

Report on Standing Committee on Legal Aid Reform 2017

1. Despite much effort and time not much progress has been achieved. Instead, additional obstacles to access to justice have been imposed.
2. This year we tried again to officially meet with and help **the LASC** on various issues but without success. LASC made a promising start from 1996 to 2006 but we are concerned and believe that more ought to be achievable by that body to meet the needs for access to justice in future. The current situation demonstrates the need for an independent Legal Aid Authority.
3. We have provided submissions to the AJLS Panel and have requested regular meetings with **a timetable** so progress on issues such as SLAS, and Financial Eligibility Levels can be achieved through regular meetings. There have been limited outcomes so far although the Panel have been most appreciative of our efforts.
4. On **Financial Eligibility Levels**, in June and July we wrote to HAB and AJLS on this subject and received the HAB response in November which only partly deals with one of the points raised, namely that HAB used a general price inflation statistic, but not the figures specifically for inflation in the costs of services. HAB did not consider the costs of both sides to a litigation, not just the plaintiff, in considering the costs of litigation on an applicant for Legal Aid. They did not address the high levels of unrepresented litigants in the courts which demonstrate the rising unmet needs for access to justice. We need to persist on this.
5. On **Emergency Certificates**, especially in domestic violence cases, we expressed our concerns by letter and in a meeting. Problems continue while we wait for improvements.
6. **The ban on counsel who have given favourable Section 9 Opinions.** With a few days' notice we were provided with HAB papers on about 13th July showing the measures to prevent the so-called Misuse of the Legal Aid System in Hong Kong. We were not consulted on this beforehand. There was no evidence of any alleged misuse in the Paper. Despite this, further obstacles to access of justice have been imposed. Despite our detailed written objections to the AJLS Panel on 18th July, the LAD informed the Bar Association by letter 31st July that the writer of a favourable S.9 opinion will be barred from being assigned the case by LAD. This will cause further obstacles to access justice, waste of time, increased costs and can cause genuine injustice where time is of the essence or in specialist areas of practice. This is often the situation in Section 9 cases. In contrast, it is regrettable that there is little recognition nor appreciation for the amount of pro bono work which is essential and now has to be done in the early stages of these difficult cases. Concerns were expressed by numerous practitioners and Dennis Kwok wrote 14th September asking for the suspension of the ban pending consultation. The legality of provisions which could deprive an Applicant of counsel of his choice have been considered. After our detailed drafting and discussions during September the Bar Association has itself written a letter to the relevant authorities on 25th October seeking the revocation of this ban. A response is awaited. We have suggested a Bar Circular be issued to inform our Members of the unsatisfactory position so far.

7. In contrast, we have heard reports of **the abuse of the S.9 procedures** whereby LAD refuse or delay applications. Sometimes, LAD obtain a second and non-specialist S.9 opinion to defend their decisions against granting Legal Aid. Wrong or irrelevant reasons are deployed to reject Legal Aid, and the Merits Test continues to be misapplied. We have learned of a case where Legal Aid was refused on merits even though leave to proceed with the JR was given by the Court. These and other obstacles to justice would be compounded by the new S.9 Ban and will add to the problems faced by litigants with limited means.
8. A **draft report** on reforms was provided to the Bar Council in August and input is awaited. Proposals include improving criminal legal aid representation, improved civil legal aid at District Court level, and appeals against refusal of Legal Aid. Our submissions are usually based on figures or statistics from Government showing high levels of unrepresented litigants, both criminal and civil, showing continuing failures to provide access to justice to people of limited means.
9. We are receiving more reports of the slow or low or non-payment of **interim/advance fees** in civil cases. Currently advance payment is only 25% of the fee note compared to 60%-70% previously. We are concerned this will discourage barristers from taking on difficult or unusual cases so that the principle of equality of arms in legally aided litigation is lost. It took decades to dispel the perception that Legal Aid was a second-class service. We do not wish an unequal system to lead to a less successful service, poorer outcomes, and more expense to the Government through losing more cases. At present the rates for satisfactory outcomes are reasonable to good, with 70% outcomes for medical negligence and JR, and 90 to 100% for PI.
10. The Chief Secretary will retake from HAB the responsibility for Legal Aid. This was proposed by LASC over 3 years ago to enhance independence of the Legal Aid system, and we are asking for explanations how this objective will now be achieved. We are cautiously hopeful that the former positive attitude to **Legal Aid as one of the 4 pillars of our justice system** will be re-established.
11. The members of the Committee are Raymond Leung S.C. (Vice Chairman), Neville Sarony S.C., Nicholas Pirie, Martyn Richmond, Azan Marwah. They have worked hard this year and I am especially grateful for the efforts of Nick and Azan.

Ruy Barretto SC
Chairman
Standing Committee on Legal Aid Reform

30 November 2017