

The Bar's Position

1. The Bar is of the view that the authority responsible for providing legal aid should be truly independent of the Government.

2. In particular, the Bar considers that the current situation whereby a Government Department, the Legal Aid Department, carries the responsibility does not reflect the necessary independence.

3. Further aggravating this situation is the fact that the policy making body for Legal Aid in Hong Kong is the Home Affairs Bureau – a department which is itself responsible for the administration of many activities which attract court actions such as judicial review and for which legal aid might be applied.

Amplification of the Bar's Position

The Case for Independence

4. The case for the independence is compelling:

   4.1. *"Chapter 3 of this Document illustrates that legal aid services are not to be treated merely as a form of social welfare. Rather they are an integral part of administration of justice that translates a theoretical right of access to justice into a practical reality. Decisions made in the administration of publicly funded legal aid services are decisions made to give effect to statutory entitlements to such services. The imperatives of the administrative law duty to act fairly, the accountability of a public service provider of its use of public resources, and the special premium of legal aid, make it triply important for decision-making in the processing of legal aid applications and the delivery of legal aid services to be independent and impartial and manifestly perceived to be so."*[1]

   4.2. *"Independence and impartiality in decision-making of publicly funded legal aid services will have to be achieved when legal aid is sought by an ordinary citizen in respect of proposed litigation against the Government or a public body."*[2]

   4.3. In a speech to the Legislative Council on 21st July 1993 the Hon. Moses Cheng stated that the Government's role in legal aid, however effective and well intentioned

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1 Legal Aid in Hong Kong p.230

2 ibid p.230

"[is] simply counter to the common principles of independent judicial propriety. In most developed democratic societies the justice systems have evolved sufficiently to separate the role of the Government and remove any lingering doubts over conflicting or self-serving interests .... The powerful perception of "the fox guarding the hen-house" must be washed away from our justice system"[3].

4.4. In England, in its Final report the Royal Commission on Legal Services stated:

> *"The main objection of principle is that legal 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 interests of clients in such cases, the independence of the legal profession is of paramount importance. If all the lawyers to assist an individual at public expense depended on 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 comply with his wishes, but in a way which avoided causing difficulties and gave least offence to those in authority."*[4]

4.5. Upon its establishment in 1996 one of the principal functions of the Legal Aid Services Council was to report on the feasibility and desirability of the establishment of an Independent Legal Aid Authority. In its 1998 submission the Council stated:

> *"that the arrangement of having civil servants administering publicly funded legal aid services was institutionally flawed because of the risk of pressure from the Administration. Such an arrangement encourages the perception of a lack of independence.* The Council argued that: *"Operational independence can only be guaranteed by institutional independence, in the sense that civil servants may find it difficult to exercise discretionary powers against the Government when they are themselves part of the Government."*[5] Against this tide of considered opinion the Administration rejected the recommendation.

4.6. Returning to the international stage, the 2005 International Forum on Legal Aid adopted a Joint Statement declaring, inter alia, that *"Legal Aid Institutions should be independent in structure, operation and delivery of services."*[6]

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[3] *See the speech of the Hon Moses Cheng before the Legislative Council on 21st July 1993: Reports of the Sittings of the Legislative Council of Hong Kong (Session 1993/94), pp 4929 – 4931.*

[4] *Royal commission on Legal Services, Final Report (London: Her Majesty's Stationary Office, 1979) (Cmnd 7648), paragraph 5.7.*

[5] *Legal Aid in Hong Kong p.232 and Legal Aid Services Council, Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority (September, 1998) pp 14-15*

[6] *Legal Aid in Hong Kong p.230 and Joint Statement of the 2005 International Forum on Legal Aid (15-17 October 2005, Taipei) in Legal Aid Services Council, Legal Aid (Issue No 10) (January 2006) pp 14-15*

The Transfer of the Legal Aid Portfolio to the Home Affairs Department

5.1. In the light of these arguments the Bar considers the recent transfer of policy responsibility from the Chief Secretary for Administration to the Home Affairs Department to be a retrograde step.

5.2. This move was announced as a proposal by the Administration before any consultation with stakeholders such as the Bar. Although the Bar made detailed submissions against the proposal these fell on deaf ears.

5.3. The Bar considers that this failure reflects the views of many that key figures in the Administration do not truly appreciate the nature and importance of the role of the legal aid system.

5.4. The Home Affairs Department has responsibility for matters of Government which are frequently the subject of litigation (e.g. judicial review applications) often affecting the right of persons of limited means. Considerable scope for a conflict of interest exists through direct or indirect means, such as limitations on the allocation of resources.

General Acceptance of the Need for Independence

6.1. In its 1986 Report (*"the Scott Report"*) the Working Party on Legal Aid recognized 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 then Department of Audit.[7] Despite this recommendation nothing to this effect has been implemented by the Administration.

6.2. In March 1992, the International Commission of Jurists, in its report of its Mission to Hong Kong observed that in the context of monitoring and enforcing the Hong Kong Bill of Rights Ordinance:

> *"It is also essential to ensure the independence of the Legal Aid Department, which at present funds much of the human rights litigation. It is a government department headed by a Director of Legal Aid. Consideration should be given to making the Legal Aid Department an independent board rather than a government department."*[8]

6.3. The Working Group on Legal Aid Policy Review, which deliberated between 1993 and 1994, recognized the importance of public perception of independence of legal aid

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[7] *Legal Aid in Hong Kong p.231 and See Legal Aid: A Report by the Working Party (January 1986) ("the Scott Report", paragraph 5.14.*

[8] *International Commission of Jurists, Countdown to 1997: Report of a Mission to Hong Kong (Geneva: International Commission of Jurists, 1992) p.105.*

provision and accepted that the status of the Legal Aid Department as a government department may create a perception problem.[9]

Conclusion and Recommendation

6.1. Historically, the Bar has consistently maintained the position described in paragraph 1 above.

6.2. Any lingering doubts as to the soundness of the Bar's position must surely have been dispelled by the result of LegCo's Research Report. Each of the jurisdictions examined has as its legal aid authority, a body which is truly detached from the Government.

6.3. The Bar therefore recommends that efforts be made to convince the Administration, once and for all, that its stance is untenable in the face of these compelling arguments and the structures present in comparable common law jurisdictions.

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[9] *Legal Aid in Hong Kong p.232 and See Administration Wing, Chief Secretary's Office, Report of the Reconvened Working Group on Legal Aid Policy Review (July 1994) paragraph 9.3 and 9.5*

Appendix III

Taxation of Civil Legal Aid Fees

1. In legal aid cases, counsel fees are such fees that are allowed on taxation or, in the absence of taxation, fixed by the Director not exceeding such amount which he thinks would have been allowed on taxation.

2. Prior to 1998, there were few concerns about taxation in legal aid costs in civil cases. Since mid 1998, counsel and solicitor fees have been mechanically and heavily taxed down by Masters without sufficient reasons or regard to the demands of the case or seniority of counsel.

3. Whilst the Bar accepts that the Judiciary has an interest in controlling the charge of unreasonably high fees, why a sea change had occurred without consultation with the professions has not been explained by the Judiciary.

4. In 1999, the Bar's proposed Bands of Fees in the Personal Injuries List arrived at by reference to market information was submitted to the Judiciary and the Civil Court Users Committee. The Judiciary has not advanced the matter ever since.

5. The absence of explanation for the reductions of fees left practitioners perplexed and aggrieved at the end of the derisory taxation process. Reviews involve further costs and is time consuming, and unlikely to take matters further.

6. Insufficient consideration is given to the amount of time and effort spent on the preparation of a document or the preparation of a trial/hearing. In worst cases, it is entirely overlooked. The element of subjectivity in different taxing Masters appears to have significant effect on the result of taxation.

7. At taxation hearings, usually the legal aid counsel in attendance does not comment on the bills presented nor would the Master invite assistance. Upon completion of party and party taxation, the legal aid counsel would invariably prevent the fees which have been taxed down on the party and party basis from being transferred to the Common Fund regardless of whether justification for transfer exists.

8. In cases where there is no party and party taxation (for example, the case is lost), it is also the persistent practice of the Director to offer counsel their fees at a substantial discount. Offer of 50% discount is not uncommon. The experience of legal aid counsel and the criteria they use for conducting taxation or assessment in lieu of taxation have never been made known to the Judiciary or the Bar.

9. The Civil Justice Reform this year has conferred upon Masters and Judges greater power over, inter alia, matters of costs, and gross sum taxation is now a regular occurrence in interlocutory applications, and we understand also in some substantive hearings. Judicial practices hitherto show that counsel and solicitor fees have been severely cut down under gross sum taxation. In one interlocutory hearing, 85% of senior counsel's brief fee was

taxed off. In another interlocutory hearing, a summary award of $1,000 was given to the winning party who was represented by counsel of over 20 years call.

10. The inherent uncertainty in the current system, the inconsistent approaches of different Masters and Judges, the judicial practice to tax down counsel fees and the failure of the Director to provide meaningful assistance in taxation have led to barristers not being properly and fairly remunerated for their professional works.

11. This continued state of affair would have a serious detrimental effect on the quality of legal services provided to the public under the Legal Aid Scheme.

12. The Bar recommends the following areas of reform for legal aid civil cases be explored:

    (a) Regular consultation meetings between the Judiciary, the Bar, the Law Society and the Director of Legal Aid;

    (b) Better taxation guides to achieve consistency;

    (c) Greater transparency and accountability in assessments in lieu of taxation;

    (d) New regulations to facilitate the above.