



THE CHIEF EXECUTIVE’S POLICY ADDRESS 2019 – LAW SOCIETY SUBMISSION

INTRODUCTION

1. The Law Society of Hong Kong wishes to bring to the attention of the HKSAR Government the following initiatives on legal policy, for the purpose of the Chief Executive’s Policy Address 2019 and in order to further the public interest (at an important time for Hong Kong).
2. Laws and legal policy are not considered in a legal vacuum. They form part of a rules based, fair and just society, in which citizens participate and should have a stake. It would be remiss not to note some recent tensions in Hong Kong that arise out of a number of longheld grievances – grievances that also raise some issues concerning the governance of Hong Kong and that test the rule of law. If these grievances are not addressed, respect for and trust and confidence in the rule of law and its institutions will be eroded. This may give rise to serious problems. Further, among other things, transparency, empathy, proper consultation and leadership are required for good governance and, more so, in testing times. Equally, all individuals have a responsibility to understand and respect The Basic Law and Hong Kong's laws and to listen to and show respect for others; with fundamental rights come fundamental obligations. Having made these important introductory remarks, we address a number of particular issues of legal policy.

LEGAL AID

3. Legal aid plays an important role in enhancing access to justice and upholding the rule of law. It ensures that those in need of legal assistance will not be denied access to justice due to a lack of means. In the Policy Agenda 2018, the Chief Executive openly stated that the HKSAR Government would strive to enhance legal aid services to benefit more people who cannot afford private legal fees. This is to be applauded and should remain as one of the Government's standing policy objectives.
4. Legal aid services should continue to be enhanced. The enhancement involves, among other things, a significant relaxation of the financial eligibility limits for the legal aid schemes, an expansion of the type of matters covered by legal aid and a procedural streamlining of the work process. The financial eligibility limits need to be significantly improved and a mechanism put in place for their regular review. The lack of progress in this regard is a blight on access to justice. Among other things, simple inflation adjusted increases are not enough in the current environment, when (for example) litigation costs in the private sector have significantly increased, particularly as a result of huge increases in commercial rents. The gulf between the "haves" and "have nots" widens, as does a sense of injustice.
5. We also ask that the policy there be no cap for legal aid expenditure be maintained.

ACCESS TO JUSTICE

6. In enhancing access to justice, it is equally important to ensure that the public can have access to justice expeditiously. For this purpose, the matters raised below should carefully be considered.

Allocation of Judicial Resources

7. We understand that the Judiciary is experiencing problems with the recruitment of judges and judicial officers. This is not a new concern and is worrying. The strain on the judicial system and those that use it (citizens and practitioners) is beginning to show.
8. We have, on various occasions, raised concerns about the waiting times for hearing / trial dates and for handing down of written judgments in civil actions. Some of our concerns (as exemplified in insolvency and matrimonial practices) are repeated below:
 - (a) for bankruptcy and insolvency cases, it is not unusual for practitioners to wait for weeks or months before they could have a hearing date of 1 day for their matters. When delays are coupled with the time required for the delivery of judgments and approving the release of trustee-in-bankruptcy, the parties suffer injustices. That also undermines the efforts to promote Hong Kong as a financial hub; and
 - (b) for matrimonial cases, similar to the above, parties have to wait for months to obtain a time slot for straightforward direction hearings. This causes concern not only for practitioners but also for the parties and society as a whole; in particular, with respect to urgent matters such as interim child arrangements or interim financial support. In these matters, a child's interests are paramount.
9. In fact, the issue of delays with court hearings in many civil cases has become such a concern that it is in danger of undermining the Government's and the jurisdiction's laudable aspirations to be a major regional and international disputes hub, that also leads the Greater Bay Area. The problems are not just a lack of IT infrastructure; they are also to do with a lack of proper allocation of judicial resources that

practitioners witness every day but are powerless, on an individual basis, to do much about.

10. In the light of the growing jurisprudence in competition law and intellectual property law (following, respectively, the work of the Competition Tribunal, and the setting up of the Intellectual Property Specialist List), we anticipate the workload of the Judiciary will only become heavier. This will aggravate the problem of delay.
11. Piecemeal resourcing does not solve the problem; substantial and systematic investment is required. There should also be a prompt and firm policy direction to assist further with judicial recruitment; that stated, standards must be maintained.

Modernization of technology in the legal and justice system

12. The courts of Hong Kong already lag behind some comparable jurisdictions in the use of technology. This affects not only the efficiency of the courts system itself but also the administration of justice as a whole. We welcome the Information Technology Strategic Plan put forward by the Judiciary Administration and remark that the use of technology in court must be given priority among various policy directives. The momentum with the Information Technology Strategic Plan must not be lost.
13. There should be, at the same time, corresponding updates to the relevant ordinances in a timely manner in order to enable the effective use of technology (e.g. deployment of electronic signatures). This point must not be overlooked. Technology is the present and will be the future.

USE OF TECHNOLOGY

14. By way of further remark, we also ask the HKSAR Government to put more emphasis on developing / deploying technology (such as big data, artificial intelligence, neural machine learning, sentiments analysis, behavioural analysis) in order to:
 - (a) help resolve disputes and improve the rule of law, such as the eBRAM initiative with Online Disputes Resolution; and
 - (b) identify issues that are of concern to the people of Hong Kong, and to proactively address them thoroughly, transparently and through means of legal policy.

CONFERENCING FACILITIES AND OTHER SUPPORT

15. The Law Society of Hong Kong is working tirelessly to promote Hong Kong's legal services to other jurisdictions, through exchanges with legal professional bodies from other countries and jurisdictions. An example is the 32nd LAWASIA Conference. This is a flagship event jointly organized by us and LAWASIA. The event will be held in Hong Kong later this year (6th-8th November, 2019). It provides a platform for sharing ideas, building professional networks, advocating for the rule of law in various jurisdictions, and advancing the status of the legal profession in the Asia Pacific. It is another good opportunity for "*One Country, Two Systems*" to shine.
16. One of the logistical difficulties that we encounter in organizing large conferences is the booking and securing of appropriate conferencing facilities and venues. In attracting overseas legal seminars and symposiums to Hong Kong, it is obvious that suitable conferencing facilities must be made available.
17. As a corollary to the above, and apart from the provision of conferencing facilities, there should be a standing policy that the HKSAR Government is to work in unison with professional bodies

regarding the promotion of Hong Kong and "*One Country, Two Systems*" to the international community.

We have been hearing from those delegations that we receive from time to time that their governments are very much in support of their legal services industry. For example, in a recent legal visit by a delegation from an Asian country, we understood that the delegation received a comfortable subsidy (without obligation) from their government to visit us and other law-related professional bodies in Hong Kong; in order to scout for work *in Hong Kong* across our many business sectors. The Law Society of Hong Kong does not have similar subsidy or support for similar legal visits abroad. We also note that we have not as yet been allocated accommodation and other appropriate facilities in the West Wing of the Central Government Offices which are being renewed for law-related bodies, although we are the largest organization of lawyers in Hong Kong and are crucial to Hong Kong's reputation as an international hub; businesses and capital depend on solicitors and foreign lawyers.

18. By way of illustration, in Singapore, the Ministry of Law, the Law Society of Singapore and International Enterprise Singapore have launched a programme to help Singapore lawyers and law firms venture overseas. Their programme connects Singapore legal talent with global opportunities, through overseas mission trips, training, and branding and marketingⁱ.
19. A prominent presence of the legal profession of Hong Kong plays a pivotal role for Hong Kong to maintain its competitive edge in the international community. It also serves to attract diverse talents from other jurisdictions. An unambiguous policy to support Hong Kong's legal services industry, through the allocation and provision of conferencing facilities and partnering with the professional bodies to promote Hong Kong, is crucial.

INFRASTRUCTURE FOR INTELLECTUAL PROPERTY

20. With enormous resources committed for the development of innovation and technology in Hong Kong, there should be clear policy directive that adequate resources are allocated to the Intellectual Property Department (“IPD”) to ensure Hong Kong maintains cost-effective and efficient systems for the registration, administration, protection and commercialization of intellectual property (“IP”) rights. Protection of IP rights (indeed, all property rights) in Hong Kong is critical.
21. The Hong Kong Trade Development Council conducted a recent survey during BIP Asia Forum in December 2018. The survey reveals that due to its excellent geographical location, the low-rate and simple tax system, Hong Kong remains a preferred place for IP trading as compared to Singapore and Shanghai. Yet, it is foreseen that Hong Kong will face more fierce competition from those two cities, and also other cities, in the coming years. This is not a new concern but it is becoming more acute.
22. In 2017, IPD has commissioned an IP Manpower Survey the results of which were published at the end of last year. Besides continuing efforts to improve IPD’s electronic platform and preparations for the implementation of the Original Grant Patent system by late 2019, steps are also being taken to prepare for the implementation of the international registration system under the Madrid Protocol which requires planning for the manpower to process the applications and related training. Taking the above into consideration, we are concerned because there is actually little real increase in the budget in the past few years to enable IPD to properly deal with many of the above initiatives (that will benefit Hong Kong and are in the public interest).
23. The IPD is tasked to continue to promote Hong Kong as an IP trading hub in the Asia-Pacific Region and to assist the Commerce and

Economic Development Bureau to implement the relevant support measures. Therefore, it is important that IPD has sufficient resources to pursue such task and the policy that underpins the above initiatives should be clearly formulated.

REFORM OF INSOLVENCY & RESTRUCTURING REGIME

24. We have on various occasions relayed to the HKSAR Government the urgent need to reform the insolvency law regime for Hong Kong. For the purpose of this submission, we repeat what we put forward in respect of the *Government Budget 2018-19* – “The reform (for insolvency law regime for Hong Kong) is long overdue, notwithstanding requests repeated time and again from practitioners and the market. For one thing, the current regime could not meet the growing demands for debt restructuring and cross-border insolvency cases. It pales in comparison with Hong Kong’s competitors in the Asian hub notably Singapore, who has decisively updated its insolvency law and capably marketed itself to the international community. Urgent updates to our regime are required.”
25. As of today, we have not heard from the Financial Services and the Treasury Bureau or other Government bureau regarding any policy initiatives to update the Hong Kong insolvency law regime. The situation continues to be worrying. A modern day insolvency and restructuring regime is important to Hong Kong's business and commercial development.
26. It is imperative to ensure that our corporate winding-up regime can keep up with latest developments in Hong Kong and also that it does not lag behind those in other major jurisdictions. The Law Society of Hong Kong is prepared to engage in discussions with the Government Bureau to help expedite the necessary review and reform process.

COMPETITIVENESS OF INSURANCE MARKET

27. The Marine Insurance Ordinance (Cap.329) ("MIO") came into effect in 1961. It codifies the law relating to marine and (despite its title) non-marine insurance in Hong Kong. It was modelled on the Marine Insurance Act 1906 of the United Kingdom ("1906 Act"). The principles codified in the statute have been extended, by case law, to non-marine insurance.
28. The MIO has been in operation for *more than 50 years* with no amendment of substance. In the same period of time, there have been significant statutory reforms to the 1906 Act in the United Kingdom. The far reaching and substantial changes to the 1906 Act in the UK evidently indicated the need for a serious consideration for equivalent or comparable substantive reform to the MIO. Yet nothing substantial appears to have been done to update the statutory regime in this important area in the past five decades. It is high time that, for example, a Law Reform Commission Sub-Committee was appointed.
29. When the HKSAR Government is committed to entrenching Hong Kong's position as an international maritime centre and, moreover, as a general insurance hub, it is critical to ensure that the insurance law in Hong Kong is updated in order to better support 21st century commercial practices. Insurance should be one of the pillars of the local economy; particularly, with the Mainland market in mind. It is a good example of where Hong Kong, with its language capabilities and common law heritage, should be looking to lead Asian and Mainland markets. The (re-)insurance markets depend on the use of the English language and this should be embraced in Hong Kong and promoted more.
30. The above must be represented in the policy-thinking in order that Hong Kong remains competitive in the international (re-)insurance and commercial markets.

RIGHTS OF ACCIDENT VICTIMS

31. We share the ongoing concerns and disappointment of the Personal Injuries (“PI”) judge in the operation of the Employees’ Compensation Assistance Fund (“the Fund”), set up under the Employees’ Compensation Assistance Ordinance, Cap.365 (“the Ordinance”). Under the current threshold provision, an injured employee who meets the threshold requirements of the Ordinance could apply to the Fund for “relief payment” in lieu of common law damages to compensate his or her workplace injuries. However, the relief payment excludes legal costs and interest; it also imposes a cap for the initial lump sum, to be followed by a meager monthly payment out by the Fund. The above is very unfair to the injured employees and their families; in particular, those who have suffered very serious injuries and whose life expectancy is reduced. This financial hardship affects families and their well-being and causes great stress.
32. The PI Judge in one of the court judgments made an open “*plea to the Secretary for Welfare and Labour and to the Commissioner of Labour, and to all those charged with safeguarding the interests of our labour force to please quickly take a close look at the [Ordinance] and do something about it. We cannot claim to have a first class legal system when our laws contain the sort of provisions we find in our [Ordinance]*”ⁱⁱ.
33. We had several discussions with the Labour Department and the Labour and Welfare Bureau on legislative amendments proposed to address the above problem. These discussions have not been helpful, so far.
34. The HKSAR Government should as a policy decision review its stated position and put forward necessary amendments to the Ordinance to ensure that it properly protects the interests of those it is intended to protect; namely, working people.

CONSTITUTIONAL AND HUMAN RIGHTS CONCERNS

35. As for the constitutional development for Hong Kong, we reiterate the importance of progression towards universal suffrage for the Chief Executive in accordance with The Basic Law, and the reform of the functional constituencies with the goal of their abolition. When appropriate, the HKSAR Government should actively engage the community for a thorough discussion on the above.
36. We also draw the attention of the HKSAR Government to the following that should merit more in-depth policy deliberation.
- (a) Immigration policies regarding the families of refugees who are in Hong Kong;
 - (b) The legal status for successful refugees and their children;
 - (c) The supervision and monitoring of detention facilities;
 - (d) Domestication of the Convention on the Rights of the Child;
 - (e) Domestication of the International Covenant on Economic, Social and Cultural Rights;
 - (f) The practice and the policy regarding the setting up of a Commission of Inquiry on appropriate occasions, and the promulgation of guidelines for that purpose;
 - (g) Enhancements in reciprocal exchanges with Mainland authorities on human rights issues (particularly, along the Belt & Road – with foreign investment come other responsibilities);
 - (h) Review of any laws that could discriminate against our LGBTI communities;
 - (i) Review of any laws that could have implications to personality rights and privacy on social media and networking service platforms (individuals and families have a right to privacy);
 - (j) Review of the law conferring authority for law enforcement agencies for searches on smartphones and other mobile devices;

- (k) Review of progress towards a comprehensive legislative framework to combat human trafficking.

CONTINUAL PROMOTION OF “ONE COUNTRY, TWO SYSTEMS”

- 37. Under the “*One Country, Two Systems*”, Hong Kong enjoys a high degree of autonomy with an independent and highly respected legal system. This constitutional arrangement embraces the continual upholding of the rule of law, and enables Hong Kong to strive to prosper. The HKSAR Government and all stakeholders should do a better job of explaining and promoting “*One Country, Two Systems*” to the general community and, as importantly, to international audiences. Just as “*One Country*” is inviolable and to be respected by all, so is respect for the two separate legal systems. The success of “*One Country, Two Systems*” cannot be taken for granted and requires hard work across all sectors of society, government and business. The Law Society of Hong Kong leads in this regard.

PARTICIPATION OF YOUNGER PEOPLE AND YOUNGER LAWYERS

- 38. Importantly, in the course of policy formulation, we ask that the views of younger people and the younger generation of legal professionals be specifically taken into account. Younger people share a desire for success and to be involved in shaping Hong Kong's and their future. They also often have their own aspirations for the future development of some laws and legal policy. Some of the challenges facing younger people are different to those that previous generations faced and these challenges are no less demanding. Indeed, the overall cost of living, environmental damage/pollution and the rapid progress of technology appear formidable and daunting challenges. With these challenges come opportunities. Younger people must be involved in the solutions to these challenges and in seizing the opportunities. Younger people are also technology-savvy, and are generally more at

ease with deploying technology in their work and personal lives. Their views should be actively sought and listened to when formulating legal policy.

CONCLUSION

39. We are prepared to engage with the relevant bureaus to discuss the above initiatives.
40. As a concluding and important overarching remark, we observe as follows (and further to our introductory remarks). The socio-economic "headwinds" facing Hong Kong are as challenging as anything seen in at least two generations. The challenges are as great as those that confronted Colonial Administrations in the 1950s and 1960s. These challenges impact on the law and legal policy. Some aspects of legal policy and legislative reform with regard to certain social issues appear to be at times in something of a state of paralysis. This undermines the community's confidence in, for example, the "social contract" that it has with those who govern and could in turn undermine stakeholders' confidence in their future.
41. These concerns and challenges need to be addressed; in general and, in particular, by adherence to two fundamental principles. First, the Government needs to address (by means of relevant and meaningful fiscal and social policies) the huge capital and income disparities that exist between the richest and poorest (or most vulnerable) members of the community; while, importantly, also accounting for the reasonable needs and aspirations of ordinary working-class taxpayers who generally see less opportunity for social mobility. Even in a justifiably and cherished *laissez faire*, relatively low tax, capitalist and free market economy, this can be done. Second, upholding an adherence to and a respect for the rule of law includes not just an individual's responsibility for his or her actions (whoever the individual may be) but also includes a proper resourcing of access to

justice considerations, in respect of which lawyers and the legal profession play such an important and unique role.

42. All stakeholders should understand that Hong Kong's continued success should not be taken for granted. Further success not only needs to be hard earned (as in the past) but it also needs to be more widely shared than it has been in the past.

The Law Society of Hong Kong

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ⁱ See <https://www.lawsociety.org.sg/For-Lawyers/Lawyers-Go-Global>.

ⁱⁱ See *Kong Hoi Lam v. Cheung Yuk Kwan & Others* HCPI 801/2012 , 19 October 2015 (para 16).