



INDEPENDENT LEGAL AID AUTHORITY (ILAA)

Access to Justice eroded

There has been a gradual but very noticeable erosion to the rights enshrined under Articles 35 and 39 of the Basic Law, through the lack of proper provision of legal aid and access to justice in Hong Kong.

Legal aid is not meeting the needs of the Hong Kong people. The Law Society of Hong Kong (LSHK) calls for the immediate establishment of an Independent Legal Aid Authority (ILAA).

Hong Kong is a democratic society; its members are equal before the law, and no one should be denied access to the courts or a fair trial, or from receiving proper legal advice or from receiving legal representation to pursue or defend a meritorious claim, all because of a lack of means. The low Financial Eligibility Limits (FELs), and restricted scope of Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS), and the organization of the Legal Aid Department (LAD) under the Home Affairs Bureau (HAB) are resulting in reduced access to justice for persons of limited means or the “Sandwich Class” lower middle-income members.

History

Democratic governments around the world provide legal aids to its citizens to enable those who are otherwise unable to afford access to justice and to guarantee these individuals of enforcement of economic, social and cultural rights.

In Hong Kong, the Legal Aid Ordinance of 1966 established legal aid for civil cases, which subsequently became known as the OLAS, administered by the then Legal Aid Section, a sub-department under the Judiciary. Legal aid was eventually administered by the LAD, a department established directly under the Administration in 1970. Following a number of reforms including the introduction of the SLAS in 1984 providing assistance to the “Sandwich Class”, the Administration convened a Working Party chaired by the then Deputy-Chief Secretary, Mr. Alan Scott to conduct a thorough examination of the legal aid policy, eventually leading to the publication of the *Scott Report* in 1986.

Scott Report and subsequent reviews

The *Scott Report* reaffirmed that legal aid is a social service, and it is a vital part of the justice system as a way of enabling those of limited means to obtain legal representation in the courts, and, thereby, to secure access to justice. The *Scott Report* further recommended that the neutrality of LAD should be established beyond doubt so that it becomes a Commission outside of the civil service¹.

Further reviews were conducted in 1992 and 1993, and concluded that the establishment of an ILAA would result in too much cost and administrative disruption, and instead proposed to set up (and in 1996 the Administration did set up) the Legal Aid Service Council (LASC) to focus on overseeing the operation of LAD, advising the Administration on legal aid policy and funding requirement, and gave it a mandate to explore the feasibility and desirability of establishing an ILAA.

Despite the recommendation in the Scott Report published some 26 years ago, despite the mandate given to the LASC some 16 years ago, and despite the LASC endorsing a package of reforms which were originally proposed by the LSHK and the Hong Kong Bar Association (HKBA) some 10 years ago, nothing has happened in a positive direction, and the objection in principle from LSHK and the HKBA have not yet been answered.

¹ *Scott Report*, para. 5.14

Criticism of the existing structure

The existing administrative structure of the Legal Aid Scheme involves several bodies:

- **HAB:** responsible for the Administration's legal aid portfolio
- **LASC:** responsible for overseeing the administration of legal aid service by LAD; advises on and formulates policies on the provision of legal aid and advises the Administration on the feasibility and desirability of establishing an ILAA
- **LAD:** responsible for the day to day administration of the legal aid services

This structure is overly bureaucratic, often conflicting, and does not promote independence:

1. LAD has become bureaucratic

Solicitors have received complaints from clients or potential clients saying that LAD is not being responsive to clients or the public needs. There is a perception that LAD is reluctant to introduce reforms to meet the changing needs of the public despite demands from both branches of the legal profession and other interest groups. The application process for legal aid has become more and more complicated focusing on administrative compliance rather than focusing on its mission to assist the public to gain access to justice. The application process is drawn-out. Too often applicants are required to make several visits to LAD to comply with administrative requirements. As a result, LAD is no longer perceived by users as being "customer friendly" and instead, it is known to be typically bureaucratic. This contributes to increased numbers of unrepresented litigants in person (LIPs) who are not familiar with the court processes (and hence waste further costs), and feelings of injustice from unsatisfactory outcomes. These feelings add to the general public dissatisfaction with the Administration because it is not being seen to be doing enough to uphold the Rule of Law and increasing access to justice.

Indeed, the unattractiveness of the process has fueled the proliferation of the

(illegal) services offered by recovery agents which, in the end, will harm the interests of the litigants.

2. **LAD is not independent**

LAD has to report to HAB in addition to LASC. It therefore receives pressure from the Administration, whether through formal or informal channels, and is accountable to other civil servants within the Administration. Even LASC acknowledged that the existing institutional set up of LAD lacks independence².

3. **HAB has conflicts of interests**

HAB is a non-specialist Bureau. It has many other responsibilities, and its policies can be influenced by other factors that conflicts with the expending of resources to promote the provision of legal aid. Whilst it is the LASC which is supposed to be responsible for overseeing the administration of LAD and advising on and formulating policies on the provision of legal aid, in reality HAB's policies are implemented, not those of the LASC, because it is the HAB which is the policy Bureau.

4. **LASC cannot function properly**

Although LASC is responsible for overseeing the administration of legal aid service by LAD, it is hampered from functioning properly because its inadequate statutory power³ means it cannot direct LAD on staff matters nor can it handle any individual cases. It has to rely on paid executive staff from the Administration. The Legal Aid Services Council Ordinance is being seen as a stop gap half-way house to independence as an ILAA⁴.

² See 1998 LASC report "*The Feasibility & Desirability of Establishment of an Independent Legal Aid Authority*"

³ s. 4, Legal Aid Services Council Ordinance (Cap. 489)

⁴ s. 4(5)(b), *ibid*

Further evidence

5. LAD budget effectively static

For the period 1975 to 1997, the Department of Justice (DoJ) and the LAD each had a similar budget typically around HK\$500 – 600 million per annum. The DoJ currently has a budget of over HK\$1,300 million per annum whilst the LAD budget remains at a low range between HK\$700-\$800 million, some 15 years later.

Legal Aid Department Budget Estimate in the last 4 years (HK\$ millions)

2009 – 2010	2010 – 2011	2011 – 2012	2012 - 2013
752.5	753.0	784.3	794.5

6. Number of applications, grants and other financial statistics

- (a) Over the past decade FELs have not kept pace with inflation so less and less people are coming within the levels for Legal Aid. Overall Applications and Grants have remained more or less static from Jan 2006 to March 2011⁵.
- (b) Expended OLAS costs for criminal cases remained static for that period but costs for civil cases increased by 25%⁶.

7. Dramatic increase in LIPs

There has been an alarmingly high number of unrepresented LIPs in civil cases in all levels of the courts. This has led to the establishment of:

- Court Liaison Office in the High Court to assist LIPs
- HKBA Pro Bono Scheme
- LSHK Personal Injuries Helpline
- LSHK Domestic Violence Panel

⁵ See Annexure 1

⁶ See Annexure 2

- LSHK Building Management Panel
- LSHK Small and Medium Enterprise Helpline
- LSHK's www.ChooseHongKongLawyer.org.hk
- LSHK Law Week
- HAB's Pilot Scheme for LIPS (yet to be started)

Notwithstanding the introduction of mediation which should in theory reduce the number of unrepresented cases, the figures in civil cases in both the High Court and the District Court have remained at approximately 40.7% - 50.8% throughout the decade⁷.

The same figure for civil trial cases in the District Courts with LIPs has reached 65%, which suggests that LAD is not granting enough certificates for District Court cases. It is therefore reasonable to draw a conclusion that the impact on the proper administration of civil justice in the District Court must be seriously affected.

It would be worth comparing the legal aid coverage above with the figures in relation to Personal Injuries cases⁸, where legal aid has traditionally been providing good coverage. Only 7% of these cases have LIPs, in both the High Court and District Court.

Why is an ILAA needed?

Since 1993, LSHK and HKBA have jointly and continually advocated for the establishment of an ILAA for the following reasons:

- ILAA will reduce bureaucracy.
- ILAA's mission will be to promote access to justice, and will provide consistent policy on the provision of legal services to the public.

⁷ See Annexure 3 – Statistics from Further Report on SLAS by LASC Interest Group (pages 6-7)

⁸ See Annexure 4 – Statistics from Further Report on SLAS by LASC Interest Group (page 8)

- Being an independent institution, ILAA will determine its own policies, day-to-day operation, and recruit staff on its own terms thus freeing it from any hint of Administration's bias or influence.
- An ILAA will enhance provision of legal services to the public. It will be able to make impartial decisions involving claims against the Administration by setting up an independent assessment mechanism, for example, nominating an independent lawyer on the Legal Aid Panel to render a legal opinion on the merits of the potential claim or defence.
- An ILAA will exercise an independent view on policy and timely reform. For example, it can lobby for the expansion of legal aid's budget which could reduce the number of LIPs.
- Long overdue expansion in scope of services and coverage can then proceed.

The Administration has previously rejected the establishment of an ILAA based on the assertion that dis-establishment of LAD would be too difficult. LSHK does not accept this reason to be an adequate disincentive compared to the benefits of an ILAA.

It is feasible and desirable to make these changes now to prevent and indeed reverse the continued erosion of access to justice for persons of limited means in our community.

**The Law Society of Hong Kong
26 September 2012**

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Subject Legal aid statistics

High Importance Return receipt Sign Encrypt

Annexure 1

Dear Mr Pirle,

I refer to our telephone conversation and set out below the information requested:

No. of legal aid applications

Year	Civil	Criminal	Total
2006	17 422	3 779	21 201
2007	15 598	3 765	19 363
2008	15 314	3 413	18 727
2009	17 357	3 816	21 173
2010	16 124	3 907	20 031
2011 (up to March)	3 759	841	4 600

No. of legal aid certificates

Year	Civil	Criminal	Total
2006	9 356	2 357	11 713
2007	7 937	2 507	10 444
2008	7 613	2 235	9 748
2009	9 031	2 800	11 831
2010	8 263	2 740	11 003
2011 (up to March)	1 939	598	2 537

Legal aid costs

Year	Civil (\$m)	Criminal (\$m)	Total (\$m)
2006/2007	313.199	105.489	418.688
2007/2008	331.031	97.181	428.212
2008/2009	347.302	82.808	430.111
2009/2010	377.546	108.221	485.767
2010/2011	390.103	116.206	506.308

Website of Legal Aid Department

<http://www.lad.gov.hk/eng/home/home.html>

<http://www.lad.gov.hk/eng/ppr/publication/ldr.html> (LAD Annual Reports from 2006 to 2009)

Website of the Law Society of Hong Kong

http://www.hklawsoc.org.hk/pub_e/default.asp

Haddy Lee
PS to DDLA/ADM
(Tel: 2887 3011)



法律援助署
Legal Aid Department

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28 June 2012

Mr. Nicholas Pirie
Barrister-at-law
11/F, Baskerville House
13 Duddell Street
Central, Hong Kong

Dear Mr. Pirie,

Re: Expansion of the Scope of Legal Aid in Civil Cases

I refer to your letter dated 15 June 2012 and set out in the table below the information requested:

	Number of applications			Number of certificates granted		
	OLAS (Civil)	SLAS (Civil)	Total	OLAS (Civil)	SLAS (Civil)	Total
2010 (Jan - Dec)	15,981	143	16,124	8,157	106	8,263
2011 (Jan - May)	6,536	56	6,592	3,124	40	3,164
2011 (Jun - Dec)	9,783	105	9,888	5,069	64	5,133
2012 (Jan - May)	6,450	76	6,526	3,356	57	3,413

Yours sincerely,


(Ms. Juliana OY Chan)
for Director of Legal Aid

Annexure 2

LAD Expenditure by Items, 2005/6 to 2010/11

	05-06 (\$M)	06-07 (\$M)	07-08 (\$M)	08-09 (\$M)	09-10 (\$M)	10-11 (\$M)
1. Personal Emoluments	197.6	194.7	201.0	215.1	214.6	211.8
2. Personnel related expenses	0.1	0.1	0.2	0.7	1.1	1.4
3. Departmental expenses	15.1	15.3	17.4	15.2	14.1	15.0
4. Legal Aid Costs (for both in-house and assigned out cases)						
Civil	293.6	313.2	331.0	347.3	377.5	390.1
Criminal	101.6	105.5	97.2	82.8	108.2	115.2
Sub-total	395.2	418.7	428.2	430.1	485.7	505.3
Total	608.0	628.8	646.8	661.1	715.5	733.5

Statistics on Trial/Appeal involving Unrepresented Litigants in High Court (2002-2008)

Hearing nature	No. of hearings involving unrepresented litigant(s) / Total no. of hearings						
	2002	2003	2004	2005	2006	2007	2008
Trial/Appeal (All CA & CRI civils)	*482/1123 (43%)	524/1162 (45%)	437/1039 (42%)	459/1113 (41%)	378/1021 (37%)	372/985 (38%)	406/960 (42%)
Civil Appeals (Appeals to CA)	106/231 (46%)	64/203 (32%)	72/211 (34%)	90/276 (33%)	97/282 (34%)	80/264 (30%)	108/308 (35%)
Civil Appeals (Appeals to CFI)	162/211 (77%)	227/308 (74%)	176/233 (76%)	157/202 (78%)	93/163 (57%)	100/151 (66%)	124/151 (82%)
Appeal against Master's decision	82/251 (33%)	91/218 (42%)	83/210 (40%)	93/233 (40%)	67/165 (41%)	77/189 (41%)	65/141 (46%)
Civil	132/430 (31%)	142/433 (33%)	106/385 (28%)	119/402 (30%)	121/411 (29%)	115/381 (30%)	109/360 (30%)

*If CA hearings on ROA cases in 2002 are taken into account, the total figures would be 6383/7032 (91%).

Statistics on Trial involving Unrepresented Litigants in District Court (2002-2008)

Hearing nature	No. of hearings involving unrepresented litigant(s) / Total no. of hearings						
	2002	2003	2004	2005	2006	2007	2008
Trial (All DC civils)	167/343 (49%)	162/347 (47%)	166/337 (49%)	174/324 (54%)	216/419 (52%)	193/411 (47%)	160/316 (51%)
Civil Action (non-IRD)	97/227 (43%)	111/250 (44%)	102/211 (48%)	127/217 (59%)	161/289 (56%)	98/210 (47%)	91/170 (54%)
Personal Injuries Action	15/27 (56%)	12/23 (52%)	10/36 (28%)	14/46 (30%)	18/69 (26%)	33/96 (34%)	24/76 (32%)
Miscellaneous Proceedings	2/3 (67%)	1/3 (33%)	6/8 (75%)	2/3 (67%)	4/6 (67%)	6/12 (50%)	3/8 (38%)
Other civils#	53/86 (62%)	38/71 (54%)	48/82 (59%)	31/58 (53%)	33/55 (60%)	56/93 (60%)	42/62 (68%)

#Other civils refer to Distraint Case, Estate Agents Appeal, Employees' Compensation Case, Equal Opportunity Case, Miscellaneous Appeal, Occupational Deafness (Compensation) Appeal, Pneumoconiosis (Compensation) Appeal and Stamp Appeal.

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3 August 2012

Mr Nicholas Pirie
Member of the Bar Association Special Committee
c/o 11/F, Baskerville House
13 Duddell Street
Central
Hong Kong

Dear Mr Pirie,

Statistics on Unrepresented Litigants

I refer to your letter of 27/7/2012 requesting for the figures of the first 6 months of 2012 on this subject. Please find below the figures asked for which have been incorporated in the table on this subject sent previously on 9.2.2012.

Statistics on Civil Appeals/Trials involving Unrepresented Litigants * in the High Court and District Court 2007-2012 (up to 30/6)

Year	2007	2008	2009	2010	2011	2012 (up to 30/6)
High Court (Civil Appeals & Trials)	38%	42%	41%	42%	36%	38%
District Court (Civil Trials)	47%	51%	55%	53%	51%	65%

* Any one of the parties not legally represented in the hearing will be counted as hearing involving unrepresented litigants.

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2. Thanks for your attention.

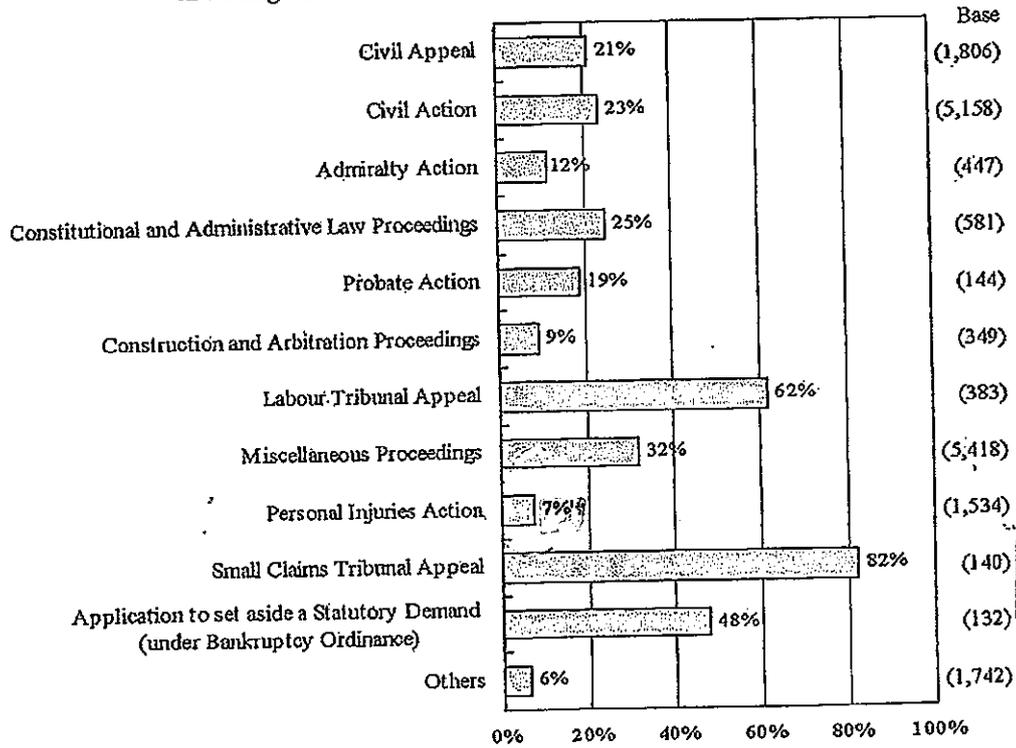
Yours sincerely,

Roger LAW
(Roger LAW)
for Judiciary Administrator

Annexure 4

16. A breakdown of the percentages by the type of cases highlights the problems.

Percentage of litigants in civil cases who were unrepresented in the High Court and Court of Final Appeal by type of cases



Percentage distribution of unrepresented litigants in civil cases in District Court by type of cases

