

THE HONG KONG BAR ASSOCIATION submission for 18TH JULY 2017 AJLS PANEL

Alleged Misuse of the Legal Aid System

1. The criticism against the Legal Aid System appears to be mainly directed at applications for Judicial Review (JR).
2. The Legal Aid System has adequate protections for abuse, most of which are outlined in the HAB paper of 13th July 2017. Additionally, the professional conduct obligations of solicitors and barristers effectively polices most potential abuses by potential applicants.
3. Existing hurdles faced by Applicants for Legal Aid deter or stifle deserving cases. These cases involve issues of public interest and concern. We note an additional obstacle to Legal Aid in difficult cases is being proposed.
4. Access to justice is denied, as in many cases there is no Legal Aid in the initial stages. Hence in many cases, solicitors and counsel are compelled to assist pro bono to help aggrieved persons formulate their grievances properly about unreasonable Government decisions, which warrant JR.
5. This unpaid and independent pro bono legal work is all the more essential since LAD is not an independent authority. Consequently, LAD cannot litigate JR cases in house, and hence lacks the necessary hands on expertise on such cases. The effectiveness of Legal Aid in JR thus depends on the work of independent lawyers working pro bono to obtain leave for would be applicants, who then apply for Legal Aid. Thus, there is no abuse.

HAB Paper provided 13th July 2017, Page 5 of LC Paper No CB (4) 1386/16-17 (03)

6. The basic criteria under Section 10(3) of Cap. 91 (reasonable grounds for making an application JR) are correctly stated. Important and public interest JR cases have been brought through Legal Aid, after leave has been obtained. Thus, there should be no reason to make any changes. Cases with the statutory merits should be allowed to proceed normally.

Analysis

7. The LAD has long recognized that JR applications are at the cutting edge of the law, and has provided means by which human rights are protected under the BORO, and are an important example of funds used in the public interest.
8. HKBA supports the LAD in this process. What has happened is that the Immigration Department was very slow to get to grips with the refugee status problem for about 10 years. As a result, large numbers of illegal immigrants were not dealt with timeously.
9. There was an upsurge in many JR Applications in 2015. These recent fluctuations are directly attributable to social and policy changes (particularly of the Immigration Department), not to abuse of Legal Aid. AJLS should be looking at the quality of the processing within LAD:

10. The number of grants of Legal Aid for non-refoulement claims and other immigration JR claims (Contribution rates for these cases are usually nil, or very small) so presumably relatively few of them are refused on means and most are refused on the basis of merits.

2014	98 applications	52 grants:	grant rate	53 %
2015	248 applications	62 grants	grant rate	25 %
2016	144 applications	9 grants	grant rate	6.25 %

11. Upon a purely numerical basis there can be little criticism of LAD and the procedures in place. It cannot be suggested that too many JR applications for non-refoulement claims are getting through, or that public funds are being wasted.

12. However, the rapid drop in percentage of grants from 53 % to 6.25 % requires careful inquiry.

13. For Other JR Cases:

2014	168 applications	22 grants	grant rate	13 %
2015	252 applications	45 grants	grant rate	17.85 %
2016	293 applications	18 grants	grant rate	6.15 %

14. Again, the grant percentages have fallen to very low rates – basically halving:

15. There can be no criticism now that too many grants for these proceedings are made.

16. The percentage of Legal Aid Costs has only gone up 1 % from 4 to 5 % of total legal aid expenditure.

17. The success rates for civil cases is high, very few PI Claims fail, and the Medical+ Dental Cases average 71 %, and miscellaneous (including JR presumably) @ 56 % on average. **From a public interest and public purse perspective, these are reasonable figures, and pro bono preparation has assisted in this high success rate.**

18. **However, whether the results could be improved with better quality of Legal Aid, providing equality of arms in cases against well-funded opponents, or whether enough Legal Aid is being granted needs a fuller examination, in a future meeting.**

19. The figures for grant after Legal Aid Appeals do not reveal the percentage of cases where Applicants are un/represented. HKBA suggests that in many cases where Legal Aid is granted after appeal, the Applicant was represented/had pro bono legal help, and vice versa. Costs should be main available by LAD in suitable cases.

20. **In many cases, much professional work needs to be done by solicitors and counsel, on a pro bono basis, (i.e. unpaid) before a Legal Aid Certificate is granted.** Cases have become more “front loaded” with more early paper work required after the Civil Justice Reforms. There is no recognition in the HAB Paper of:
- a. the existence of such work, or
 - b. that such work is essential to the process of granting Legal Aid efficiently, and
 - c. that this work contributes to the relatively high rate of success in all Legal Aid Applications.
21. This is particularly so in medical and dental negligence claims. **In JR Cases often DLA is now waiting for Leave for JR to be given by the Judge, before granting a certificate.** Thus the JR Leave Application process, and the court appearance have to be either borne by the JR Applicant or undertaken Pro Bono. When this is done, by public spirited lawyers, they are at risk of being accused of being politically motivated or tainted in some other way, which detracts totally from the good and well intentioned work undertaken by the pro bono lawyers.
22. In a mature and independent Legal Aid System, there must be proper payment for the professional work which needs to be done to access the justice system. Lack of such payment is more typical of a less developed country.
23. In Hong Kong, we should not make effective access to justice depend upon the charity of pro bono lawyers rather than being a right to access to justice. The policy of encouraging Pro bono work is intended to cover the gaps in the formal Legal Aid system in specific cases.
24. It should not displace the public duty to provide access to justice to those with limited means.
25. **A flexible system of retroactive payment for professional work which was reasonable and necessary,** should be in place now, with suitable safeguards, to pay for this valuable pro bono work. This successful and efficient process should be considered by LASC and DIA and inserted into the Guidance Notes issued to solicitors and barristers.
26. HKBA views it as essential that a strong and up-to-date Legal Aid system be kept in place to ensure there is continuing access to justice and the benefits of our Common Law based system continues for the next generation of Hong Kong citizens in accordance with the Basic Law.

Assignment of Lawyers

27. There have been repeated (and largely unwarranted criticism) of “favouritism”, of over allocation of cases to various lawyers. The ICAC has evaluated the process and LAD have acted on their advice. **Altering the limits on cases or payment is not the correct way forward. LASC has not consulted the HKBA.**

28. We suggest:

a. **DLA and LASC should be looking at “the quality of work” and not just “numbers”:**

Where barristers and solicitors are good at a particular type of work, and do it in a cost-effective manner, they should receive more certificates. This will help meet the objective of delivering quality Legal Aid services. **The crude across the board limits need refinement.** In other countries, where Legal Aid systems are in place, there is a “block allocation of cases” for say a 5-year period, which is reviewable. Thus, standard fees can be put in place for both barristers and solicitors for this type of work, and this saves the system substantial sums and builds on the particular expertise that these lawyers have. This has been evident in the SARS Cases.

b. As the HAB Paper does not explain and LASC has not consulted HKBA, we do not know the factual or legal basis for their adjustment. If it is just a reaction to potential criticism, then this is not an adequate basis to adjust them.

c. This does not take account of class actions, which we have in fact already in Hong Kong. HAB and LASC may not be aware of this, as judges, particularly in personal injuries cases have been delivering “class directions” for years. Over 50 years LAD has been assigning on a class basis to individual law firms and barristers cases for: Thalidomide, HIV/Aids Blood Transfusion Cases, SARS, the Shek Kong Disaster Cases, the KMB Bus Accident at Sham Cheng Flyover, Cipel Marco Fire, Top One Karaoke Fire – these are all cases where it is sensible that LAD assigns just 1 or 2 firms and barristers to handle these types of cases. The High Court has given class action directions in the past, and will do in the future in these types of class actions – this is a major omission in this discussion in Paragraph 19.

d. No account is taken of the specialist nature of Legal Aid practices. In certain specialist areas of practice, few solicitors and counsel will accept Legal Aid assignments at all by reason of the delay in the Legal Aid Taxation. An 8 year wait for the final payment is not uncommon. **To meet the objective to provide quality Legal Aid services, solicitors and counsel who are able to efficiently and cost-effectively handle specialist and difficult matters should not be ‘capped’.**

Touting – Maintenance & Champerty – nomination by clients for a particular solicitor

29. **This has long been an area of abuse.** We have not been party to the discussions to prevent such abuse recently, but we have written papers and provided advice on the wording and the legal aspects. Individual Members have reported abuse when it has come to their attention. This has resulted in prosecutions of those concerned.

The Departmental Monitoring Committee - HAB Paper paragraph 21

30. **As noted above, such a Committee could pro-actively monitor the quality of services provided to the LAD so improvements are achieved.** We are not currently party to the “Departmental Monitoring Committee”. Nor was the Standing Committee on Legal Aid consulted on this.

31. Concerns include:

- a. This Committee has the power to take a solicitor or barrister off the Panel, for “Unsatisfactory Performance or Conduct” without the right of any redress.
- b. The Paper states improprieties or undue delays are the “Unsatisfactory Performance or Conduct”. In 2016, there were 14 cases of this type of conduct and it would be useful to know (without the names) to know what the improprieties or delays were so we could warn practitioners of the consequences of such behavior.
- c. This Committee should be acting more openly;
- d. Representatives of HKBA and the Law Society should be sitting upon it, or be brought in for special cases.
- e. This affects the professional lives of a barrister and a solicitor. LAD should be widening participation in this process, rather in the same way in which the Buildings Department deals with delinquent contractors and tenderers.

Section 9 Opinions - Paragraph 19 of HAB Paper contains a Proposal

“that, as a general policy, a counsel who has earlier given a favourable section 9 opinion would not be assigned to handle the case if legal aid is subsequently granted.”

32. HKBA has not been consulted on this. Our initial observations include:

- a. Another obstacle or hurdle to obtaining access to justice in difficult cases is erected.
- b. No valid ground for the proposal is given.
- c. Having regard to the absence of valid grounds, the LegCo Paper 12th July 2017 paragraph 18, in relation to questioning the nominations of lawyers when there are no valid grounds, states “it is improper for the Department and would be a slur on the character and professional integrity of the nominated lawyer for LAD to enquire if the nomination is prompted by some kind of questionable conduct on the part of the lawyer concerned.” Such sentiments apply to the current proposed ban on lawyers being assigned after they have given positive Section 9 opinions.
- d. This ban will duplicate work and increase the costs.
- e. This ban will increase delays.
- f. Often in Masters’ Appeals and difficult subject areas which require a lot of preparation – e.g. medical negligence or professional negligence – it is not cost effective for a second barrister to be assigned to go over the same ground.
- g. This happens repeatedly, where experienced counsel advises on an appeal against the refusal of legal aid – the Master orders a section 9 opinion from a second barrister – who then comes to the same conclusion as the first barrister.
- h. This results in one or two specialists being excluded from acting for the Legally Aided Person to the prejudice of the LAP and the Legal Aid Fund or SLAS Fund.

- i. The LegCo Paper again uses appropriate words in paragraph 19. Similarly this Proposal “could also be construed as interference with the aided person’s right of access to justice.”
 - j. A barrister who undertakes a Section 9 opinion will have little incentive to undertake such work, if the LAD policy debars him from being assigned later.
 - k. In certain matters, pro bono advice from Senior Counsel will already have been sought and obtained by applicants for Legal Aid. In such cases, a further section 9 opinion is unnecessary.
33. This proposal should be rejected.

Discussions in the Near Future

Financial Eligibility Limits (FELs)

34. HKBA has serious concerns about the continuing numbers of unrepresented persons in our courts – in some areas as high as 50-60 % and similar concerns are noted in the LegCo Panel Paper of 12th July 2017 paragraph 44. We have obtained the latest judiciary statistics and passed these to members of LASC and we hope to have a discussion with LASC and with Panel Members.
35. We have written submissions eg 24th April 2017, and letters on this, eg 30th June 2017 to Chairman of LegCo Panel and to HAB direct.
36. We are pleased to note that page 2 of the HAB Paper of 13th July 2017 informs that the House Committee decided to form a subcommittee to scrutinize this issue. HKBA is willing to assist and participate in due course.
37. A significant increase of FELs to offset the current decline in grants of Legal Aid Certificates is justified when all the relevant factors are examined.
38. In summary these are:-
- a. Inflation based on Cost of Services at a median level, and not CPI dealing with household expenditure,
 - b. Removing slippage, bringing FELs up to date of implementation of late 2017, 3 years since old figures, not 2 years inflation adjustment,
 - c. Declining numbers in Legal Aid grants, changing society needs and conditions, and
 - d. The Scott Report, which required basing the cost of litigation on both sides costs, not just the Legal Aid side.
39. HKBA would welcome a discussion with the Panel or any Sub Committee in the early autumn on the rates of increase really required.

40. **HKBA will present a review of Legal Aid issues in the autumn** as it would appear that that the previous administration under Donald Tsang committed itself to increase the scope of SLAS. It then transferred \$100 million to the DLA SLAS Account, pursuant to its promise. This expansion has not taken place.
41. We hope that HAB & LASC will enter into this discussion early with HKBA, as this Panel cannot be properly advised when ill-thought out papers by HAB are presented just 6 days before the Panel discussion, as happened on the 24th April 2017 and just 5 days before the 18th July 2017 meeting.

Ruy Barretto SC and Nicholas Pirie

Hong Kong Bar Association Standing Committee on Legal Aid Reform

17th July 2017

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