

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. Regrettably, 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