

## Report of the Special Committee on Legal Aid Reform

1. There were two major areas of work this year:-
  - (a) Independence of Legal Aid and the 'U turn' defective reports from LASC and their consultant Deloitte, and
  - (b) Criminal Legal Aid Fees and connected problems of unrepresented litigants and lack of instructions, payment and provisions which are handicapping the conduct of Legally Aided Criminal Appeals.
2. **Independence.** On 22<sup>nd</sup> June 2012, the Bar put in its 30-page submission on The Need to Establish an Independent Legal Aid Authority. In March 2013 Deloitte's, under contract from LASC finished their report. Josephine Pinto, newly appointed to LASC, wrote a dissenting opinion objecting to the U turn dated the 21<sup>st</sup> March 2013 and on the 30<sup>th</sup> April 2013, LASC sent their Report to the Chief Executive and supplied the Bar Association with the LASC Report but only an Executive Summary of the Deloitte Report. Subsequently, the LASC provided a full copy of Josephine Pinto's opinion to the Chief Executive and the Bar. Finally, on the 14<sup>th</sup> June 2013, LASC, upon request, sent Deloitte's Report to the Bar. In response to another request we were finally sent the LASC Consultancy Brief.
3. Urgent work was done to make submissions to the LegCo Panel on Administration of Justice and Legal Services on the 25<sup>th</sup> June 2013. The Bar is indebted to Nicholas Pirie for his drafting with the useful statistics he has obtained over the years, and Raymond Leung's work which led to the Bar's submission of 15 pages. My notes for the Legco hearing, at which Raymond Leung and Nicholas Pirie and Valentine Yim attended, are attached as an Addendum. This shows the key points raised. We had a sympathetic hearing.
4. The Home Affairs Bureau sent an Information Paper of 11<sup>th</sup> September 2013 to the Legco Panel to explain the assertion in LASC's 30<sup>th</sup> April Report that LAD had an "uncapped legal aid fund ..." Our letter on this Paper to the Bar shows this has proved the Bar's assertion that LAD expenditure is clearly recognized as de facto capped by the presence of a budget and various controls. Thus there is no longer any reasoned obstacle to an independent authority with appropriate controls to provide public accountability. The Government's objection in 1998 had been no cap therefore no independence. The legal profession's rationale in 2012 and to date is that there is a de facto cap, there is a need for independence and independence gives a better chance of reforms. We expect there to be a more even handed examination of the issue in future.
5. **Criminal Legal Aid problems.** At the Biennial Review of Criminal Legal Aid Fees, the Law Society registered its concern on the level and scope of fees and the number of unrepresented appeals. This led to the Committee reporting to the Bar Association which led to the Bar Association issuing on 21<sup>st</sup> October 2013, a 13-pages Submission on the Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees which has been submitted to LASC. I am much indebted to Robert Pang S.C. and Raymond Leung for help on this.

6. The review mechanism has been substantially lagging behind inflation so that even before the new figures start, they will be one-and-a-half years out of date. This needs to be avoided in future. There must be a catch up. The inadequacy of the base figures has not been addressed. There appears to be double standards in Government's attitude as a purchaser of legal services.
7. The consequence of outdated fees and outdated rules are several shortcomings related to Criminal Appeal work. Analysis of the LAD's position found that unpaid initial steps, comprising doing a certificate and preliminary grounds, fell far short of the further work required to prepare a criminal appeal now required under Practice Direction 4.2. No fee is provided in the Schedule to Cap 221D for counsel undertaking the detailed steps required in PD4.2. We concluded that no instructions and no payment are at the heart of the problems for criminal appeals. Part of the problem is the limited availability of transcripts and payment for work on transcripts.
8. Legally aided criminal appeals are handicapped and prejudiced by a mixture of outdated rules, non-payment for the vital initial grounds, drafting being handicapped by a lack of documents and then perfected grounds not being adequately remunerated. The concerns expressed by Judges of the Court of Appeal are not isolated incidents.
9. **The Way Forward** to reduce such problems in future is an Independent Legal Aid Authority which can deal with reforms on a timely basis. It seems that LAD are receptive to a degree of reform. Continued attention to detail on all these matters and more LegCo Panel meetings are required.
10. I am most indebted to the members of this committee who are as follows: Neville Sarony SC, Robert Pang SC, Nicholas Pirie, Jeevan Hingorani, Tim Kwok, Valentine Yim, Ashok Sakhrani and Raymond Leung.

Ruy Barretto SC  
Chairman  
Special Committee on Special Legal Aid Reform

10 December 2013

## **Independence for Legal Aid, Key points for LegCo**

1. Omitted half-way house rationale behind LASC towards full independence. Wrong attitude of assumption against independence. One sided approach throughout.
2. No immediate need? Subjective opinion and no evidence. Clear and present need for ILAA to do reforms, instead of moribund LAD, to provide for the unmet needs for access to justice. This worrying evidence was avoided.
3. No risk of interference when it is Govt Department but alleges is risk of interference when is ILAA? Contrary to commonsense, there are risks in both situations but there are more likely to be risks of interference from Govt when it is a Govt Department. Independent body more institutionally capable to deal with threats than civil servants under Govt Bureaux influence.
4. No desire? Statistics distorted, such as to lump no comment with no desire. Data when analysed properly shows there is more desire than no desire. Did not deal with 1998 findings of desirable. U turn based on distortion.
5. Consulted widely? Fails to consult appropriately, fails to consider desirability and feasibility in the light of success of independent NGO legal aid services.
6. Feasible, but not practicable? Practicability is non-statutory irrelevant consideration used to find excuses to do nothing.
7. 1998 Report also found independence feasible, but Deloitte/LASC gives no reason for U turn except the non-statutory and non relevant alleged practicability obstacles.
8. Confused and inconsistent on No Cap and Capped legal aid. Having found evidence that LAD operates to a de facto capped budget, Deloitte argues against independence because LAD is not capped! This is illogical.
  - a. The rationale in 1998 had been: No cap, no independence, hence no or slow progress on access to justice.
  - b. Legal Profession 2012 rationale: Have cap, have independence and better chance of reforms.
  - c. Currently have the worst of all worlds: Have cap, no independence, Govt Departmental inertia and unmet needs for access to justice. Resistance to reform.
9. Clear needs, clearly desirable and feasible. There is enough evidence for LegCo and Govt to reject the Letter and Report but use the information in this and the 1998 Report to establish ILAA without more procrastination.