



Consultancy Study on the Feasibility and Desirability of Establishing an Independent Legal Aid Authority

Final Report

March 2013



Executive Summary	4
Background of the Study.....	4
Project objectives and approach	4
Key findings on legal aid administration	5
Key findings on stakeholder perceptions	8
Options	8
Recommendation.....	9
Introduction.....	13
Project Objectives and Approach.....	15
Methodology	16
Interviewees	18
Background.....	20
Mission of the Legal Aid Department	20
Organisation of the Legal Aid Department	21
Financial operation of the legal aid schemes	22
Legal aid cost and the number of legal aid certificates granted	25
Appeal mechanisms against decisions	26
Key Findings.....	28
Current views on the degree of independence of the LAD in Hong Kong.....	28
The view that "The LAD is sufficiently independent"	28
Stakeholder groups which hold the perception that “LAD is sufficiently independent”...31	
The view that “The LAD is not sufficiently independent from the Government”	34
Stakeholder groups which hold the perception that “LAD is not sufficiently independent”	38
Mixed perceptions among stakeholder groups on the current independent status of the LAD	41
Some stakeholders have no strong views on legal aid independence.....	46
Independence of legal aid practices in overseas jurisdictions.....	51
Options	67
Overall analysis.....	85
Uncertainties / concerns in establishing a completely independent LAA	85
Considerations for establishing an independent legal aid authority	86
Cost and impact analysis.....	91
Implementation.....	92
Summary and recommendations.....	94
The overall LAD model.....	96
Institutional arrangement of the proposed LAD model.....	98

Financial arrangement of the proposed LAD model	104
Operational arrangement of the proposed LAD model	105
Governance of the proposed LAD model	107
Conclusion	108
Appendices	110
Appendix A – Legal Aid Practice in Hong Kong.....	110
Appendix B – Legal Aid Systems in Overseas Jurisdictions	114
Appendix C – Questionnaires	126
Appendix D – List of Interviewees.....	146
Appendix E – Survey Results.....	151
Appendix F – Cost projections	169
Appendix G – Details of SLAS	176
Appendix H – Statements from the Two Professional Bodies.....	178
Appendix I – Abbreviations	223

Executive Summary

Background of the Study

Deloitte Consulting (Hong Kong) Limited ("Deloitte") was engaged by the Legal Aid Services Council ("LASC"), in late 2011 to carry out a consultancy study ("the Study") on the feasibility and desirability of establishing an independent legal aid authority in Hong Kong. The Legal Aid Services Council ("LASC"), which was established in 1996 under the Legal Aid Services Council Ordinance (Cap. 489), is a statutory body set up to oversee the administration of legal aid services provided by the Legal Aid Department ("LAD") and to advise the Chief Executive ("CE") of the Hong Kong SAR on legal aid policy.

The LAD processes all legal aid applications, and grants legal aid to successful applicants according to the Legal Aid Ordinance (Cap. 91) and Legal Aid in Criminal Cases Rules (Cap. 221D). Due to the LAD's status as a part of the Government, the possibility of establishing a legal aid authority which is independent of the Government's administration has been under consideration for a number of years. An internal Working Party was formed in 1985 to conduct a study concerning the law, practice, administration and finance relating to the provision of legal aid, where the findings and recommendations are documented in the Scott Report.

Under Section 4(5)(b) of the LASC Ordinance, the LASC is obliged to advise on the "feasibility and desirability of the establishment of an independent legal aid authority." The LASC formed the Working Party on Independent Legal Aid Authority in 1997 to commission a third-party consultant to study the issue in 1998, and formed the Working Party on Independence of Legal Aid in 2007 to revisit the issue in 2008.

In the 2008 review, the LASC proposed to keep the LAD's independence under consideration, and defer the opportunity to revisit the issue until late 2011/early 2012. For this reason, the LASC engaged Deloitte to conduct this study..

Project objectives and approach

Together with our external consultants, Professor Alan Paterson (University of Strathclyde) and Professor Frank Stephen (University of Manchester), we have defined four dimensions of legal aid independence – institutional, financial, operational and governance – along which the degree of independence is determined.

Through literature review, news research and consultation with key stakeholders in the legal aid administration – including legal practitioners, legislators, community groups, representatives of Government departments and public bodies, trade unions, district councillors, reporters, academics, political parties, LAD staff and LASC members – we have developed an evidence-based approach to examine the current level of independence in legal aid administration, as well as to map stakeholders' expectations of legal aid independence.

Under the guidance of two overseas subject-matter experts, we have looked into nine overseas legal aid practices in order to compare and contrast the identified strengths and weaknesses in Hong Kong's legal aid administration as well as to consider how particular areas can be improved. The nine overseas legal aid practices include common law jurisdictions such as England & Wales, Scotland, Northern Ireland, Ireland, New Zealand, Ontario (Canada), and New South Wales (Australia), as well as civil law jurisdictions such as the Netherlands and Finland.

Given that it is members of the general public who will be the key users of legal aid services, we have solicited their views through a large-scale telephone survey. Opinions from the general public who have never used the LAD's service have been analysed and compared with the views from existing or previous legal aid service users, i.e., legal aid applicants. Views of legal aid applicants have been collected through a paper-based survey. Respondents in both surveys have been selected at random.

Key findings on legal aid administration

We have identified four dimensions – institutional, financial, operational and governance – which are considered to be crucial to the independence of legal aid. Key findings with regard to each of the four dimensions of independence are summarised as follows:

- 1) Institutional dimension:
 - i. Unlike many overseas jurisdictions that adopt a non-departmental public body ("NDPB") structure for their legal aid bodies, Hong Kong's LAD is within the Government and, therefore, not institutionally independent.
 - ii. The LAD's institutional independence is thought by some to have been undermined when its policy portfolio was transferred from the Administration

Wing of the Chief Secretary for Administrations Office to the Home Affairs Bureau in 2007.

- iii. The LASC, as a statutory body, was set up to enhance the institutional independence of the legal aid administration. However, some parties have also expressed disappointment that the LASC has not been sufficiently empowered to insulate the LAD from potential pressure from government.
- iv. The Official Solicitor's Office ("OSO"), being a part of the LAD, creates potential or perceived conflict of interests in some cases.
- v. From our local news review, we have not found any record of comments made by the general public on the subject of the LAD's independence.

2) Financial dimension:

- i. In line with the nine legal aid bodies in overseas jurisdictions examined in the Study, the LAD is funded by the Government and, therefore, not financially independent.
- ii. Given that there is no jurisdiction observed that does not rely on any Government funding, the focus of financial independence should be on a legal aid body's ability to receive sufficient income to meet its running costs, as well as its freedom to allocate its funding within given limits. From this perspective, the financial independence of legal aid in Hong Kong is considered fairly strong, with an uncapped legal aid expenditure and a self-financing Supplementary Legal Aid Scheme ("SLAS") in place.
- iii. Although there has been no cap on expenditure on legal aid services over the past ten years, the LAD has not sought supplementary provisions. It has maintained a stable trend in expenditure, and granted similar numbers of legal aid certificates during this period. Such scenario might create the perception that the LAD is bound to exercise tight control on its legal aid spending.

3) Operational dimension:

Operational independence gauges the degree of autonomy that LAD staff experience as members of the civil service. On the one hand, as civil servants, LAD staff benefit from job security, income stability and pensions which are preventions against them succumbing to potential pressure from any parties, including the Government. On the other hand, LAD staff members might work in favour of the Government because, as civil servants, they might see it as being in their best career interests to do so.

Operational independence also needs to take into consideration the perceptions of various key stakeholders in legal aid administration. There is a perception that the Government might pressure LAD staff through informal (or formal) means, particularly when determining whether legal aid should be granted in certain politically-sensitive cases.

Section 9(d) of the Legal Aid Ordinance gives the Director of Legal Aid ("DLA") the discretion and a channel to seek external professional opinions (Section 9 opinions) when evaluating a legal aid application. However some legal practitioners are concerned that the DLA has a "preferred panel" of counsel and solicitors who might provide Section 9 opinions that tend to be in line with the DLA's decisions.

4) Governance dimension:

Legal aid administration is subject to monitoring by legislative parties such as the LASC, the Legislative Council ("LegCo"), and the Ombudsman. The LAD also has a formal internal system and procedure for receiving and handling complaints.

As reflected in examples of overseas practices presented in this Study, another form of protection for operational independence of a legal aid body is the statutory appeal provision against the refusal of legal aid applications, (except in the case of criminal cases). In Hong Kong's legal practice, a civil legal aid applicant who is aggrieved by any order or decision of the DLA has the statutory right under the Legal Aid Ordinance to appeal to the Registrar of the High Court, whose decision will be final. Although there is no statutory avenue to appeal against refused legal aid applications for criminal cases, judges of the Courts are empowered pursuant to the relevant provisions of the Legal Aid in Criminal Cases Rules (Cap. 221D) to grant legal aid in certain circumstances to financially qualified applicants.

Key findings on stakeholder perceptions

Stakeholder groups that we have met with or participated in the survey have different opinions on the current degree of independence exercised by the LAD, and there are mixed views on the establishment of an independent legal aid authority.

Stakeholders who have strong or fairly strong confidence in the current level of independence include members of the LAD staff, legal aid applicants and various Government departments and public bodies. District councillors, media reporters, trade unions and general public are generally more concerned about the quality of the legal aid service rather than the issue of independence itself. Although some stakeholders consider the establishment of an independent legal aid authority an appropriate move to enhance perceived independence, the majority do not have a strong opinion in this matter.

There are mixed views among legal practitioners, LASC members, academics and community groups. Compared with the survey results from the general public and legal aid applicants, the legal practitioners who participated in the survey have an overall lower level of confidence in the current level of independence. In particular, those who specialise in criminal cases and judicial reviews tend to show a stronger desire for an independent legal aid authority than those who specialise in other areas. Legislators and representatives from political parties tend to have split views. While the pan-democrats tend to be in favour of the establishment of an independent legal aid authority, cohorts from the pro-establishment camp have concerns over the cost-benefit relationship.

The Hong Kong Bar Association and the Law Society of Hong Kong consider the level of independence as not sufficiently independent.

Options

The existing setup of Legal Aid in Hong Kong is well-recognised and commended for its uncapped financial budget, treatment in judicial review cases, effective management in upholding the relevant Ordinances, as well as the politically neutral workforce.

However our Study has found that there are still areas of concern regarding:

- i. Whether institutional independency has been undermined when its administration was transferred to the Home Affairs Bureau;

- ii. Whether the LAD might have a “preferred panel” for providing Section 9 opinions;
- iii. The lack of an established appeal mechanism against refused legal aid application for criminal cases; and
- iv. The lack of public information about the appointment criteria for members in the LASC and the directorate of the LAD.

These issues support the case for a break-away from the status quo and for changes to be made.

To address each of the issues identified, we have proposed a spectrum of options and further elaborated how effectively each option could solve the issues along the institutional, financial, operational and governance dimensions.

At one end of the spectrum, the “Status quo option” maintains the current service and staffing structure, and brings no change to the current LAD administration. At the other end of the spectrum, the “Fully independent option” refers to the establishment of an independent legal aid authority as a statutory body which is governed by a Board of Directors.

Recommendation

Our recommendation takes a holistic and balanced approach, by aiming to address each identified issues with reference to the solicited views from stakeholder groups composed of both legal professionals and those from a non-legal background, as well as lessons learnt from overseas practices,. All the recommended options together form a coherent recommended model for a legal aid administration, which is meant to be rational, pragmatic and improvement-oriented.

At the end of the Study, our conclusion and proposal are that the LAD should be retained within the government because we consider the level of independence exercised by the LAD as sufficient. No substantiated example of the Government’s interference on legal aid administration has been identified during this Study. On the contrary, there are ample examples of legal aid being granted to cases against the Hong Kong Government as long as the cases have reasonable grounds e.g. the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers’ right of abode in Hong Kong.

Although it appears that the establishment of an independent LAA is largely desirable to the consulted stakeholders and feasible at the conceptual stage, there are major uncertainties and setbacks that may occur even if an independent LAA is set up as a separate entity to administer legal aid. These include:

- i. Whether there may still be influence from other external bodies, particularly political ones, which could exert substantial pressure in the decision-making process of the independent LAA;
- ii. Whether an independent LAA is still subject to *de facto* controls given that the majority of funding will still come from the Government.

In fact, the lack of perceived independence among different stakeholder groups is more of an issue, which can be addressed by introducing various measures of improvement without having to change the LAD's institutional structure itself. For example, we consider the concerns regarding the scope of legal aid services and the financial eligibility limit as issues of resource allocation rather than of institutional independence. By allowing the LAD to stay within the government, a stabilised workforce will be able to maintain or even enhance the service quality of the legal aid services.

On the basis that the current standard of legal aid services will be maintained, certain improvements can be introduced under the current legal aid administration framework to further enhance transparency of legal aid approval, LASC member appointment, as well as lawyer assignment for the provision of Section 9 opinions. We propose to retain all LAD staff as civil servants, including the DLA and DDLAs. The LASC would nominate a pool of candidates eligible for the positions of DLA and DDLAs to the CE or CS. The CE or CS, who will be the final appointing body, could only appoint from this short-listed group which would thereby limit any conflict of interest. An improved level of management can be achieved by giving transparency to the criteria for the selection of the DLA and DDLAs, as well as the roles and remit of the LASC. A career path that could lead to being selected to the DLA / DDLA candidate pool would provide incentive and reward for top-performing employees. All these measures are considered effective in addressing the issues of perceived independence, strengthen the public's confidence in legal aid service provision, and motivate existing staff.

Taken together, we recommend that the most cost-effective and efficient legal aid service is to retain it within the Government. Our recommendation is based on the provision of a

sustainable and consistent legal aid service in the long term, while maintaining its autonomy in decision-making and governance by improving the current governance and operational structure.

Diagram I and Table I summarise the recommended model for our proposed legal aid administration. In this model, the LAD will remain as a part of the Government with direct accountability to the Chief Executive or Chief Secretary of Administration ("CS"). LAD staff will remain as civil servants, including the Director and Deputy Directors of Legal Aid ("DLA" & "DDLAs"). The OSO will remain part of the LAD's structure, which will then allow the LASC to be significantly empowered to monitor multiple aspects of the LAD operations.

Diagram I: Recommended Model of Legal Aid Administration

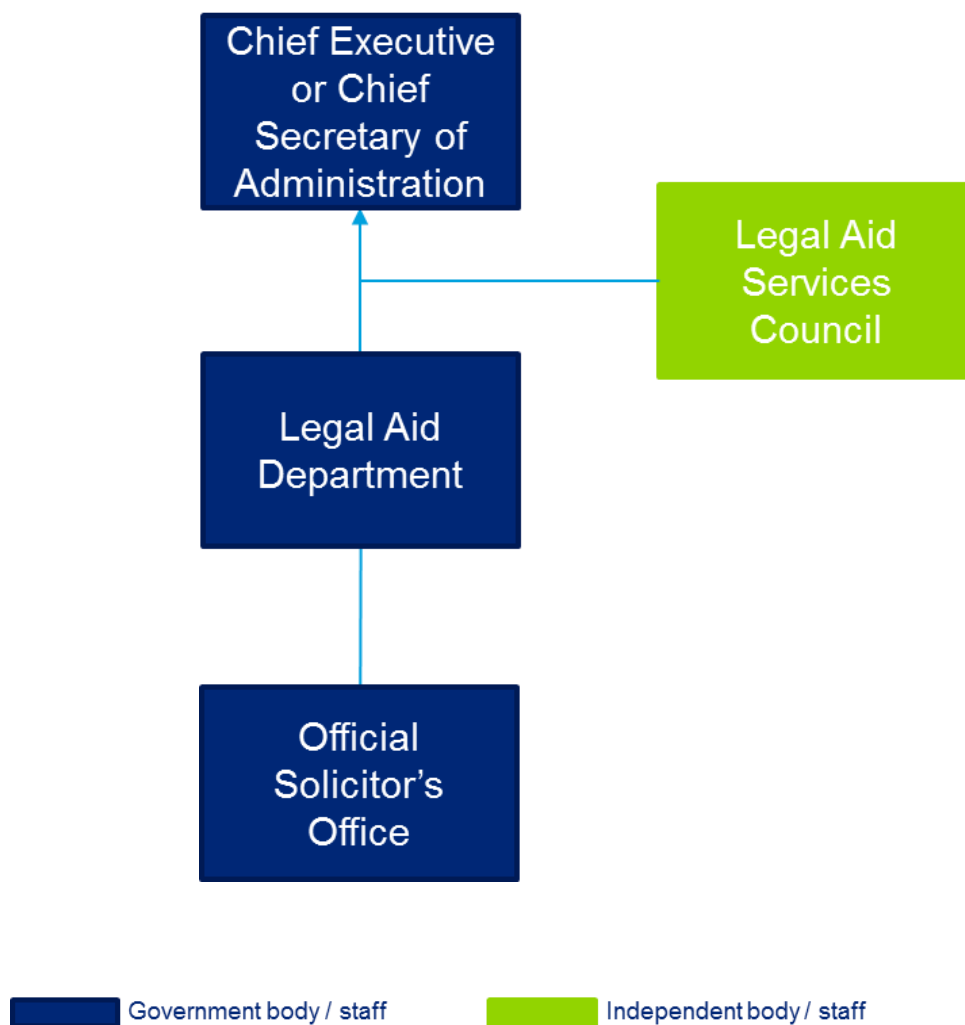


Table I: Key Responsibilities of Key Role in the Recommended Model

Key Role	Key responsibilities
Chief Executive or Chief Secretary of Administration	<ul style="list-style-type: none"> • Holds accountability for LAD • Appoints the DLA and DDLAs from a pre-selected group nominated by the LASC • Defines competency requirements for appointment of LASC members • Appoints LASC members based on competency requirements
Legal Aid Services Council	<ul style="list-style-type: none"> • All LASC members will continue to be appointed by the CE • LASC members are nominated by a range of stakeholder organisations based on defined competencies • LASC members have the right to recommend DLA and DDLA candidates to the CE or CS who will make the final decision to employ short-listed candidates • Evaluates DLA and DDLAs • Oversees Section 9 opinion • Monitors the operation of OSO
Legal Aid Department	<ul style="list-style-type: none"> • Remains within the Government • Becomes directly accountable to the CE or CS • All LAD staff continue to be civil servants, including DLA and DDLAs • DLA and DDLAs are directly evaluated by the LASC • Remaining LAD staff continue to be evaluated by their respective supervisors • Current financial arrangement is maintained, including uncapped legal aid fund and SLAS
Official Solicitor's Office	<ul style="list-style-type: none"> • OSO continues to stay within the LAD • To be monitored by LASC

Introduction

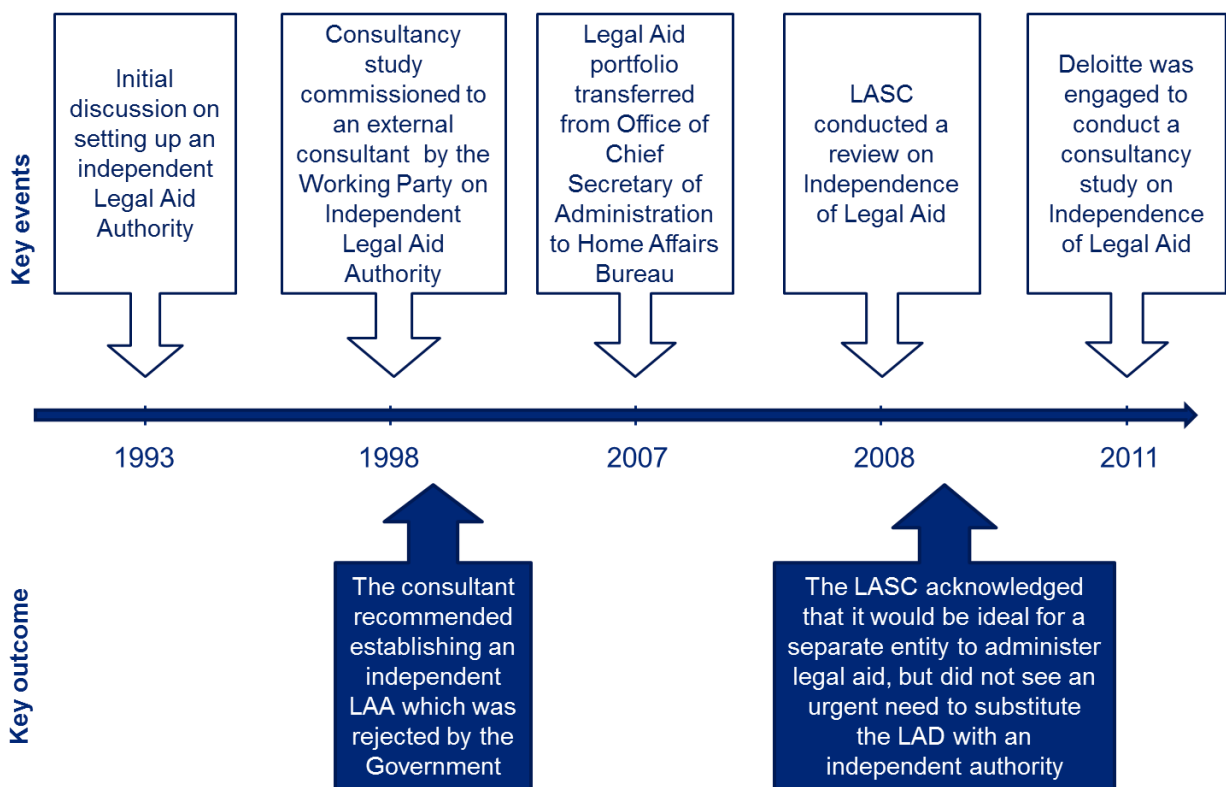
1. Over the years, there have been a number of attempts to evaluate the possibility of establishing an Independent Legal Aid Authority ("LAA"). In 1985, the Chief Secretary appointed an internal Work Party "to examine the law, practice, administration and finance relating to the provision of legal aid, advice and assistance in Hong Kong, to consider whether any changes are desirable and to report to the Chief Secretary." The Scott Report, submitted in the following year, suggested that the Legal Aid Department ("LAD") should enjoy "an independent status outside the main Civil Service."
2. Under Section 4(5)(b) of the LASC Ordinance, Cap. 489, the Council is obliged to advise on the "feasibility and desirability of the establishment of an independent legal aid authority." The LASC formed the Working Party on Independent Legal Aid Authority in 1997 to commission the first feasibility and desirability study in 1998, and formed another Working Party on Independence of Legal Aid in 2007 to conduct a review in 2008.
3. To this date, the motion of establishing an independent LAA has not been carried into effect at the LegCo level. In the LegCo documents regarding the independence of legal aid in 1998, the response to establish an independent legal aid authority was as follows:
" The Administration did not agree that the legal aid administration was not independent"

"...legal aid services should continue to be operated in the present manner under the current institutional setup." The Administration considered that the genuine concern of the public was over the quality of legal aid services and was cautioned about the unsettling effect of a disestablishment exercise on staff morale.
4. As for the review conducted in 2008, "LASC does not see a pressing need to disestablish LAD and substitute it by an independent legal aid authority considering that the present system is working well". In 2010, the following was mentioned in a letter from the LASC to Ms. Margaret Ng (Legislator – Functional Constituency – Legal):
" Given a consolidated budget deficit announced in the 2008/09 budget speech which also forecasted consecutive deficits for the ensuing few years, any proposal to disestablish the LAD to address a perception problem to some ... setting up a new

organi[z]ation to continue the same kind of work, would unlikely meet serious consideration.”

5. Since it has been several years since the previous reviews have been published, the LASC wishes to re-evaluate the feasibility and desirability of establishing an independent legal aid authority in Hong Kong. The Working Party on Independence of Legal Aid of LASC engaged Deloitte in 2011 to carry out a new comprehensive and independent re-assessment to determine whether the establishment of an independent legal aid body in Hong Kong is feasible and desirable.
6. Diagram 1 summarises the chronological development and key milestones relating to the consideration of legal aid independence¹.

Diagram 1: Chronological Development and Key Milestones relating to the Consideration of Legal Aid Independence



¹ A set of recommendations prepared by the LASC, which favoured the setting up of an independent statutory legal aid authority in stages under the current mode of financing (i.e., uncapped legal aid spending) and the disestablishment of the LAD, was submitted to the CE in September 1998. The Administration rejected the proposal in October 1999. In light of the very satisfactory service provided by the LAD in 2009, the views of the LAD staff on the matter, and having considered the financial positions of the Government at the time of the Study, the LASC did not see a pressing need to disestablish the LAD and substitute it with an independent authority.

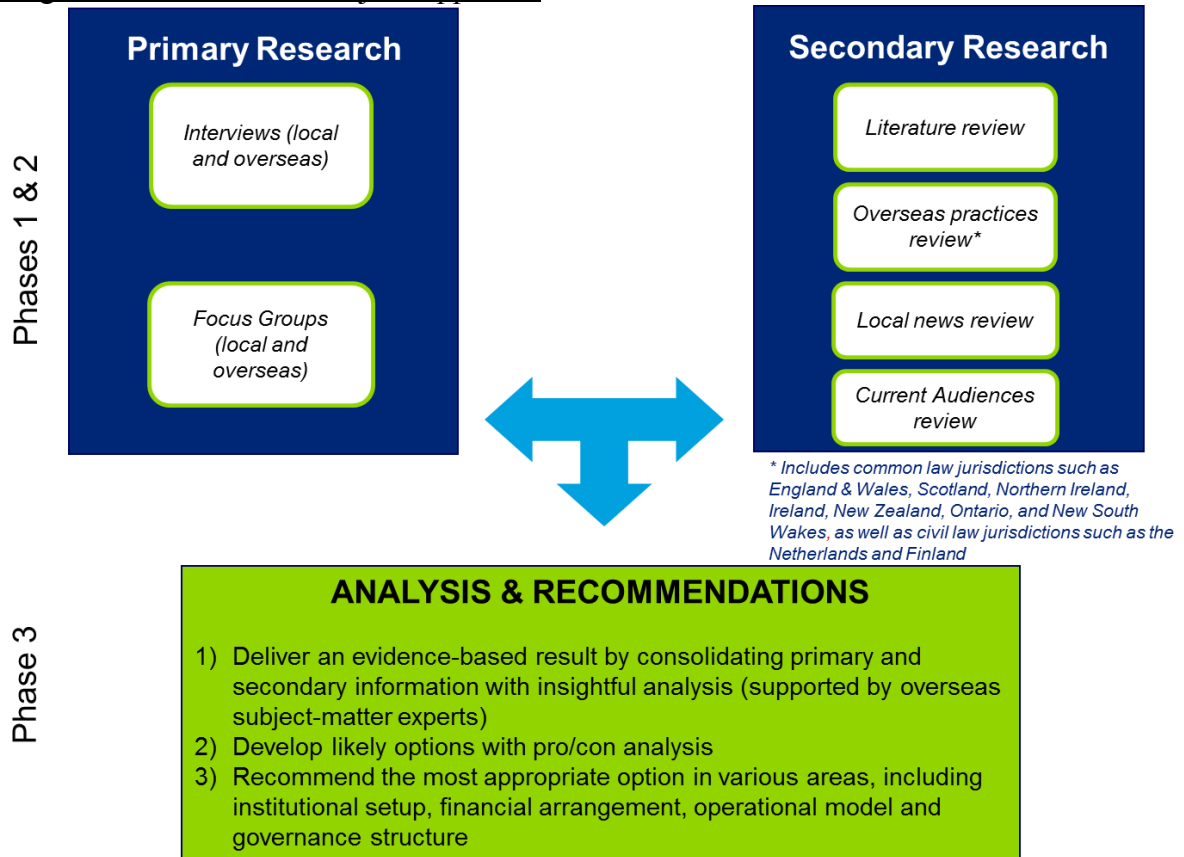
Project Objectives and Approach

7. This consultancy study has the following objectives:

- i. To examine the feasibility and desirability of establishing an independent legal aid authority in Hong Kong, through:
 - a. identifying the key preferences, needs, and satisfaction levels with the current service provision of various stakeholders involved in the legal aid services, including legal practitioners, legislators, community groups, Government officials, trade unions, district council members, media reporters, academics, political parties, current and past legal aid applicants and aided persons, LAD staff, LASC members who are not serving the Working Party, and members of the general public;
 - b. identifying comprehensive views and feedback on the issue of independence of legal aid from the aforementioned stakeholders; and,
 - c. ascertaining whether the current services at the LAD are meeting the users' initial and on-going needs and expectations.
- ii. To review and compare the practices in Hong Kong against the legal aid services and structures of legal aid administration in other common law jurisdictions, such as England & Wales, Scotland, Northern Ireland, Ireland, New Zealand, Ontario (Canada) and New South Wales (Australia), as well as civil law jurisdictions such as the Netherlands and Finland;
- iii. To consolidate findings and develop recommendations to form a basis for optimal strategic alternatives; and
- iv. To propose an implementation plan for the establishment of LAA, if this is recommended.

8. Diagram 2 illustrates the overview of the project approach.

Diagram 2: Overview of Project Approach



9. Surveys for legal practitioners, legal aid applicants/ aided persons and the general public can be found in Appendix C – Questionnaires.

Methodology

10. Together with our subject matter experts ("SMEs"), Professor Alan Paterson (University of Strathclyde) and Professor Frank Stephen (University of Manchester), we have defined four dimensions of legal aid independence – institutional, financial, operational and governance – along which the degree of independence (refer to Diagram 3) as well as the actions required to achieve the most desirable and feasible level of independence, are determined.

Diagram 3: The Four Dimensions of Legal Aid Independence



11. Through literature review, news research and consultation with key stakeholders in legal aid administration – including legal practitioners, legislators, community groups, representatives of Government departments and public bodies, trade unions, district councillors, media reporters, academics, political parties, LAD staff and LASC members – we have developed an evidence-based approach to examine the current level of independence in legal aid administration, as well as to map stakeholders' expectations of legal aid independence.
12. We have also considered the arrangements for the provision of legal aid internationally, to ensure that we have taken account of any salient points. Under the guidance of the two overseas SMEs, we have looked into nine overseas legal aid practices in order to compare and contrast the identified strengths and weaknesses in Hong Kong's legal aid administration, as well as to consider how particular areas can be improved. The nine overseas legal aid practices include common law jurisdictions such as England & Wales, Scotland, Northern Ireland, Ireland, New Zealand, Ontario (Canada), and New South Wales (Australia), as well as civil law jurisdictions such as the Netherlands and Finland.
13. Given that it is members of the general public who will be the key users of legal aid services, we have solicited their views through a large-scale telephone survey. Opinions from the general public who have never used the LAD's service have been analysed and compared with the views from existing or previous legal aid service users, i.e., legal aid applicants. Views of legal aid applicants have been collected through a paper-based survey. Respondents in both surveys have been selected at random.

Interviewees

14. A wide range of individuals and organisations who contribute to, have an interest in, or are on the receiving end of, current service delivery arrangements of the LAD, have been consulted. The approach to include people with and without legal background is to represent society as a whole. Table 1 summarises the sample size of different groups of stakeholders who have participated in our consultation on a voluntary basis. The interviewees list can be found in Appendix D – List of interviewees.

Table 1: Sample Size of Different Groups of Stakeholders

Stakeholder Group	Consultation Summary (as of 15 June 2012)		
	Sample size of interview / focus group*	Number of invitations sent	Sample size of surveys
Legal Field Practitioners	Judges	24	--
	Barristers and solicitors	95	112
	Legal Aid Department staff	44	--
Users / Potential Users	Representatives of trade unions	16	--
	Representatives of community groups	24	--
	General public	--	1,010
	Legal aid applicants	--**	110
Government / Political Representatives	Representatives of Government departments and public bodies	14	--
	District councillors	18	--
	Legislators	21	--
	Political parties	6	--
Others	LASC members, excluding LASC Working Party on Independence of Legal Aid and DLA	5	--
	Academics	7	--
	Reporters	17	--
Total	110	291	1,232

*There may be overlapping groups among stakeholders. For example, a legislator can be a barrister or solicitor by profession.

**Due to confidentiality reason, Deloitte did not send out invitations for interview to legal aid applicants individually; interviewees were referred to Deloitte by legal practitioners on a voluntary basis. Hence, the actual number of invitations for interview sent to legal aid applicants was unknown. Moreover, a total of 1,000 paper surveys, which is of a different format comparing with the interview questions, were distributed in two batches to legal aid applicants by the LAD.

***The Consultant has met with the two LAD staff associations, namely the Legal Aid Counsel Association and the Law Clerk Association, as well as the two professional bodies, namely the Hong Kong Bar Association and the Law Society of Hong Kong, after our original consultation period to solicit their views regarding the independence of legal aid.

Background

15. This section summarises the factual findings on the background of LAD. For details, refer to Appendix A – Legal Aid Practice in Hong Kong.

Mission of the Legal Aid Department

16. Legal aid services in Hong Kong are provided by the LAD and the Duty Lawyer Services ("DLS"). The DLS is managed by the Hong Kong Bar Association and the Law Society of Hong Kong through a governing council and is administered by a legally qualified Administrator. A small percentage of legal aid services is provided for free by parties such as Legislative Council members, District Council members and non-governmental organisations ("NGOs").
17. It is a statutory responsibility for the LAD to consider applications for legal aid independently to ensure it fulfils its central mission that no one who qualifies for legal aid is denied access to justice because of lack of means.
18. The long-term aims and objectives of the LAD include²:
- i. to operate an independent, efficient and cost-effective legal aid service;
 - ii. to ensure that no one with reasonable grounds for taking or defending proceedings is prevented from doing so because of lack of means;
 - iii. to ensure that in the interests of justice, no one charged with a criminal offence or with meritorious grounds of appeal is deprived of legal representation because of lack of means; and
 - iv. to improve the quality and accessibility of legal aid services to the public while achieving maximum cost-effectiveness.

² The Legal Aid Department website: <http://www.lad.gov.hk/eng/ginfo/sp/ltao.html>

Organisation of the Legal Aid Department

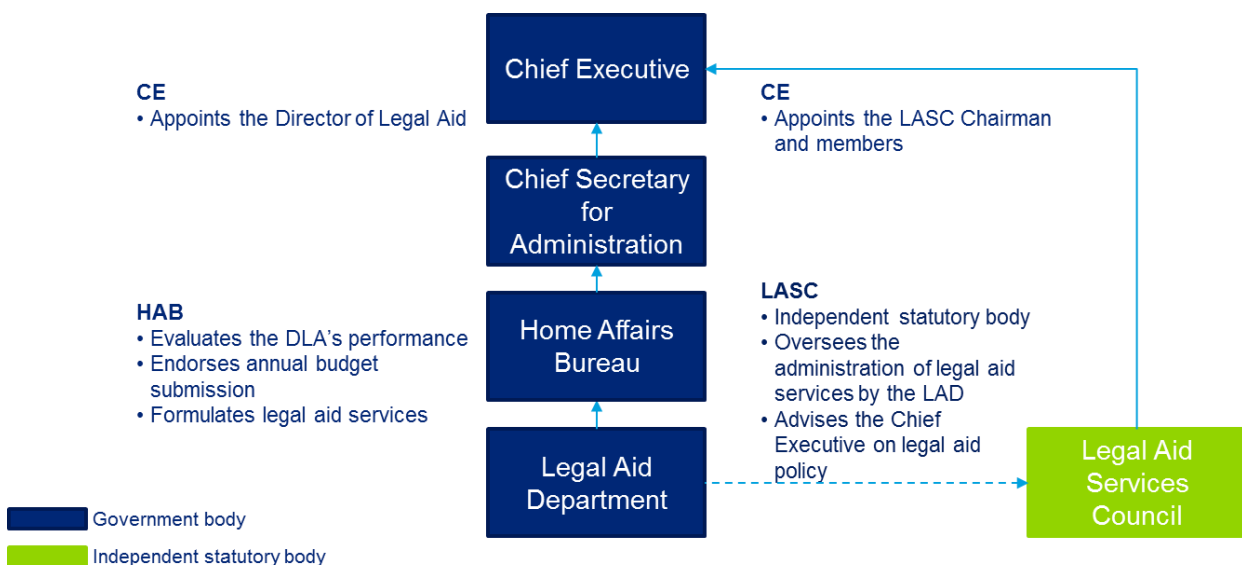
19. Prior to 2007, the LAD was accountable directly to the Administration Wing (refer to Diagram 4):

Diagram 4: Administration of LAD prior to 2007



20. Since 2007, the LAD has been devolved away from the Administrative Wing, into being a part of the Home Affairs Bureau ("HAB") (refer to Diagram 5):

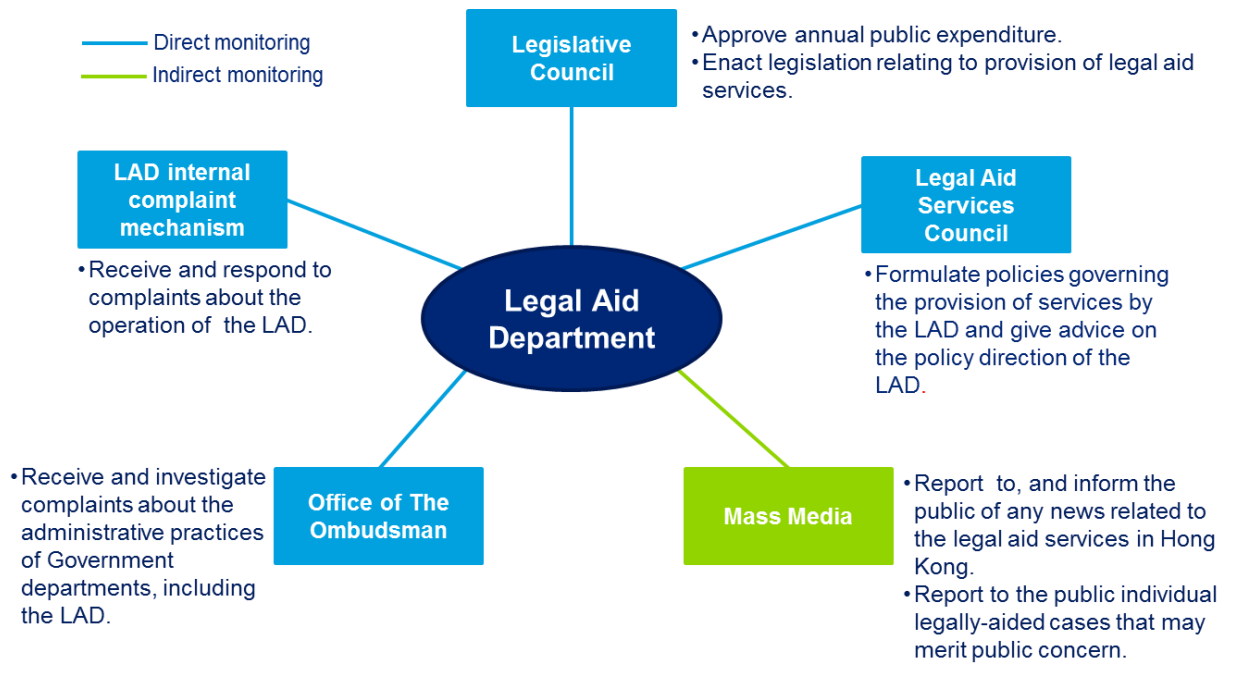
Diagram 5: Administration of LAD since 2007



21. As a Government department, the LAD is monitored by various parties through direct and indirect means (refer to Diagram 6).

- **Direct monitoring:** Public bodies, such as the LegCo, the LASC and Office of the Ombudsman, have statutory responsibilities to monitor legal aid administration. For example, the LASC, established in 1996 under the Legal Aid Services Council Ordinance (Cap. 489), is a statutory body set up to oversee the administration of legal aid services provided by the LAD and to advise the CE of the Hong Kong SAR on legal aid policy.
- **Indirect monitoring:** The LAD is subject to close public scrutiny through the mass media which reports on legal aid services and individual legally-aided cases.

Diagram 6: Monitoring Parties of the LAD



Financial operation of the legal aid schemes

22. The LAD’s expenditure on legal aid services is uncapped, which ensures that every successful legal aid applicant is not prevented from receiving legal aid services due to insufficient funding. Such cases are categorised as the Ordinary Legal Aid Scheme ("OLAS").

Significance of uncapping legal aid expenditure

23. The absence of ceiling on legal aid expenditure contributes to legal aid independence for the following reasons:

- i. No legal aid applicant who passes the required means and merits tests³ is excluded from legal aid services because of funding constraints.
- ii. The absence of ceiling implies that there is no cap on the number of persons who can have access to legal aid services each year.

24. Jurisdictions which still uphold an uncapped legal aid budget are becoming scarcer. Besides Hong Kong, the other two rare examples are Scotland and the Netherlands. Further details on funding arrangements and the implications of overseas jurisdictions will be discussed in the section on "Key findings – Independence of legal aid practices in overseas jurisdictions".

How is legal aid expenditure “uncapped”?

25. The LAD can apply for supplementary provisions which will be subject to LegCo’s approval where fluctuation in the demand for legal aid services from qualifying members of the public leads to an unforeseeable need for funding to meet this demand,.

SLAS as a self-financing scheme for the "sandwich class"

26. In addition, the Supplementary Legal Aid Scheme ("SLAS") provides legal assistance to the “sandwich class” whose financial resources exceed the upper limit allowed under the OLAS but are still below a certain amount. SLAS applies to cases where the intended claim of the legal aid applicant involves personal injuries or death, or medical, dental and legal professional negligence, where the claim is likely to exceed HK \$60,000. It also covers claims brought under Employees' Compensation Ordinance irrespective of the amount of the claim.

³ The purpose of the "means test" is to assess the financial resources of the applicant. Under the Ordinary Legal Aid Scheme, the upper financial eligibility limit is HK \$260,000 whereas that under the Supplementary Legal Aid Scheme is HK \$1,300,000. The main purpose of the “merits test” is to determine whether an applicant has a reasonable claim or defence and whether the grant of legal aid to an applicant is justified. For further information, please visit <http://www.lad.gov.hk/eng/las/faq.html>.

27. Since 30 November 2012, SLAS has been expanded to cover new types of cases which are likely to exceed HK \$60,000 and that covers:
- i. Professional negligence claims against certified public accountants (practising), registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorized land surveyors, registered landscape architects and estate agents;
 - ii. Negligence claims against insurers or their intermediaries in respect of the taking out of the personal insurance products; and
 - iii. Monetary claims against vendors in the sale of completed or uncompleted first-hand residential properties.
28. SLAS also covers representation for employees in appeals against awards made by the Labour Tribunal, regardless of the amount in dispute. This self-financing scheme draws its funds from application fees payable by applicants, the interim contributions from aided persons and the final contributions from a percentage deduction of the damages recovered in successful cases. (For details, refer to Appendix G – Details of SLAS)

Current staffing arrangements within the LAD

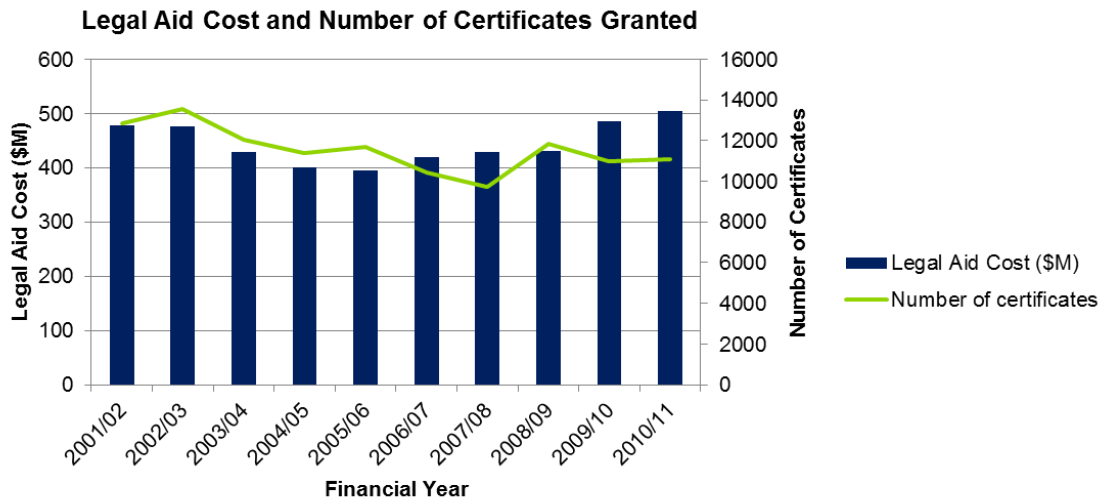
29. LAD staff members, regardless of their rank or grade, are all part of the civil service. All professional staff members in the LAD, and law clerks, are hired by the LAD directly.
30. The LAD consists of two types of staff – general grade and departmental grade. Recruitment mechanisms differ between these two types of staff in the following ways:
- i. General grade staff who perform mainly administrative work and those who are not required to have specific legal knowledge are subject to rotation in various Government departments. Rotation decisions and arrangements are made by the Civil Services Bureau.
 - ii. Departmental grade staff includes legal aid counsel and law clerks. Legal aid counsel are required to have professional qualifications. Departmental grade staff members are recruited directly by the LAD, and are not subject to the rotation requirements for general grade staff.

Legal aid cost and the number of legal aid certificates granted

31. Legal aid costs have been relatively stable in the past 10 years, ranging between HK \$395 and \$505 million. The most substantial increase in legal aid costs occurred in financial year 2009-10 which saw an increase of 13 percent over 2008-09⁴. The number of legal aid certificates granted has also been relatively stable in the past 10 years, ranging between 9,748 and 13,574 cases, including civil and criminal cases (refer to Diagram 7).

⁴ Legal aid cost is accounted according to the fiscal year, while the number of legal aid certificates granted is accounted according to the calendar year.

Diagram 7: Legal Aid Cost and Number of Legal Aid Certificates Granted



Appeal mechanisms against decisions

- 32. The LAD is under the statutory obligation to make all decisions and take actions in accordance with the Legal Aid Ordinance (Cap. 91) and Legal Aid in Criminal Cases Rules (Cap. 221D). A civil legal aid applicant who is aggrieved by any order or decision of the DLA has a prescribed channel to appeal.
- 33. For civil legal aid applications, the Registrar and Masters of the High Court are vested under Section 26 of the Legal Aid Ordinance with the function to hear and determine appeals against the decision of the DLA (refer to Diagram 8).
- 34. There is no statutory avenue to appeal against refused criminal legal aid applications. However, if an applicant has been refused legal aid because the case / appeal lacks merits, the judge hearing the case / appeal may grant legal aid provided that the applicant is eligible on means. If the case / appeal involves murder, treason or piracy with violence, the judge hearing the case / appeal may grant legal aid and exempt the applicant from the means test and payment of contribution (refer to Diagram 8).

Diagram 8: Appeals Mechanism against Legal Aid Refusals



Key Findings

35. Table 2 provides a top level summary of the views from each stakeholder group. In the subsequent pages, we provide more detailed comments by each stakeholder group. Detailed analysis of the data obtained from the surveys can be found in Appendix E – Survey results.

Table 2: Summary of the Views from Each Stakeholder Group

Stakeholder Group	Perception Summary	
	Confidence in current level of independence	Desirability of an independent legal aid authority
Legal Field Practitioners		
Barristers and solicitors	Low - Medium	High
Legal Aid Department staff	High	Low - Medium
Users / Potential Users		
Representatives of trade unions	High	Low
Representatives of community groups	Medium - High	Low - High
General public	High	Low - Medium
Legal aid applicants	High	Low - Medium
Government / Political Representatives		
Representatives of Government departments and public bodies	High	--
District councillors	High	Low
Legislators	Medium – High	Medium – High
Political parties	Medium – High	Medium – High
Others		
LASC members excluding LASC Working Party on Independence of Legal Aid and DLA	High	Medium
Academics	High	Medium
Reporters	High	Low

Current views on the degree of independence of the LAD in Hong Kong

The view that "The LAD is sufficiently independent"

Institutional dimension

36. As a department under the Home Affairs Bureau, the LAD is not institutionally independent from the Government. However, the LASC has been established to safeguard the independence of the LAD. It is set up as a statutory body to oversee the

administration of the legal aid services provided by the LAD and advise the Chief Executive on legal aid policy⁵.

Financial dimension

37. The LAD's expenditure on legal aid services is uncapped, i.e. there is no ceiling imposed on the spending on each legally-aided case or the LAD's total spending on legal aid services. This ensures that every successful legal aid applicant is not prevented from receiving legal aid services due to insufficient funding.
38. Although legal aid cost is uncapped and therefore demand-led, the LAD is aware that stable trends in legal aid cost and legal aid certificates granted may create an impression that the LAD has been monitoring its legal costs closely and that, in order to exercise tight control on legal aid spending, it may have imposed a limit on the number of legal aid cases it is able to fund each year.

Supplementary provisions in recent years

39. Although the LAD upholds an uncapped legal aid budget, it has not sought supplementary provisions in the past ten years. According to the LAD, this is a result of its robust mechanism in setting the annual budget which is performed holistically based on past actual expenditure pattern, any anticipated increase in legal aid applications, certificates granted and the likely number of costly cases.
40. However, the fact that no supplementary provisions have been sought in the past ten years may result in speculation that the LAD tends to budget more than it needs in order to avoid the need of applying for supplementary provisions while others may interpret this as a tight control exercised by the LAD on legal aid spending.

Operational dimension

41. Operational independence is, to a large extent, an outcome of institutional and financial independence. On the one hand, it gauges the degree of autonomy that the LAD staff

⁵ Section 4, LASC Ordinance, Cap. 489: Section 4(6) of the LASC Ordinance states that "the Council shall not be regarded as an agent or servant of the Government."

Section 5(1) of the LASC Ordinance requires the LASC to consist of a Chairman who is not a public officer or legal practitioner, 4 legal members (2 barristers and 2 solicitors), 4 lay members and the DLA.

experience as members of the civil service. On the other hand, it is associated heavily with the perceptions of various key stakeholders in legal aid administration.

42. There are pros and cons for LAD's staff being civil servants. On the one hand, as civil servants, LAD staff members benefit from job security, income stability and pensions, which can help to prevent them from yielding to potential pressure from any parties, including the Government. On the other hand, LAD staff members might respond to the expressed or perceived wishes of the Government because, as civil servants, they might see it as being in their best career interests to do so.

Significance of the LAD's autonomy in recruiting departmental grade staff

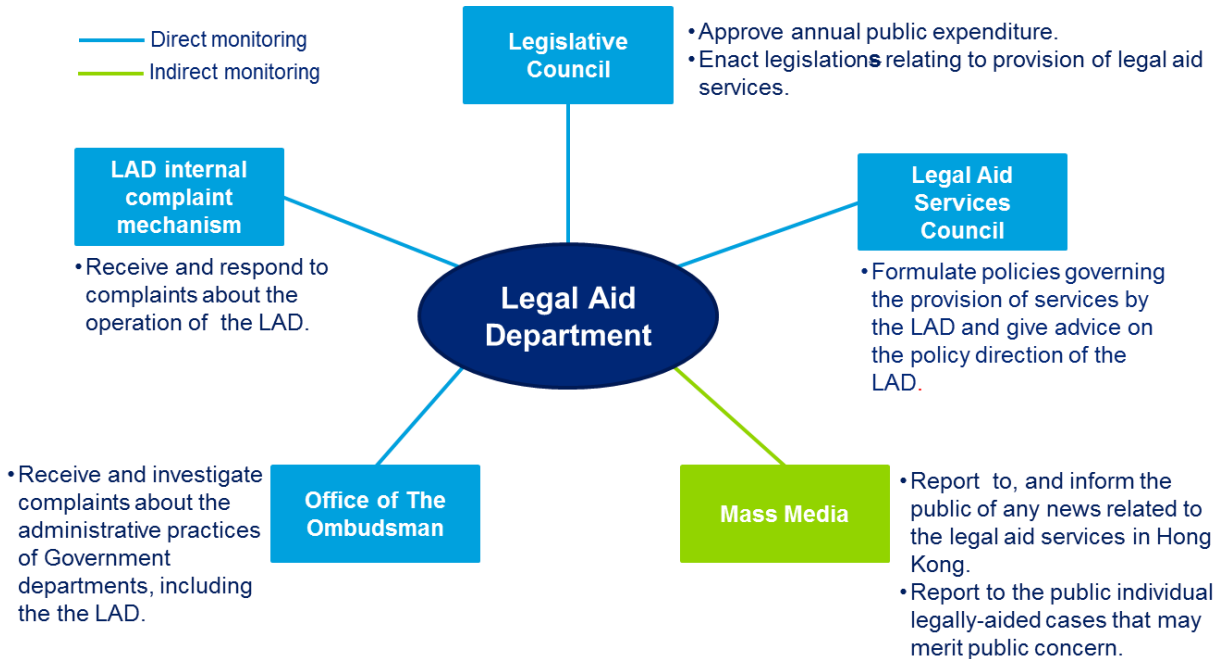
43. Departmental grade staff are the key decision-makers to execute the LAD's core functions. Decisions on legal aid applications and subsequent legal proceedings are often made by these professionals. It is, therefore, beneficial to have operational independence for the LAD to be able to maintain recruitment autonomy for these professionals, so that they have no or low risk of potential conflict of interests with other Government departments.

Governance dimension:

44. Independent governance of the LAD is monitored by various institutions and governing bodies, such as the LASC, the Ombudsman and the general public (refer to Diagram 9). Any statutory right given to legal aid applicants to appeal against refusals of their legal aid applications also provides a certain degree of governance over the LAD's decision on whether or not to grant legal aid.
45. The LASC, as a statutory body, oversees the administration of the legal aid services provided by the LAD. The Ombudsman, as a non-departmental public body, performs inquiries and investigations into the LAD's operations when needed. The LAD, as a Government department, is accountable to the general public through the monitoring function of the LegCo and mass media. The LAD also has a formal system and procedure for receiving and handling complaints.
46. The LAD is under the statutory obligation to make all decisions and actions in accordance with the Legal Aid Ordinance (Cap. 91).
47. A civil legal aid applicant who is aggrieved by any order or decision of the DLA is given the statutory right under the Legal Aid Ordinance to appeal to the Registrar of

the High Court, whose decision will be final (Section 26(1&4) and Section 26A, Legal Aid Ordinance).

Diagram 9: Monitoring Parties of the LAD



Stakeholder groups which hold the perception that “LAD is sufficiently independent”

LAD staff

48. The majority of the LAD staff believe that the LAD, despite being a Government department, operates sufficiently independently of the Government. They believe that every decision made on a legal aid application and the handling of subsequent legal proceedings is in accordance with the Legal Aid Ordinance. A fair number of the LAD staff cited legally-aided cases against the Government in recent years as evidence that the LAD’s decisions on legal aid applications are not biased even on such politically-sensitive cases. Most believe that the LAD’s departmental status allows it to be accountable to a multitude of monitoring parties, including the LegCo. The LASC has also helped to ensure independence in legal aid administration.

49. Almost none of the staff interviewed, regardless of rank, grade or seniority, think they have been under any form of pressure from the Government on legal-aid processing. Most believe that the concern on independence is a matter of perception as a result of the LAD’s departmental status. Only very few staff interviewed cited incidences where independence was thought to have been compromised, e.g., in relation to the Vietnamese boat people.

50. The majority of LAD staff consider that the establishment of an independent legal aid authority will benefit independence from a perception point of view, but questioned whether the change in perception is worth a tremendous expenditure of resources and possible disruption to legal aid services.
51. The employment arrangement and continuous entitlement to the existing pension are understandably the top personal concerns among the LAD staff. However, those who are approaching retirement welcome the suggestion of early retirement with a full payment of pensions plus other possible exit incentives.

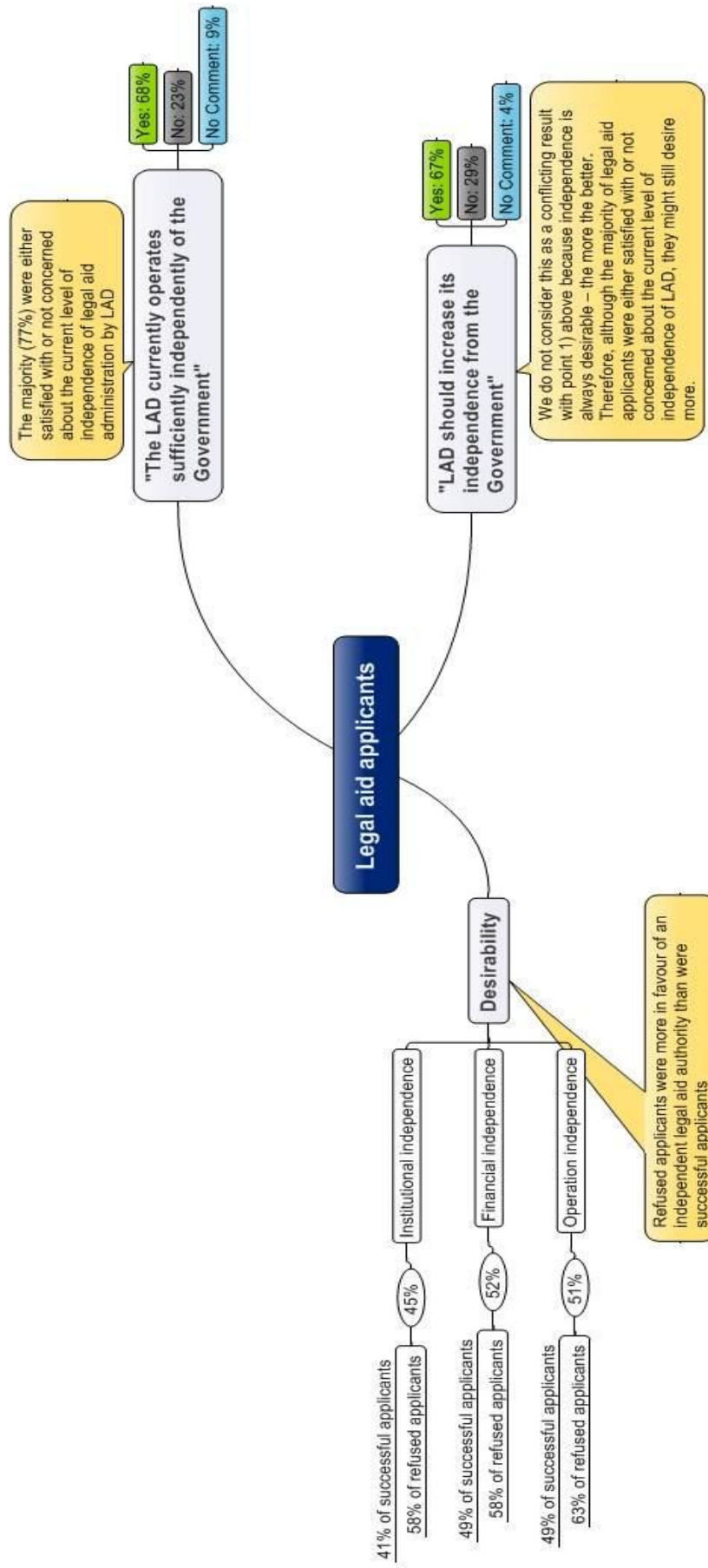
Representatives of Government departments and public bodies

52. Representatives of various Government departments and public bodies consider the current operation of the LAD sufficiently independent. None of them has encountered concerns or complaints from the citizens of Hong Kong towards legal aid independence.
53. Representatives from existing statutory bodies, such as the Office of the Ombudsman and the Consumer Council, consider that their organisations maintain a high degree of autonomy. Despite the fact that these statutory bodies are funded by the Government, they are free to design and manage their own organisation and staff structure, as well as to challenge the policies or administration of the Government.
54. The majority of representatives from other Government departments and public bodies consider the establishment of an independent legal aid authority feasible from a cost perspective, provided that the Government agrees with this direction.

Legal aid applicants

55. Existing and previous users of LAD's services do not have a pressing concern over legal aid independence, although a higher degree of independence was said to be desirable (refer to Diagram 10).

Diagram 10: Survey Results of Legal Aid Applicants



The view that “The LAD is not sufficiently independent from the Government”

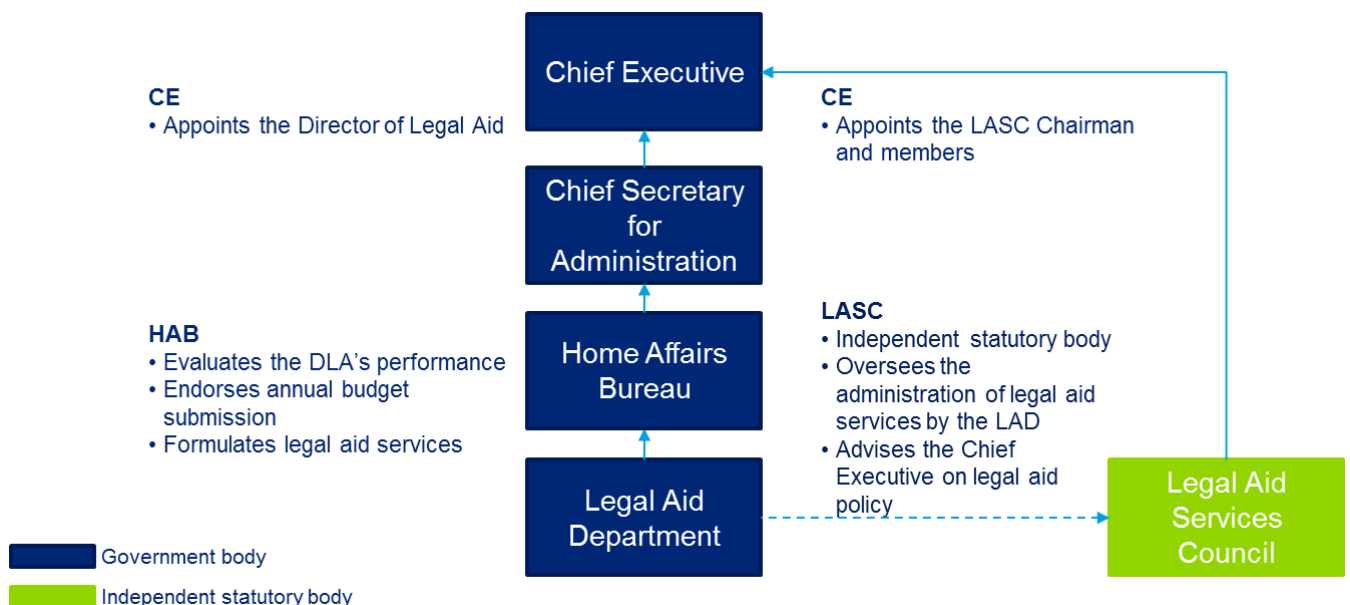
Institutional dimension:

A. The LAD’s departmental structure creates the potential for perception that its operation is not sufficiently independent of the Government.

56. The LAD has been a part of the HAB since 2007. Prior to 2007, the LAD was accountable directly to the Administration Wing. The LAD’s institutional independence is considered by some to have been undermined when its policy portfolio was transferred from the Administration Wing of the Chief Secretary for Administrations Office to the Home Affairs Bureau. Diagram 11 depicts the current institutional relationship between the LAD and other core legislative bodies:

57. Such a structural change creates the following concerns over the issue of independence among individuals interviewed. Firstly, being structurally further away from the Administration Wing, the LAD might experience tighter financial and policy control by the policy bureau. Secondly, in case of litigation against sister departments under the HAB, e.g., Leisure and Cultural Services Department, the LAD’s independence might be or be seen to be compromised.

Diagram 11: Administration of LAD since 2007



58. Moreover, the standing of the LASC is in part undermined by the fact that staff appraisal on the DLA is conducted by the Secretary of Home Affairs. Under Section 4(3) of the LASC Ordinance, the LASC is expressly denied “the power to direct the Department on staff matters and the handling of individual cases by the Department”. Although this safeguards confidentiality of individual legal aid cases, the LASC’s

power to advise or govern the LAD's operation is limited. Although the LASC recommended to the Chief Executive, in 1998, the establishment of an independent legal aid authority in stages, the proposal was rejected, possibly due to significant costs, potential disruption to service provision and the reduced role and authority of the Government.

B. All LASC members are appointed by the CE. Appointment criteria are not made known to the public

59. All LASC members are appointed by the Chief Executive. Although the Chief Executive is expected to consult the Bar Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong on the appointment of legal members, the Chief Executive has the right to appoint a person other than the candidate recommended (Section 5(3) and 5(4), LASC Ordinance). Greater transparency would raise the public's confidence level on the appointment mechanism.

C. Concerns over the dual role of the Director of Legal Aid and the Official Solicitor

60. Since the enactment of the Official Solicitor Ordinance (Cap. 416) in 1991, the DLA has been designated as the Official Solicitor ("OS") as well within the Official Solicitor's Office ("OSO"), whose statutory functions are, among others, to represent the interests of persons under a disability of age or mental capacity in proceedings, including persons under the age of 18 and individuals with impaired mental capacity. The OSO has been a part of the LAD structure because Section 7 of the Official Solicitor Ordinance provides for the DLA to be the first OS. Although the OSO maintains a separate workforce with 14 dedicated staff members at the time of the Study, there are potential independence issues such as the following.

- i. There are cases in which the OS represents mentally incapacitated persons, while the other party in the case is legally aided. Such a scenario can typically be seen in matrimonial cases, where the minor is represented by the OS while one or both parent(s) are legally aided.
- ii. OSO staff members are subject to a rotational program in the LAD. The lack of Chinese walls opens up the possibility that personal relationships may be exploited to pressure LAD staff into granting or discharging legal aid for cases that involve the OSO.

- iii. Although the risks from potential conflict of interest are mitigated by assigning private practitioners to conduct cases on behalf of the OS when the other party is legally aided and represented by the LAD's in-house litigation teams, there is no guarantee that unwarranted influence from the OSO on the LAD or vice versa is entirely absent.
61. The dual role of the DLA as OS therefore can create a perceived conflict of interest, namely, when the LAD and the OSO represent opposite parties in litigation. Nevertheless, an internal guideline is in practice to mitigate this perceived conflict of interest. When the LAD and the OSO represent opposite parties in litigation, the LAD is instructed to assign the case out to independent private practitioners.
62. Attempts to separate the DLA from the OSO have been made. In 2002, the LASC's proposal to establish an independent OSO with its own administrative secretariat was rejected by the Government, primarily due to concerns over cost effectiveness.

Financial dimension

63. The LAD is funded by the Government and is therefore not financially independent of the Government. However, there is no overseas jurisdiction observed in this Study that does not rely on any Government funding. The focus of financial independence should relate more to a legal aid body's ability to receive the level of funding required to meet its legal aid costs, as well as its freedom to allocate its funding within given limits (refer to Key findings – Independence of legal aid practices in overseas jurisdictions).
64. Although expenditure on legal aid services is uncapped, the LAD has maintained a stable trend in expenditure, and granted similar numbers of legal aid certificates over the past ten years, and has not sought supplementary provisions, creating a possible perception that the LAD is bound to exercise tight control over its legal aid spending.

Operational dimension

65. The degree of operational independence is, to a certain extent, measured by stakeholders' perceptions. Some stakeholders hold the impression that the LAD, being a Government department, may exchange information with other departments in such a way that undercuts the LAD and undermines its independence. This impression has not been justified. For example, the LAD is thought to have shared information with the Immigration Department ("ImmD") resulting in applicants being deported from Hong Kong before legal aid was granted. The validity of this impression is hard to

substantiate. The ImmD, however, stated that ImmD and LAD often stand on different ground and therefore are seldom in contact with each other; and that the only occasion for the LAD to communicate with the ImmD is when the LAD grants legal aid to a person whom ImmD would otherwise deport from Hong Kong, unless a notice is received in time from the LAD.

66. In addition, some legal practitioners are sceptical about the “appropriate panel” who provides Section 9 opinion. They are concerned that the DLA has a “preferred panel” whose decisions may favour the DLA’s interests. Section 9 of the Legal Aid Ordinance provides statutory power for the DLA to refer legal aid applications to “counsel or solicitor, whose name is on the appropriate panel”. This ensures that the DLA has the statutory right to seek independent opinions from external barristers or solicitors when making a decision on a legal aid application, especially one that involves complicated or sensitive issues. However, some legal practitioners are sceptical about the definition of the “appropriate panel,” and how such a panel is selected. They are concerned that the DLA has a “preferred panel,” whose decisions tend to be in line with DLA’s decisions. The LAD, on the other hand, assured us that, as stated under Section 4(1) of the Legal Aid Ordinance, Cap. 91, the Section 9 panels are the same as the panels of counsel or solicitors who act on behalf of legally-aided persons⁶.

Governance dimension

67. Unlike civil cases, there is no statutory avenue to appeal against refused legal aid applications in criminal cases. A refused criminal legal aid applicant may still apply to the judge hearing the case / appeal for the grant of legal aid, provided that the applicant has passed the means test, (except in cases involving murder, treason or piracy with violence, where the judge may grant exemption on means), and the original refusal by the LAD is on merits.

⁶ Section 4(1) of Legal Aid Ordinance states that “[t]he Director shall prepare and maintain separate panels of counsel and solicitors enrolled on the rolls of barristers or solicitors maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap. 159) who are willing to investigate, report and give an opinion upon applications for the grant of legal aid and to act for aided persons”.

Stakeholder groups which hold the perception that “LAD is not sufficiently independent”

68. The consultant is aware that the two professional bodies, namely the Hong Kong Bar Association and the Law Society of Hong Kong, have strong views regarding legal aid independence. The views of the two professional bodies are summarised below while their full position papers are provided in Appendix H.

The Hong Kong Bar Association ("HKBA")

69. For decades, the HKBA has supported the establishment of an independent Legal Aid Authority ("LAA") with the following rationale⁷.

- i. The HAB's lack of awareness and the insufficiency of the LASC to advise Government on expansion of SLAS
 - a. Despite the unmet needs being identified by the Interest Group of the LASC and supported by the HKBA in April 2002, the HKBA considers that nothing has been done by the LASC or LAD over the years to seek to expand legal aid.
 - b. To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to cost ratios.
- ii. Failure to make timely responses by expanding legal aid to cover social needs
 - a. The HKBA considers that legal aid should have been involved, either by an ad hoc scheme under SLAS or a quick amendment to the Legal Aid Ordinance to embrace new types of claims, e.g., the Lehman Brothers' Cases. The general perception is that if legal aid had been involved and test cases brought to the Courts, proper settlements could have been reached and full compensation achieved.
- iii. Blinkered perception that everything is doing fine for the current system
 - a. The HKBA proposed amendments to cover the additional types of cases which have all along been included in the HKBA's recommendation, but these

⁷ For the purpose of this Study, the HKBA submitted a paper titled “The Hong Kong Bar Association’s Submission on the Need to Establish an Independent Legal Aid Authority” to Deloitte Consulting and the LASC in June 2012.

amendments were rejected by the LASC and the HAB without valid reasons being provided.

- iv. Legal aid must develop and be engaged in the new areas of law as well as social, environmental and financial problems, which constantly come to the fore.
- v. The LASC is not working well enough.
 - a. The HKBA has the distinct impression over the last few years that the members of the LASC do not have independent legally trained support staff to regularly review unmet legal aid needs in Hong Kong.
 - b. The LASC is remote from individual cases, which would provide live examples for needs of reform.
 - c. There is an impression that LASC members are too busy to deal with important matters of detail and policy for the proper extension of the legal aid scheme.
- vi. Perception of lack of independence of the DLA
 - a. The LAD is a Government department, manned by civil servants, and the DLA is now accountable to the Secretary for Home Affairs, but there is no suggestion that the Secretary for Justice should be accountable to the Secretary for Home Affairs.
 - b. The HKBA considers that having the DLA accountable to the Secretary for Home Affairs is in fact a downgrade of the independence of legal aid.
- vii. The legal aid budget has shrunk in real terms over the last decade.
- viii. Independence is undermined by putting the LAD under the HAB.
 - a. The HKBA considers that, in management terms, having the LAD under the HAB compromises the LAD's independence, and that the LAD is not accountable to the LASC which is mainly advisory. The HKBA suggests abolishing the LASC and replacing it with a supervisory board of an independent LAA.

The Law Society of Hong Kong ("LSHK")

70. The LSHK supports the establishment of an independent Legal Aid Authority ("LAA") with the following rationale⁸.

- i. The LAD is bureaucratic
 - a. The LSHK considers that the LAD is not responsive to clients or the public's needs.
 - b. There is a perception that the 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 group.
 - c. 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.
- ii. Independence is undermined by putting the LAD under the HAB
 - a. The LAD is exposed to potential pressure from the Administration, whether through formal or informal channels, as the LAD has to report to both the HAB and the LASC.
 - b. The LAD is accountable to other civil servants within the Administration which the LSHK believes that this downgrades the independence of legal aid.
- iii. The HAB is a non-specialist Bureau as it has many other responsibilities
 - a. The HAB has a conflict of interests because it has many other responsibilities, and its policies can be influenced by other factors that conflict with the expending of resources to promote the provision of legal aid.
- iv. The LASC is not functioning properly due to its inadequate statutory power

⁸ The LSHK submitted a paper titled "Independent Legal Aid Authority" to Deloitte Consulting in September 2012. The paper can also be found on the website of LSHK.

- v. The legal aid budget has been static.
 - a. The increment of LAD budget is far below that of the Department of Justice for the period 1975 to 1997.
- vi. The financial eligibility limit has not kept pace with inflation.
- vii. Dramatic increase in unrepresented litigants in person ("LIP").
 - a. The LSHK believes that the introduction of mediation should reduce the number of unrepresented cases.

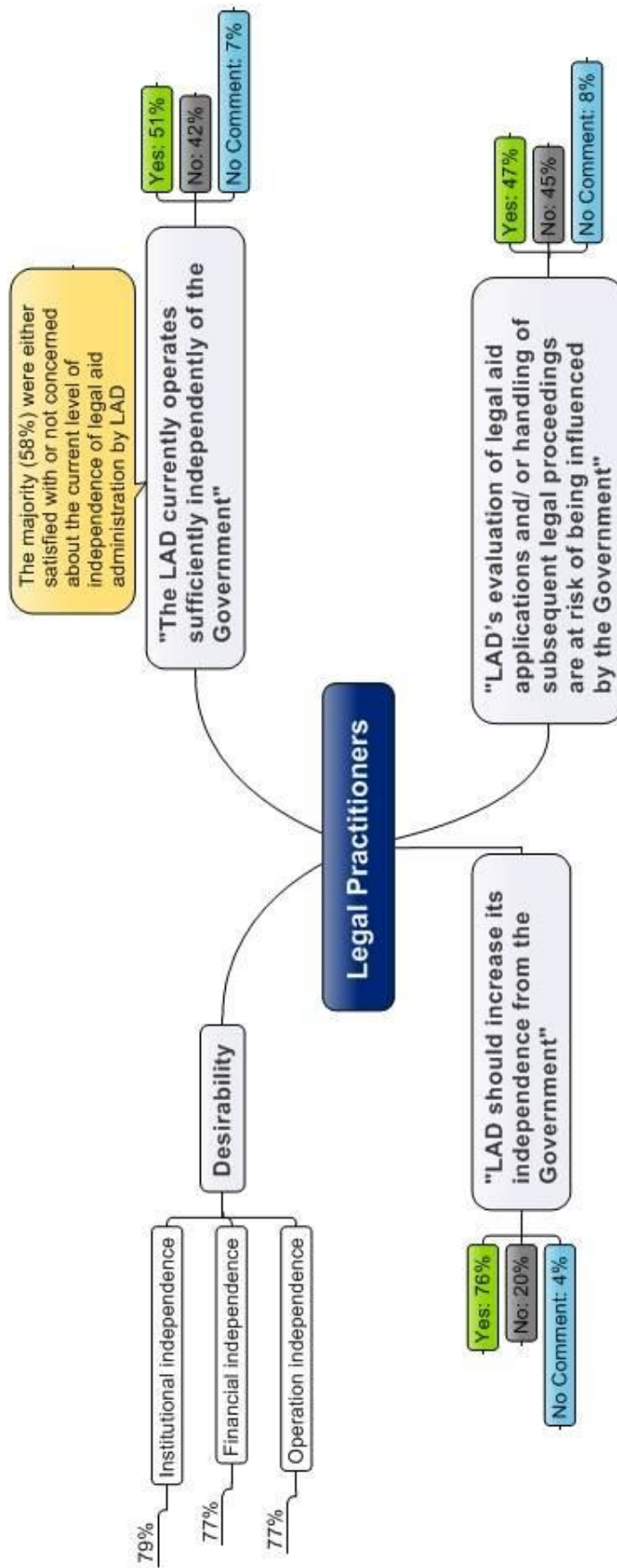
Mixed perceptions among stakeholder groups on the current independent status of the LAD

71. Although the aforementioned stakeholder groups expressed distinctive interpretations of the current status of the LAD's independence, it is worth noting that there is no unanimous opinion from any stakeholder group which suggested that the LAD should be retained as a government department, as is, or be re-established as an absolutely independent LAA. Instead, the following stakeholder groups have mixed perceptions about the independent status of the LAD, and raised other issues that require a balance of how legal aid services should be delivered and controlled.

Legal practitioners

72. The majority of the legal practitioners interviewed were either satisfied with or not concerned about the current level of independence of the LAD. The most controversial dimension of independence among legal practitioners is institutional independence. A few legal practitioners cited instances where independence was thought to have been compromised, e.g., in relation to the Vietnamese boat people. On the LASC's effectiveness in monitoring the LAD's independence, a number of individuals in the legal profession commended that the level of independence of the LAD has been strengthened in the past two decades, especially since the establishment of the LASC (refer to Diagram 12).

Diagram 12: Survey Results of Legal practitioners (e.g. barristers and solicitors)



73. However, some professionals in the legal field generally have a rather low level of recognition of the LASC's role and responsibilities, which limits the level of trust on legal aid independence. On the one hand, those who specialise in judicial reviews and criminal cases consider the current institutional status of the LAD problematic. On the other hand, legal practitioners who specialise in other areas, such as matrimonial cases, believe that the LAD operates with sufficient independence from the Government despite its institutional setup.
74. One general consensus among all legal practitioners interviewed, regardless of their specialisation, is that they find the mechanism of assigning cases out to private lawyers is lacking in transparency, which creates the impression that preferential treatment might have been given to certain lawyers on the Legal Aid Panel. Views on how case assignment should be done, however, vary. Some practitioners desire a greater degree of equity in case assignment, while others consider it important for the LAD to have discretion to discriminate among lawyers when assigning cases so as to ensure that legally-aided persons are assisted by the most competent and experienced lawyers available.
75. A number of legal practitioners interviewed were concerned about the selection of lawyers for providing Section 9 opinions. Those practitioners share a similar perception that the LAD has a "preferred panel" to whom the LAD will reach out for Section 9 opinions, and whose views tend to align with that of the LAD's. Although the LAD claims that the same panels of counsel and solicitors are used to give Section 9 opinions and to act on behalf of legally-aided persons, some senior barristers and solicitors drew our attention to the fact that they have never been invited to provide Section 9 opinions, despite their close working relationship with the LAD on representing legally-aided persons.
76. Some legal practitioners are also concerned that, being a Government department administering a given annual budget, the LAD appears to put cost over justice. This challenges the LAD's perceived independence in granting or refusing legal aid. Some think that the LAD appears to be extremely conservative on cases without legal precedents, creating an impression that the LAD tends to grant legal aid only to cast-iron cases in order to conserve legal aid funds.
77. A few legal practitioners also think that the LAD would apply more stringent control on merits tests for legal aid applicants under the SLAS because, as a self-financing scheme, it has a limited budget which needs to be monitored carefully.

Legislators and representatives of political parties

78. Almost all legislators and representatives from political parties interviewed agreed that the benefit of establishing an independent legal aid body is to gain a higher degree of confidence and perceived independence among members of the general public. But almost all legislators and representatives from political parties interviewed noted that the directorate grade staff in the LAD are currently upholding the standard in maintaining independence, although a few questioned whether this can be sustained when there is a change in personnel.
79. A few interviewees see the establishment of an independent legal aid authority as a means to expedite the realisation of legal aid reforms, such as the provision of pre-litigation legal assistance and the expansion of scope to increase middle class access to legal aid.
80. In view of the rising trend in the number of cases related to judicial reviews from year to year, some interviewees shared the view that an independent legal aid authority is a must, in order to prevent potential or perceived conflict of interests between the Government and the administrator of legal aid.
81. It is noteworthy that legislators and representatives from political parties interviewed who are supportive of the establishment of an independent legal aid authority are mostly members of the pan-democrats. Those who come from a legal background also hold a strong belief that “justice must be seen to be done”, which tips them towards favouring the establishment of an independent legal aid authority.
82. In contrast to members of the pan-democrats, members of the pro-establishment camp tend to have more reservations on the establishment of an independent legal aid authority⁹. They tend to be in favour of the current institutional status of the LAD as a part of the Government. They consider the current administrative measures in place to be effective in safeguarding legal aid independence. They believe that members of the general public are more concerned about service quality and the scope of legal aid services than the issue of independence. Taking financial implications into account, these interviewees doubt whether it is justifiable to use taxpayers’ money to establish

⁹ Political inclination of legislators and representatives of political parties has been considered during the selection of stakeholders to be sent interview invitations. Although attempts have been made to obtain equal representation between the pan-democrats and members of the pro-establishment camp, most of the legislators and representatives of political parties who accepted our invitations voluntarily were pan-democrats.

an independent legal aid authority that might achieve an improvement in perception but not in actions.

LASC members (excluding the Working Party and DLA¹⁰)

83. Some members who are in favour of the establishment of an independent legal aid authority believe that this will eliminate the problem of “perceived lack of independence,” and help strengthen the general public’s confidence in the provision of legal aid services.
84. Those who have reservations about this change are, however, concerned about the financial arrangements if the LAD becomes independent. On the one hand, they think that stable and sufficient funding from the Government is crucial, even if the LAD becomes independent. On the other hand, they consider that the issue of perception cannot be fully eliminated if the Government remains as the main source of funding.

Academics

85. The two academics being interviewed believe that the current level of independence maintained and exercised by the LAD is sufficient, and whether or not an independent legal aid authority should be established is not the top concern of the general public. Nonetheless, one of them believes that “justice must be seen to be done” and that currently the LAD is not seen to be independent because of its institutional and financial reliance on the Government.
86. In addition, these two academics have divergent views on the mechanism of assigning cases to private practitioners. One academic believes that equality is the top priority for any jurisdictions providing legal aid services, and that equality is linked to accessibility of legal aid by members of the general public, i.e., the more people gaining access to legal aid, the more equal the system is. Therefore, with limited legal aid budget available, a legally aided case should be assigned to the lawyer who is willing to take over the case with the lowest fees possible. The other academic believes that a legally aided case should be assigned to the best lawyer available.

¹⁰ DLA’s comments have been generalised under the perception of LAD staff. Out of the remaining 9 LASC members, there are 5 members who are not part of the LASC Working Party on Independence of Legal Aid (Working Party). Content in this section is based on comments from 4 of those LASC members who are not part of the Working Party or the DLA.

Representatives of community groups

87. The majority of community groups invited to participate in our interviews provide paralegal advice to their clients to a certain extent. Based on their experience in assisting clients with the preparation of legal aid applications, most of them believe that the LAD's operation is currently sufficiently independent from the Government, and that independence is not a major issue.
88. Most of them have greater concerns over the service quality. The community groups would like to see improvements in the following areas:
- i. reducing application processing time;
 - ii. enhancing the knowledge of counter staff about the types of cases that are covered by legal aid;
 - iii. explaining in fuller details the reasons behind application rejections; and
 - iv. providing a translator to assist minorities, instead of relying on representatives from the community groups to translate.
89. Compared to other types of community groups, human rights advocacy groups interviewed are more inclined to the establishment of an independent LAA. These groups are more likely to challenge Government policies and decisions, and hence tend to think that the establishment of an independent LAA can help overcome the perception or perceived risk of Government interference.

Some stakeholders have no strong views on legal aid independence

90. The following stakeholder groups, in general, do not have strong views on the current degree of legal aid independence. Although, in general, these stakeholders welcome a higher degree of legal aid independence, they are more concerned about the quality of legal aid service provision over the issue of independence itself.

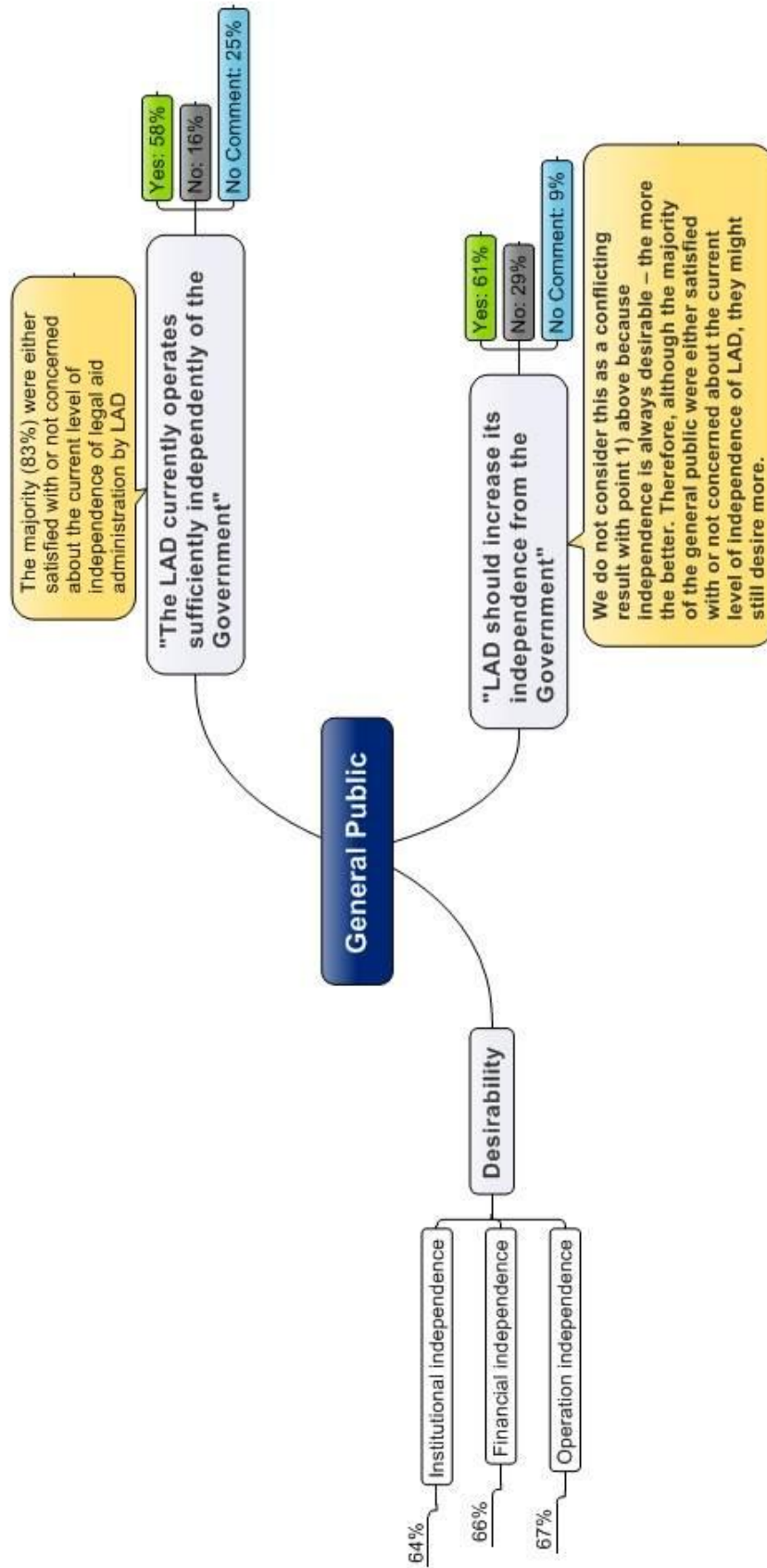
General public

91. Individuals from the general public generally have a rather low level of recognition of the LASC's role and responsibilities, which limits the level of trust on legal aid independence. However, the general public does not have a pressing concern over legal

aid independence, although a higher degree of independence was said to be desirable¹¹ (refer to Diagram 13).

¹¹ More detail of the survey can be found in Appendix D – Survey statistics.

Diagram 13: Survey Results of the General public



District councillors

92. No strong views about legal aid independence exist among district councillors, who are more concerned about scope of services and ease of legal aid access than independence¹². Most district councillors provide pro bono legal advice either by themselves or through delegated lawyers. If needed, district councillors will refer their clients to the LAD. Most of the people in the districts who seek legal advice from district councillors have inquiries pertaining to personal or family matters, such as personal injuries and matrimonial cases. Very few of them want to pursue claims against the Government on constitutional matters or cases with an element of public interest. As a result, district councillors consider that their clients do not generally see independence as an issue.
93. However, district councillors, given their close working relationship with the LAD through seeking the LAD's assistance with their clients, are more concerned about the LAD's service delivery and efficiency than the independence issue itself. Therefore, some district councillors wish to see the realisation of such improvement through the establishment of a new legal aid authority, regardless of its institutional status. District councillors and their clients would like to see improvements in the following areas of legal aid services:
- i. providing better access to legal aid services for the general public, especially to the middle class;
 - ii. broadening the financial eligibility limit so that more people become eligible;
 - iii. requiring less-substantial financial contribution from successful applicants;
 - iv. providing a broader scope of services, e.g., pre-litigation advice in districts, legal advice for individuals arrested by the police;
 - v. strengthening the community's legal aid knowledge through publicity;
 - vi. simplifying legal aid application procedures; and

¹² Political inclination of district councillors has been considered during the selection of stakeholders to be sent interview invitations. Although attempts have been made to obtain equal representation between the pan-democrats and members of the pro-establishment camp, most of the district councillors who accepted our invitations voluntarily were members of the pro-establishment camp.

- vii. shortening the processing time for legal aid applications.

Representatives of trade unions

94. Cases filed by workers under trade unions typically include employees' compensation claims, personal injuries and other employment-related entitlements. This means that most of the cases are against individuals or organisations, but rarely against the Government on constitutional matters or matters with an element of public interest. Therefore, the majority of the trade unions consulted believe that the LAD is currently sufficiently independent, and no concerns have been expressed over the issue of independence.
95. Most of them have greater concerns on service quality than the issue of independence. Trade unions would like to see improvements in the following areas:
- i. lowering / waiving contributions that plaintiffs are required to pay;
 - ii. broadening the financial eligibility limit so that more people will become eligible; and
 - iii. broadening the scope of services so that small-medium enterprises can have better access to legal aid.
96. Some trade unions expressed concerns on the establishment of an independent legal aid authority, and preferred the LAD's institutional status to remain as it is. They think that the current departmental status of the LAD provides more friendly legal aid access to the working class than an independent status. Based on experience of public services being delinked from the Government, such as the establishment of the Hospital Authority, some of them questioned whether independence could guarantee service quality.

Media Reporters

97. Media reporters interviewed consider the LAD's operation sufficiently independent from the Government and that independence of legal aid is not a concern.
98. Given the increasing number of legally-aided cases related to judicial reviews, e.g., the cases of Hong Kong-Zhuhai-Macao Bridge and domestic helpers' right of abode, they

believe that the LAD is independent in making its own decision on granting legal aid, even on cases that challenge the Government.

99. Based on their interaction with members of the general public, reporters believe that Hong Kong citizens are more concerned about their financial eligibility for legal aid than the independence of legal aid.

100. Since members of the general public are not well informed of the discussion about legal aid independence, in case legal aid services do become an independent entity, the Government should be prepared to provide detailed explanation to the public on the reasons behind this change in order to minimise public discomfort.

Independence of legal aid practices in overseas jurisdictions

101. This subsection summarises the legal aid practices in overseas jurisdictions. For details, refer to Appendix B – Legal Aid Systems in Overseas Jurisdictions.

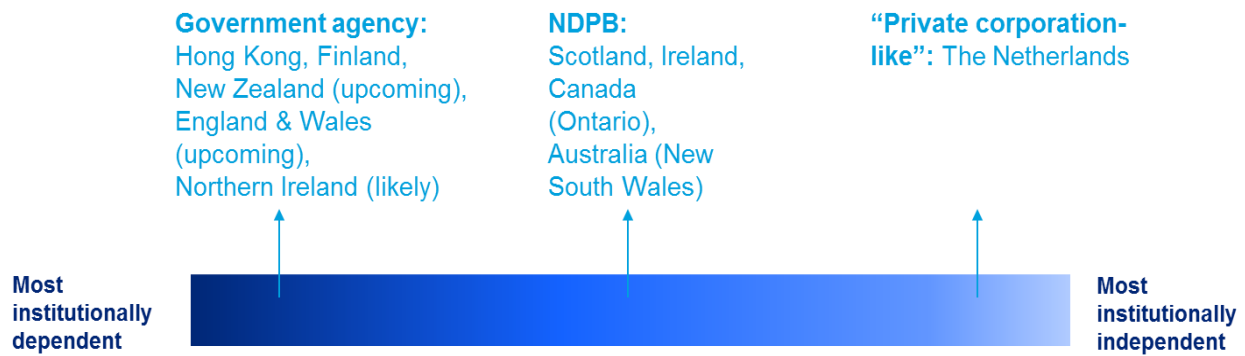
102. Making comparisons of international justice systems is complex. In the first instance, legal aid practices in Asian jurisdictions such as Taiwan and Singapore have been studied. For example, in Taiwan, the Legal Aid Foundation began operations on July 1, 2004. Its governance status was set up as a non-government organisation but, financially, it is funded by the Judicial Yuan (the highest judicial organ in Taiwan), related governmental entities and community groups. In Singapore, the Legal Aid Bureau is a government department under the Ministry of Law and only handles civil proceedings. Criminal proceedings are handled by the Law Society of Singapore.

103. Further research into the legal aid practices of these two jurisdictions revealed little information released in the public domain. Moreover, their legal aid practices have rarely been used as a standard in such comparison among overseas jurisdictions, both in academia and in the legal field. The following nine overseas jurisdictions of common law and civil law origins have therefore been selected to reflect a broad spectrum of arrangements for the provision of legal aid internationally.

Institutional arrangements in overseas legal aid bodies

104. Legal aid bodies can be structured along a spectrum of institutional independence from their sponsoring Government (refer to Diagram 14):

Diagram 14: Spectrum of Legal Aid Independence



105. For example, the Netherlands Legal Aid Board represents one end of the spectrum where it is most institutionally independent. It is a pure creature of legislation with a unique legal persona, similar to a private corporation, except that its funding comes solely from the Ministry of Justice ("MOJ") or client contributions.
106. Most of the legal aid bodies in other overseas jurisdictions - including Scotland, Ireland, Ontario and New South Wales - have a non-departmental public body ("NDPB") structure with either an executive Board of directors or a stakeholder Board. However, some Board members and CEOs have greater security of tenure than others.
107. The legal aid body in Finland is located within the Government, as a division of the MOJ. In recent years, governments in New Zealand and England & Wales have also announced that their legal aid bodies would change from NDPB status to being a government agency. In each case, the government took the view that the legal aid body had lost control of aspects of its budget. A recent review of Northern Ireland's legal aid structure has also recommended the same approach.

Staffing arrangements in overseas legal aid bodies

A. Appointment of the Board and CEO

108. The use of a public appointments process with a reasonable security of tenure in the recruitment of the Board and Chair provides the greatest autonomy from Government. Nomination of the Board and Chair by a range of stakeholder organisations (e.g., the different branches of the legal profession, the consumer movement, the judiciary), using criteria to ensure that those selected for these positions have the necessary skills and competencies to serve on the Board, is also considered to bring a reasonable measure of autonomy.

109. Similarly, CEOs who are appointed by the Boards using a form of public appointments procedure, with robust security of tenure, are seen as having the greatest degree of institutional independence.
110. For legal aid bodies located within a Government, the more autonomous option is the “non-ministerial department,” consisting of a small executive board of senior managers together with an Advisory Council selected by a public appointments procedure, along the lines proposed for Northern Ireland’s Advisory Council after a recent review.

B. The role of the Advisory Council in Northern Ireland

111. The role of the Advisory Council in Northern Ireland covers the following:
- i. To ensure the independence of decision-making by the legal aid body in relation to grants, refusals and withdrawals of legal aid.
 - ii. To act as an appeals panel for complex and difficult cases and as a source of independent advice for the Government on access to justice matters.
 - iii. The lay chair might also serve as a non-executive director on the management board of the legal aid body.

C. OSO practices

112. Unlike Hong Kong's practice, the OSO in most of the overseas jurisdictions examined is separate from the jurisdiction's legal aid body. Although the OSO has its unique functions and responsibilities to fulfil, it is usually a very small part of legal aid.

- i. **In overseas jurisdictions where no in-house lawyers are employed in the legal aid body, e.g., New Zealand**, there are no concerns about independence issues on the OSO administration because the legally-aided person and the opposite party (under OSO's supervision) are represented by different private lawyers.
- ii. **In England & Wales and in Northern Ireland**, the OS is a civil servant lawyer appointed by the Lord Chancellor, whose office is at arm's length from the MoJ, and more closely-linked to the Supreme Courts. The OSO has in-house lawyers, but regularly instructs outside private lawyers to represent their clients, who in such cases must be eligible for legal aid. As a result, the OSO in England & Wales is very concerned about the impact of the impending legal aid cuts in England & Wales on clients of the OSO.
- iii. **In Canada and Australia**, the OSO is located within the Attorney General's Office or the MoJ. These are currently independent of the legal aid bodies in those jurisdictions which have a NDPB status.

113. Table 3 states the practicality of applying overseas institutional arrangements in Hong Kong.

Table 3: Practicality of applying overseas institutional arrangements in Hong Kong

Arrangement in overseas jurisdiction	Practicality / situation in Hong Kong
<ul style="list-style-type: none"> The experience of the overseas jurisdictions indicates that most, but not all, LAA have either an executive Board of directors or a stakeholder Board. By making the Board (rather than the Minister) responsible for the hiring and firing of the CEO the model provides a measure of autonomy. 	<ul style="list-style-type: none"> This is not the current situation in Hong Kong. The LASC is responsible for overseeing the administration of the legal aid services provided by the LAD and the LAD is accountable to the Council for the provision of such services. However, the LASC is not responsible for the hiring and firing of the DLA. This is appropriate to apply in Hong Kong. Allowing the LASC to provide input in the appointment and evaluation of the performance of the DLA and DDLA will prevent the CE from applying pressure on the top management of the LAD or interfering with its decisions.
<ul style="list-style-type: none"> The use of a public appointments process (with a reasonable security of tenure) in the recruitment of the Board and Chairman are seen as having the greatest degree of institutional independence. 	<ul style="list-style-type: none"> Due to the political environment in Hong Kong, it is not appropriate to use a public appointment process.
<ul style="list-style-type: none"> The general trend is to locate policy making more in the hands of the LAA rather than the Government, except where the LAA is located inside the Government. This is thought to encourage autonomy and self-confidence without posing a threat to the Government who still control financial independence. 	<ul style="list-style-type: none"> Allowing policy making to be in hand of the future legal aid body can enhance autonomy.
<ul style="list-style-type: none"> The general view is that LAAs which are outside Government are in stronger position to engage with the media, form alliances with other stakeholders, respond critically to consultation papers or to appear before parliamentary committees in situations where the Government is planning to introduce major changes to legal aid, than if their LAA was in the Government. 	<ul style="list-style-type: none"> As a government department, the LAD has established effective mechanics to work with other Government counterparts, such as the Immigration Department and the Department of Justice to facilitate decision making on whether or not legal aid should be granted. However, consideration should be given to whether the LAD and other government departments can collaborate in such an effective way if the LAD were to move out of the Government.

Financial arrangements in overseas legal aid bodies

A. No jurisdiction affords its legal aid body complete budgetary autonomy

114. None of the jurisdictions examined in the Study offers financial autonomy to its legal aid bodies whose budgets are derived largely from Government funding. Rather, the level of financial autonomy relates to the extent to which restrictions are imposed by the Government on annual levels of expenditure on cases, staff and administration, and the constraints on the LAA's freedom to spend as it sees fit within these limits.

B. All jurisdictions studied maintain a capped budget, except in the Netherlands and Scotland

115. Jurisdictions where there is still an open-ended, uncapped, demand-led legal aid budget are becoming scarcer and programmes are usually successful where there is a good working relationship (and a large extent of trust) between the legal aid body and the sponsoring ministry. Scotland and the Netherlands are two such jurisdictions. In addition, in England & Wales and Northern Ireland, the criminal legal aid budget remains uncapped.

116. In Scotland, the Government sets the estimated level of spend in consultation with the Scottish Legal Aid Board ("SLAB") and there is a three year spending review on a rolling basis from which the SLAB develops its corporate plan, stating what its projected spend is for the next few years. In years of recession there has been considerable overspend on the civil side, but this was predicted, since the SLAB has developed forms of trend-planning to warn the Scottish Government in advance of likely overspend.

117. In the Netherlands, the MoJ ultimately sets the budget based on a formula contained in regulations which include the volume of cases in the past year and the unit price for pieces of work. The Legal Aid Board ("LAB") of the Netherlands can negotiate with the MoJ on the basis of its figures and its understanding of the market. It has an excellent track record in projecting its outturn accurately. Since the MoJ can rely on the detailed facts and the figures of the LAB, it can predict the cost of the legal aid budget in advance and place itself in a good position when it comes to dealing with the Ministry of Finance, as well as have time to make proposals for changes if needed.

118. In overseas jurisdictions, budget caps have led to the following developments.

- i. The block grant for legal aid in Australia and Canada tends to come as a fixed sum, equivalent to the legal aid spent in the previous year, plus an allowance for

inflation. As Treasuries try to hold down expenditure, legal aid bodies will tend to find that the allowance for inflation has been down-rated, due to required efficiency savings.

- ii. Budget caps have meant that in recent years, legal aid bodies have been focusing on improving their projections for expenses on cases in different categories throughout the year.
 - iii. Budget caps in the past meant that legal aid grants in certain types of cases, e.g., divorces, would not be available in the later parts of a year, if it became clear that available funds would not stretch to year-end. Nonetheless, such crude and high-profile forms of rationing are less common now because legal aid bodies have a better ability to predict expenditure overages.
 - iv. In case of expenditure overages, legal aid bodies may choose to cut back grants in low-priority matters, or by tightening the means test.
 - v. In one jurisdiction, the need to stay within the capped budget has led to the waiting time for an appointment with legal aid staff or private lawyers extending into months, and plans are being considered to prioritise cases at an earlier stage.
119. Table 4 states the practicality of applying overseas financial arrangements in Hong Kong.

Table 4: Practicality of applying overseas financial arrangements in Hong Kong

Arrangement in overseas jurisdiction	Practicality / situation in Hong Kong
<ul style="list-style-type: none"> No jurisdiction affords its LAA complete budgetary autonomy, regardless on whether the funding is a block grant, or a budget that is demanded, uncapped and open ended. 	<ul style="list-style-type: none"> The primary source of legal aid fund will be the Government regardless of the institutional setup. Hong Kong is one of the rare jurisdictions with an uncapped legal aid fund, which ensures successful legal aid applicants are not prevented from being legally aided due to insufficient funds.
<ul style="list-style-type: none"> The Netherlands and Scotland are two jurisdictions outside the Government that operate successfully. They are good at forecasting future needs for legal aid services, and therefore, being able to obtain sufficient legal aid funding from the Government. New Zealand and England & Wales are two jurisdictions that are moving back into the Ministry partly due to their inability to control their financial budget. 	<ul style="list-style-type: none"> The LAD has done well in forecasting the annual budget in past years. Annual budgeting is done holistically based on past actual expenditure pattern and the anticipated increase in legal aid applications, certificates granted and likely number of high costs cases.
<ul style="list-style-type: none"> In large jurisdictions with financial constraints, there is a challenge to integrate supply and demand. Modern jurisdictions tend to have to choose between having a wide range of legal aid providers spread across the jurisdiction, with some doing very little legal aid work, or a smaller number of legal aid providers doing a lot more legal aid work but concentrated in the population centres. Jurisdictions which follow the latter route (e.g. England & Wales) by concentrating the supply of providers tend inadvertently to create “advice deserts” where there are no providers. 	<ul style="list-style-type: none"> This does not apply to Hong Kong as Hong Kong has uncapped legal aid fund. This does not apply to Hong Kong as Hong Kong is a small jurisdiction where legal aid offices can be centred and reasonably accessible geographically to all of its population.

Operational arrangements in overseas legal aid bodies

120. Staffing models in overseas legal aid bodies vary, largely depending upon the institutional model each adopts (refer to Table 5):

Table 5: Staffing Models in Overseas Legal Aid Bodies

Staffing model	Characteristics
<p>A. Civil servants for Government agencies</p>	<p>1) In jurisdictions where the legal aid body is located within the Government, e.g., New Zealand, all staff, including lawyers, are civil servants.</p> <p>2) This entails that they are subject to the normal discipline provisions for civil servants, that they receive the same salaries and pension entitlements as other civil servants, and that they have unrestricted access to promotion or transfers to other parts of the civil service.</p> <p>3) The Government also determines the number and grade of the staff, even where, as in Finland, most of the legal aid staff are employed by and work in one of the local legal aid offices.</p>
<p>B. Non-civil servants for NDPBs</p>	<p>1) For the other jurisdictions which have a legal body outside the Government as a NDPB, the staff members are typically not civil servants.</p> <p>2) In some jurisdictions, e.g., Ontario, they are classified as public servants, with some similarities to civil servants in terms of discipline and ethics, if not in terms of salary and pension.</p> <p>3) Where the staff are not civil servants, their salary may match those of civil servants, although not always, but they rarely have equivalent pension entitlements.</p>
<p>C. Mixed model as an exception</p>	<p>1) Ireland’s legal aid body, which adopts a NDPB model, is an exception with its staff being a mixture of civil servants and public servants.</p>

121. However, legal aid bodies experience different challenges regardless of the staffing models they adopt (refer to Table 6):

Table 6: Challenges of Staffing Models in Overseas Legal Aid Bodies

Staffing model	Challenges
A. Civil servants for Government agencies	<p>1) Civil servants often have a rather different culture from public servants. As one senior staff member who had experience of working inside and outside the civil service in an overseas jurisdiction observed, there is a fundamental difference between a NDPB and a Government agency in terms of the client’s status in each situation. With the NDPB, the “sharp end” is the customer or citizen for whose benefit the NDPB exists. In the case of the Government agency, the client / sharp end is the Minister, and the main responsibility of a civil servant is to protect and serve the Minister.</p>
B. Non-civil servants for NDPBs	<p>1) Just because the legal aid body is outside the Government and its staff are not civil servants does not ensure autonomy for the legal aid body. In some jurisdictions, the Ministry retains the power to limit staff numbers and their pay, sometimes keeping the salary of the lawyers in the legal aid body below that of lawyers in the Ministry, thus causing recruitment and retention problems.</p> <p>2) Moreover, an NDPB legal aid body can be so small that the potential for promotion or career progression is affected, leading to recruitment problems at the junior level. This is particularly the case with smaller jurisdictions, and was one of the factors to encourage the recent review in Northern Ireland to recommend that the NDPB legal aid body should become an arm’s-length Government agency, with its staff becoming civil servants.</p>
C. Mixed model as an exception	<p>1) In Ireland, regardless of whether the staff are civil servants or public servants, they are employed by the Legal Aid Board, but their number and grade is the product of negotiations between the MOJ and the Ministry of Finance.</p>

Independence in processing legal aid applications

A. No jurisdictions reported direct Government interference on granting or refusing legal aid

122. In none of the jurisdictions studied was there a formal power for the Minister of the sponsoring Department to intervene in individual cases. Indeed, in some of them, e.g., Ireland, England & Wales, and Northern Ireland, there is an expressed statutory provision to prevent this from happening.
123. In the countries where no such provision is on the statute book, there is often a counsel's opinion which shows why the legislation does not implicitly allow such an interference in individual cases. Although all the jurisdictions recounted incidences in which assisted cases were an embarrassment to the ministry, or showed the ministry in a negative light, e.g., asylum cases, prisoner human rights cases, or judicial review of alleged torture of terrorist suspects, none provided examples of Ministers seeking formally to instruct the legal aid body to refuse to fund such cases, or to withdraw funding from such cases.

B. Informal pressure is, nonetheless, possible

124. However, that is not to say that from time to time Governments have not tried to interfere or to apply indirect pressure. In all jurisdictions, the legal aid bodies had rebuffed such approaches. It seems widely accepted in all the jurisdictions surveyed that the Government may not interfere with grants or refusals of legal aid in individual cases. An additional factor which reduces the temptation for Governments to intrude on decisions in individual cases, is the fact that in all of the surveyed jurisdictions there is a requirement that the legal aid body must keep confidential the case and personal details of those applying for, or receiving legal aid.

Governments' possible means of interference on granting or refusing legal aid

125. Despite the inability of Governments to intervene in relation to individual cases, there are several ways through which Governments could intervene through policymaking.
126. In some jurisdictions, e.g., Ireland, the ministry has the power to give "such general directives to the LAB [Legal Aid Board] as to policy in relation to legal aid and advice as he or she considers necessary." This can extend to guidance as to which categories of civil cases should be prioritised, although the legislation expressly states that this power does not extend to individual cases.

127. Similarly in Northern Ireland, the Justice Department has the power to give guidance to the Northern Ireland Legal Services Commission ("NILSC") as to the general performance of its functions, and this too would extend to guidance as to prioritisation of civil cases.
128. Funding code in Northern Ireland and England & Wales places the legal aid body under a duty to take account of the public interest when deciding whether to fund a case. Presumably the guidance from the ministry could stipulate that the "public interest" should include the interest of the state or the economy, although such a suggestion would be very unlikely and highly controversial.
129. The ministry could also exclude a complete category of cases from legal aid scope, e.g., divorce, defamation, or money claims, if it had the parliamentary votes to change the legislative provisions, and provided the reform could withstand judicial review, and did not infringe on the human rights of citizens.
130. Table 7 states the practicality of applying overseas operational arrangements in Hong Kong.

Table 7: Practicality of applying overseas operational arrangements in Hong Kong

Arrangement in overseas jurisdiction	Practicality / situation in Hong Kong
<ul style="list-style-type: none"> • NDPB LAAs are considered to be more autonomous where the Government does not seek to control the number, grade, salary and pension entitlement of LAA staff. • The evidence from other jurisdictions, however, does not suggest that the use of salaried public lawyers poses significant threats to the operational autonomy of the LAA. 	<ul style="list-style-type: none"> • The future legal aid body can adopt an NDPB model to enhance actual or perceived level of independence. • The legal aid body can maintain in-house lawyers.
<ul style="list-style-type: none"> • The Netherlands and Scotland are two jurisdictions outside the Government that operate successfully. The two jurisdictions are able to maintain a good working relationship with the Government, and thus, gain trust from the Government • New Zealand and England & Wales are two jurisdictions that are moving back into the Ministry due to their failure in maintaining a good working relationship with the Government and that the Government has lost confidence on them. 	<ul style="list-style-type: none"> • The current working relationship between the Government and the LAD is considered reasonably effective. The Hong Kong Government maintains a high level of trust in the LAD.
<ul style="list-style-type: none"> • In none of the jurisdictions studied was there a formal power for the Minister to intervene in individual cases. Indeed, in a range of them (Ireland, England & Wales, Northern Ireland), there is an express statutory provision against the Government's intervention in individual cases. 	<ul style="list-style-type: none"> • This applies to Hong Kong as the Government and the LASC have no power to comment on individual cases. This gives absolute operational autonomy to the LAD to grant, refuse or withdraw legal aid applications independently.
<ul style="list-style-type: none"> • Some jurisdictions assign out all OS cases to private practitioners so these jurisdictions would not have the conflict of in-house lawyers against in-house lawyers. 	<ul style="list-style-type: none"> • An internal guideline is in practice to mitigate this perceived conflict of interest. When the LAD and the OSO represent opposite parties in litigation, the LAD is instructed to assign the case out to independent private practitioners.

Governance arrangements of overseas legal aid bodies

131. Overseas jurisdictions adopt various ways to ensure that legal aid bodies are properly and independently monitored. In accordance with the NDPB model, in almost all of the legal aid bodies that were surveyed, the CEOs are the officer accountable to the Board and Chair, who in turn are accountable to the sponsoring Minister and to Parliament.
132. In relation to monitoring, one or two of the legal aid bodies are required to account separately on financial matters to the Treasury or Finance Ministry. The only other form of independent monitoring is peer-review of a random sample of files, which exists for all legal aid practitioners in Scotland, a large sample of practitioners in England & Wales, and to a small percentage of files and practitioners in the Netherlands and Finland.
133. More commonly, the legal aid bodies are subject to regular audit by independent auditors or the Public Audit Office. Both groups of auditors concentrate on financial issues, but in the case of the Public Audit Office, random samples of files will be examined. Most of the scrutiny will be directed to payments, and to ensure that they conform to the legal aid bodies' policies and regulations.
134. All of the overseas jurisdictions examined have Annual Reports which are sent to the legislature and the media. Where the Government seeks to cut back legal aid provision, this will tend to generate substantial media publicity.

Appeal mechanism against determinations in overseas jurisdictions

A. Review committee for refused legal aid applications, including civil and criminal cases

135. In all of the jurisdictions, a legal aid applicant who is aggrieved by a refusal can ask for an internal review of the decision – usually by a more senior official in the legal aid body, whether it is a civil or a criminal case. If that does not succeed, in most jurisdictions, there is the possibility for review by a committee.
 - In some jurisdictions, e.g., Northern Ireland, Ontario and New South Wales, the committee is outside the legal aid body and is made up of independent lawyers and laypersons.
 - In other jurisdictions, e.g., Ireland, it is a committee composed of just Board members of the legal aid body.

- The committee can also consist of Board members plus external lawyers or the judiciary, such as in the Netherlands. If the review rejects the appeal, the applicant in the Netherlands has a right of appeal in both civil and criminal cases to the Administrative Court, and then on to the highest court. In some cases legal aid can be awarded to fund these appeals.

B. Refused applications can be challenged by way of judicial review

136. More typically in some jurisdictions, refusals to grant legal aid are open to challenge by way of judicial review through the courts. However, the operation of the legal aid merits test would make it unlikely for such a challenge to receive legal aid, e.g., Ontario, New South Wales. In Scotland, if legal aid is wanted to judicially review the Scottish Legal Aid Board's ("SLAB") refusal to grant legal aid (civil or criminal) and it is rejected by the SLAB committee, the case is referred to a senior judge, who will review the case and make recommendations to the SLAB.

C. Legal assistance can be ordered by the judge and provided by the Government

137. In a number of jurisdictions, such as those of Canada and Australia, the courts can stay the proceedings in a criminal case if the judge is of the opinion that there cannot be a fair trial unless the accused is represented. This provision can operate where legal aid has been formally refused by the legal aid body. In such cases the burden of providing legal assistance is usually met by the Government rather than the legal aid body, even though the latter will often organise the assistance.
138. Table 8 states the practicability of applying overseas operational arrangements in Hong Kong.

Table 8: Practicality of applying overseas operational arrangements in Hong Kong

Arrangement in overseas jurisdiction	Practicality / situation in Hong Kong
<ul style="list-style-type: none"> In some jurisdictions, the Courts have the power to directly or indirectly states whether legal aid should be granted or refused. Sometimes, the Courts have a role to deal with the appeal mechanism. 	<ul style="list-style-type: none"> For civil legal aid applications, the Registrar and Masters of the High Court are vested under Section 26 of the Legal Aid Ordinance with the function to hear and determine appeals against the decision of the DLA to refuse, discharge or revoke legal aid. For criminal legal aid applications, judges of the District Court and the High Court are empowered pursuant to the relevant provisions of the Legal Aid in Criminal Cases Rules to grant legal aid in certain circumstances, provided that the applicant has passed the means test.

Options

139. Our key findings are that the stakeholder groups – from those who have a legal and / or legislative background, to the general public – have mixed perceptions on the feasibility and desirability of an independent LAA. They went on to raise other concerns outside of the scope of the issue, “independence”.
140. For each of the key issues along the four dimensions of legal aid independence that we have identified in previous sections, we propose a spectrum of options – ranging from maintaining the status quo to becoming fully independent – to facilitate consideration of how independence of legal aid should be reinforced, and analysis of how effectively each option is addressing the issue. The formulation of these options and the corresponding pros and cons analyses are based on the lessons learnt from legal aid practices in overseas jurisdictions and the practicality of applying these overseas practices in the political, cultural and social context of Hong Kong. It should be noted that these options are not meant to be mutually exclusive¹³.

¹³ In the following pages, each option targeted to address an issue (e.g., issue I1) will be coded by a capital letter (e.g., option I1-A and I1-B). Any of the options I1-A or I1-B can be combined with options I2-A, I2-B or I2-C. For example, if option I1-A is combined with option I2-B, it means that while maintaining the LAD under the Government, the DLA is made directly accountable to the Chief Executive or the Chief Secretary for Administration. This approach creates numerous possible combinations. A recommended model drawn from the most desirable combination will be illustrated in the "Summary and Recommendations" section.

141. Table 9 summarises the key issues that need to be addressed.

Table 9: Key Issues to be Addressed

<u>Dimension</u>	<u>Key issue</u>
Institutional (I)	I1. Some stakeholders have the perception or fear that independence might be undermined with the LAD being a Government department.
	I2. The LAD's institutional independence is thought by some to have been undermined when its administration was transferred from the Administration Wing to the Home Affairs Bureau.
	I3. The Director of Legal Aid is also the Official Solicitor, whose office is currently a part of the LAD's organisational structure.
	I4. LAD staff, being civil servants, might be perceived to treat protection of the Government's interests as a top priority. The standing of the LASC is in part undermined by the fact that staff appraisal of the DLA is conducted by the Secretary for Home Affairs.
	I5. All LASC members are appointed by the Chief Executive. Appointment criteria are not made known to the public.
Financial (F)	F1. Financial independence of the LAD is not a major issue as the LAD's expenditure on legal aid services is uncapped. However, regardless of its institutional model, the LAD should be able to receive the level of funding required to meet its legal aid costs. It should also have the autonomy to allocate its funding within given limits.
Operational (O)	O1. Some stakeholders hold the impression that the LAD might be at risk of being influenced by the Government when a sensitive figure/issue is involved in the legal aid application.
	O2. Some legal practitioners are concerned that the DLA has a "preferred panel" for providing Section 9 opinions, which may be skewed towards the DLA's decisions.
Governance (G)	G1. There is no established appeal mechanism against refused legal aid application on criminal cases.

Issue I1: Some stakeholders have the perception or fear that independence might be undermined by the LAD being a Government department.

142. Option II-A	Retain the LAD as a Government department The LAD continues to be a Government department and remains in the civil service.
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Pros	<ul style="list-style-type: none"> Operational improvement can be introduced under the same institutional structure to reinforce legal aid independence with minimal financial costs or negative impact to the existing workforce. This option is favoured by stakeholders who do not have a strong opinion about legal aid independence.
Cons	<ul style="list-style-type: none"> This option is opposed by legal practitioners and legislators who are in favour of establishment of a fully independent legal aid authority.

143. Option II-B	<p>Establish an independent legal aid authority ("LAA")</p> <p>The LAD would be abolished and a new independent legal aid authority established as a statutory body.</p>
Pros	<ul style="list-style-type: none"> This option will align with the institutional structure of most overseas legal aid bodies that adopt a NDPB model. The NDPB structure with an Executive Board of Directors is considered to have the highest degree of autonomy. This option is most welcomed by those legal practitioners and legislators who strongly believe that independence of legal aid can only be achieved through the establishment of an LAA that is not within the Government organisational structure.
Cons	<ul style="list-style-type: none"> This is the most costly option. The costs associated with the disestablishment of the LAD and establishment of the LAA are estimated to range from HK\$41 million to \$600 million in net present value terms (refer to Appendix F – Cost projections). Implementation of this option is expected to take three years or more.

Issue I2: The LAD's institutional independence is thought to have been undermined when its administration was transferred from the Administration Wing to the Home Affairs Bureau.

<p>144. Option I2-A</p>	<p>Retain the HAB as the policy bureau of the LAD</p> <p>The following functions of the HAB would remain:</p> <ul style="list-style-type: none"> i. Overseeing the work of the LAD; ii. Evaluating the DLA's performance; iii. Endorsing the annual budget submission; iv. Formulating legal aid services policy.
<p>Pros</p>	<ul style="list-style-type: none"> • Operational improvement can be introduced under the same accountability model to reinforce legal aid independence with minimal financial costs or impact to the existing workforce. • No evidence is found to substantiate the claim that independence is undermined with the LAD under the HAB, hence change might be unnecessary.
<p>Cons</p>	<ul style="list-style-type: none"> • In the event of litigation against sister departments under the HAB, the LAD's independence might be seen to be jeopardised. • This option is opposed by legal practitioners and legislators who are in favour of establishment of a fully independent legal aid authority.

<p>145. Option I2-B</p>	<p>Make the LAD directly accountable to the Chief Executive ("CE") or the Chief Secretary for Administration ("CS")</p> <p>The CE or CS would hold accountability for the LAD. Under</p>
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	this option, the LAD can remain as a Government department.
Pros	<ul style="list-style-type: none"> • This option resembles the accountability relationship between the CE or CS and the Ombudsman or the Independent Commission Against Corruption ("ICAC"), which are considered sufficiently independent. • This option reduces the risk of conflict of interest in case other parts of the Government Administration are being legally challenged.
Cons	<ul style="list-style-type: none"> • Some stakeholders may challenge that this option will not fully eliminate the possibility of conflict of interest in the abovementioned scenario. • This option will have to be supported by a robust monitoring mechanism to prevent the possibility of the CE or CS applying formal or informal pressure on the LAD's decision for granting or refusing legal aid.

146. Option I2-C	<p>Make the LAA accountable to an executive Board of Directors</p> <p>The Board would hold accountability for the LAD by:</p> <ol style="list-style-type: none"> Evaluating the performance of all directorate grade staff; Endorsing the annual budget submission; Endorsing the legal aid services policy.
Pros	<ul style="list-style-type: none"> • This option will align with the institutional structure of most overseas legal aid bodies that adopt a NDPB model. • This option is considered most effective in eliminating the risk of conflict of interest in case other parts of the Government Administration are being legally

	challenged.
Cons	<ul style="list-style-type: none"> Under this option, the LASC may need to be disestablished or transformed into an executive Board of Directors.

Issue I3: The Director of Legal Aid ("DLA") is also the Official Solicitor ("OS") whose office ("OSO") is currently part of the LAD's structure.

147. Option I3-A	<p>Remain as part of the LAD</p> <p>To keep the OSO as part of the LAD.</p>
Pros	<ul style="list-style-type: none"> Administrative safeguards against a conflict of interest between the OSO and other sections of the LAD are already in place, and are thought to be effective by most stakeholders. The relatively small caseload of the OSO does not justify the costs needed to make it independent.
Cons	<ul style="list-style-type: none"> This option has not been commonly adopted by overseas jurisdictions.

148. Option I3-B	<p>Locate the OSO within the Department of Justice ("DoJ")</p> <p>To retain the OSO as a Government agency under the DoJ. The Secretary of Justice would resume the role of the OS.</p>
Pros	<ul style="list-style-type: none"> This option provides a larger degree of separation between the LAD and the OSO while retaining both as part of the Government. This option aligns with the models of Canada and Australia where the OSO is considered sufficiently independent as part of the Ministry of Justice.
Cons	<ul style="list-style-type: none"> Legal aid bodies in Canada and Australia have an

	<p>NDPB status while the OSO is part of the Government. Locating the OSO under the DoJ may not provide Hong Kong with an equivalent level of independence if the LAD remains as a Government department.</p> <ul style="list-style-type: none"> Conflicts of interest between the OSO and other sections of the DoJ may arise under this option.
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149. Option I3-C	<p>Establish an independent OSO</p> <p>Suggested arrangements for an independent OSO include:</p> <ol style="list-style-type: none"> A dedicated professional lawyer to be appointed as the OS; A separate administrative secretariat to be provided.
Pros	<ul style="list-style-type: none"> This option addresses the perceived potential conflict of interest of the DLA also serving as the OS.
Cons	<ul style="list-style-type: none"> With the small number of OSO cases and the small infrastructure of the OSO workforce, appointment of a dedicated OS and the establishment of an independent OSO is not cost-effective. The LASC proposed this option in 2001 which was rejected by the Administration primarily due to concerns about cost-effectiveness. It is unclear whether this option will again receive opposition from the Administration if proposed again.

Issue I4: The LAD staff, being civil servants, might be thought to treat protection of the Government’s interests as the top priority. The standing of the LASC is in part undermined by the fact that staff appraisal of the DLA is conducted by the Secretary for Home Affairs.

<p>150. Option I4-A</p>	<p>Retain all members of the LAD staff as civil servants</p> <p>All LAD staff members would continue to be civil servants. The DLA would continue to be evaluated by the Secretary for Home Affairs while other staff members would continue to be evaluated by their respective supervisors.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • As civil servants, the LAD staff have the benefit of job security, income stability and pensions, which insulates them from potential pressure from any parties, including the Government. • Continuation of civil service status, welcomed by the majority of existing LAD staff, would help maintain the current level of service quality.
<p>Cons</p>	<ul style="list-style-type: none"> • The LAD staff might respond to the expressed or perceived wishes of the Government because, as civil servants, they might see it as being in their best career interests to do so.

<p>151. Option I4-B</p>	<p>LASC to nominate and evaluate the Director of Legal Aid ("DLA") and the Deputy Directors of Legal Aid ("DDLAs")</p> <p>The LASC would be given the authority to nominate a pool of candidates eligible for the positions of the DLA and the DDLAs to the CE or CS. The CE or CS could only appoint from this short-listed group thereby limiting any conflict of interest. The LASC would also evaluate the DLA and DDLAs. Other members of the LAD staff would continue to be civil servants and work under the direction of the DLA and DDLAs.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • This option would prevent the potential for the CE or CS to exert pressure on the top management of the LAD or interfere with its decisions.

	<ul style="list-style-type: none"> The fact that all other LAD staff would remain as civil servants could help minimise potential disruption to service provision.
Cons	<ul style="list-style-type: none"> This arrangement is not commonly practised among public services in Hong Kong. This option would need to be coupled with a mechanism to appoint LASC members to prevent the potential for the CE or CS to apply pressure on the LAD management through the LASC.

152. Option I4-C	<p>The Board to recruit and evaluate all members of the LAA staff</p> <p>The Board would be given full authority to recruit all members of the LAA staff and endorse their evaluations. All staff members would cease to be civil servants.</p>
Pros	<ul style="list-style-type: none"> This option would prevent any LAD staff from yielding to any form of pressure or perceived pressure from the Government for their career interests.
Cons	<ul style="list-style-type: none"> This option may cause disruption to service provision if not planned or executed properly. If staff are to be hired on fixed-term contracts, which is common on statutory bodies, there is potential negative impact on staff morale. High staff turnover may also undermine the neutral position of the LAA.

Issue I5: All LASC members are appointed by the Chief Executive ("CE"). Appointment criteria are not made known to the public.

153. Option	All LASC members continue to be appointed by the CE
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I5-A	Retain the current membership arrangement as stated under Section 5 of the LASC Ordinance, Cap. 489. All LASC members would continue to be appointed by the CE.
Pros	<ul style="list-style-type: none"> • Section 5(3) and (4) of the LASC Ordinance states that the CE should consult the Law Society and Bar Association respectively about the appointments of solicitors and barristers. • There is considerable similarity in the size and composition of the LASC and the Board of Directors in many overseas jurisdictions.
Cons	<ul style="list-style-type: none"> • Although the Law Society and Bar Association are given the statutory right to recommend respectively solicitors and barristers, the CE may appoint a person other than the person so recommended (Section 5 (4) of the LASC Ordinance, Cap. 489). • This option is considered to provide the lowest level of transparency.

154. Option I5-B	<p>Introduce stakeholder nomination in the appointment procedure</p> <p>A range of stakeholder organisations (e.g., Law Society, Bar Association and organisations of other professions) would nominate candidates based on competency criteria endorsed by the CE.</p>
Pros	<ul style="list-style-type: none"> • Providing the stakeholder groups and even the general public with information about the member selection criteria will enhance the transparency of the appointment mechanism and strengthen the public's confidence in the nomination process. • Nomination curbs the potential for Government

	infringement of independence.
Cons	<ul style="list-style-type: none"> Nomination opens the door to members acting to protect sectoral interests.

155. Option I5-C	<p>Introduce a public appointment procedure</p> <p>All the LASC members would be appointed by a public appointment procedure whereby:</p> <ol style="list-style-type: none"> Open recruitment of members would be conducted based on defined competency; LegCo would shortlist candidates; CE would make the final appointment.
Pros	<ul style="list-style-type: none"> This option is in line with current appointment processes in many overseas jurisdictions, such as Ontario, Northern Ireland, Scotland, and England & Wales. This arrangement is largely independent of Government influence.
Cons	<ul style="list-style-type: none"> This arrangement is not commonly practised among public services in Hong Kong.

Issue F1: Regardless of its institutional model, the LAD should be able to receive the level of funding required to meet its legal aid costs. It should also have the autonomy to allocate its funding within given limits.

156. Option F1-A	<p>Maintain current financial arrangement</p> <p>The following financial arrangements would be maintained:</p> <ol style="list-style-type: none"> Government as the primary source of funding; Uncapped legal aid fund;
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	<ul style="list-style-type: none"> iii. The SLAS as a self-financing scheme; iv. The LASC as the CE’s advisory body to advise about funding requirements (Section 4(5)(a) of the LASC Ordinance, Cap. 489).
Pros	<ul style="list-style-type: none"> • Hong Kong is one of the rare jurisdictions where the legal aid fund is uncapped. The Netherlands and Scotland are the two other examples. • The SLAS is considered to be a leading legal aid model which allows more people to have access to legal aid.
Cons	<ul style="list-style-type: none"> • Being a Government department, the LAD is considered by some stakeholders to have been too protective towards the interest of the Government, and hence too conservative about granting legal aid.

157. Option F1-B	<p>Enhance LASC’s power on funding monitoring</p> <p>In addition to the current arrangement, the LASC would monitor the LAD’s use of funding on individual cases under both the OLAS and SLAS.</p>
Pros	<ul style="list-style-type: none"> • This option provides one more independent monitoring channel on the LAD’s legal aid expense to help ensure that legal cases with reasonable grounds are given the appropriate financial treatment.
Cons	<ul style="list-style-type: none"> • This option would need to be coupled with enhancing the LASC’s power to oversee and handle individual cases.

158. Option F1-C	<p>Establish an independent legal aid fund</p> <p>The following features would be introduced under the independent legal aid fund:</p>
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	<ul style="list-style-type: none"> i. The Government would provide a sum for setting up the fund; ii. The LAA would manage and monitor the fund; iii. Any further financial injection would be approved by the Legislative Council.
Pros	<ul style="list-style-type: none"> • This option is seen to provide the LAA with the largest degree of autonomy in spending, managing and monitoring its own fund.
Cons	<ul style="list-style-type: none"> • Any mismanagement of the fund can be detrimental to the reputation of the LAA and its independence. Overseas jurisdictions such as New Zealand, England & Wales and, likely, Northern Ireland are moving their legal aid bodies from NDPBs to Government agencies as they are thought to have lost control of aspects of their budgets.

Issue O1: Some stakeholders hold the impression that the LAD might be at risk of being influenced by the Government when determining whether a sensitive case should be granted legal aid.

159. Option O1-A	<p>Maintain current procedure for granting legal aid</p> <p>Maintain current procedures for evaluation of legal aid applications and granting of legal aid as stated in the Legal Aid Ordinance, Cap. 91.</p>
Pros	<ul style="list-style-type: none"> • The merits test ensures that a person will be granted legal aid in connection with proceedings covered under OLAS and SLAS if reasonable grounds can be demonstrated. • Legally-aided cases challenging the Government, e.g., Hong Kong-Zhuhai-Macao Bridge and domestic

	helpers' right of abode, demonstrate the LAD's independence in granting legal aid.
Cons	<ul style="list-style-type: none"> The perception that the LAD lacks independence in granting legal aid will persist if no change is introduced.

160. Option O1-B	Statutory prohibition against the Government's interference by law
161. Option O1-C	Impose clear limits on the Government's power Strengthen confidentiality obligation
162. Option O1-D	To enhance autonomy, the following measures should be considered by the LASC or the Board, depending upon the institutional model: <ul style="list-style-type: none"> i. Introduce statutory prohibition to prevent the Government from interfering with the grant, discharge, revocation or refusal of legal aid in individual cases; ii. Introduce clear limits on any power of the Government to give guidance to the LAD or the LAA as to their functions in relation to aid granting and payments; iii. Strengthen the confidentiality obligation with clear limits as to what may be passed to the Government by the LAD or the LAA as advanced warning of legal aid cases in the pipeline.
Pros	<ul style="list-style-type: none"> Regardless of the institutional status of the legal aid body, be it a Government department (the "LAD") or a statutory body (the "LAA"), clear statutory limits on the roles and responsibilities of the Government would significantly strengthen the LAD's or the LAA's independence in granting legal aid . These measures share considerable similarities with

	overseas jurisdictions, such as Ireland, England & Wales and Northern Ireland, where there are express statutory provisions against Governments’ intervention in individual cases.
Cons	<ul style="list-style-type: none"> • The trust between the LAD / LAA and the Government might be undermined if the Government is excessively restricted from guiding the LAD or being provided with necessary information to assist policymaking.

Issue O2: Some legal practitioners are concerned that the DLA has a “preferred panel” for providing Section 9 opinions which tends to be in line with the DLA’s decisions.

163. Option O2-A	<p>Maintain the current arrangement of soliciting Section 9 opinions</p> <p>Retain the current arrangement as stated under Section 9(d) of the Legal Aid Ordinance, Cap. 91.</p>
Pros	<ul style="list-style-type: none"> • The existing arrangement provides an effective mechanism to help ensure that decisions made by the LAD are not biased. • The LAD considers factors such as expertise, experience, availability, willingness and the cost of the counsel or solicitor when deciding who will be assigned for providing Section 9 opinions for a case.
Cons	<ul style="list-style-type: none"> • The existing arrangement lacks transparency in lawyer assignment for providing Section 9 opinions. • It does not provide sufficient confidence to legal practitioners that lawyer assignment is unbiased.

<p>164. Option O2-B</p>	<p>Empower the LASC with oversight of Section 9 opinions and case assignment</p> <p>In addition to the current arrangement, introduce a robust internal mechanism within the LAD for assigning private lawyers to provide Section 9 opinions, coupled with a sub-committee within the LASC which is empowered to oversee the assignment of lawyers and Section 9 opinions.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • This option helps enhance the internal control of lawyer assignment for providing Section 9 opinions. • It also provides a monitoring mechanism to help ensure that lawyer assignment and hence the opinions obtained are unbiased.
<p>Cons</p>	<ul style="list-style-type: none"> • This option would need to be coupled with enhancing the LASC’s power to oversee and handle individual cases.

<p>165. Option O2-C</p>	<p>The Courts to review Section 9 opinions</p> <p>Introduce a review mechanism which would allow the Courts to review Section 9 opinions.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • This option would provide a monitoring mechanism to help ensure that lawyer assignment and hence the opinions solicited are unbiased. • The Courts are perceived to enjoy a high level of independence. Therefore, this option would provide the public with the highest level of independence.
<p>Cons</p>	<ul style="list-style-type: none"> • The practicality of this mechanism requires further investigation.

Issue G1: There is no established appeal mechanism against refused legal aid application for criminal cases.

<p>166. Option G1-A</p>	<p>Maintain the current appeal mechanism against refusals of civil and criminal cases</p> <p>Maintain the current appeal mechanism against refusals of civil legal aid applications according to the Legal Aid Ordinance. Maintain current arrangement for the Courts to grant legal aid to refused criminal legal aid applicants according to the relevant provisions of the Legal Aid in Criminal Cases Rules.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • Although refused criminal legal aid applicants lack a statutory avenue to appeal against refusals, judges of the District Court and High Court can grant legal aid to qualified applicants.
<p>Cons</p>	<ul style="list-style-type: none"> • Civil and criminal legal aid applicants apparently do not have equal statutory avenue to appeal against refusals.

<p>167. Option G1-B</p>	<p>Introduce a robust review mechanism for refusals of civil and criminal legal aid applications</p> <p>In addition to the current arrangement, introduce a robust internal review mechanism within the LAD for refusals of legal aid for both civil and criminal cases.</p> <p>Provide a statutory avenue for criminal legal aid applicants to appeal against refusal of their applications.</p>
<p>Pros</p>	<ul style="list-style-type: none"> • This option would help strengthen the internal review of legal aid applications. • It would also provide a monitoring mechanism to help ensure that any decisions about legal aid refusals have

	<p>been made correctly.</p> <ul style="list-style-type: none"> • It would allow refused criminal legal aid applicants to have the same statutory avenue as civil legal aid applicants to appeal. • It would provide an additional channel for refused criminal legal aid applicants to appeal their cases and a first-layer to appeal rather than going straight to the Court.
Cons	<ul style="list-style-type: none"> • This option would need to be coupled with enhancing the LASC's power to oversee and handle individual cases.

168. Option G1-C	The Court to review refusals
Pros	<ul style="list-style-type: none"> • This would provide statutory rights to legal aid applicants to appeal to the Courts against refusals of legal aid for both civil and criminal cases.
Cons	<ul style="list-style-type: none"> • This would increase the workload of the Court.

Overall analysis

Uncertainties / concerns in establishing a completely independent LAA

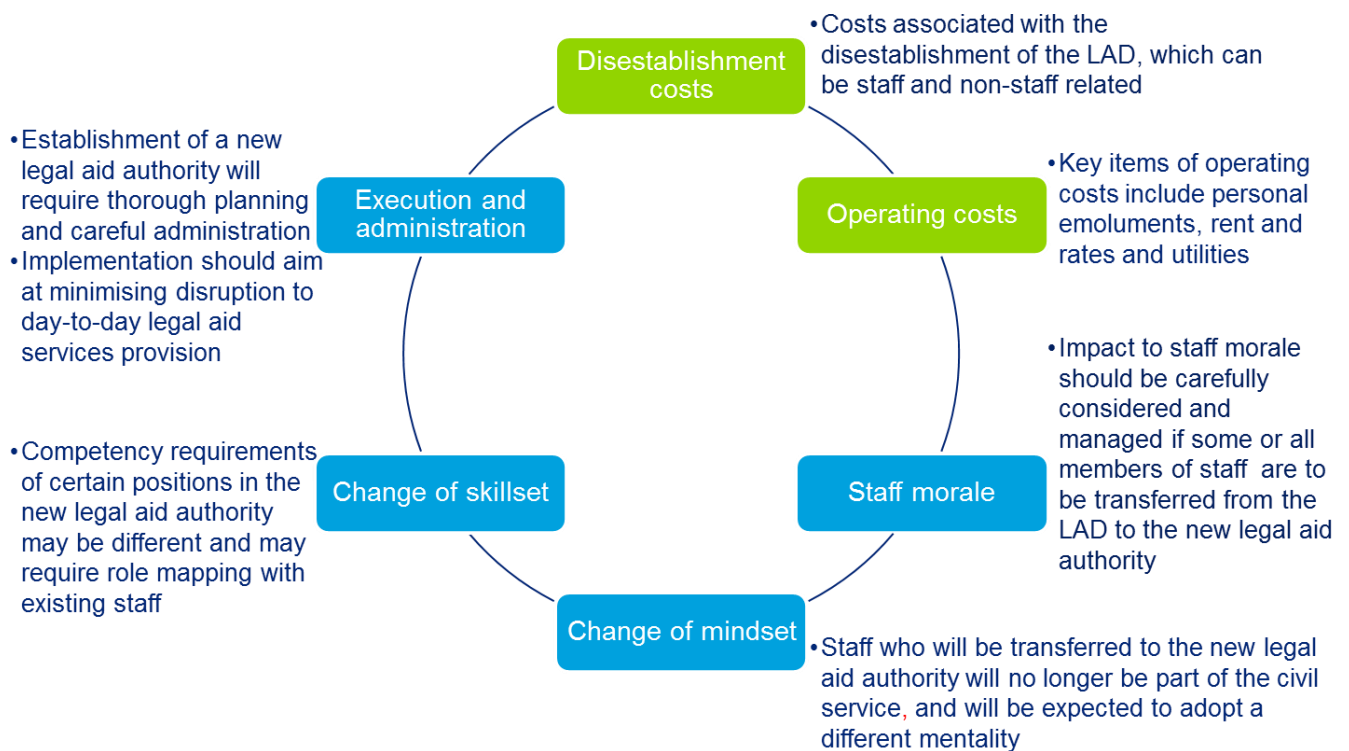
169. The options suggested in the Option section have provided a conjunctural analysis of the various arrangements in which the LAD can be transformed. It appears that the establishment of an independent LAA is largely desirable to the consulted stakeholders and feasible at the conceptual stage, though no unanimous view has prevailed.
170. In this section, we consider the complexity of the existing LAD framework and the anticipated multiple knock-on effects of forays into relatively unexplored areas should an independent LAA be established. Here, we consider the major uncertainties and setbacks that may occur even if an independent LAA is set up as a separate entity to administer legal aid, and the consequences this change might bring.
171. In an independent LAA establishment, we envisage that the government would no longer be perceived as the major force in interfering with legal aid services. Nevertheless, there may still be influence from other external bodies, particularly political ones, which could exert substantial pressure on the decision-making process of the independent LAA. Some may also think that an independent LAA will solve the current flaw in governance which is the lack of a robust appeal mechanism for criminal cases. However, this is an issue concerning the provision of the legal aid services and does not involve the institutional status of the legal aid services.
172. In terms of operational arrangements, there is a perception that bureaucracy leads to operational inefficiency. An independent LAA, as pointed out by some legal and political professionals, is still subject to de facto controls. For example, one government official questioned, “Code to access information applies to all government departments, will LAA have access to this?” Concern over the operation of the legal aid service has little to do with its independent status.
173. An independent LAA no doubt would address the perceptions about its institutional arrangements and governance, although, ultimately, the financial arrangements of an independent LAA would determine the provision and delivery of the legal aid services. This directly impacts on the end-user. Taking the United Kingdom as an example, “When an independent legal aid body was in place, there was invariably the pressure to contain costs through capping the funds provided for legal aid and narrowing the scope of services.” Other jurisdictions such as Canada have reported

that publicly funded legal aid programmes are vulnerable to restraint, cutbacks and redesign, constantly depending on assistance programmes for survival. Moreover, legal aid services in New Zealand and England and Wales are moving from NDPB to Government bodies, as a result of insufficient financial control of their operations which has challenged the trustworthiness of the working relationship between the Government and these legal aid jurisdictions. (There were over payments to the profession and concerns about possible cheating in the profession.) Our view is that, regardless of the institutional arrangement, legal aid has to be funded by the Government.

Considerations for establishing an independent legal aid authority

174. Diagram 15 describes the factors to consider if an independent legal aid authority is to be established:

Diagram 15: Factors to Consider If An Independent Legal Aid Authority Is to be Established



Disestablishment costs

175. We have identified the following types of expenditure that will result from the disestablishment of the LAD (refer to Table 10). All the costs are expected to be an addition to the LAD's existing cost commitments.

Table 10: Cost of Disestablishing LAD

Staff-related disestablishment expenditure	Non-staff-related disestablishment expenditure
<p>The following types of staff-related expenditure will result from the departure or transfer of existing staff, as well as recruitment of new staff.</p> <ol style="list-style-type: none">1) Pension payments made to individuals taking early retirement, up to their normal retirement age.2) Pension enhancements paid to individuals taking early retirement.3) Ex gratia payments (assumed to be equivalent to six months' salary) made to individuals whose positions in the civil service are abolished.4) Recruitment and induction costs of replacement staff by the new legal aid authority (assumed to be equivalent to three months' salary).5) Incentive payments (assumed to be equivalent to three months' salary) made to encourage individuals to join a new employer.	<p>The following types of non-staff-related expenditure will result from the administration of the LAD disestablishment, as well as physical establishment of the new offices.</p> <ol style="list-style-type: none">1) Cost of the Project Management Office (PMO) to manage the implementation of LAD disestablishment and the miscellaneous administrative costs involved2) Cost of refurbishment of new offices3) Cost of relocation to new offices

Operating costs

176. We have identified the following types of on-going operating costs which will be applied to the new legal aid authority (refer to Table 11). In case legal aid services become independent of the Government, the legal aid authority will no longer be located in the same Government complex. Therefore, if the LAD is made independent, rent and rates of its office space in any commercial property will be a substantial financial burden to the operation of legal aid services.

Table 11: On-going Operating Costs to be Applied to the New Legal Aid Authority

Rent and rates	Personal emoluments	Utilities cost
If the new legal aid authority is no longer located in a Government complex, rent and rates of its office space in any commercial property will cause a substantial financial burden to the operation of legal aid services.	If the new legal aid authority deploys a staff structure that is similar to the LAD's existing one, personal emoluments are not expected to be significantly higher or lower than the LAD's existing level.	If the scope of services provided by the new legal aid authority is similar to the LAD's existing one, utilities costs are not expected to be significantly higher or lower than the LAD's existing level.

Staff morale

177. The establishment of a new legal aid authority will impact the morale of staff members who will be transferred from the LAD to the new organisation (refer to Table 12). The impact should be carefully considered and managed.

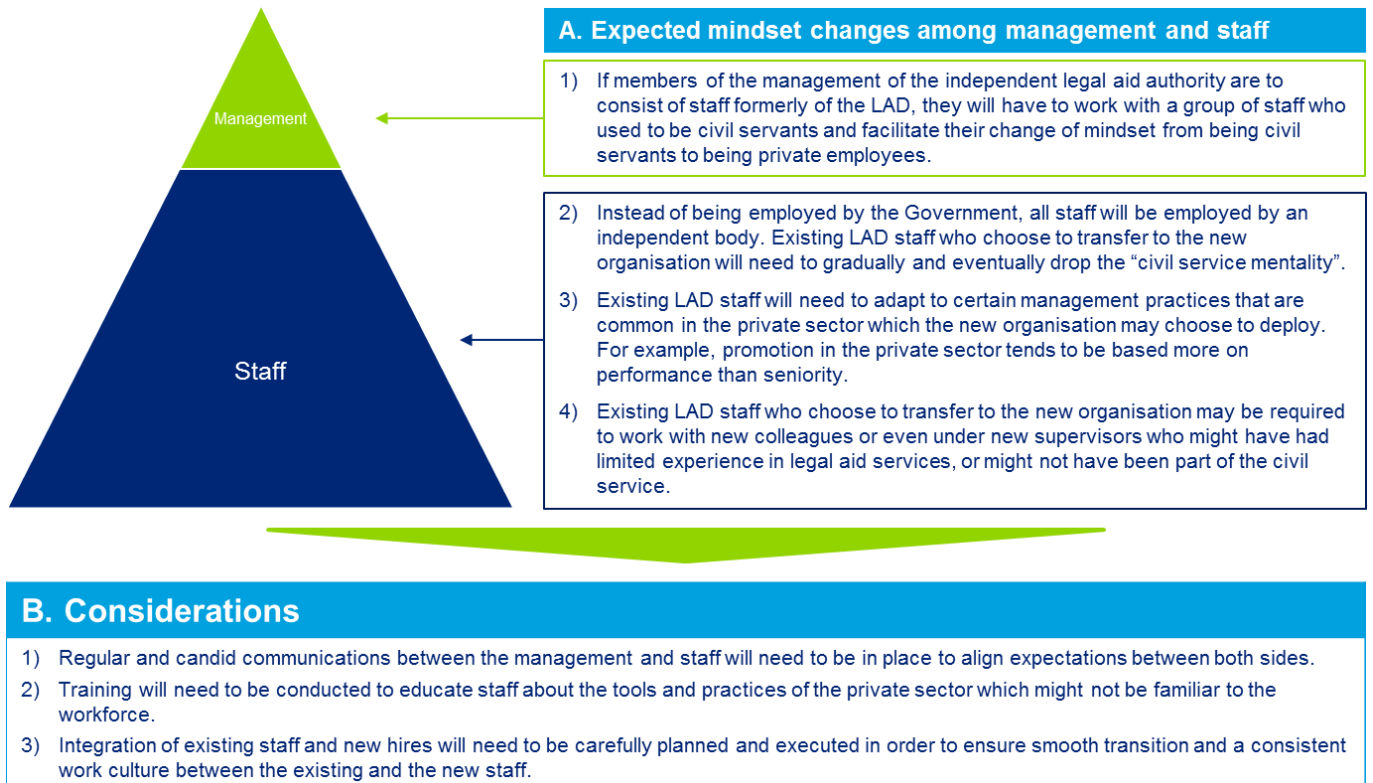
Table 12: Impact to Staff Morale for the Establishment of A New Legal Aid Authority

Positive impact to staff morale	Negative impact to staff morale
<ol style="list-style-type: none"> 1) A significant number of LAD staff interviewed considered the independent status of a new legal aid authority an effective means to tackle unreasonable complaints from legal aid applicants about service provision. They considered that, with the independent status, the potential risk of yielding to unreasonable requests would be reduced. As a result, efficiency and quality of services can be enhanced. 2) Departmental grade staff of the LAD who choose to depart or retire early will be replaced by new hires who may introduce new ideas and management techniques into the organisation. 	<ol style="list-style-type: none"> 1) If existing LAD staff who will transfer to the new organisation cease to be civil servants, they may fear that they will lose a certain degree of job security or pride as civil servants. 2) Speculations and uncertainty among existing staff members before and during the transition will be inevitable. Therefore, regular and candid communications between the PMO and staff are deemed necessary. 3) Not being part of the civil service, staff will have limited access to internal promotions or transfer to other Government departments. This may discourage young and capable staff who take pride in the civil service from continuing their career in the new legal aid authority.

Change of mindset

178. If a new legal aid authority is going to be established, staff members who used to work at the LAD are expected to experience certain changes in mindset resulting from the change of their employer (refer to Diagram 16).

Diagram 16: Considerations for the Expected Mindset Changes among Management and Staff

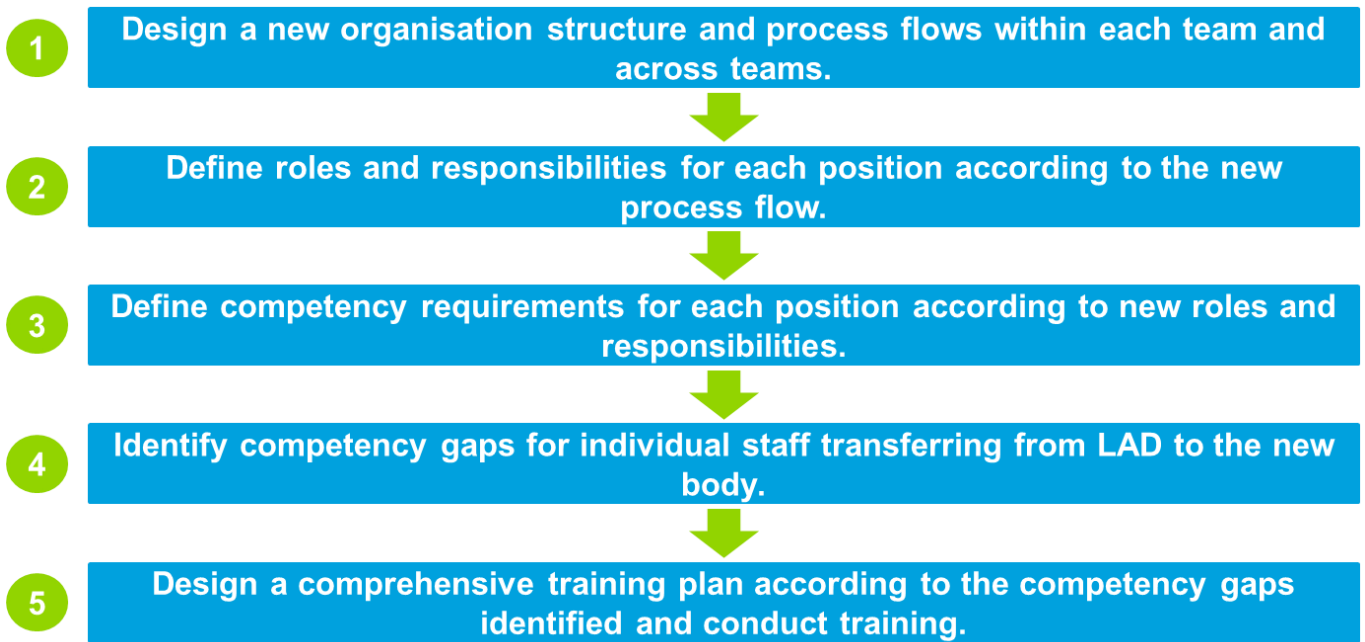


Change of skillset

179. With changes in personnel and workplace, the expected skillset and job requirement of certain roles in the new legal aid authority may demand higher-level training. For example, law clerks may be expected to perform the same tasks, but with more sophisticated software or tools. Under a new organisational structure, the procedure as well as check and balance for carrying out the same tasks could also involve learning new skills.

180. Diagram 17 shows the framework that would facilitate existing LAD staff to be re-trained and stay competitive.

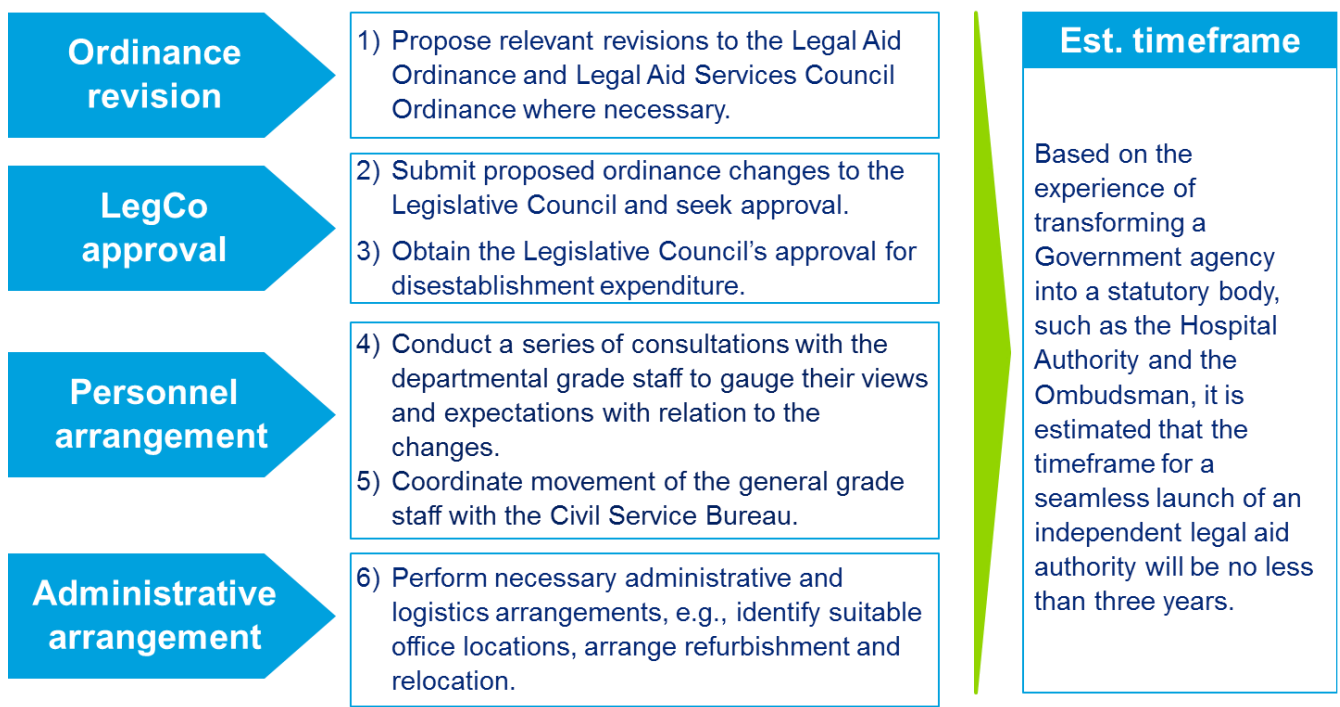
Diagram 17: Framework to Facilitate Existing LAD Staff to be Re-trained and Stay Competitive



Execution and administration

181. Once the future model of the legal aid authority is decided, establishing it will require thorough planning and careful administration. Implementation should be of minimal disruption to the provision of day-to-day legal aid services. Diagram 18 suggests the action items that the project management office ("PMO") should perform to ensure a seamless transition.

Diagram 18: Action items that the PMO should perform



Cost and impact analysis

182. Table 13 summarises the costs and impact of each option:

- i. The status quo option will basically cause no costs or impact;
- ii. The middle ground will cause a fairly high level of disestablishment costs but minimal disruption to service provision;
- iii. The fully independent option will be the most costly option.

183. Full details of the costs and assumptions employed can be found in Appendix F – Cost projections.

Table 13: Cost and Impact Analysis of the Options

	Status quo option		Fully independent option
Disestablishment costs	--	Costs associated with the disestablishment or transfer of the existing DLA and DDLAs are expected to be fairly high , and estimated to range from HK\$2 million to HK\$30 million in net present value terms, depending upon the number of DLA and DDLAs leaving the LAD versus those transferring to the LAA.	Disestablishment costs are expected to be high and estimated to range from HK\$41 million to HK\$600 million in net present value terms, depending upon the number of staff leaving the LAD versus those transferring to the LAA.
Operating costs	Operating costs are expected to be the same as or similar to the current level if the staff structure remains unchanged.	Operating costs are expected to be similar to the current level provided that the DLA and DDLAs are offered similar compensation and benefits as current and the remaining staff structure remains unchanged.	Operating costs are expected to be high if the LAA no longer stays in Government complex. Rental costs, estimated to range from HK\$2.38 million to HK\$7.51 million per month, will be the biggest financial burden to the operation.
Impact on staff morale	--	Impact on staff morale is expected to be minimal given that the majority of the staff would remain as civil servants and stay in the same positions.	Impact on staff morale is expected to be high given that staff who transfer from the LAD to the LAA will cease to be civil servants.
Change of mindset	--	Change of mindset is expected to be minimal given that majority of the staff would remain as civil servants. The only change required is that they will be reporting to a new management team which may consist of the same or different directors or deputy directors who are not civil servants.	Requirements for change of mindset are expected to be high given that staff who transfer from the LAD to the LAA will cease to be civil servants.
Change of skillset	--	Change of skillset is expected to be minimal given that majority of the staff would stay at the same positions.	Requirements for change of skillset are expected to be high given that some of the staff who transfer from the LAD to the LAA may be required to take up different positions.
Implementation timeframe	--	Timeframe for completing the required personnel rearrangement, legislation revisions and LegCo approval is expected to be no less than 18 months .	Timeframe for a seamless launch is expected to be no less than 36 months .

Implementation

184. Implementation of the suggested arrangements will require legislative support and other changes.

- i. If the LASC is to be empowered, changes will be required to relevant Ordinances, e.g.:
 - a. Revision of the Legal Aid Ordinance, Cap. 91, to empower the LASC to oversee Section 9 opinions and refusals of legal aid;
 - b. Revision of the LASC Ordinance, Cap. 489, to lift restrictions on the powers of the LASC, revise its member composition and appointment method as needed.
- ii. If the DLA and DDLAs cease to be civil servants, changes will be required in the method of appointment of the DLA and DDLAs, and their terms and conditions of employment such as the following.
 - a. The necessary leadership and management skills will have to be defined to manage the transition to the new arrangements.
 - b. To reinforce the LASC's control of the management, new terms and conditions will need to be established for these positions, such as a renewable, fixed term of appointment and a reasonable security of tenure.
 - c. Better definition of the criteria of the DLA and DDLAs, as well as the roles and remit of the LASC will be required. By providing an attractive compensation package and pension scheme to staff, a career path that could lead to being selected to the DLA / DDLA candidate pool would be able to reward top-performing employees. Such flexibility to be able to move between civil servant roles and non-civil servant DLA / DDLA roles should help retain and motivate staff.
- iii. Arrangements will be required whereby the DLA and DDLAs would be given authority over the management of the careers and performance of the LAD staff, recognising that the DLA and DDLAs would require appropriate incentives and sanctions to ensure that the staff work effectively to realise the LAD's vision for independent legal aid administration, even though the majority of staff would continue to be employed under civil service terms and conditions.
- iv. The size of the LASC secretariat will need be increased with paralegal professionals in order to support the increased workload and enhanced roles of the LASC.

- v. The OSO will need to be established as an independent agency with a dedicated OS and workforce if OSO is separated from LAD.

Summary and recommendations

185. While we appreciate the virtue in the separateness of the LAD, and the cost and resources that could be saved if the LAD remained as it currently is, we believe that the status of the LAD does not have to be one way or another, rather, changes can be made within the existing framework to preserve what is distinctive and best about the system, while allowing it to modernise. In Key Findings, we have shown the strengths and weaknesses of Hong Kong's legal aid services in the four dimensions of institutional, financial, operational and governance, and compared these aspects with those in overseas jurisdictions.
186. In summary, the provision of legal aid services in Hong Kong is commended in the following areas.
- i. Legal aid funding is uncapped, so no legal aid applicant who passes the required means and merits tests is excluded from legal aid services because of funding constraints. This also implies that there is no cap on the number of persons who can have access to legal aid services each year.
 - ii. The Supplementary Legal Aid Scheme ("SLAS") allows more people to have access to legal aid who would otherwise be ineligible under the Ordinary Legal Aid Scheme ("OLAS").
 - iii. The LAD currently maintains a reasonable working relationship with the Home Affairs Bureau ("HAB") and other Government counterparts. Our findings from the overseas jurisdictions show that a legal aid body, whether it is a Government department or a non-departmental public body ("NDPB"), will strive to maintain a reasonable working relationship with its sponsoring Ministry. A good working relationship allows the legal aid body to have direct communications with and access to the Minister when needed.
 - iv. The LAD staff members, as civil servants and politically neutral, are prevented from succumbing to potential pressure from the Government or any form of political influence.
 - v. The LAD is under the scrutiny of other governing bodies and is ultimately accountable to the CE.
 - vi. No substantiated examples of any Government interference on legal aid administration have been found. Instead, there is a significant number of examples of legal aid being granted to applicants to pursue claims against the

Hong Kong Government, as long as there are reasonable grounds, e.g., the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers' right of abode in Hong Kong.

187. Our assessment is that the existing or potential users of legal aid services are more concerned about the quality of legal aid services, scope of service provision and the level of financial eligibility limit than the issue of legal aid independence itself. In other words, whether or not the legal aid body is a part of the Government is not the top priority in the minds of our existing or potential users of legal aid services as long as quality services are provided to the people who lack financial means to have access to legal assistance. The areas where improvement is desired include:

- i. Expedited legal aid processing
- ii. Staff quality
- iii. Better post-application service (especially in unsuccessful cases)
- iv. Better care for minorities (e.g. providing translators)
- v. Increased accessibility to legal aid services for all
- vi. Broadening of the financial eligibility limit and reduction in the cost of service to maximise the number of beneficiaries
- vii. Provision of a broader scope of services

188. Nonetheless, the perceived lack of independence among different stakeholder groups is more of an issue for the following reasons.

- Institutional independence of the LAD is thought to have been undermined when its administration was moved from under the Administration Wing to be under the Home Affairs Bureau. This has been seen as a *de facto* “downgrading” of the independence of the LAD.
- Some stakeholders hold the impression that the LAD might be at risk of being influenced by the Government when determining whether a sensitive case, particularly when the Government is legally challenged, should be granted legal aid.
- There is a lack of transparency in the appointment mechanism and selection criteria of the LASC members and the DLA, which

undermines the public's confidence in the level of independence of these roles.

- Some legal practitioners are concerned that the DLA has a “preferred panel” for providing Section 9 opinions which tend to favour the DLA’s decisions.

189. We have taken a holistic and balanced approach to forming our recommendation by considering the solicited views of stakeholder groups consisting of both legal professionals and those from a non-legal background. The recommendations that will be proposed in the following pages aim to address the identified issues, especially those related to stakeholders' perception of the LAD's lack of independence, while preserving the existing strengths of the LAD.

The overall LAD model

190. Diagram 19 and Table 14 summarise the proposed model for legal aid administration. Under this model, the LAD will remain as a part of the Government with direct accountability to the Chief Executive or the Chief Secretary of Administration. The LASC will be significantly empowered to monitor multiple aspects of the LAD’s operations. We propose to retain all LAD staff as civil servants, including the DLA and DDLAs.

Diagram 19: Recommended Model of Legal Aid Administration



Table 14: Key Responsibilities of Key Personnel in the Recommended Model

Key Role	Key responsibilities
Chief Executive or Chief Secretary of Administration	<ul style="list-style-type: none"> • Holds accountability of LAD • Appoints the DLA and DDLAs from a pre-selected group nominated by the LASC • Defines the competency criteria for being appointed as LASC members • Appoints the LASC members based on the defined competency criteria
Legal Aid Services Council	<ul style="list-style-type: none"> • All the LASC members will continue to be appointed by the CE • The LASC members are nominated by a range of stakeholder organisations based on the defined competency criteria • The LASC members have the right to recommend the DLA and DDLA candidates to the CE or CS who will make the final decision to employ short-listed candidates • Evaluates the DLA and DDLAs • Oversees Section 9 opinion • Monitors the operation of the OSO
Legal Aid Department	<ul style="list-style-type: none"> • Remains within the Government • Becomes directly accountable to the CE or CS • All the LAD staff continue to be civil servants, including the DLA and DDLAs • The DLA and DDLAs are directly evaluated by the LASC • The remaining LAD staff will continue to be evaluated by their respective supervisors • The current financial arrangement is maintained, including uncapped legal aid fund and the SLAS
Official Solicitor's Office	<ul style="list-style-type: none"> • The OSO will continue to stay within the LAD • The OSO will be monitored by the LASC

191. This recommended model addresses each element in the Option section. It consists of suggested steps that require both short-term and long-term implementations in the following four dimensions.

Institutional arrangement of the proposed LAD model

Recommendation to address Issue II: Some stakeholders have the perception or fear that independence might be undermined with the LAD as a Government department.

192. *Option II-A: Retain the LAD as a Government department*

Option II-B: Establish an independent legal aid authority ("LAA")

193. The LAD continues to be a Government department and remains in the civil service. This option is chosen for the following reasons.

- i. No substantiated example of the Government's interference on legal aid administration has been identified in this Study. On the contrary, there are a significant number of examples of legal aid being granted to applicants to pursue claims against the Hong Kong Government, as long as there are reasonable grounds e.g. the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers' right of abode in Hong Kong. In other words, the level of independence upheld and exercised by the LAD is considered sufficient, but the level of perceived independence is more of an issue.
- ii. The reason for the LAD's perceived lack of independence varies from stakeholder group. For example, some legal aid applicants who legally challenge the Government's decisions may fear that the LAD is at risk of being influenced by the Government. Legal practitioners may, on the other hand, fear that the DLA has a "preferred panel" when deciding who are to provide Section 9 opinions. All these root causes of the perception issue can be addressed by other measures for operational improvement without having to change the LAD's institutional structure itself. Improvements in the operational process will be addressed in Recommendation.
- iii. We consider that the institutional setup of the LAD within the Government would not restrict the scope of legal aid services and financial eligibility limit ("FEL"), and hence, would not increase the number of unrepresented litigants in Courts. We consider that this is more an issue of resource allocation rather than an

institutional issue. This is a product of the need to economise, and there are various jurisdictions with an independent LAA that has low financial eligibility limits.

- iv. We also consider that the high level of unrepresented litigants, given a significant increase of FEL in Ordinary Legal Aid Scheme, is unlikely due to institutional independence but rather the interpretation of the means and merits tests.
- v. If an independent LAA is to be established, the LAA, while maintaining its independent position, will need to reestablish the working mechanisms with other Government counterparts, such as the Department of Justice and the Immigration Department. Such multidisciplinary partnerships and, more importantly, the rapport, will take a considerable amount of time to be built and reinforced as a stable system. As a result, disruption to legal aid service provision, at least in the short run, is deemed inevitable if an independent LAA is to be established. An LAD within the government can stabilise the workforce and maintain, or even enhance, the service quality of legal aid when changes are made.

194. With the above considerations, we believe there is no immediate need to establish an independent LAA. Nonetheless, it may be worthwhile to conduct a review on legal aid independence in the future.

195. If the LASC considers any institutional improvement of the LAD in the future, we recommend that the LASC take into account staff comments. The institutional arrangement of the LAD may have a direct or indirect impact on the service quality provided by the LAD, and therefore, the institutional arrangement of the LAD should take into account the concerns of the LAD staff.

Recommendation to address Issue I2: The LAD's institutional independence is thought to have been undermined when its administration was moved from under the Administration Wing to be under the Home Affairs Bureau ("HAB").

- 196. *Option I2-A: Retain the HAB as the policy bureau of the LAD*
- Option I2-B: Make the LAD directly accountable to the Chief Executive ("CE") or the Chief Secretary for Administration ("CS")*
- Option I2-C: Make the LAA accountable to an executive Board of Directors*

197. The CE or CS should hold accountability for the LAD. Under this option, the LAD can remain as a Government department. This option is recommended for the following reasons.

- i. While under option I1-A, the LAD is recommended to be retained as a Government department, option I2-B provides the LAD with more direct access to the CE or CS. Bearing in mind that, under the current arrangement of the LAD as a department under the HAB, any litigation against sister departments under the HAB, e.g., Leisure and Cultural Services Department, might be seen to compromise the LAD's independence. However, the I2-B option recommends that the LAD not be grouped under any policy bureau, which should elevate the perceived independence of the LAD above its current level in the event that any Government department is being legally challenged.
- ii. According to our research in overseas jurisdictions, more direct access to the person at the most senior level of a Government is always preferred. By making the LAD directly accountable to the CE or the CS, communications between the LAD and the CE or CS can be strengthened; and thus, the working relationship and trust between them can be enhanced.

198. While the CE or CS should be the final appointing body, the LASC should govern the execution of the LAD to ensure decisions made by the LAD are unbiased.

199. In terms of implementation, this option will have to be supported by a robust monitoring mechanism to prevent the potential for the CE or CS to apply formal or informal pressure on the LAD's decision on granting or refusing legal aid. These measures will be discussed in later pages.

Recommendation to address Issue I3: The Director of Legal Aid (DLA) is also the Official Solicitor ("OS") whose office ("OSO") is currently part of the LAD's structure.

200. Option I3-A: Remain as part of the LAD

Option I3-B: Locate the OSO within the Department of Justice ("DoJ")

Option I3-C: Establish an independent OSO

201. Continuation of the OS as the DLA and the OSO as part of the LAD's structure. This option is recommended for the following reasons.

- i. The number of cases handled by the OSO is not high and some of the cases are non-contentious or non-litigious.
 - ii. The number of litigious cases with the opposite parties being legally aided is few and there is a standing arrangement that aided persons in those cases are all represented by private legal practitioners.
202. As measures are in place to mitigate against any potential conflicts of interest that may arise, there should not be an problem in having the DLA serve also as the OS. Further, given the current size and case volume of the OSO, there is no need to set up a separate office.
203. We also recommend that the OSO, with the DLA also serving as the OS, should be monitored by the LASC. This provides an additional layer of governance on the decisions made by the OS to ensure that those decisions are unbiased and avoid any conflict of interest.
204. Overseas benchmarking indicates that there may be a need for OSO to be independent of the LAD in the future. The OSO in most of the jurisdictions examined is separate from the jurisdiction's legal aid body. Meanwhile, the status quo of the operation of the OSO can be maintained, given its small infrastructure, while being monitored by the LASC.
205. We do not recommend grouping the OSO within the Department of Justice ("DoJ") as described in option I3-B . Although such an arrangement is common in overseas jurisdictions such as Canada and Australia, legal aid bodies in these jurisdictions have an NDPB's status.

Recommendation to address Issue I4: The LAD staff, being civil servants, might be thought to treat protection of the Government's interests as the top priority. The standing of the LASC is in part undermined by the fact that staff appraisal of the DLA is conducted by the Secretary for Home Affairs.

206.Option I4-A: Retain all members of the LAD staff as civil servants

Option I4-B: The LASC to nominate and evaluate the DLA and DDLAs

Option I4-C: The Board to recruit and evaluate all members of the LAA staff

207. All LAD staff members, including the DLA and DDLAs, will continue to be civil servants and evaluated by their respective supervisors. Since the LASC is recommended to be responsible for the governance and operations of the LAD, the DLA and DDLAs should be evaluated by the LASC directly.

208. The status of the DLA and DDLAs can remain as civil servants providing that the selection criteria of the candidates are transparent. Their performance evaluation should also be conducted in a clear and transparent manner to avoid any perceived lack of independence.
209. The LASC should recommend candidates for the DLA and DDLAs by nominating a pool of candidates eligible for these positions to the CE or CS under clear and transparent criteria. The CE or CS can only appoint from this short-listed group thereby limiting any conflict of interest.
210. Under option I1-A, the LAD is recommended to be retained as a Government department. Therefore, it would make most sense to retain all staff, including the DLA and DDLAs, as civil servants. This option will prevent disruption to legal aid service provision due to changes in personnel. In addition to this current arrangement, in order to enhance independence and transparency of the appointment of the DLA and DDLAs, we recommend that the LASC be given the power to nominate potential candidates to the CE or CS who will make the final decision.
211. Under option I2-B, the LAD is recommended to be made directly accountable to the CE or CS and to be governed by the LASC. Therefore, it would make most sense to have the DLA and DDLAs directly evaluated by the LASC while other staff members should continue to be evaluated by their respective supervisors. It must be emphasised that an active management or human resources department must be in place to provide the mechanisms needed to retain and motivate staff. For example, this can be achieved by clearly and transparently defining the criteria of the DLA and DDLAs, as well as the roles and remit of the LASC. By providing an attractive compensation package and pension scheme to staff, a career path that could lead to being selected to the DLA / DDLA candidate pool would help reward top-performing employees (e.g. awarded their pension sooner).
212. The implementation consideration is that, to provide the LASC with the statutory power to nominate and evaluate the DLA and DDLAs, the LASC Ordinance (Cap. 489) will need to be revised. Specifically, Section 4(3) of the LASC Ordinance, which states that “[t]he Council shall not have the power to direct the Department on staff matters”, will need to be amended accordingly and approved by the LegCo.
213. By appointing the DLA and DDLAs within the civil service structure, there should not be any impact on civil servants' morale because they will still be able to reach the top of the management ladder in the civil servant environment.

Recommendation to address Issue I5: All the LASC members are appointed by the Chief Executive ("CE"). Appointment criteria are not made known to the public.

214. *Option I5-A: All the LASC members continue to be appointed by the CE*

Option I5-B: Introduction of stakeholder nomination in the appointment procedure

Option I5-C: Introduction of a public appointment procedure

215. I5-A: All the LASC members continue to be appointed by the CE

- i. All LASC members will be appointed by the CE.
- ii. On top of this current arrangement, the competency of the LASC members should be endorsed by the CE and disclosed to the public. The LASC members should be appointed based on the defined competency.

I5-B: Introduction of stakeholder nomination in the appointment procedure

- i. The two branches of the legal profession, namely the Law Society and the Bar Association, should continue to nominate prospective LASC members based on the competency criteria.
- ii. On top of this arrangement, further stakeholder nomination should be encouraged in the appointment procedure. For example, other professional bodies can be given the right to nominate lay members; existing LASC members can be given the right to nominate their successors using the defined competency.

216. We consider that the mechanism of all LASC members being appointed by the CE is not the root cause of the concerns over independence. Instead, the transparency of such an appointment mechanism is more of a problem. Defining and disclosing competency criteria to the public can enhance transparency and strengthen the public's confidence in the appointment mechanism.

217. A public appointment procedure, although widely practiced and accepted in overseas jurisdictions, does not seem practical in Hong Kong at present. Therefore, in order to enhance transparency of the current appointment mechanism, we recommend strengthening participation of different stakeholder groups in the nomination of both legal and lay members of LASC.

218. The implementation consideration is that in order to provide professional organisations with the statutory right to nominate the LASC members, the LASC Ordinance (Cap. 489) will need to be revised. Specifically, Section 5 of the LASC Ordinance, which provides guidelines on the membership of the LASC, will need to be amended accordingly and approved by the LegCo.

Financial arrangement of the proposed LAD model

Recommendation to address Issue F1: Regardless of its institutional model, the LAD should be able to receive the level of funding required to meet its legal aid costs. It should also have the autonomy to allocate its funding within given limits.

219. *Option F1-A: Maintain current financial arrangement*
Option F1-B: Enhance the LASC's power over funding monitoring
Option F1-C: Establish an independent legal aid fund

220. The following financial arrangements should be maintained:

- i. Government as the primary source of funding
- ii. An uncapped legal aid fund
- iii. The Supplementary Legal Aid Scheme ("SLAS") as a self-financing scheme
- iv. The LASC as the CE's advisory body to advise about funding requirements (Section 4(5)(a) of the LASC Ordinance)

221. The LAD, although funded by the Government, enjoys a relatively high level of autonomy in allocating its funds within its given limits. Hong Kong's legal aid funding mechanism is recognised as one of the leading practices in the world with its uncapped legal aid fund and self-financing scheme SLAS. Therefore, we consider that no immediate attention is required in the current financial arrangement.

222. With uncapped funding from the Government, no legal aid applicant who passes the required means and merits tests is excluded from legal aid services because of funding constraints. This also implies that there is no cap on the number of persons who can have access to legal aid services each year. We, therefore, recommend that such an arrangement should be maintained in the best interests of existing and future legal aid applicants.

223. The SLAS allows more people to have access to legal aid services who would otherwise be ineligible under the Ordinary Legal Aid Scheme ("OLAS"). We, therefore, recommend that such an arrangement should be maintained as well.

Operational arrangement of the proposed LAD model

224. If the LASC considers any operational improvement of the LAD in the future, we recommend the LASC take into account staff comments. Their comments, and concerns, if any, can provide data for evaluating the sufficiency of manpower.

Recommendation to address Issue O1: Some stakeholders hold the impression that the LAD might be at risk of being influenced by the Government when determining whether a sensitive case should be granted legal aid.

225. Option O1-A: Maintaining the current procedure for granting legal aid

Option O1-B: Statutory prohibition against Government interference

Option O1-C: Clear limits imposed on Government's power

Option O1-D: Strengthened confidentiality obligation

226. O1-B: Statutory prohibition against Government interference

- i. The introduction of a statutory prohibition to prevent the potential for the Government to interfere with the grant, discharge, revocation or refusal of legal aid in individual cases.

O1-C: Clear limits on Government's power

- i. The introduction of clear limits on any power of the Government to give guidance to the LAD as to its functions in relation to aid granting and payments.

O1-D: Strengthened confidentiality obligation

- i. A strengthened confidentiality obligation with clear limits as to what may be passed to the Government by LAD as advanced warning of legal aid cases in the pipeline.

227. Given that the LAD is recommended to be retained as part of the Government with direct accountability to the CE or CS, the abovementioned measures are considered necessary to ensure that the CE or CS, and other parts of the Government, will have as little interference on legal aid administration as possible. These measures will also

enhance the public's confidence in legal aid granting particularly in cases where the Government is legally challenged.

228. These measures share considerable similarities with overseas jurisdictions, such as Ireland, England & Wales and Northern Ireland, where there are express statutory provisions against Governments' intervention in individual cases.

229. Relevant amendments to the Legal Aid Ordinance will need to be made in the implementation stage.

Recommendation to address Issue O2: Some legal practitioners are concerned that the DLA has a “preferred panel” for providing Section 9 opinions which tend to be in line with DLA’s decisions. (Refer to Key findings – The view that the "LAD is not sufficiently independent from the Government" and Key findings – Mixed perception among stakeholder groups on current independent status of the LAD for details about Section 9 opinions)

230. Option O2-A: Maintain the current arrangement of soliciting Section 9 opinions

Option O2-B: Empower the LASC with oversight of Section 9 opinions and case assignment

Option O2-C: The Courts to review Section 9 opinions

231. In addition to the current arrangement, introduce a robust internal mechanism within the LAD for assigning private lawyers to provide Section 9 opinions, coupled with empowering the LASC with oversight of the assignment of lawyers and soliciting Section 9 opinions.

232. Some legal practitioners have the impression that the DLA has a “preferred panel” for providing Section 9 opinions due to the lack of transparency of case assignment. A robust internal mechanism within the LAD for case assignment would provide the LAD with the necessary guidelines to follow to make sure that such assignments are unbiased.

233. We recommend that the LASC should be empowered with oversight of the assignment of lawyers and Section 9 opinions on a needs basis. The LASC may consider hiring independent legal practitioners for this matter as it requires special legal knowledge. This measure removes the perception that only lawyers who favour the LAD's interpretation of the assigned cases are selected.

234. To provide the LASC with the statutory power of oversight of Section 9 opinions and case assignment, the LASC Ordinance (Cap. 489) will need to be amended. The roles and remit of the LASC should be clearly stated. Specifically, Section 4(3) of the

LASC Ordinance, which states that “[t]he Council shall not have the power to direct ... the handling of individual cases by the Department ("LAD")”, will need to be amended accordingly and approved by the LegCo. Extra funding to the LASC, change in ordinance and additional staffing may be able to ameliorate the negative views of the LASC which some parties have expressed.

Governance of the proposed LAD model

Recommendation to address Issue G1: There is no established appeal mechanism against refused legal aid application for criminal cases.

235. Option G1-A: Maintain the current appeal mechanism against refusals of civil and criminal cases

Option G1-B: Introduction of a robust review mechanism for refusals of civil and criminal legal aid applications

Option G1-C: The Court to review refusals

236. Introduce a robust internal review mechanism within the LAD for refusals of legal aid for both civil and criminal cases.
237. Provide a statutory channel for criminal legal aid applicants to appeal against refusals of their applications.
238. A robust internal review mechanism can ensure that the LAD’s decisions on all legal aid applications, for either civil or criminal, have been correctly made.
239. We recommend that criminal legal aid applicants who are aggrieved by any order or decision of the DLA, should have the same statutory access to appeals as civil legal aid applicants.
240. Some refused applicants do not know that there is a channel for them to appeal to the Court for refused criminal cases. On the other hand, some refused applicants may not want to go to the Court directly, even if they know that they have the right to do so, as they have no legal knowledge.
241. The introduction of a statutory channel can offer them another channel to appeal their cases and provide them a first layer to appeal rather than going directly to the Court.
242. In terms of implementation, relevant amendments to the Legal Aid Ordinance will need to be made to provide statutory power for the LASC on oversight of the LAD’s decisions and for criminal legal aid applicants to appeal against refusals.

Conclusion

243. Since the first discussion on setting up an independent Legal Aid Authority began in 1993, there have been ongoing attempts to separate Hong Kong's Legal Aid Department. This motion has not yet been brought into reality mainly due to cost and the view that there has not been a pressing need. However, major initiatives to re-visit this issue have mirrored shifts in the social and political structure of the system. Therefore, the establishment of an independent LAA is not only a matter of action, but also of perception. In order to address this ongoing dialogue among policy-makers, legal professionals and the public, this Study on the feasibility and desirability of establishing an independent LAA provides an update on the current views.
244. The preceding sections have illustrated the developments in the institutional, financial, operational and governance dimensions of the LAD, which have been benchmarked against those of overseas jurisdictions in order to compare the strengths and weaknesses of each aspect. In this Study, we have carried out literature and news research, interviewed communities who are extremely knowledgeable in legal aid services and policies, and able to point clearly to the deficiencies (and the consequences of the deficiencies), as well as a cross-section of the general public taking into consideration different age groups, gender and education background to represent a cross-section of views. We have found that, while the existing LAD framework has its own merits, the response to and perceptions of the independence of the LAD were mixed. On the one hand, the critique on the current LAD status included the devolvement of the LAD away from the Administrative Wing of the Government, the potential conflict of interest due to the dual role of the DLA in the OSO, and the lack of transparency in the appointment mechanism of senior officials in the legal aid system. However, the uncapped funding of the LAD services is a rare benefit that has been commended and ultimately benefits the legal aid applicants and users. The continued increasing demand for a better legal aid system appears to be focused on the quality and provision of the legal aid service, i.e. the roots of the legal aid mandate, instead of its "image".
245. Taking together the benefits and deficiencies of the current LAD system, we have further assessed the cost and implementation strategies of establishing a new LAA,

again based on lessons learnt in Hong Kong and observations on overseas jurisdictions. We recommend that the most cost-effective and efficient legal aid service is to renew it within the Government, in order to provide a sustainable and consistent legal aid service in the long term, while maintaining its autonomy in decision-making and governance by improving the current governance and operational structure. The recommendations are not exhaustive, however, and their implementation will require further elaboration and an overarching collaboration with other government bodies. But with a clarity in priorities, transparency in operations, vigilant monitoring of officials and staff, dynamic evaluation capacity, and effective use of government budget, it is possible to deliver and control a legal aid department that serves the fundamental interests of legal aid applicants, where the need is most pressing and the benefit is likely to be the greatest.

Appendices

Appendix A – Legal Aid Practice in Hong Kong

246. Profile of Hong Kong

Source: World Bank, World Development Indicators
Hong Kong Census and Statistics Department

Demographics	Population: ~ 7 million (2010)		
	GDP: ~ HKD \$2,710 billion (2010)		
	Household income (2010) :		
	Annual household income (HKD \$)	Number of domestic households (in thousands)	% of total domestic households
	<120,000	629.2	27.0%
	120,000 - 299,999	873.4	37.4%
	300,000 - 599,999	540.7	23.2%
	600,000 - 959,999	177.0	7.6%
960,000 - 1,199,999	44.5	1.9%	
≥ 1,200,000	69.2	3.0%	
Total	2,334.0	100.0%	
Median annual household income (\$)	216,000.0		

Legal system	Type of legal system: Common law
	Source of legal system: The United Kingdom

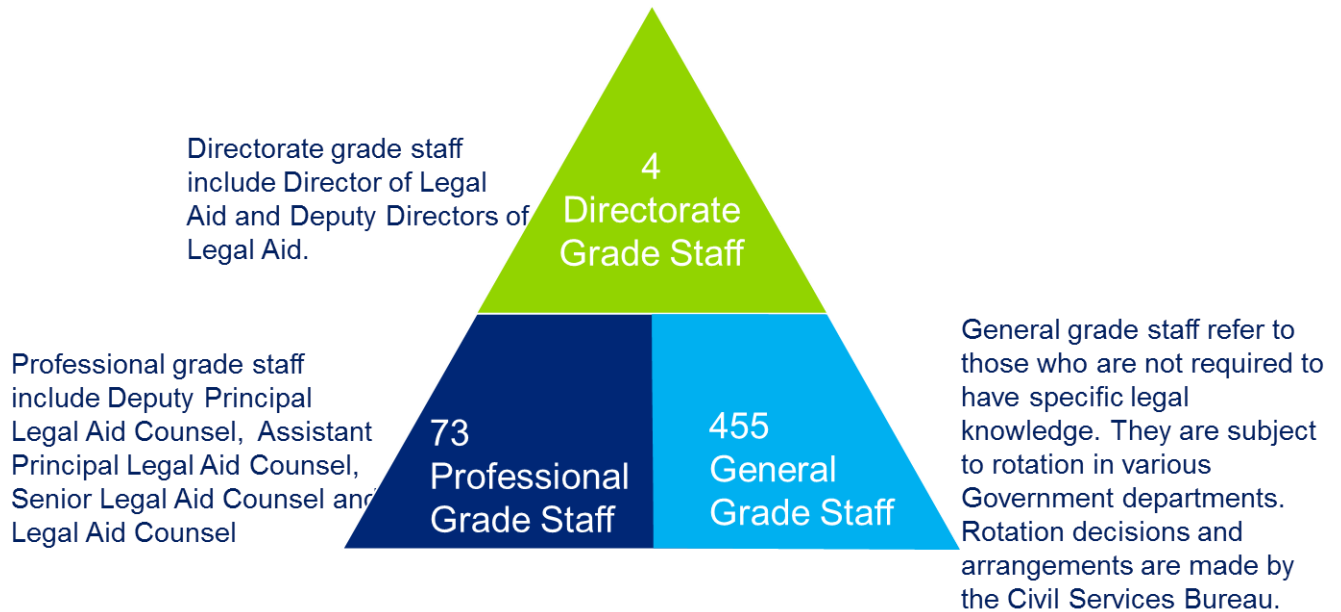
247. The Legal Aid Department operates under three divisions

Source: <http://www.lad.gov.hk>
Legal Aid in Hong Kong, Legal Aid Services Council, 2006

Application and Processing Division	<ul style="list-style-type: none"> • Processes civil legal aid applications to determine whether the applicant satisfies both the means and merits tests. • Assigns cases to either in-house lawyers or to private practitioners. • Monitors cases assigned to private practitioners. • Provides information and responds to enquiries relating to legal aid services. <p><u>Civil Litigation Section</u></p> <ul style="list-style-type: none"> • Handles and conducts in-house civil litigation in relation to family matters, employees' compensation claims, personal injuries, medical and dental profession negligence claims, and seamen's claims for arrears of wages and other employment-related entitlements.
Litigation Division	<ul style="list-style-type: none"> • The Insolvency Unit handles insolvency cases referred by the Labour Department for the recovery of arrears of wages and other employment-related benefits. <p><u>Crime Section</u></p> <ul style="list-style-type: none"> • Processes criminal legal aid applications. • Represents aided persons in Magistrates' Court in committal proceedings, plea day proceedings at the District Court, listing and bail applications in the Court of First Instance, acts as instructing solicitors for persons seeking legal-aid at trials in the Court of First Instance and appeals before the Court of First Instance, Court of Appeal and Court of Final Appeal. • Monitors cases assigned to private practitioners.
Policy and Administration Division	<ul style="list-style-type: none"> • Oversees the Accounts and Supplies Section, Administration Section, and Policy and Development Section. • Also supervises the following Units: <ul style="list-style-type: none"> • Training Unit, which implements the LAD's Annual Department Training and Development Plan. • Information Unit, which responds to enquiries from the media. • Costing Unit, which assesses all bills of costs prepared by solicitors in assigned-out cases, assesses costs and prepares bills of costs for taxation for cases conducted in-house. • Enforcement Unit, which takes enforcement proceedings for the recovery of judgment debts and costs in legally-aided cases. • Information Technology Management Unit, which maintains the computer networks within the LAD. • Special Duties and Research Unit, which carries out investigations in respect of representations on means against the grant of legal aid in particular cases.

248. Number of staff members in LAD

The number of staff members in LAD, as of December 2011, is shown in the diagram below.*



***Remarks:**

The number of general grade staff is an approximate number, which is calculated by deducting the number of professional officers from the total number of LAD staff. These numbers may have come from different sources. The diagram is for illustrative purpose only.

249. Legal Aid Structure in Hong Kong – An Overview

Source: <http://www.lad.gov.hk/>
 Legal Aid in Hong Kong, Legal Aid Services Council, 2006
 Legal Aid Ordinance (Cap. 91)

Legal aid administration	<p>Legal aid body: Legal Aid Department (LAD)</p> <p>Ordinance: Legal Aid Ordinance and Legal Aid in Criminal Rules</p> <p>Status: Government body</p> <p>Purpose: To ensure that any individual in Hong Kong who has reasonable grounds for taking or defending a legal action is not prevented from doing so by lack of means.</p>
Funding	<p>Source of funding</p> <p>The LAD's services under the Ordinary Legal Aid Scheme (OLAS) are primarily financed through public funding. The Supplementary Legal Aid Scheme (SLAS); is a self-financing scheme drawing its funds mainly from contributions from aided persons on the basis of damages awarded, the costs recovered in successful cases and the application fees payable by applicants.</p> <p>No pre-determined funding cap</p> <p>A significant feature of the legal aid services provided in Hong Kong is that funding for legal aid costs provided by the government (excluding SLAS, which is self-financing) is not cash-limited. There is no pre-determined funding cap and supplementary appropriation can be sought in case expenditure on legally-aided cases in the year exceeds the amount of appropriation originally projected. There is no pre-determined funding cap for individual cases either.</p>

Operation

Are in-house lawyers available?

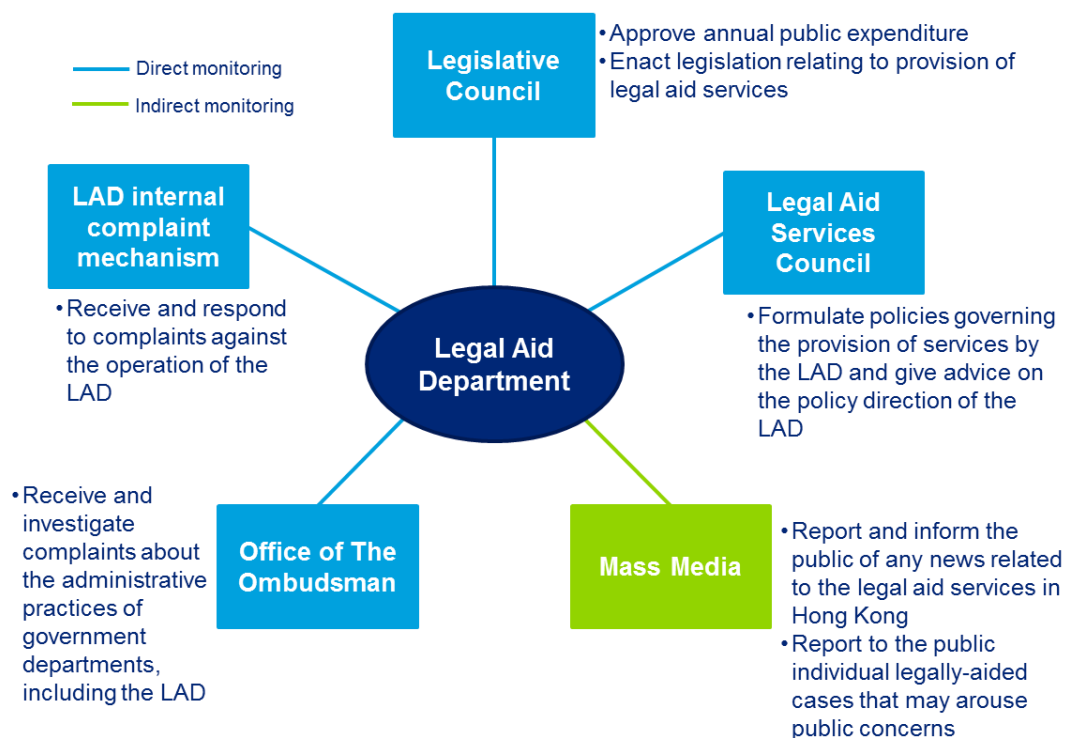
Yes, the Civil Litigation Section is responsible for conducting litigation on legal aid cases assigned in-house, which accounts for not more than 30 percent of the civil legal aid cases that include personal injuries, family matters and all insolvency cases referred by the Labour Department to recover arrears of wages and other employment-related benefits.

How to apply for legal aid :

Applicants can apply for legal aid in person or submit their pre-application documents through the Department's portal. Applicants remanded in custody can submit applications through the Correctional Services Department. Staff of the Crime Section often attend prisons, remand centres or court to complete the formalities in urgent cases. In addition, the Insolvency Unit in the Civil Litigation Section handles insolvency cases referred to it by the Labour Relations Office of the Labour Department to take winding up or bankruptcy proceedings for the recovery of arrears of wages and other employment-related entitlements from defaulting employers.

Governance

The LAD is a Government department overseen by the Home Affairs Bureau (HAB) which is responsible for formulating policies for the provision of legal aid services. The Legal Aid Services Council (LASC), an advisory body established under the Legal Aid Services Council Ordinance, is responsible for overseeing the administration of legal aid services provided by the LAD. The LASC is also responsible for advising the Chief Executive on matters relating to legal aid policy.



Is legal aid free of charge?

No. Under the OLAS, an aided person, subject to his / her assessed financial resources, may have to pay a contribution towards the costs that may be or become payable on his account by the DLA. For cases under the OLAS, legal aid will be granted when the applicant accepts the offer and pays the contribution, if any, depending on the amount of his /her assessed financial resources. The scale of contributions is prescribed in terms of a percentage in sliding scale in accordance with the amount of assessed financial resources of the applicant.

For the SLAS, an applicant has to pay an application fee and, if his / her application is successful, to pay an interim contribution at an amount equivalent to the maximum amount payable under OLAS since it is a self-financing scheme. Aided persons who are successful in litigation have to pay out of the damages awarded the costs and expenses of the aided proceedings that are not recovered from the opposite party, and also pay a percentage of the damages awarded to the Supplementary Legal Aid Fund to assist future litigants.

Eligibility determination factors:

During the application process, the DLA will conduct means testing, such that the applicant's financial resources are taken into consideration in accordance with the provisions of the Legal Aid Ordinance and related regulations. The DLA is empowered to assess the financial resources, i.e. the aggregate of the applicant's annual disposable income and disposable capital, and determines the amount of contribution payable in respect of the aided proceedings. The DLA may re-determine an aided person's financial resources if there appears to be a change in the circumstances of that person and may after this re-determination, re-determine that person's maximum contribution.

Is exemption allowed?

For civil cases, the DLA is empowered to waive the upper limit of financial resources imposed on the applicant under the OLAS where the application involves proceedings in which a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong is an issue. He has otherwise no discretion to waive the financial eligibility limits for civil legal aid. For criminal legal aid, the DLA is empowered, if he is satisfied that it is desirable in the interests of justice, to grant legal aid to an applicant notwithstanding that the applicant's financial resources exceed the limits.

Appendix B – Legal Aid Systems in Overseas Jurisdictions

250. Profile of England and Wales

Source: Regional, sub-regional and local gross value added 2009
Payscale.com

Demographics	<p>Population: ~ 54.8 million</p> <p>GDP: ~ HKD \$12,600 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$307,000 (2010)</p>
Legal system	<p>Type of legal system: Common law</p> <p>Remarks: England and Wales operate a common law system, and are the basis of common law systems used in most commonwealth countries. The essence of English common law is that it is made by judges sitting in court, applying their knowledge of legal precedent to the facts before them. Statute law is another source of the law of England and Wales. The power to make and pass law lies with the UK Parliament.</p>

251. Legal Aid Structure in England and Wales – An Overview

Sources: http://www.legalservices.gov.uk/aboutus/how/our_organisation.asp
<http://www.legalservices.gov.uk/aboutus.asp#more>

Legal aid administration	<p>Legal aid body: Legal Services Commission (LSC), which has been a replacement of Legal Aid Board since 2000</p> <p>Ordinance: Access to Justice Act 1999</p> <p>Status: The Government has announced that the legal body will move from a non-departmental public body to a government agency within the sponsoring Ministry.</p> <p>Purpose: To disseminate information, advise and provide legal support</p>
Funding	<p>Source of funding: Ministry of Justice. An approximate 15 percent budget cut within a three-year period have been forced upon the Ministry of Justice / Justice Department due to austerity measures.</p>
Operation and governance	<p>Are in-house lawyers available? No. LSC employs private solicitors and various NGOs as subcontractors to provide information, advice and legal representation to people in need.</p> <p>Collaboration with third parties: LSC delivers legal services through two schemes: The Community Legal Service (CLS) for people involved in civil cases, and the Criminal Defence Service (CDS) for people facing criminal charges. CLS is a network of solicitors, barristers and advice agencies which provides and promotes civil and family legal advice and representation. CDS allows solicitors' firms to offer advice, assistance, and magistrate court representation under contract.</p> <p>Governance: LSC is publicly accountable.</p>
Financial eligibility limits	<p>Is legal aid free of charge? For criminal legal aid, anyone who has a monthly disposable income of ~HKD \$3,495 or more and/or capital assets in excess of ~HKD \$370,535 will be asked to contribute. People with assets less than the suggested figures; who are under 18, and/or ones who are on state benefits, do not have to pay a contribution. Civil legal aid is also contributory. If the assisted party loses, legal aid is considered a grant. However, if the assisted party wins, legal aid is considered a loan which must be repaid from the contribution of the losing party or the assisted party's winnings.</p> <p>Eligibility determination factors: Applicants of legal aid are means tested on gross and disposable income, capital assets and whether they are receiving certain state benefits.</p> <p>Is exemption allowed? Yes, there are certain proceedings where funding is available to individuals without the need to reference a person's financial means, such as funding for parents involved in Special Children Act.</p>

Recent update (2011)

- Tighter financial control of legal aid budget in England and Wales

252. In 2011, the Ministry of Justice announced that the LSC would become an executive agency of the Ministry of Justice. The change is aimed at bringing tighter financial control over the legal aid budget.
253. The Ministry of Justice issued a consultation entitled “Proposals for the Reform of Legal Aid in England and Wales.” In his introduction to the consultation, the Secretary of State for Justice said,
254. “I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation of serious issues which have sufficient priority to justify the use of public funds, subject to people’s means and the merits of the case.”
255. "Legal aid must also play its part in fulfilling the Government’s commitment to reducing the fiscal deficit and returning this country’s economy to stability and growth. The proposals on which I am consulting are therefore designed with the additional aim of achieving substantial savings.”
256. The consultation closed in February 2011. Despite the five thousand responses which were largely critical, the government is implementing most of the proposed reforms – including the transfer of Legal Services functions to the Ministry of Justice – in the Legal Aid, Sentencing and Punishment of Offenders Bill which went through the House of Lords in early January 2012.
257. The Legal Aid, Sentencing and Punishment of Offenders Bill has now been passed as an Act. The transfer of the Legal Services Commission to become part of the Ministry of Justice will take place in April 2013.
258. With this change, the Director who has been responsible for Legal Aid in the Ministry of Justice will be appointed on fixed terms. This will ensure the independence of his/her remit and job security while he is in office, while restricting the ability of the Government to influence his actions unless it is by ways of public guidance and direction. The Government cannot interfere with the assessment of eligibility in individual legal aid cases and can only offer guidance and support. In addition, the Director must file an Annual Report at the end of the financial year, stating the scope of his remit for that year. This Annual Report will be sent to the

head of the Ministry of Justice, (the Lord Chancellor), who must lay it before the Parliament and publish it.

259. Profile of Scotland

Sources: Regional, sub-regional and local gross value added, 2009
 Payscale.com
<http://www.suite101.com/content/the-structure-of-the-scottish-legal-system---criminal-law-a330155>
http://www.siliconglen.com/Scotland/1_8.html
<http://www.scotland.gov.uk/Resource/Doc/925/0000078.pdf>

Demographics	<p>Population: ~ 5.19 million</p> <p>GDP: ~ HKD \$1,160 million (2008)</p> <p>Average annual salary (full time): ~ HKD \$317,000 (2008/09)</p>
Legal system	<p>Type of legal system: Common law</p> <p>Remarks: The Scottish legal system is separate from the rest of the UK and has a long history. It has its own courts, legislation and legal officers. However, Scots law can be separated into civil and criminal law. Civil cases are heard in the civil courts and criminal cases are heard in the criminal courts. The legal system is considered to be mixed, since it has elements of both civil and common law systems. Scots law is drawn from two main sources: statute and the common law. The Scottish Parliament, established under the Scotland Act 1998, can legislate on specific devolved matters but the UK Parliament can legislate on any issue for Scotland. Common law in Scotland derives its authority from the courts and is based on the legal traditions of Scotland. Institutional writers such as Lord Stair, Erskine, Bell and Hume have also greatly influenced Scots law. Scots Law clearly shares numerous statutory provisions with England and Wales. However, Scots civil law is based primarily on Scots common law. The civil law also contains elements that originate from Roman Dutch Law rather than English Common Law. The Scottish legal system is therefore considered to be rather unique.</p>

260. Legal Aid Structure in Scotland – An Overview

Source: http://www.slab.org.uk/about_us/what_we_do/what_we_do.htm

Legal aid administration	<p>Legal aid body: Scottish Legal Aid Board (SLAB)</p> <p>Ordinance: Legal Aid Scotland Act 1986</p> <p>Status: Executive non-departmental public body</p> <p>Purpose: To provide access to justice in a cost effective manner to those eligible and in need of it.</p>
Funding	<p>Source of funding: Publicly funded. The budget for legal aid is not a set figure, i.e., it is demand-led, not cash limited.</p>
Operation and governance	<p>Are in-house lawyers available? Yes, SLAB employs 25 public defenders for criminal cases. There are around 1600 private lawyers who are qualified to provide criminal legal aid services. There are around 10 civil legal aid lawyers employed by SLAB to augment services provided by private lawyers. They are funded by the legal aid body.</p> <p>Collaboration with third parties: SLAB works with a number of organisations such as Citizens Advice Scotland and other advice organisations throughout Scotland.</p> <p>Governance: SLAB is overseen by Board Members appointed by Scottish Ministers under the independently-monitored public appointments procedures.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, recipients of legal aid pay an income-related fee .</p> <p>Eligibility determination factors: Net Disposable Income and Capital.</p> <p>Is exemption allowed? Yes.</p>

261. Profile of Ontario, Canada

Source: Ontario Budget 2007 - Chapter II
Payscale.com

Demographics	<p>Population: ~ 13.1 million</p> <p>GDP: ~ HKD \$4,070 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$396,000 (2010)</p>
Legal system	<p>Type of legal system: Common law</p> <p>Source of legal system: The United Kingdom</p> <p>Remarks: The Canadian Constitution which defines the nature and powers extended to the federal/provincial governments forms a large part of the legal system. In addition, it sets out the basic rights of all Canadian citizens and therefore represents the supreme law of Canada. The legislative authority is split between the Canadian Parliament and the various provinces. The Canadian federal government has jurisdiction over matters that affect Canada as a whole, while provinces have authority over other matters. Ontario, as one such province, is being referenced in this report for comparison with other overseas jurisdictions.</p>

262. Legal Aid Structure in Ontario, Canada – An Overview

Source: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la5-rr03_aj5/p07.html

Legal aid administration	<p>Legal aid body: Legal Aid Ontario (LAO), which is a replacement of Ontario Legal Aid Plan (OLAP)</p> <p>Ordinance: Legal Aid Services Act by the Ontarian government</p> <p>Status: Independent non-profit corporation</p> <p>Purpose: To provide legal aid services to the low-income group in Ontario</p>
Funding	<p>Source of funding: This is currently in form of a publicly funded block grant. The amount has been fixed from previous years with a year-on-year increment that is adjusted for inflation.</p>
Operation and governance	<p>Are in-house lawyers available? Yes, the LAO operates a duty counsel service. Duty counsel refers to lawyers who give immediate legal assistance to the low-income group who stand before court without a lawyer. The LAO also operates Family Law Information Centres where lawyers are available to provide general legal advice, and can help with preparing documents.</p> <p>Collaboration with third parties: Student Legal Aid Services Societies (SLASS), funded by the LAO, operate out of Ontario's six law schools. With the supervision of full-time lawyers, volunteer law students provide legal advice and represent clients on legal matters.</p> <p>Governance: The LAO is publicly accountable.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, although non-contributory legal aid is available on the basis of an assessment of maximum allowances, including a basic allowance, and allowances for debts and shelter.</p> <p>Eligibility determination factors: Historically, the eligibility levels have been tied to provincial social service benefit levels. Financial eligibility is determined through a "needs test" which takes into account income but also considers the expenses and liabilities of the applicants.</p> <p>Is exemption allowed? Yes, there is an "income waiver" element of the eligibility determination process that "fast tracks" applicants who have very low incomes through the assessment of assets.</p>

263. Profile of New South Wales, Australia

Sources: NSW Government – Industry and Investment
Payscale.com

Demographics	<p>Population: ~ 7.17 million</p> <p>GDP: ~ HKD \$3,480 billion (2007-2008)</p> <p>Average annual salary (full time): ~ HKD \$487,000 (2010)</p>
Legal system	<p>Type of legal system: Common law</p> <p>Source of legal system: England</p> <p>Remarks: In addition to the Common law, the Australian legal system also comprises the federal laws enacted by the Australian Parliament and the laws enacted by' Parliaments of the various states/territories. Each state/territory is self-governing and is a separate jurisdiction, which has its own courts system and parliament. New South Wales, as one such state, is being referenced in this report for comparison with other overseas jurisdictions.</p>

264. Legal Aid Structure in New South Wales, Australia – An Overview

Source: <http://www.legalaid.nsw.gov.au/what-we-do>

Legal aid administration	<p>Legal aid body: Legal Aid NSW</p> <p>Ordinance: Legal Aid Commission Act 1979 by the NSW government</p> <p>Status: Independent statutory body</p> <p>Purpose: To provide legal aid and other legal services to disadvantaged people through different schemes.</p>
Funding	<p>Source of funding: Legal Aid NSW is funded by the Commonwealth and New South Wales Governments and the Public Purpose Fund (established under the Legal Profession Act 2004). It also receives some income from interest and client contributions. It is currently a block grant for legal aid in Australia. The amount has been fixed from previous years with a year-on-year increment that is adjusted for inflation.</p>
Operation and governance	<p>Are in-house lawyers available? Yes, in-house lawyers are available to provide legal advice to individuals who call to make an appointment. They also offer further help to individuals who are granted legal aid.</p> <p>Collaboration with third parties: Legal Aid NSW works with various community groups, NGOs and private lawyers to provide legal services to people throughout the state.</p> <p>Governance: The Board consists of non-executive members appointed by the Attorney General, and the Chief Executive Officer.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, most people will have to pay a contribution depending upon the financial situation and the area of law. Certain eligibility requirements will also need to be met.</p> <p>Eligibility determination factors: An applicant's net assessable income, net assessable assets and an assessment of applicant's ability to pay legal fees.</p> <p>Is exemption allowed? Yes.</p>

265. Profile of New Zealand

Source: World Bank, World Development Indicators
Payscale.com

Demographics	<p>Population: ~ 4.37 million</p> <p>GDP: ~ HKD \$979 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$336,000 (2010)</p>
Legal system	<p>Type of legal system: Common Law</p> <p>Source of legal system: England</p> <p>Remarks: The common law of New Zealand is a body of law built up from decisions made in both the United Kingdom and in New Zealand. Developments made in New Zealand courts over the years, however, have led the common law of New Zealand to diverge from English common law. Statute law, which is all the law made by Parliament, is the second main source.</p>

266. Legal Aid Structure in New Zealand – An Overview

Legal aid administration	<p>Legal aid body: Ministry of Justice</p> <p>Ordinance: Legal Services Act 2011</p> <p>Status: The Government has announced that the legal aid body will move from a non-departmental public body to a government agency within the sponsoring Ministry.</p> <p>Purpose: To promote access to justice in New Zealand by providing a legal scheme which allows people who cannot afford legal services can have access to them.</p>
Funding	<p>Source of funding: Government funding</p>
Operation and governance	<p>Are in-house lawyers available? Yes, duty lawyers are available to provide free legal help to people who have been charged with an offence and do not have their own lawyer.</p> <p>Collaboration with third parties: The Ministry of Justice works with various Community Law Centres to provide a broad scope of legal services tailored to each community's needs.</p> <p>Governance: The Ministry of Justice is accountable to the New Zealand parliament.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, it is contributory.</p> <p>Eligibility determination factors: There are different financial thresholds for legal aid, depending on the individual's circumstances.</p> <p>Is exemption allowed? Yes.</p>

Recent update (2011)

- Transformation of Legal Services Agency in New Zealand

267. Following Dame Margaret Bazley's review, "Transforming the Legal Aid System", and subsequent Cabinet decisions, a range of improvements to the legal aid system were introduced in the Legal Services Act 2011. Following the act, the Legal Services Agency has been disestablished and the Ministry of Justice has become responsible for administering the system.
268. Furthermore, an independent statutory officer, the Legal Aid Commissioner, has been established under the new Act within the Ministry of Justice to ensure that there is independence in granting legal aid to individuals.

269. Profile of the Republic of Ireland

Source: World Bank, World Development Indicators
Payscale.com

Demographics	<p>Population: ~ 4.5 million</p> <p>GDP: ~ HKD \$1,950 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$368,000 (2010)</p>
Legal system	<p>Type of legal system: Common Law</p> <p>Source of legal system: England</p> <p>Remarks: Ireland also has a written constitution, which is absent in English common law.</p>

270. Legal Aid Structure in the Republic of Ireland – An Overview

Source: http://www.legalaidboard.ie/lab/publishing.nsf/Content/Civil_Legal_Aid

Legal aid administration	<p>Legal aid body: Legal Aid Board</p> <p>Ordinance: Civil Legal Aid Act 1995, Civil Legal Aid Regulations, Criminal Justice (Legal Aid) Act</p> <p>Status: Independent statutory body</p> <p>Purpose: To provide legal aid and advice on civil law to persons unable to fund such services from their own resources.</p>
Funding	<p>Source of funding: Publicly funded</p>
Operation and governance	<p>Are in-house lawyers available? Yes.</p> <p>Collaboration with third parties: There are a small number of associations seeking to provide legal advice on a voluntary basis. These include the nationwide Free Legal Advice Centres, and the Dublin based Northside and Ballymun Community Law Centres</p> <p>Governance: The Board consists of a chairperson and members drawn from various stakeholder communities.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, recipients of legal aid pay a contribution based on their disposable income and their disposable capital, if any.</p> <p>Eligibility determination factors: An applicant's annual disposable income and capital.</p> <p>Is exemption allowed? Yes.</p>

271. Profile of Northern Ireland

Sources: Regional, sub-regional and local gross value added 2009
Payscale.com

Demographics	<p>Population: ~ 1.79 million</p> <p>GDP: ~ HKD \$347 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$280,000 (2010)</p>
Legal system	<p>Type of legal system: Common Law</p> <p>Source of legal system: The United Kingdom</p> <p>Remarks: The Northern Irish common law is very similar to the common law of England, yet there are some important differences in both law and procedure.</p>

272. Legal Aid Structure in Northern Ireland – An Overview

Source: <http://www.nilsc.org.uk/>

Legal aid administration	<p>Legal aid body: Northern Ireland Legal Services Commission (NILSC)</p> <p>Ordinance: Access to Justice (Northern Ireland) Order 2003</p> <p>Status: Non-departmental public body</p> <p>Purpose: To promote fair and equal access to justice in Northern Ireland in its provision of publicly funded legal services.</p>
Funding	<p>Source of funding: It is part of the Ministry of Justice and sponsored by the Northern Ireland Court Service.</p>
Operation and governance	<p>Are in-house lawyers available? Yes.</p> <p>Collaboration with third parties: The Northern Ireland Legal Services Commission works with various community groups, NGOs and private lawyers to provide legal services to people throughout the country.</p> <p>Governance: Currently eight commissioners plus a Chair appointed by the Lord Chancellor of England & Wales in accordance with public appoint procedures – a process publicly monitored. It has recently been proposed that the NILSC should become an executive agency in the Northern Ireland Justice Department, in part because of an exponential rise in some very costly criminal cases (one percent of cases costs 30 percent of the entire legal budget).</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, recipients of legal aid pay an income-related fee.</p> <p>Eligibility determination factors: An applicant's capital and disposable monthly income for the green form scheme and an applicant's capital and gross monthly income for publicly-funded legal representation.</p> <p>Is exemption allowed? Yes.</p>

273. Profile of the Netherlands

Sources: World Bank, World Development Indicators
 Payscale.com
<http://www.investinthenetherlands.org/?id=15>

Demographics	<p>Population: ~ 16.7 million</p> <p>GDP: ~ HKD \$6,540 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$440,000 (2010)</p>
Legal system	<p>Type of legal system: Civil Law</p> <p>Source of legal system: French Code Civil</p> <p>Remarks: The Dutch system of law is based on the French Code Civil with influences from Roman Law and traditional Dutch customary law. The new civil law books (which went into force in 1992) were heavily influenced by the German Bürgerliches Gesetzbuch.</p>

274. Legal Aid Structure in the Netherlands – An Overview

Sources: http://www.rvr.org/binaries/rbv-downloads/brochures/def-opmaakvoorsel-brochure-legal-aid--rvr90265-_ve.pdf
http://ec.europa.eu/civiljustice/legal_aid/legal_aid_net_en.htm

Legal aid administration	<p>Legal aid body: Legal Aid Board (Raad voor Rechtsbijstand)</p> <p>Ordinance: Legal Aid Act 1994. It has since undergone numerous amendments. The last amendment took effect on July 1st, 2009.</p> <p>Status: The legal aid system is a mixed model that consists of a public first-line and a private second-line.</p>
Funding	<p>Purpose: The Dutch Legal Aid system provides legal aid to people of limited means.</p> <p>Source of funding: The legal aid itself is mainly financed by the state (the Legal Aid Fund) and only for a minor part from income-related fee of individual clients. The budget for legal aid is not a set figure, i.e., it is demand-led, not cash-limited.</p>
Operation and governance	<p>Are in-house lawyers available? Yes, in-house lawyers are available to provide legal advice about simple legal matters, and refer clients to private lawyers or mediators if their cases turn out to be more complicated and time-consuming,</p> <p>Collaboration with third parties: The Legal Aid Board works with various community groups and NGOs and private lawyers to provide legal services to people throughout the Netherlands.</p> <p>Governance: The Board is made up of five regional offices and one central office. The Board is not a Government agency but independent of the Ministry of Justice. Two directors of the board are appointed by Ministry of Justice. The Advisory Council to the Board is also appointed by the Ministry of Justice.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, recipients of legal aid pay an income-related fee.</p> <p>Eligibility determination factors: An applicant's disposable income and asset.</p> <p>Is exemption allowed? Yes.</p>

275. Profile of Finland

Sources: World Bank, World Development Indicators
 Payscale.com
<http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

Demographics	<p>Population: ~ 5.26 million</p> <p>GDP: ~ HKD \$2048 billion (2008)</p> <p>Average annual salary (full time): ~ HKD \$431,000 (2010)</p>
Legal system	<p>Type of legal system: Civil Law</p> <p>Source of legal system: The Roman Empire</p> <p>Reference: As opposed to common law, civil law "has comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense."</p>

276. Legal Aid Structure in Finland – An Overview

Sources: Legal Aid and Legal Services in Finland (Rosti, Miemi & Lasola). P63
http://ec.europa.eu/civiljustice/legal_aid/legal_aid_fin_en.htm

Legal aid administration	<p>Legal aid body: A division within the Ministry of Justice</p> <p>Ordinance: Legal Aid Act, the Act on Legal Aid Offices and various Government Decrees</p> <p>Status: Operated by the State</p> <p>Purpose: The purpose of legal aid activities is to ensure that citizens receive sufficient and professional services for a price that corresponds to their paying capacity irrespective of their financial position.</p>
Funding	<p>Source of funding: Public funds</p>
Operation and governance	<p>Are in-house lawyers available? Yes, legal aid advice and counseling is given by lawyers employed by the Ministry of Justice based in 41 public legal aid offices around the country. These lawyers also provide court representation funded by the legal aid body. Private lawyers may also provide legally-aided representation in courts. Assisted parties have a free choice of in-house or private lawyers at the court stage.</p> <p>Collaboration with third parties: Legal aid in Finland is provided in a context where there is already extensive publicly-funded advice to citizens. All public bodies are required to provide advice to their customers/clients about their legal rights and may be fined if they give inaccurate advice. There is also an extensive Ombudsman system which extends beyond the public sector. Many legal disputes in Finland fall under the jurisdiction of the Administrative Courts which adopt an inquisitorial system under which legal representation is not required.</p> <p>Governance: The Ministry of Justice is accountable to the Finnish parliament.</p>
Financial eligibility limits	<p>Is legal aid free of charge? No, most people will have to pay a contribution depending upon the financial situation and the area of law. Certain eligibility requirements will also need to be met.</p> <p>Eligibility determination factors: Monthly available funds of applicants and spouses, applicants' bank deposits and readily available assets.</p> <p>Is exemption allowed? Yes.</p>

Appendix C – Questionnaires

277. Questionnaire for Legal Practitioners


Independent Legal Aid Authority – Feasibility and Desirability Study

Questionnaire for Legal Practitioners (Barristers and Solicitors)

INTRODUCTION

The Legal Aid Services Council ("LASC") has appointed Deloitte Consulting (Hong Kong) Limited ("Deloitte Consulting") to conduct an independent consultancy study (the "Study") on the feasibility and desirability of establishing an independent legal aid authority in Hong Kong.

As a legal practitioner in Hong Kong, you are cordially invited to complete a survey which should take no more than 5 minutes.

 *Please start the paper questionnaire from next page*

PERCEPTION OF LEGAL AID SERVICES

The LAD, currently a government department, processes all legal aid applications according to the Legal Aid Ordinance. In terms of monitoring the work of LAD, the Legal Aid Services Council which is an independent statutory body that serves as the Chief Executive’s advisory body on the policy concerning legal aid services is empowered to review the work of the LAD. The decision of the Director of Legal Aid is subject to review by the Court whose decision is final.

1. In your opinion, does the LAD currently operate sufficiently independent of government?

- ₁ Yes
- ₂ No
- ₃ Others, please specify: _____

2. Do you think that LAD's evaluation of legal aid applications and/or the handling of subsequent legal proceedings are at risk of being influenced by the government?

- ₁ Yes, because _____
- ₂ No
- ₃ Others, please specify: _____

3. In your opinion, should the LAD increase its independence from government?

- ₁ Yes
- ₂ No
- ₃ Others, please specify: _____

Independence from government can mean different things. In the following questions no. 4-6, we are interested in finding which aspect of independence you may regard as being desirable.

Remarks: "Desirability" means how much you want to see it happen.

4. Financial aspect

Remarks: A **financially** independent legal aid authority means that the body will receive a budget directly from the government and possibly from the money recovered from successful legally aided persons. Decisions on how to spend this budget will be determined solely by this independent legal aid authority.

a. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **financially** independent of government?

1	2	3	4	5	6	7	8	9	10

Others, please specify:

- b. Why did you pick this number? What are the benefits of establishing a **financially** independent legal aid authority? How do you think this will be different from the current LAD setup?

5. **Operational aspect**

*Remarks: An **operationally** independent legal aid authority means that the staff will no longer be civil servants. Moreover, the body's operational procedures would be determined by the independent legal aid authority itself.*

- a. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **operationally** independent of government?

1	2	3	4	5	6	7	8	9	10

Others, please specify:

- b. Why did you pick this number? What are the benefits of establishing an **operationally** independent legal aid authority? How do you think this will be different from the current LAD setup?

6. **Institutional aspect**

*Remarks: An **institutionally** independent legal aid authority means that the body will no longer be a government department. It could be a quasi-government agent or a body that is totally independent of the government.*

- a. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **institutionally** independent of government?

1	2	3	4	5	6	7	8	9	10

Others, please specify:

- b. Why did you pick this number? What are the benefits of establishing an **institutionally** independent legal aid authority? How do you think this will be different from the current LAD setup?

7. Would you be willing to participate in follow up discussion through interview or focus group study so that your opinions and concerns on independence of legal aid are better understood and addressed?

- ₁ Yes. Please provide your contact details. Your information will be maintained strictly confidential.

Name :	
Phone :	
Email :	
Address :	

- ₂ No

OTHERS

8. What is your occupation?

- ₁ Barrister ₂ Solicitor

9. Have you ever been engaged by LAD?

- ₁ Yes, employed by LAD as in-house lawyer.
₂ Yes, worked on a legally aided case as an external solicitor or barrister.
₃ No, never.

This concludes the questionnaire. Thank you for your participation.

Survey of Legal Aid Applicants/Aided Persons Regarding Legal Aid Independence
以法律援助申請人及受助人為對象有關法律援助獨立性的調查

INTRODUCTION

簡介

The Legal Aid Services Council ("LASC") has appointed Deloitte Consulting (Hong Kong) Limited ("Deloitte Consulting", "we") to conduct a study regarding the desirability of establishing an independent legal aid authority. As someone who has applied to the Legal Aid Department ("LAD"), you have been selected to participate in this survey on a random basis. Your opinion will provide us with valuable insights. We would very much appreciate your help if you could spare approximately 5 minutes to run through a short questionnaire. The information that you give will be kept strictly confidential and used for statistical purposes only. No one will be able to identify you from this questionnaire.

法律援助服務局（下稱「法援局」）已委任德勤企業管理諮詢（香港）有限公司（下稱「德勤諮詢」/「我們」）展開一項顧問研究（下稱「此研究」），以評估成立獨立法律援助機構的可取性。由於閣下曾向法律援助署（下稱「法援署」）申請法律援助，現被隨機抽樣選定參與此調查。閣下的意見對此研究尤為重要，我們很希望閣下能抽空約 5 分鐘填寫以下簡短問卷。你所提供的資料將被嚴格保密，並只會用於統計用途。無人將能夠由此問卷識別你的身分。

Instructions: Please check the box where appropriate. Completed questionnaires should be returned to Deloitte Consulting directly via the enclosed prepaid envelope.

說明：請在適當的答案旁劃上剔號，並將填妥的問卷用隨附的回郵信封直接寄回德勤諮詢。



Please start the questionnaire from next page
請揭下一頁開始問卷

PART A: EXPERIENCE OF LEGAL AID SERVICES

甲：法律援助服務的經驗

1. When did you apply for legal aid? (Select multiple answers if applicable)

請問你在什麼時候申請過法律援助？（可選多個答案）

- ₁ Year 2007 – current 2007 年 – 現在
- ₂ Year 2002 – Year 2006 2002 年 – 2006 年
- ₃ Before Year 2002 2002 年以前

2. For what type(s) of cases have you applied for legal aid? (Select multiple answers if applicable)

請問你為哪些案件申請法律援助？（可選多個答案）

- ₁ Matrimonial cases 婚姻訴訟案件
- ₂ Traffic accident claims 交通意外索償
- ₃ Landlord and tenant disputes 業主與租客糾紛
- ₄ Claims in respect of industrial accidents 工業意外方面的申索
- ₅ Employees' wages and related employment benefits 僱員的工資及相關就業福利
- ₆ Immigration matters 入境事務
- ₇ Breach of contract 合約糾紛
- ₈ Professional negligence 專業疏忽
- ₉ Seamen's wage claims 海員追討欠薪
- ₁₀ Mental Health Review Tribunal cases 精神健康覆核審裁處案件
- ₁₁ Coroners inquests involving interests of public justice 涉及公義的死因聆訊
- ₁₂ Criminal Cases 刑事案件

3. Was your legal aid application successful? (If you have applied for more than once, was your latest legal aid application successful?)

你的法律援助申請是否成功？（如果你曾申請多於一次，你最近一次的法律援助申請是否成功？）

- ₁ Yes 是 (Proceed to Q.4) （前往問題 4）
- ₂ No 否 (Proceed to Q.5) （前往問題 5）
- ₃ I decided to withdraw the application, because _____ (Proceed to Q.8)
本人選擇撤回申請，因為 _____ （前往問題 8）
- ₄ Others, please specify: _____ (Proceed to Q.8)
其他，請註明： _____ （前往問題 8）

4. Was your case handled by LAD in-house lawyers or assigned out to private practitioners?
你的案件是由法援署內部律師或是由法援署外判的私人執業律師處理呢?
- ₁ LAD in-house lawyers 法援署內部律師 (Proceed to Q.8) (前往問題 8)
- ₂ Assigned out to private practitioners 私人執業律師 (Proceed to Q.8) (前往問題 8)
- ₃ Others, please specify: _____ (Proceed to Q.8)
其他, 請註明: _____ (前往問題 8)
5. Which of the following reasons was given for the rejection of your application? (Select multiple answers if applicable)
你的申請被拒是基於以下哪個原因? (可選多個答案)
- ₁ Lack of reasonable grounds 缺乏合理理據
- ₂ Unreasonable in the particular circumstances for legal aid to be granted 就案件的個別情況而言, 給予法律援助並不合理
- ₃ Financial resources exceeded the financial eligibility limit 財務資源超逾財務資格限額
- ₄ Others, please specify: _____
其他, 請註明: _____
6. Did you appeal against the rejection of your application to the Registrar of the High Court?
就你被拒的申請, 你有否向高等法院司法常務官提出上訴?
- ₁ Yes, and the appeal was allowed 有, 並且上訴得直
- ₂ Yes, but the appeal was dismissed 有, 但是上訴被駁回
- ₃ No, because _____ (Proceed to Q.8)
沒有, 因為 _____ (前往問題 8)
7. What was the approximate time lapse between the date of the Registrar of High Court's final decision on your appeal and the date of your initial legal aid application?
高等法院司法常務官就你的上訴作出最終決定的日期, 相距你最初申請法律援助的日期大概有多久?
_____ Days 天
8. Generally speaking, do you think that the processing of legal aid applications and/or the handling of subsequent legal proceedings are influenced by the government?
總括而言, 你認為法律援助申請的審批及其後法律程序的處理有沒有受到政府干預呢?
- ₁ Yes, because _____
有, 因為 _____
- ₂ No 沒有
- ₃ Others, please specify: _____
其他, 請註明: _____

PART B: PERCEPTION OF LEGAL AID SERVICES

乙：你對法律援助服務的評價及見解

The LAD, currently a government department, processes all legal aid applications according to the Legal Aid Ordinance. In terms of monitoring the work of LAD, the Legal Aid Services Council which is an independent statutory body that serves as the Chief Executive's advisory body on the policy concerning legal aid services is empowered to review the work of the LAD. The decision of the Director of Legal Aid is subject to review by the Court whose decision is final.

法援署目前是一個政府部門，根據《法律援助條例》審批所有法律援助的申請。在監察法援署的工作方面，則由法律援助服務局負責。法律援助服務局是一個獨立的法定機構及諮詢組織，就法律援助服務的政策向行政長官提供意見，該局獲賦權檢討法援署的工作。法援署署長的決定可由法院覆核，以法院的決定為最終決定。

9. In your opinion, does the LAD currently operate sufficiently independent of government?

就你個人意見，你認為現時法援署的運作是否充分獨立於政府呢？

- 1 Yes 是
- 2 No 否
- 3 Others, please specify: _____
其他，請註明： _____

10. In your opinion, should the LAD increase its independence from government?

就你個人意見，你認為法援署是否有需要更加獨立於政府？

- 1 Yes 有需要
- 2 No 沒有需要
- 3 Others, please specify: _____
其他，請註明： _____

Independence from government can mean different things. In the following questions no. 11-13, we are interested in finding which aspect of independence you may regard as being desirable.

Remarks: "Desirability" means how much you want to see it happen.

獨立於政府可以從不同方面來理解。以下第 11-13 條問題，旨在探討你認為哪些方面的獨立是可取的。

備註：「可取」指你有多希望這件事發生。

10. Financial aspect 財政方面

Remarks: Financially independent legal aid authority means that the body will receive a budget directly from the government and possibly from the money recovered from successful legally aided persons. Decisions on how to spend this budget will be determined solely by this independent legal aid authority.

備註：財政獨立的法律援助機構是指該機構將直接從政府獲得財政預算，另一方面，資金亦可能從勝訴的法律援助受助人獲得。至於如何使用這筆財政預算，則完全由該獨立的法律援助機構決定。

- c. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **financially** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**財政**方面獨立於政府的法律援助機構的可取性有多高？

1	2	3	4	5	6	7	8	9	10

Others, please specify:

其他，請註明：

- d. Why did you pick this number? What are the benefits of establishing a **financially** independent legal aid authority? How do you think this will be different from the current LAD setup?

為甚麼你會選擇這個分數呢？建立一個在**財政**方面獨立於政府的法律援助機構有甚麼好處？你認為這個機構跟現時的法援署的體制會有甚麼不同呢？

11. **Operational aspect** 運作方面

Remarks: An **operationally** independent legal aid authority means that the staff will no longer be civil servants. Moreover, the body's operational procedures would be determined by the independent legal aid authority itself.

備註: 運作獨立的法律援助機構是指該機構的員工不再是公務員，而機構的日常運作程序，全由該機構決定。

- a. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **operationally** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**運作**方面獨立於政府的法律援助機構的可取性有多高？

1	2	3	4	5	6	7	8	9	10

Others, please specify: _____

其他，請註明： _____

- b. Why did you pick this number? What are the benefits of establishing an **operationally** independent legal aid authority? How do you think this will be different from the current LAD setup?

為甚麼你會選擇這個分數呢？建立一個在**運作**方面獨立於政府的法律援助機構有甚麼好處？你認為這個機構跟現時法援署的體制會有甚麼不同呢？

12. **Institutional aspect** 制度方面

Remarks: An **institutionally** independent legal aid authority means that the body will no longer be a government department. It could be a quasi-government agent or a body that is totally independent of the government.

備註: 制度獨立的法律援助機構是指這個機構不再是一個政府部門，而可能是一個半政府機構或者是一個完全獨立於政府的機構。

- a. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **institutionally** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**制度**方面獨立於政府的法律援助機構的可取性有多高？

1	2	3	4	5	6	7	8	9	10

Others, please specify: _____

其他，請註明: _____

- b. Why did you pick this number? What are the benefits of establishing an **institutionally** independent legal aid authority? How do you think this will be different from the current LAD setup?

為甚麼你會選擇這個分數呢？建立一個在**制度**方面獨立於政府的法律援助機構有甚麼好處？你認為這個機構跟現時法援署的體制會有甚麼不同呢？

13. Regarding the issue of legal aid independence, do you have any other opinion(s)?

就法援獨立性的問題，你有其他意見嗎？

₁ Yes, please specify 有，請註明:

₂ No 沒有

PART C: DEMOGRAPHICS

丙：被訪者資料

14. Where did you first learn about legal aid services? (Select multiple answers if applicable)
你最初從何處得到有關法律援助服務的知識？（可選多個答案）

- ₁ Mass media 傳媒
- ₂ Legal Aid Department's brochures or website 法律援助署的宣傳小冊子或網站
- ₃ Other government departments 其他政府部門
- ₄ Legislative Councilors, District Councilors, NGOs, community groups
立法會議員、區議會議員、非政府機構或社區團體
- ₅ Other parties in the legal field, such as lawyers and compensation collection agents
其他法律界代表，如律師或索償代表人
- ₆ Relatives and friends 親戚朋友
- ₇ Legal aid services is related to my work or education 法律援助服務與我的工作或教育有關
- ₈ Others, please specify: _____
其他，請註明： _____

15. Have you ever worked in the legal field?
你有沒有曾經於法律界工作？

- ₁ Yes 有
- ₂ No 沒有
- ₃ Others, please specify: _____
其他，請註明： _____

This concludes the questionnaire. Thank you for your participation.
調查完畢，多謝你的參與。

279. Telephone Survey for General Public

Legal Aid Services Council: Independence of Legal Aid

Telephone Survey – General Public

法律援助服務局：法律援助的獨立性

電話調查 - 廣大市民

INTRODUCTION

簡介

[INTERVIEWER READ]

Good morning/afternoon/evening my name is _____, from Ipsos Market Research, an independent market research company. We are conducting a survey today on behalf of the Legal Aid Services Council regarding the desirability of establishing an independent legal aid authority. We hope you could spare approximately 5 minutes to run through a short questionnaire. The information that you give will be strictly confidential and used for statistical purposes only. No one will be able to identify you from this questionnaire.

[訪問員讀]

你好,我叫做_____,係易普索(Ipsos)市場研究公司嘅訪問員。今日,我哋代表法律援助服務局進行一項關於成立獨立法律援助機構嘅可取性嘅調查。希望你可以抽大約 5 分鐘時間做呢個訪問。請放心,你嘅個人資料同意見將會絕對保密,並只會作統計用途。

PART A: FILTERING QUESTIONS

甲：甄別問題

1. Since this questionnaire is only intended for respondents within a certain age range, would you mind telling me how old you are? 由於呢個問卷只係適用嘅某個年齡範圍內嘅受訪者,你介唔介意話我知你幾多歲?
 - _1 Below 18 18 歲以下..... [Ask to speak with someone at 18 or older] 要求邀請一位 18 歲或以上人士受訪
 - _2 18-24..... [Please proceed to Q.2] 問 Q.2
 - _3 25-34..... [Please proceed to Q.2] 問 Q.2
 - _4 35-49..... [Please proceed to Q.2] 問 Q.2
 - _5 50-64..... [Please proceed to Q.2] 問 Q.2
 - _6 Above 64 64 歲以上..... [Terminate questionnaire] (多謝及終止訪問)

2. Have you ever applied for or received legal aid from the Legal Aid Department (LAD)? 你有無曾經申請過或接受過法律援助署提供嘅法律援助?

₁ No 無..... [Please proceed to Q.2b] 問 Q.2b

₂ Yes 有..... [Terminate questionnaire] (多謝及終止訪問)

b. Has any member of your family applied for or received legal aid from LAD? 你有無家庭成員曾經申請過或接受過法律援助署提供嘅法律援助?

₁ No 無..... [Please proceed to Q.3a] 問 Q.3a

₂ Yes 有 [Please proceed to Q.4] 問 Q.4

₃ Not sure 唔清楚，唔肯定 (DO NOT READ)(不要讀出答案) [Please proceed to Q.3a] 問 Q.3a

3. a. Have you ever heard of the LAD?

你有無聽過法律援助署（法援署）？

₁ Yes 有..... [Please proceed to Q.3b] 問 Q.3b

₂ No 無..... [Terminate Questionnaire] (多謝及終止訪問)

b. Can you give examples of what LAD does? (DO NOT READ THE ANSWERS) (MULTIPLE ANSWERS ALLOWED)

你可唔可以舉例講出法律援助署會做嘅野？（不要讀出答案）（可提供幾個答案）

Probe: Are there any other services provided by LAD?

Is there anything else you can tell me about it?

充分追問: 法律援助署仲有無提供其他服務？

仲有咩其他野你可以話我知？

(Note to interviewer: This question is to test whether the respondent has basic knowledge on LAD. As long as the respondent can provide some ideas that match any of the following descriptions, please check the answers and proceed to Q.4. Otherwise, please terminate questionnaire.)

訪問者請注意: 此問題旨在測試一下被訪者對法律援助署有否基本的知識。如被訪者可以大概講出任何下列相關的描述，請記下然後問 Q.4。否則，請終止調查。

₁ Assist people who are unable to afford legal representation 幫助窮嘅人請律師打官司

₂ Assist people who are unable to afford access to the court system
幫助無能力比堂費嘅人

₃ Assist people who are charged with a crime 幫助被指控犯罪嘅人

₄ Provide legal advice 提供法律意見

- ₅ Matrimonial cases / divorces / family disputes 婚姻訴訟/ 離婚 / 家庭糾紛案件
- ₆ Traffic accident claims 交通意外索償
- ₇ Landlord and tenant disputes 業主與租客糾紛
- ₈ Claims in respect of industrial accidents 工業意外方面的申索
- ₉ Employees' wages and related employment benefits 僱員的工資及相關就業福利
- ₁₀ Immigration matters 入境事務
- ₁₁ Breach of contract 合約糾紛
- ₁₂ Professional negligence 專業疏忽
- ₁₃ Seamen's wage claims 海員追討欠薪
- ₁₄ Mental Health Review Tribunal cases 精神健康覆核審裁處案件
- ₁₅ Coroners inquests involving interests of public justice 涉及公義的死因聆訊
- ₁₆ Criminal Cases 刑事案件

[Terminate Questionnaire if no valid answer is provided]

[如未能提供任何可取之描述，請終止調查。]

PART B: LEGAL AID SERVICES

乙：法律援助服務

4. [INTERVIEWER READ]

The LAD, currently a government department, processes all legal aid applications according to the Legal Aid Ordinance. In terms of monitoring the work of LAD, the Legal Aid Services Council which is an independent statutory body that serves as the Chief Executive's advisory body on the policy concerning legal aid services is empowered to review the work of the LAD. The decision of the Director of Legal Aid is subject to review by the Court whose decision is final.

[訪問員讀]

事實上，法援署目前係一個政府部門，根據《法律援助條例》審批所有法律援助的申請。至於監察法援署嘅工作方面，則由法律援助服務局負責。法律援助服務局係一個獨立嘅法定機構及諮詢組織，就法律援助服務嘅政策向行政長官提供意見，該局獲賦權檢討法援署嘅工作。法援署署長的決定可由法院覆核，以法院的決定為最終決定。

In your opinion, does the LAD currently operate sufficiently independent of government?

就你個人意見，你認為現時法援署嘅運作係唔係充分獨立於政府呢？

- ₁ Yes 係
- ₂ No 唔係
- ₃ Don't know how it operates (DO NOT READ) 唔知道法律援助署點運作（不要讀出）
- ₄ Don't know if it is independent (DO NOT READ) 唔知道法律援助署係唔係獨立（不要讀出）
- ₅ Don't care (DO NOT READ) 唔關注、無所謂、是旦（不要讀出）
- ₆ Others, please specify: _____ (DO NOT READ)
其他，請註明： _____（不要讀出）

5. In your opinion, should the LAD increase its independence from government?

就你個人意見，你認為法援署需唔需要更加獨立於政府呢？

- ₁ Yes 需要
- ₂ No 唔需要
- ₃ Don't know (DO NOT READ) 唔知道（不要讀出）
- ₄ Don't care (DO NOT READ) 唔關注、無所謂、是旦（不要讀出）
- ₅ Others, please specify: _____ (DO NOT READ)
其他，請註明： _____（不要讀出）

[INTERVIEWER READ] Independence from government can mean different things. In the following questions no. 6-9, we are interested in finding which aspect of independence you may regard as being desirable.

[INTERVIEWER READ] "Desirability" means how much you want to see it happen.

[訪問員讀] 獨立於政府可以從不同方面來理解。以下第 6-9 條問題，旨在探討你認為哪些方面的獨立是可取的。

[訪問員讀] 「可取」是指你有多希望這件事發生。

6. Financial aspect 財政方面

[INTERVIEWER READ]: Financially independent legal aid authority means that the body will receive a budget directly from the government and possibly from the money recovered from successful legally aided persons. Decisions on how to spend this budget will be determined solely by this independent legal aid authority.

[訪問員讀]: 財政獨立的法律援助機構是指該機構將直接從政府獲得財政預算，另一方面，資金亦可能從勝訴的法律援助受助人獲得。至於如何使用這筆財政預算，則完全由該獨立的法律援助機構決定。

e. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **financially** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**財政**方面獨立於政府嘅法律援助機構嘅可取性有幾高？

1	2	3	4	5	6	7	8	9	10

Others, please specify: _____

其他，請註明: _____

b. Probe: (for respondents choosing 5 or below) How do you think this will be different from the current LAD setup?

Probe: (for respondents choosing 6 or above) What are the benefits of establishing a financially independent legal aid authority?

充分追問: (詢問選擇 5 分或以下的受訪者)你認為呢個機構同現時法援署嘅體制會有咩唔同？

充分追問: (詢問選擇 6 分或以上的受訪者)建立一個係**財政**方面獨立於政府嘅法律援助機構有咩好處？

7. **Operational aspect 運作方面**

[INTERVIEWER READ]: An **operationally** independent legal aid authority means that the staff will no longer be civil servants. Moreover, the body's operational procedures would be determined by the independent legal aid authority itself.

[訪問員讀]: 運作獨立的法律援助機構是指該機構的員工不再是公務員，而機構的日常運作程序，全由該機構決定。

- c. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **operationally** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**運作**方面獨立於政府的法律援助機構的可取性有幾高？

1	2	3	4	5	6	7	8	9	10

Others, please specify: _____

其他，請註明：_____

- b. **Probe: (for respondents choosing 5 or below)** How do you think this will be different from the current LAD setup?

Probe: (for respondents choosing 6 or above) What are the benefits of establishing a operationally independent legal aid authority?

充分追問: (詢問對於選擇 5 分或以下的受訪者) 你認為呢個機構同現時法援署嘅體制會有咩唔同？

充分追問: (詢問對於選擇 6 分或以上的受訪者) 建立一個喺**運作**方面獨立於政府嘅法律援助機構有咩好處？

8. Institutional aspect 制度方面

[INTERVIEWER READ]: An **institutionally** independent legal aid authority means that the body will no longer be a government department. It could be a quasi-government agent or a body that is totally independent of the government.

[訪問員讀]: **制度**獨立的法律援助機構是指這個機構不再是一個政府部門，而可能是一個半政府機構或者係一個完全獨立於政府嘅機構。

- c. In your opinion, on the scale of 1-10, 1 being lowest and 10 being highest, what is the desirability of establishing an independent legal aid authority which is **institutionally** independent of government?

如果 1 至 10 分，以 1 為最低，10 為最高分，你認為建立一個在**制度**方面獨立於政府嘅法律援助機構嘅可取性有幾高？

1	2	3	4	5	6	7	8	9	10

Others, please specify:

其他，請註明：

9. The Legal Aid Service Council wishes to fully understand the general public's point of view on the issue of legal aid independence. Would you be willing to participate in follow up discussion through interview or focus group study so that your opinions and concerns on independence of legal aid are better understood and addressed? If needed, can we pass your information to the Legal Aid Service Council separately? 法律援助服務局希望充分收集市民對法律援助獨立性嘅意見。你會唔會願意參與跟進討論，例如通過訪問或焦點小組嚟比法律援助服務局更了解你對法律援助獨立性嘅睇法？如果有需要，請問我哋可唔可以將你嘅資料單獨咁交俾法律援助服務局呢？

- ₁ Yes. Please provide your contact details. Your information will be maintained strictly confidential. 願意。請提供你的聯絡資料。你的資料將會被嚴格保密。

Name 姓名:	
Phone 電話:	
Email 電郵地址:	
Address 地址:	

- ₂ No 不願意

PART C: DEMOGRAPHICS

丙：被訪者資料

10. Where did you get the knowledge of legal aid services? (You may select multiple answers.)你喺邊度得到有關法律援助服務嘅知識？（可選幾個答案）

- ₁ Mass media 傳媒
- ₂ Legal Aid Department's brochures or website 法律援助署嘅宣傳小冊子或網站
- ₃ Other government departments 其他政府部門
- ₄ Legislative Councilors, District Councilors, NGOs, community groups 立法會議員、區議會議員、非政府機構或社區團體
- ₅ Other parties in the legal field, such as lawyers and compensation collection agents 其他法律界代表，如律師或索償代表人
- ₆ Relatives and friends 親戚朋友
- ₇ Legal aid services is related to your work or education 法律援助服務同你嘅工作或教育有關
- ₈ Don't know 不知道 (DO NOT READ) （不要讀出）
- ₉ Others, please specify: _____ (DO NOT READ)
其他，請註明： _____ （不要讀出）

11. What is your average monthly income in the last year?

請問你去年每月平均收入係幾多？

- ₁ < \$10,000
- ₂ \$10,000 – \$20,000
- ₃ \$20,000 – \$30,000
- ₄ \$30,000 – \$40,000
- ₅ \$40,000 – \$50,000
- ₆ > \$50,000
- ₇ Retired (DO NOT READ) 已退休(不要讀出)
- ₈ Unemployed (DO NOT READ) 無業（不要讀出）
- ₉ Don't know (DO NOT READ) 不知道（不要讀出）
- ₁₀ Refuse to answer (DO NOT READ) 拒絕作答（不要讀出）

12. Have you ever worked in the legal field?你有無曾經喺法律界工作過？

- ₁ Yes 有
- ₂ No 無
- ₃ Don't know (DO NOT READ) 不知道（不要讀出）
- ₄ Refuse to answer (DO NOT READ) 拒絕作答（不要讀出）

[INTERVIEWER READ] (訪問者讀)

This concludes the questionnaire. Thank you for your participation.
調查完畢。多謝你嘅參與。

Appendix D – List of Interviewees

280. Tables below list out names of the stakeholders who have participated in our consultation as of 15 June 2012.

Stakeholder Group	Name	Organisation/ Capacity
Judge	Christopher Chan	Retired Judge
Legal Practitioners	Nigel Kat	Barrister
	Samuel Chien	Barrister
	Gladys Li	Barrister
	Carmen Kei	Barrister
	Richard Yip	Barrister
	Phillip Ross	Barrister
	Nicholas Pirie	Barrister
	Phillip Dykes	Barrister
	Jeffrey Tam	Barrister
	PY Lo	Barrister
	John Wright	Barrister
	Dennis Kwok	Barrister
	Corinne Remedios	Barrister
	Jonathan Man	Barrister
	Victor Luk	Barrister
	Kenny Chan	Barrister
	Earnest Cheung	Barrister
	Margaret Ng	Barrister
	Oliver Chan	Solicitor
	Michael Vidler	Solicitor
	Eric Au Ping Kwan	Solicitor
	Antony Wong	Solicitor
	Edith Au-yeung	Solicitor
	Peter Barnes	Solicitor
	Mark Daly	Solicitor
	Sidney Lee Chi Hang	Solicitor
	Patrick Burke	Solicitor
John Clancey	Solicitor	
Jimmy Ng Ka Wing	Solicitor	
Clifton Wong	Solicitor	
Holden Chow	Solicitor	
Public Bodies (include government departments and NDPBs)	Leung Kam Yan	Correctional Services Department
	David W.K. Chiu	Immigration Department
	Roderick A.L. Mason	Hong Kong Police Force
	Connie Lau	Consumer Council

Stakeholder Group	Name	Organisation/ Capacity
Public Bodies (include government departments and NDPBs)	Wong Chung Yan, Johann	Civil Service Bureau
	Jackie Lau	Social Welfare Department
	Frederick Tong	Office of Ombudsman
Community Groups	Phyllis Marwah	Mother's Choice
	Chan Kit Ying	Mother's Choice
	Lisa Lee	Christian Action
	Jennifer Lee	PathFinders
	Yu Ying Ho	The Hong Kong Federation of Youth Groups
	Jessie Yu	Hong Kong Single Parents Association
	Ivan Yiu	Tung Wah Group of Hospitals
	Kong Shuk Wah	Hong Kong Christian Service
	Holly Allen	Help for Domestic Helpers Limited
	Wong Chi Yuen	Society of Community Organisation
	Annie Lin	Society of Community Organisation
	Law Yuk Kai	Human Rights Monitor
	Kwok Hiu Chung	Human Rights Monitor
	Raymond Tsui	Human Rights Monitor
Trade Unions	Cheung Wai Kuen	Hong Kong Postal Workers Union
	Ng Ka Wing	The Chinese Manufacturers' Association of Hong Kong
	Chan Kam Hong	Association for the Rights of Industrial Accident Victims
	Chow Luen Kiu	Hong Kong Construction Industry Employees General Union
	Fung Kin Chung	Hong Kong Construction Industry Employees General Union
	Chiu Kin Keung	Hong Kong Construction Industry Employees General Union
	Lee Cheuk Yan	Hong Kong Confederation of Trade Unions
Academics	Puja Kapai	Faculty of Law, University of Hong Kong
	Leung Mei Fun	Law School, City University of Hong Kong
Reporters	Lai Ming Kit (賴銘傑)	AM730
	Ken Lui Tsz Lok (雷子樂)	Apple Daily
	Chan Shi Lin (陳雪玲)	Apple Daily (formerly of Ming Pao)

Stakeholder Group	Name	Organisation/ Capacity	Occupation	Political Affiliation
Political Parties	Lee Cheuk Yan	Labour Party	Legislative Council Member	Labour Party
	Holden Chow	DAB		DAB
	Yiu Cheuk Wah	DAB		DAB
Legislators	James To Kun Sun	Geographical Constituency - Kowloon West	Solicitor	Democratic Party
	Audrey Eu Yuet Mee	Geographical Constituency - Hong Kong Island	Counsel	Civic Party
	Cheung Kwok Che	Functional Constituency - Social Welfare	Social Worker	Labour Party
	Priscilla Leung Mei Fun	Geographical Constituency - Kowloon West	Barrister	The Professionals Forum
	Lee Cheuk Yan	Geographical Constituency - New Territories West	Legislative Council Member	Labour Party
	Margaret Ng	Functional Constituency - Legal	Barrister	Civic Party
	Paul Chan Mo Po	Functional Constituency – Accountancy	Certified Public Accountant	
District Council Members	Choi Siu Fung	Yau Tsim Mong	Solicitor	DAB
	Edward Leung	Yau Tsim Mong	Professional Social Worker	
	William Cheung	Tai Po	Chief Operating Officer	DAB
	Lee Chi Hang	Central and Western	Solicitor	
	Holden Chow	Islands	Solicitor	DAB
	Wong Kwok Yan	Wong Tai Sin	Solicitor	DAB
Legal Aid Services Council Members	Paul Chan Mo Po	Chairman	Certified Public Accountant	
	Edward Leung	Member	Professional Social Worker	
	Corinne Remedios	Member	Barrister	
	Virginia Choi	Member	Management Consultant	

Stakeholder Group	Name	Organisation/ Capacity
Legal Aid Department Staff	William Chan	DLA
	Benjamin Cheung	Former DLA
	Patrick Moss	Former DLA
	Thomas Kwong	Deputy Director of Legal Aid
	Annie Williams	Deputy Director of Legal Aid
	Alice Chung	Deputy Director of Legal Aid
	Juliana Chan	DPLAC
	Chris Chong	DPLAC
	Mo Yuk Wa	APLAC
	Nelson Kwok	Legal Aid Counsel
	Jason Chan	Legal Aid Counsel
	Katrina Ng	Legal Aid Counsel
	Edmund Chan	Legal Aid Counsel
	Emily Ho	Legal Aid Counsel
	Helen Choi	Legal Aid Counsel
	Winnie Fung	Law Clerk
	Matthew Mui	Law Clerk
	Kitty So	Law Clerk
	Sabrina Tse	Law Clerk
	Victor Chang	Law Clerk
	Yvonne Lam	Law Clerk
	Susanna Lai	Law Clerk
	Bonnie Choy	Law Clerk
	Margaret Wong	Law Clerk
	Lai Tin Tak	Law Clerk
	Edward Tam	Law Clerk
	Stephanie Wong	Law Clerk
Yuki Cheng	Law Clerk	
Minnie Wong	Law Clerk	
Wilson Kong	Law Clerk	
Rock Ng	Law Clerk	
Legal Aid Applicant	Kwok Chuek Kin	

Remarks:

Some interviewees' comments reflected their personal views and did not necessarily represent those of their associated organisation/capacity.

281. Job positions and roles of the LAD staff consulted

In total, 31 professional staff across divisions with various roles within the LAD were engaged.

The length of service among the LAD staff interviewed range from 1.5 to 36 years. The average years of experience is 16.52.

	DLA or DDLA	DPLAC or APLAC	Legal Aid Counsel	Law Clerk	Total
Application & Processing Division	1	1	2	4	8
Policy & Administration Division	4*	1		2	7
Litigation Division					
• Crime Section		1	1	4	6
• Civil Litigation Section	1		1	5	7
Official Solicitor's Office			2	1	3
Total	6	3	6	16	31

*Includes the DDLA in the Policy & Administration Division, current DLA and two former DLAs.

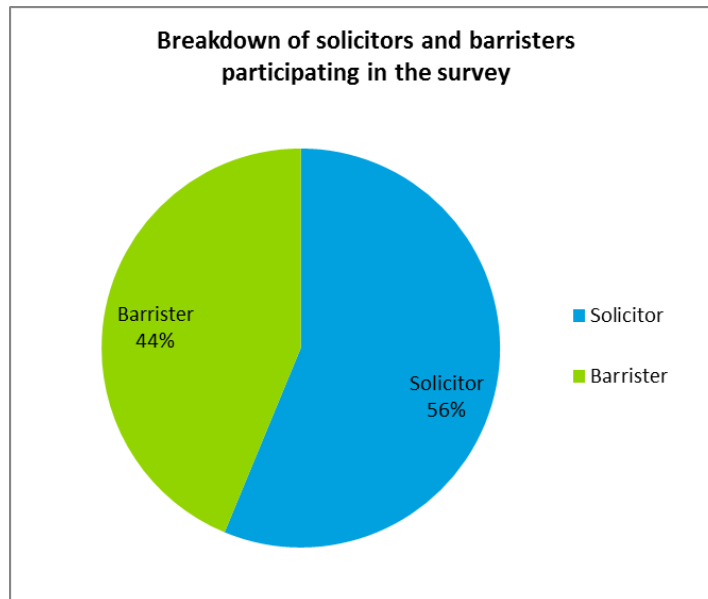
Appendix E – Survey Results

282. The table below summarises the background of each sample group. The survey methodology is illustrated as follows:

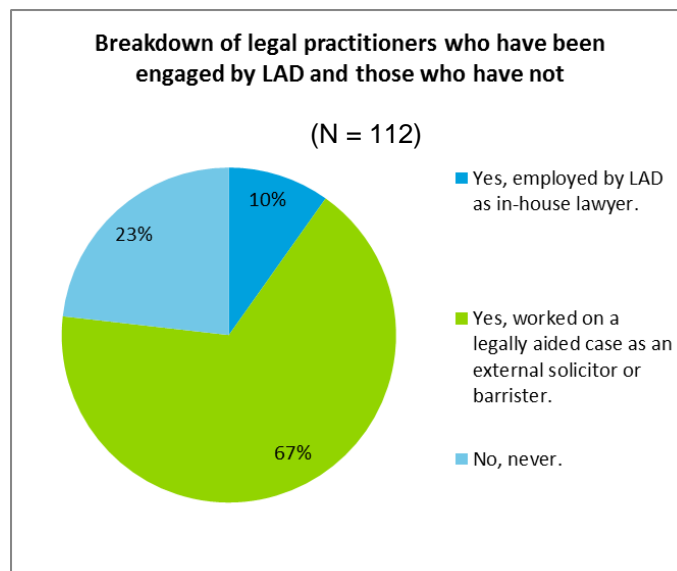
	General public	Legal aid applicants	Legal practitioners
Target respondents	Members of the general public, age ranging from 18 to 64, who have never applied for legal aid services in Hong Kong	Legal aid applicants who have applied for legal aid services, including applicants who have been accepted, refused or who have withdrawn their applications	Practising barristers and solicitors in Hong Kong
Sample size	1,010	110	112
Third-party agent	The survey was carried out through telephone interviews by Ipsos, a market research agency. The survey was conducted between 6 March and 30 March	2 batches of 500 surveys (1,000 in total) were distributed to legal aid applicants by the LAD	<ul style="list-style-type: none"> An online survey was distributed to legal practitioners through the circular of the Hong Kong Bar Association and the Law Society of Hong Kong A paper survey was distributed to legal practitioners as an insert in the publication of <i>HK Lawyer</i> in the week of April 9, 2012
Survey mechanism	Telephone survey	Paper survey	Online survey and paper survey

283. Profile of legal practitioners

Out of 112 legal practitioners who have participated in the survey, 56% are solicitors and the remaining 44% are barristers.



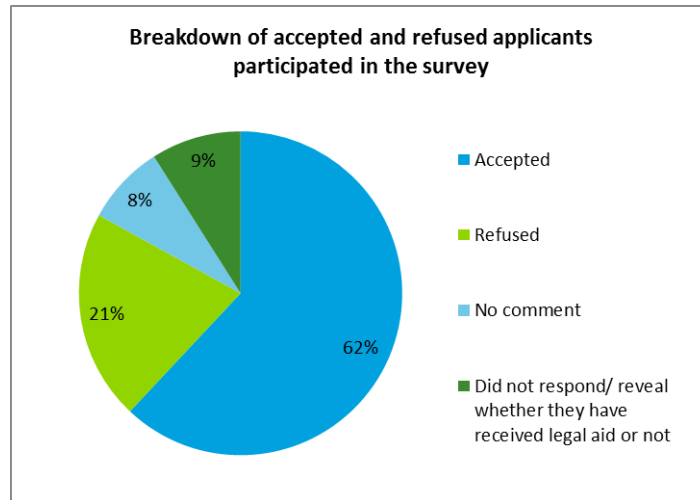
284. The majority of the legal practitioners who participated (67%) have worked on a legally-aided case as an external solicitor or barrister. Only 10% of them have previously been employed by the LAD as an in-house lawyer. The remaining 23% have never been engaged by the LAD, externally or internally.



285. Profile of legal aid applicants

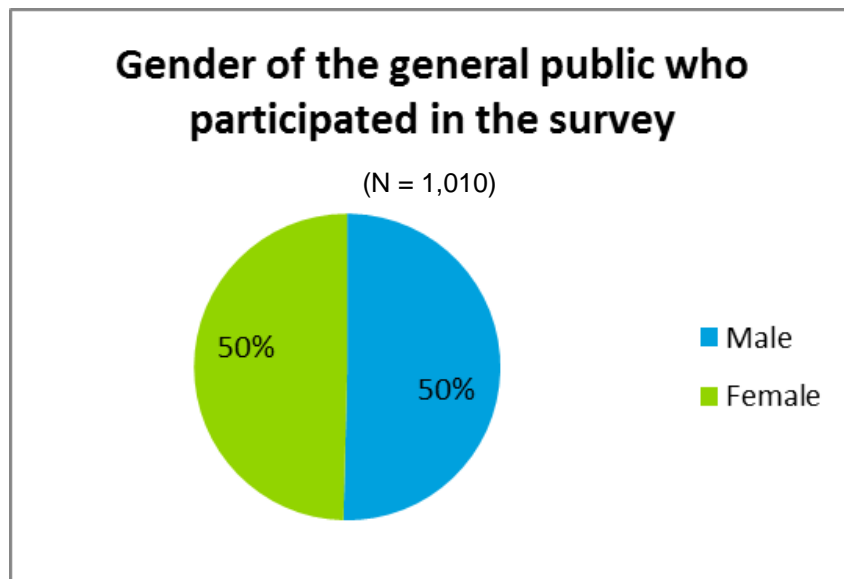
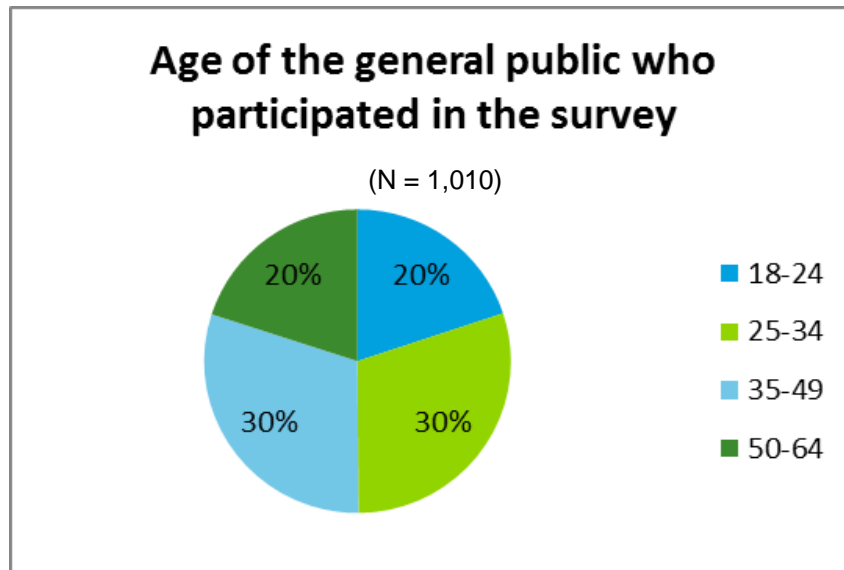
Out of 110 legal aid applicants who participated in the survey, 62% have received legal aid services while 21% have been refused. 9% of the respondents did not reveal whether their legal aid applications have been successful. The remaining 8% includes applicants whose

application is still under the process of evaluation, and those who have applied for legal aid more than once and who have experienced both acceptance and rejection of their applications.

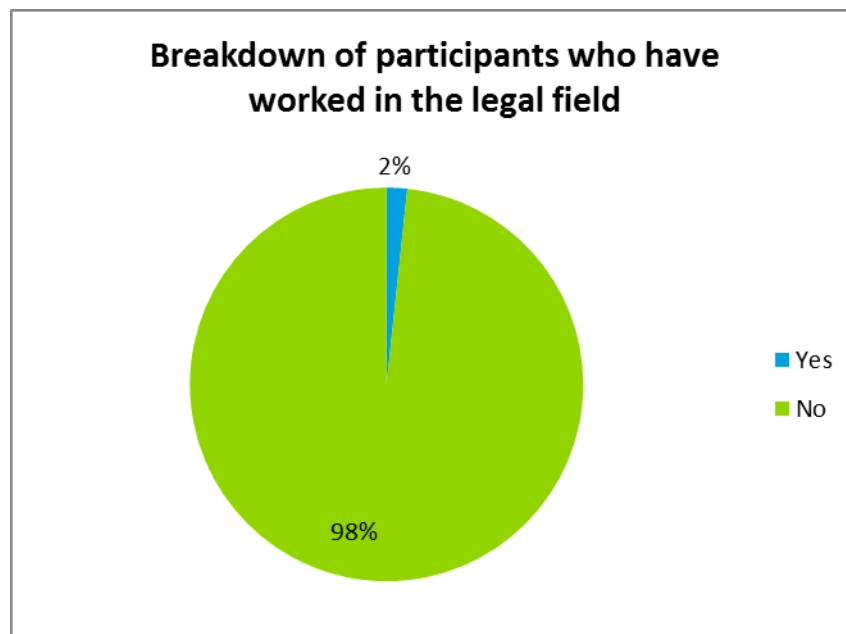
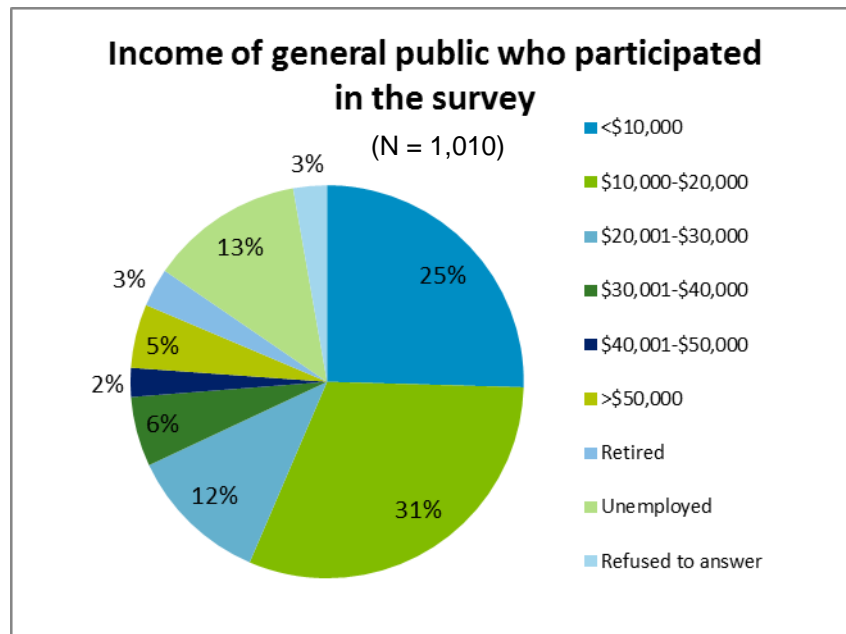


*Participants with no comment include applicants whose application is still under the process of evaluation as well as applicants who have applied for legal aid more than once and who have experienced both acceptance and rejection.

286. Profile of general public by age and gender



287. Profile of general public by income and experience in the legal field

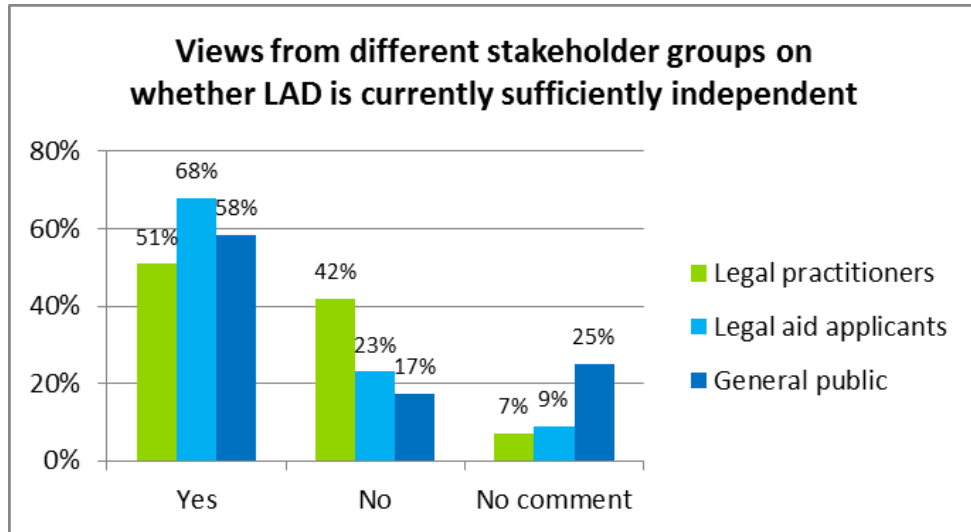


288. Summary of survey results among members of the general public, legal aid applicants and legal practitioners

“Do you agree that the LAD is currently sufficiently independent?”

Yes: >50% of all participants

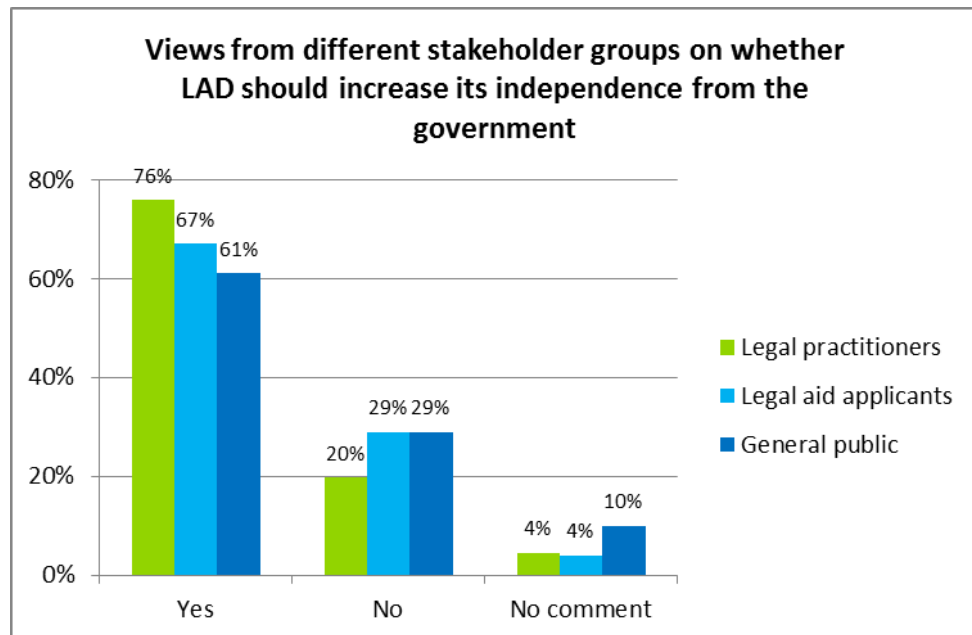
67% of those who answered in the affirmative were legal aid applicants



“Should the LAD increase its independence from the Government?”

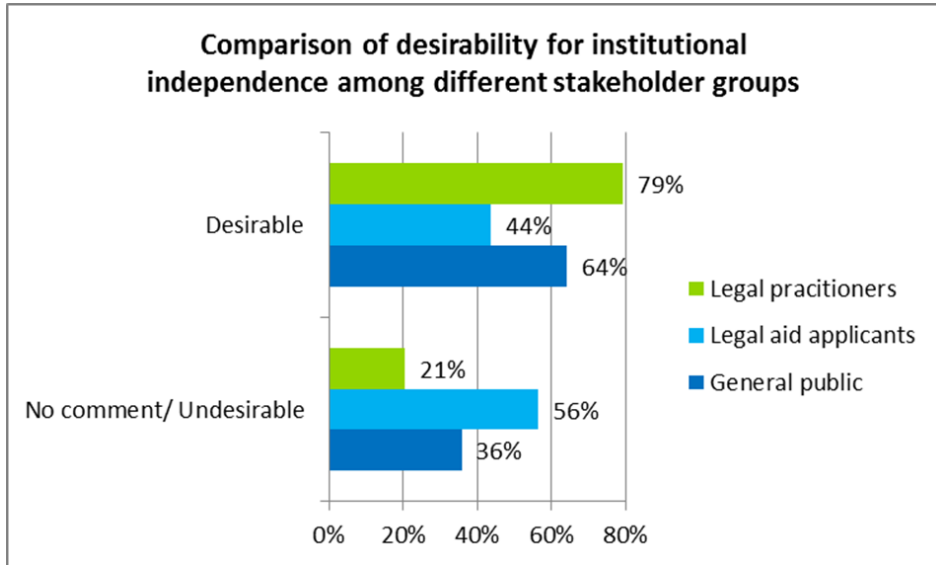
Yes: ~68% of all participants

76% of those who answered in the affirmative were legal practitioners



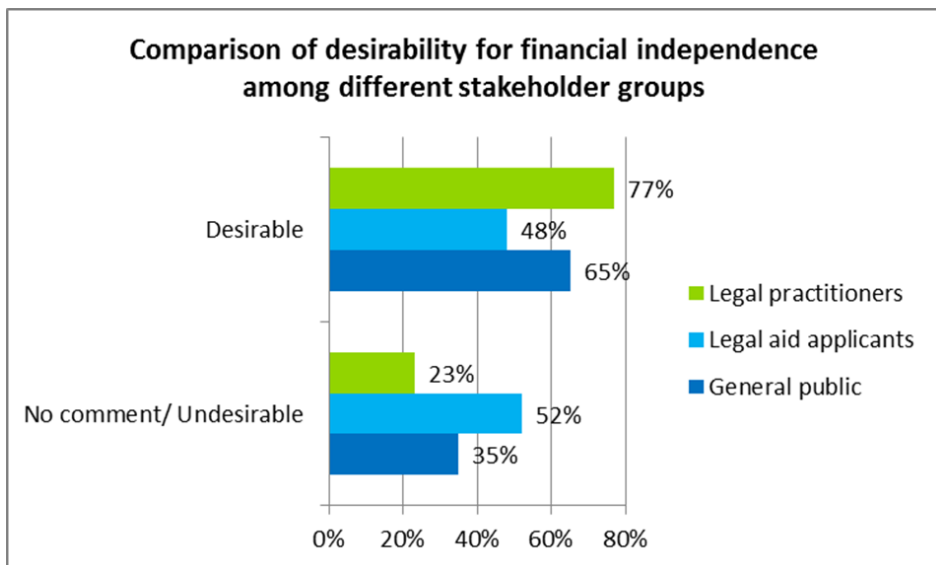
Who would wish to see an institutionally independent LAD?

Legal practitioners expressed the highest levels of desire for the institutional independence of legal aid, followed by the general public and legal aid applicants.



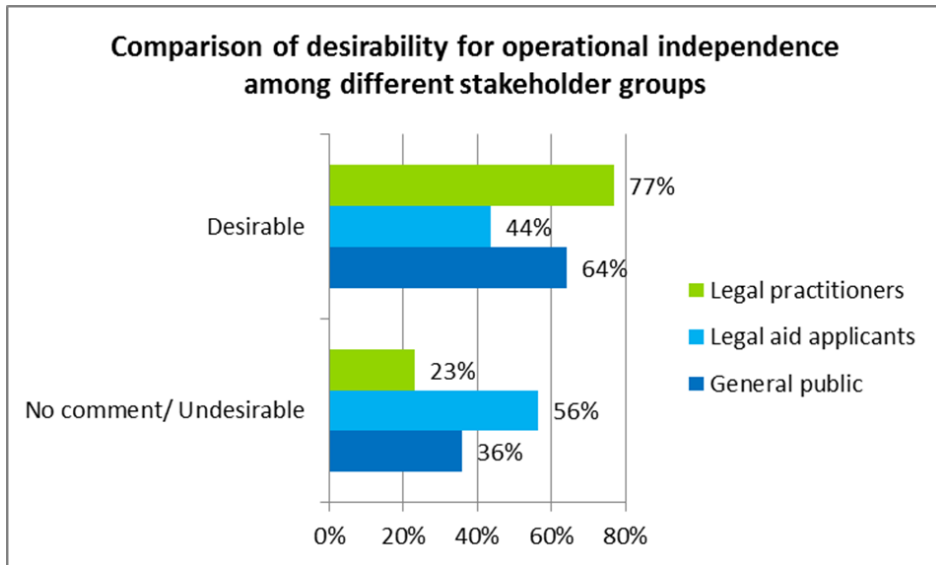
Who would wish to see a financially independent LAD?

Legal practitioners expressed the highest levels of desire for the financial independence of legal aid, followed by the general public and legal aid applicants.



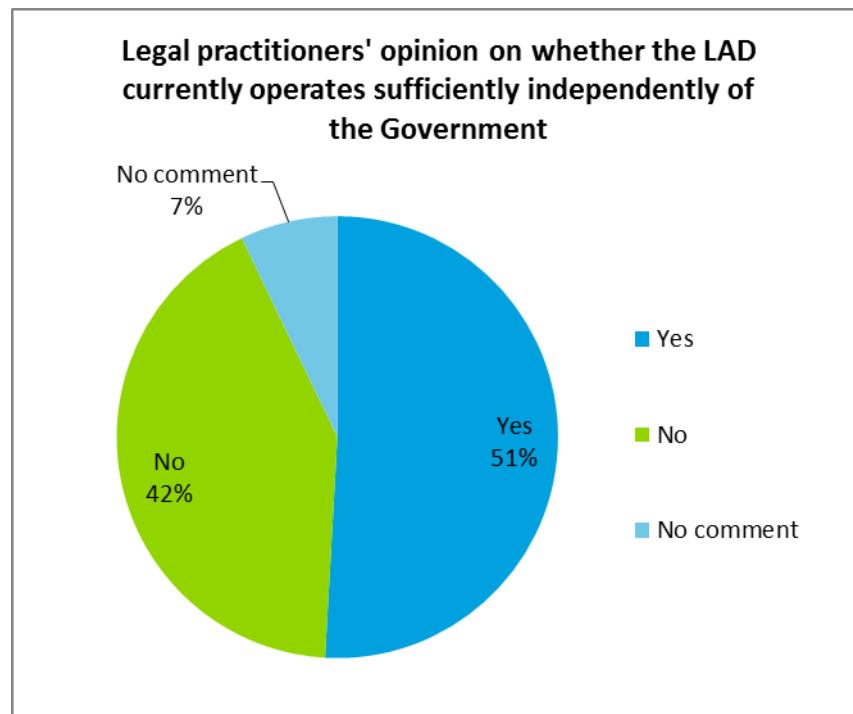
Who would wish to see an operationally independent LAD?

Legal practitioners expressed the highest levels of desire for the operational independence of legal aid, followed by the general public and legal aid applicants.

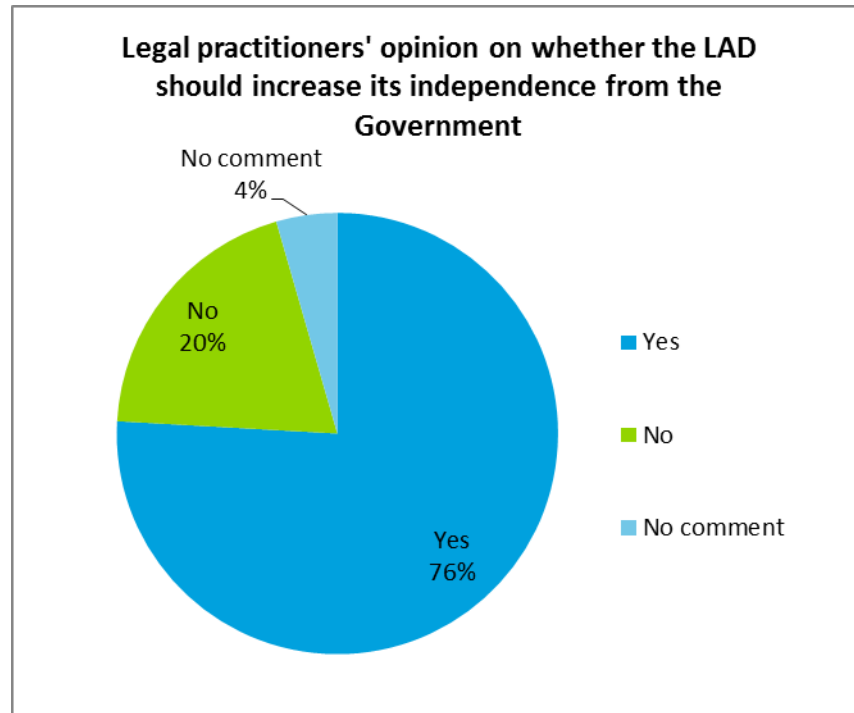


289. Legal practitioners' opinion on the current level of LAD independence

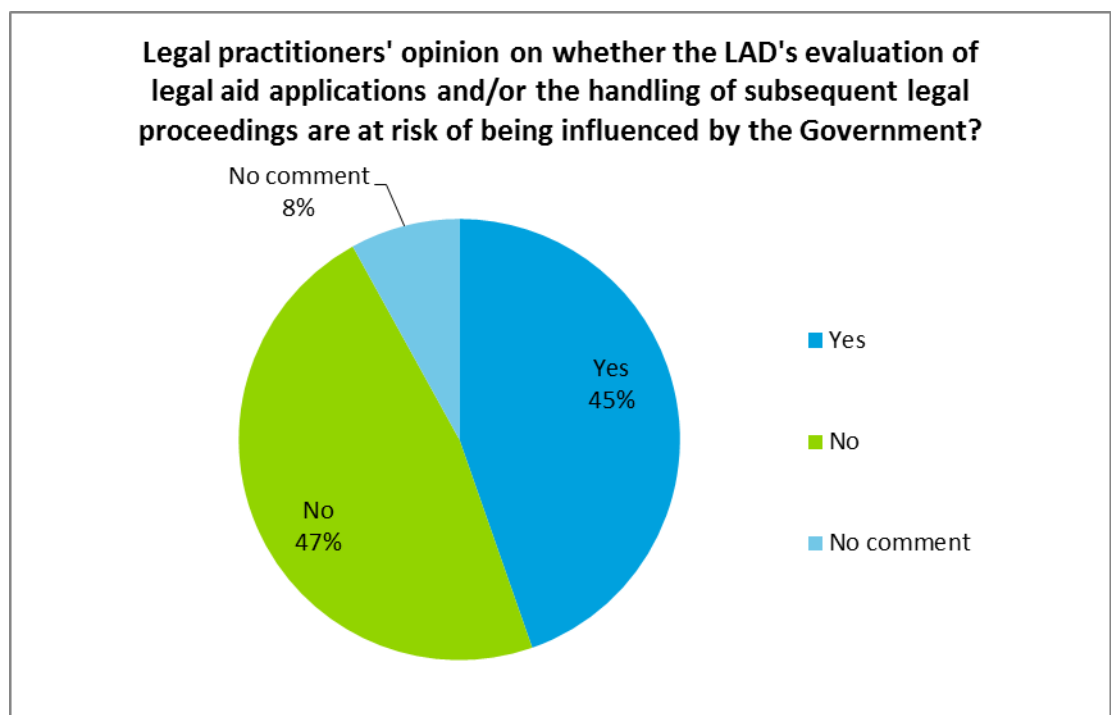
51% of the legal practitioners who participated in the survey think that the LAD currently operates sufficiently independently of the Government while 42% think otherwise.



76% of the participated legal practitioners think that the LAD should increase its independence from the Government while 20% think otherwise.

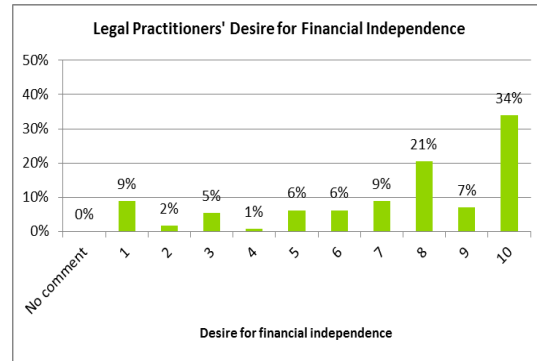
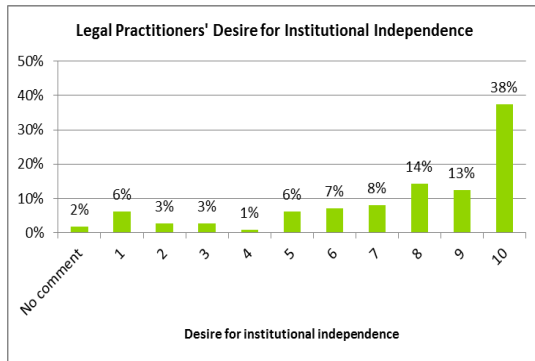


45% of legal practitioners who participated in the survey think that the LAD's evaluation of legal aid applications and/or the handling of subsequent legal proceedings are at risk of being influenced by the Government. 47% think otherwise.



290. Legal practitioners' levels of desire for legal aid independence

Legal practitioners had similar levels of desire along the three dimensions of legal aid independence – institutional, financial and operational. Overall, approximately 80% think that legal aid independence is desirable along each of these three dimensions.

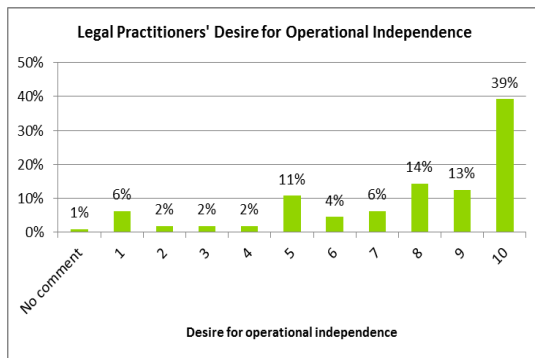


Analysis of legal practitioners' desire for institutional independence

- N = 112
- Average = 7.55
- No comment/ Undesirable (1-5) = 21%
- Desirable (6-10) = 79%

Analysis of legal practitioners' desire for financial independence

- N = 112
- Average = 7.31
- No comment/ Undesirable (1-5) = 23%
- Desirable (6-10) = 77%

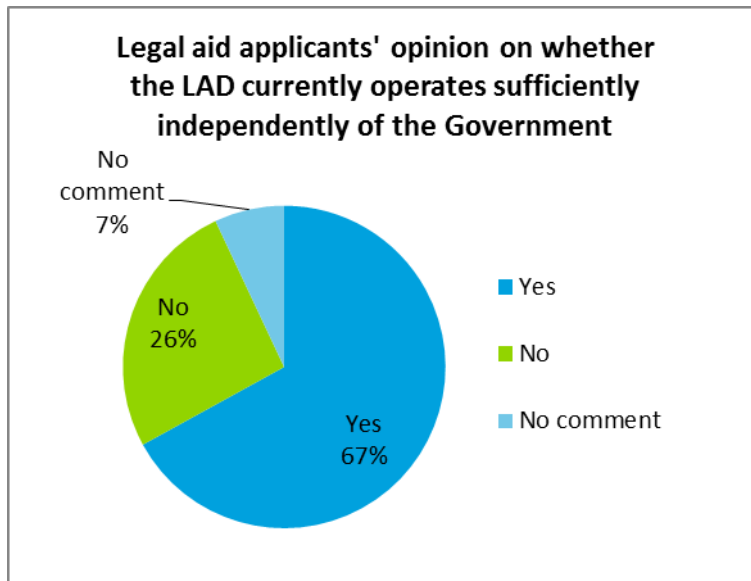


Analysis of legal practitioners' desire for operational independence

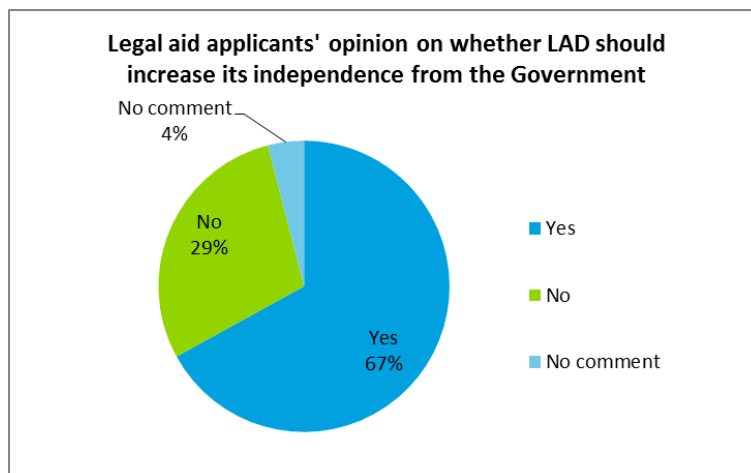
- N = 112
- Average = 7.66
- No comment/ Undesirable (1-5) = 23%
- Desirable (6-10) = 77%

291. Legal aid applicants' opinion on the current level of the LAD's independence

67% of the legal aid applicants who participated in the survey think that the LAD currently operates sufficiently independently of the Government while 26% think otherwise.

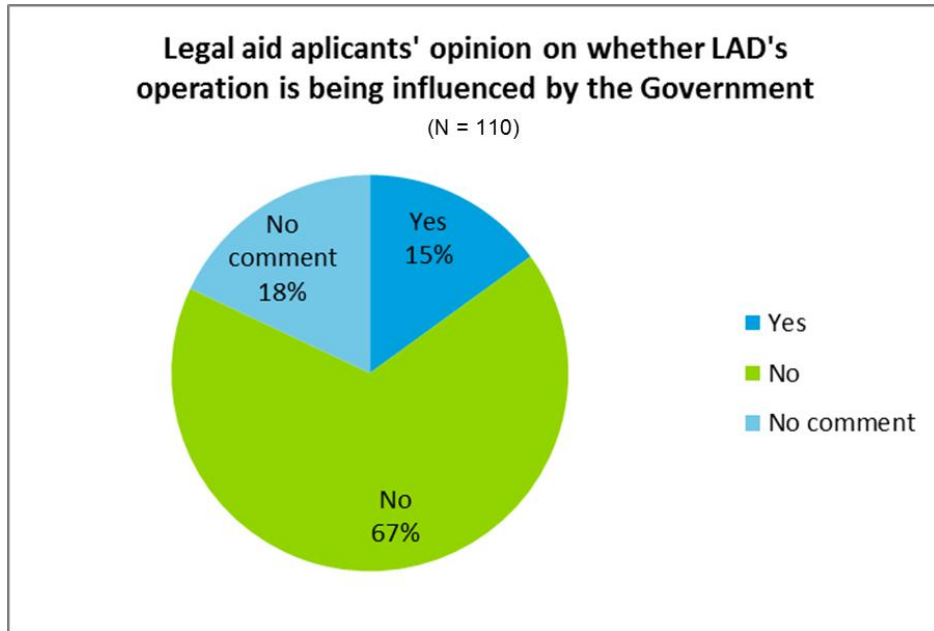


67% legal aid applicants think that the LAD should increase its independence from the Government while 29% do not think that there is a need to increase its independence.



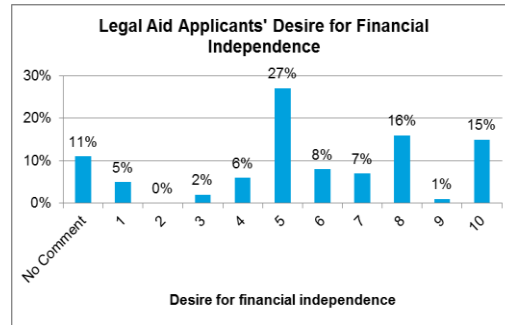
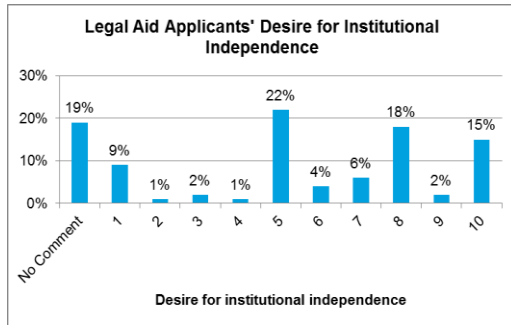
“Do you think that the LAD’s operation is being influenced by the Government?”

67% do not think the LAD's evaluation of legal aid applications and/or the handling of subsequent legal proceedings is at risk of being influenced by the Government while 15% think otherwise, .



292. Legal aid applicants' levels of desire for legal aid independence

Legal aid applicants had similar levels of desire along the three dimensions of legal aid independence – institutional, financial and operational. Overall, less than 50% of legal aid applicants think that legal aid independence is desirable along each of these three dimensions.

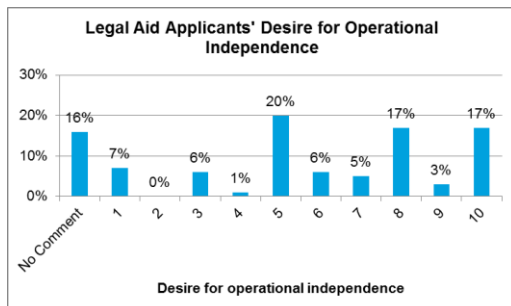


Analysis of legal aid applicants' desire for institutional independence

- N = 110
- Average = 5.00
- No comment/ Undesirable (1-5) = 56%
- Desirable (6-10) = 44%

Analysis of legal aid applicants' desire for financial independence

- N = 110
- Average = 5.66
- No comment/ Undesirable (1-5) = 52%
- Desirable (6-10) = 48%

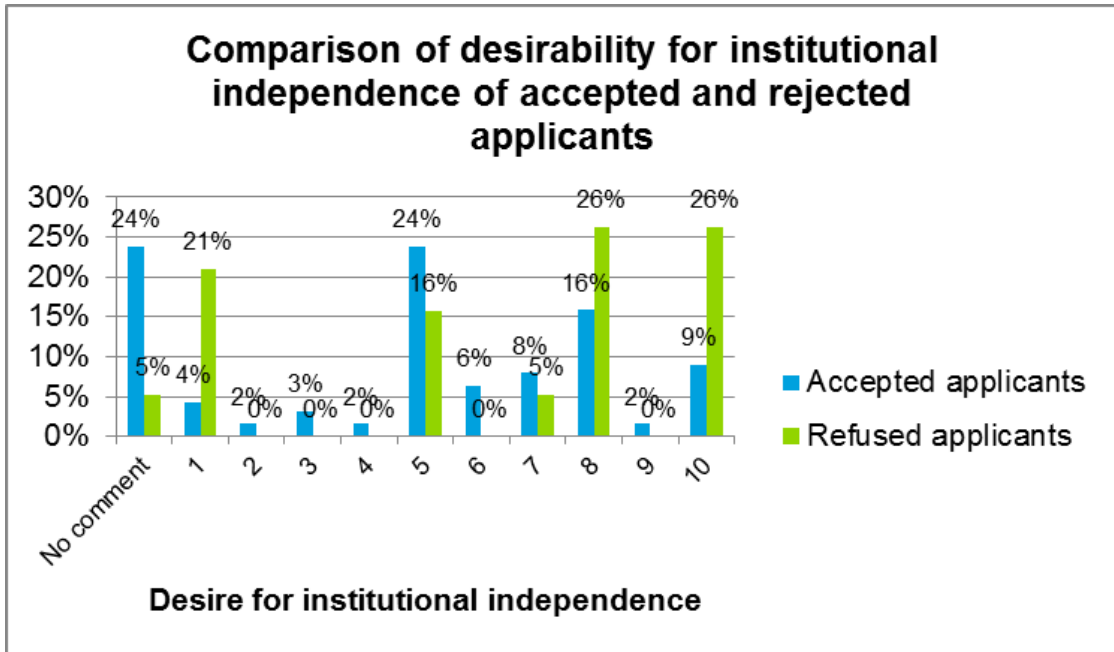


Analysis of legal aid applicants' desire for operational independence

- N = 110
- Average = 5.42
- No comment/ Undesirable (1-5) = 51%
- Desirable (6-10) = 49%

293. A comparison between the accepted and rejected applicants' desire for legal aid independence

Refused applicants have a higher level of desire for institutional independence for legal aid than accepted applicants. Approximately 60% of the accepted applicants do not desire institutional independence for legal aid.



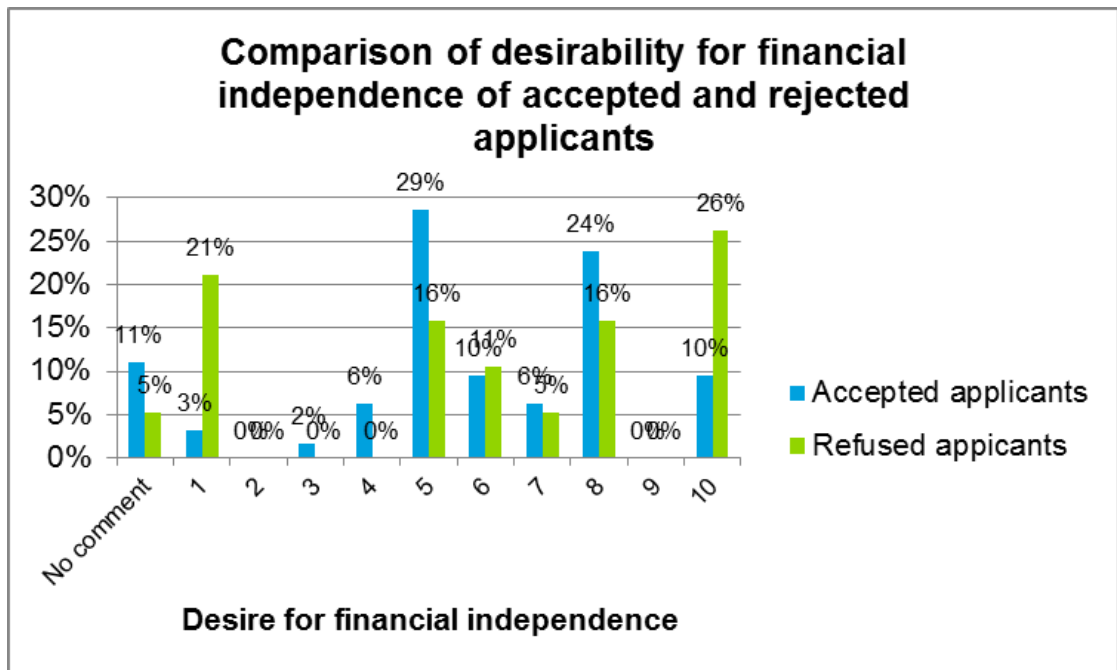
Analysis of accepted applicants' desire for institutional independence

- N = 68
- Average = 4.63
- No comment/ Undesirable (1-5) = 59%
- Desirable (6-10) = 41%

Analysis of refused applicants' desire for institutional independence

- N = 23
- Average = 6.22
- No comment/ Undesirable (1-5) = 39%
- Desirable (6-10) = 61%

Refused applicants have a slightly higher level of desire for financial independence of legal aid than accepted applicants. Slightly more than half of the accepted applicants do not desire financial independence for legal aid.



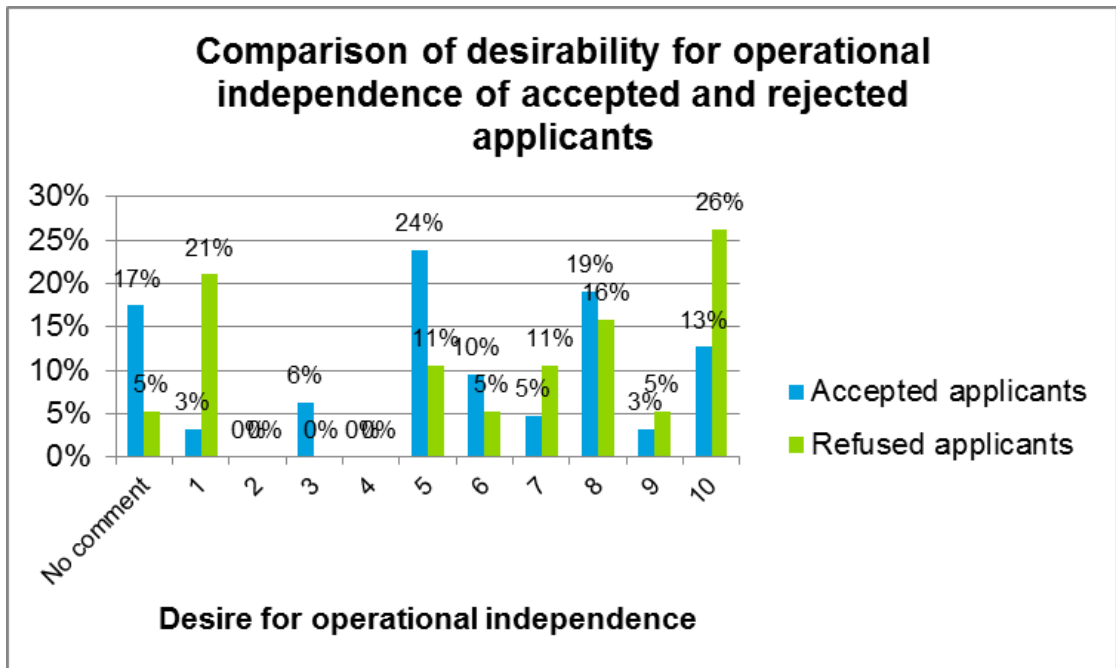
Analysis of accepted applicants' desire for financial independence

- N = 68
- Average = 5.50
- No comment/ Undesirable (1-5) = 54%
- Desirable (6-10) = 46%

Analysis of refused applicants' desire for financial independence

- N = 23
- Average = 5.96
- No comment/ Undesirable (1-5) = 48%
- Desirable (6-10) = 52%

Refused applicants have a slightly higher level of desire for the operational independence of legal aid than accepted applicants. Slightly more than half of the accepted applicants do not desire operational independence for legal aid.



Analysis of accepted applicants' desire for operational independence

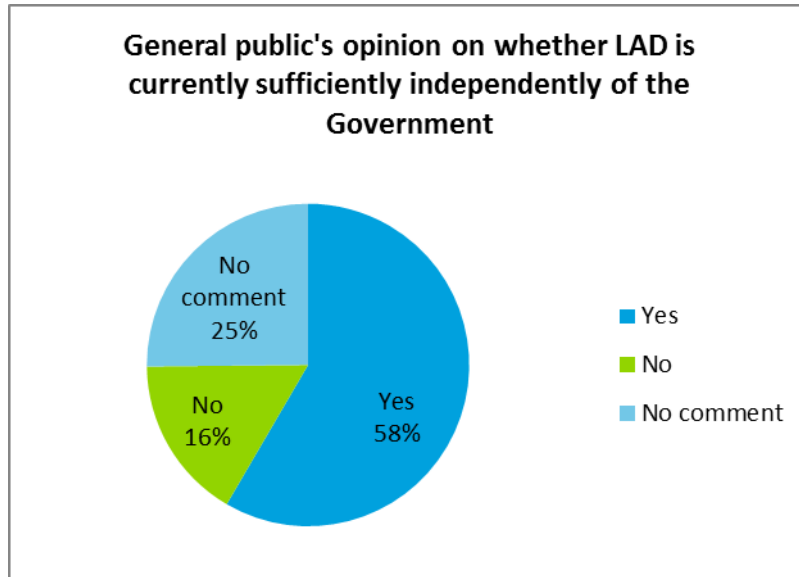
- N = 68
- Average = 5.34
- No comment/ Undesirable (1-5) = 51%
- Desirable (6-10) = 49%

Analysis of refused applicants' desire for operational independence

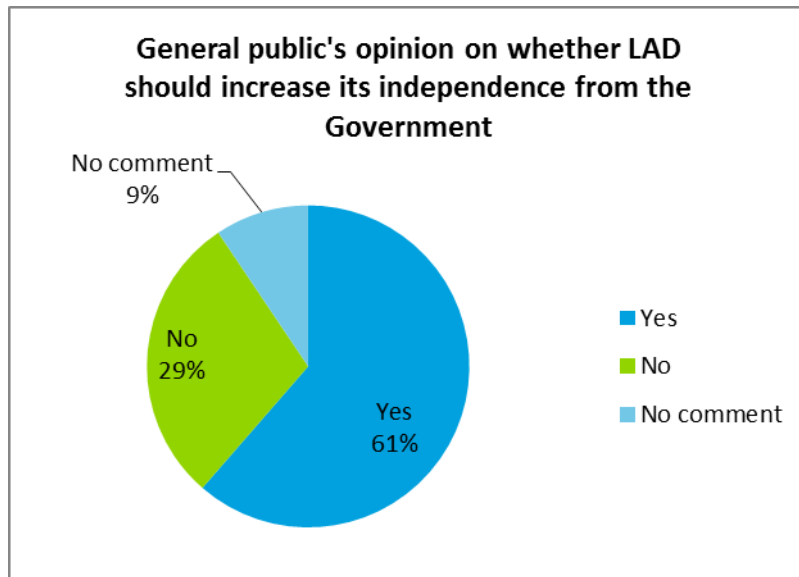
- N = 23
- Average = 6.52
- No comment/ Undesirable (1-5) = 35%
- Desirable (6-10) = 65%

294. The general public's opinion on the current level of the LAD's independence

58% of the general public who participated in the survey think that the LAD currently operates sufficiently independently of the Government.

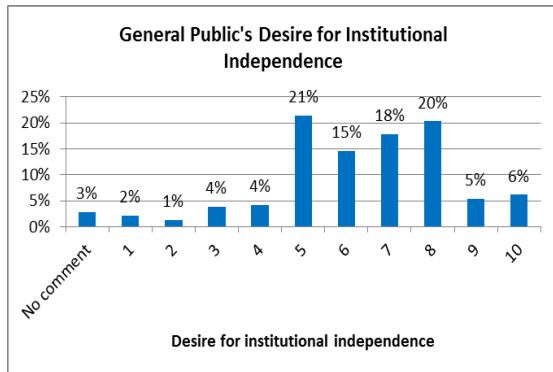


61% of the general public think that the LAD should increase its independence from the Government.



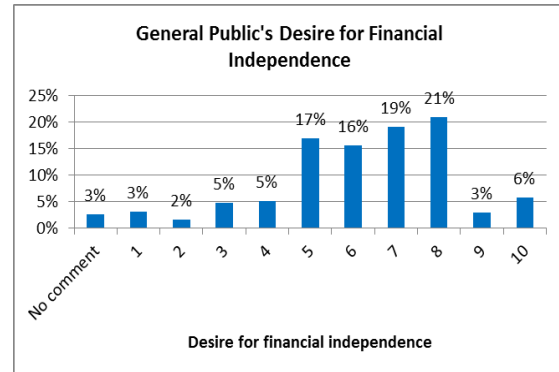
295. The general public's levels of desire for legal aid independence

The general public had similar levels of desire along the three dimensions of legal aid independence – institutional, financial and operational. Overall, approximately 67% of the general public think that legal aid independence is desirable along each of these three dimensions.



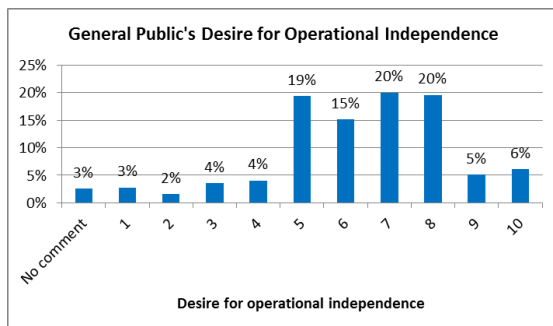
Analysis of general public's desire for institutional independence

- N = 1,010
- Average = 6.24
- No comment/ Undesirable (1-5) = 36%
- Desirable (6-10) = 64%



Analysis of general public's desire for financial independence

- N = 1,010
- Average = 6.15
- No comment/ Undesirable (1-5) = 35%
- Desirable (6-10) = 65%



Analysis of general public's desire for operational independence

- N = 1,010
- Average = 6.24
- No comment/ Undesirable (1-5) = 36%
- Desirable (6-10) = 64%

Appendix F – Cost projections

Scenario analysis - staff arrangement in case of the disestablishment of the LAD - Key assumptions

- i. It is assumed that all general grade staff will be absorbed into other Government departments in the event of a disestablishment and would need to be replaced through recruitment and induction by the new body.
- ii. All departmental grade staff members are assumed to be Category A civil servants.
- iii. Staff members who are entitled to pension are assumed to be currently earning their highest possible pensionable emoluments.
- iv. The expected retirement age is assumed to be 55 for staff under the old pension scheme and 60 for those under the new pension scheme.
- v. All departmental grade staff members who are eligible for early retirement would retire early.
- vi. The ages of departmental grade staff members have been estimated according to their salary point scale.
- vii. The pension schemes for departmental grade staff have been classified according to their grade point scale.
- viii. The projections for the costs of disestablishment are based on the assumption that no annual enhanced pensions exceed the annual pension for which individuals would have been eligible had they worked through to their normal retirement age.
- ix. In calculating NPVs, we have used a discount rate of 7.6 percent and a price inflation rate of 4.6 percent.
- x. The recruitment and induction cost for inducing third party to join the new legal aid body is equal to the incentive payment make to existing members.

Note:

1. The expected retirement age is based upon the guides for the new pension scheme and old pension scheme from the Civil Service Bureau.
2. The inflation rate is the CPI(A) published by the Census and Statistics Department on April 23, 2012, while the discount rate is calculated by adding a required premium, 3%, on the inflation rate in which the premium is the benchmark of capital accumulation fund.

Sources for staff-related expenditure projections

296. The following table provides the 5 main, staff-related elements that could give rise to additional costs, beyond the LAD’s existing staff cost commitments.

Staff-related expenditure	Description
Pension payments	Pension payments made up to individuals taking early retirement, up to their normal retirement age
Pension enhancements	Pension payments made up to individuals taking early retirement
<i>Ex gratia</i> payments	Payments made to individuals whose positions in the civil service are abolished
Recruitment and induction costs	Recruitment and induction of replacement staff by a new legal aid body
Incentive payments	Incentive payments made to encourage individuals to join a new employer

Scenario analysis - staff arrangement in case of a LAD disestablishment (assuming DLA and DDLAs cease to be civil servants)

297. Staff-related expenditure projection is performed in the following scenarios:

Scenario A – “All 4 DLA and DDLAs exit”	Scenario B – “All 4 DLA and DDLAs transfer”
All four DLA and DDLAs leave LAD and none join the new legal aid authority or other parts of the public service.	All four DLA and DDLAs transfer to the new legal aid authority.
<ul style="list-style-type: none"> ➤ All four DLA and DDLAs receive an enhanced pension or a short service gratuity, plus an <i>ex gratia</i> payment (assumed to be equivalent to six months salary). 	<ul style="list-style-type: none"> ➤ All four DLA and DDLAs receive an incentive payment for the transfer (assumed to be equivalent to three months salary). ➤ The transfer is in other respects treated as a transfer within the Government service, and no other staff-related costs arise as a result of the transfer, e.g., premature retirement costs.

298. The following table provides a summary of expenditures projected under each of the defined scenarios. These projections are approximate and are intended to be

indicative only. A number of simplifications and approximations have been employed in our calculations and assumptions to facilitate the analysis.

Staff-related expenditure	NPV in HK\$ million	
	Scenario A – “All 4 DLA and DDLAs exit”	Scenario B – “All 4 DLA and DDLAs transfer”
Pension payments	28	0
Pension enhancements	9	0
<i>Ex gratia</i> payments	0 *	0
Recruitment and induction costs (directorate grade)	1.9-2.0	0
Incentive payments (directorate grade)	0	1.9-2.0
Total	38.9-39.0	1.9-2.0

Projection is based on staff profile provided by LAD. Data consists of average salary and age figures analysed by grade.

*** Remark:**

The ex-gratia payment is 0 under Scenario A because all four DLA and DDLAs would choose early retirement based on their estimated age and the assumption that their positions are not abolished.

**Scenario analysis - expenditure projection
(assuming all the LAD staff cease to be civil servants)**

299. Staff-related expenditure projections have been performed in scenarios which vary by the proportion of departmental staff who will exit versus those who will transfer to the new legal aid authority.

Scenario A – “100% Exit”	Scenario B – “100% Transfer”
<p>All members of departmental grade staff leave the LAD and none join the new legal aid authority or other parts of the public service.</p> <ul style="list-style-type: none"> ➤ All departmental grade posts are abolished. ➤ All departmental grade staff members receive an enhanced pension or a short service gratuity, plus an <i>ex gratia</i> payment (assumed to be equivalent to six months salary). ➤ All general grade staff members are absorbed into other parts of the civil service. 	<p>All departmental grade staff transfer to the new legal aid authority. No departmental grade posts are abolished.</p> <ul style="list-style-type: none"> ➤ All departmental grade staff members receive an incentive payment for the transfer (assumed to be equivalent to three months salary). ➤ The transfer is in other respects treated as a transfer within the Government service, and no other staff-related costs arise as a result of the disestablishment of the LAD, e.g., premature retirement costs. ➤ All general grade staff members are absorbed into other parts of the civil service.

300. The following table provides a summary of expenditure projected under each of the defined scenarios. These projections are approximate and are intended to be indicative only. A number of simplifications and approximations have been employed in our calculations and assumptions to facilitate the analysis.

Staff-related expenditure	NPV in HK\$ million	
	Scenario A – “100% Exit”	Scenario B – “100% Transfer”
Pension payments	449	0
Pension enhancements	24	0
<i>Ex gratia</i> payments	64	0
Recruitment and induction costs (director grade)	1.9-2.0	0
Recruitment and induction costs (professional grade)	26-40	0
Recruitment and induction costs (general grade)	13-21	13-21
Incentive payments (director grade)	0	1.9-2.0
Incentive payments (professional grade)	0	26-40
Total	578-600	41-63

Projection is based on the staff profile provided by the LAD. Data consists of average salary and age figures analysed by grade.

Formulae for disestablishment expenditure projection

Calculation	Formula
Pension per annum	Highest monthly pensionable emoluments x length of service (months) x factor*
Pension enhancement per annum ¹	Highest monthly pensionable emoluments x length of service (years) / 3 x factor**
<i>Ex gratia</i> payments ²	Highest monthly pensionable emoluments x 6
Years to retirement ³	Age 60 (new pension scheme) or 55 (old pension scheme)
Highest annual pensionable emoluments	Highest of the expenditure on personal emoluments, based on existing pay scale of different point grade provided by LAD
Incentive payments ⁴	Highest monthly pensionable emoluments x 3

*Factor = 1/600 (old pension scheme), 1/675 (new pension scheme)

**Factor = 10/600 (old pension scheme) or 10/675 (new pension scheme)

Note:

1. The formula for pension per annum as well as the formula for pension enhancement per annum were found in the guides for the new pension scheme and the guide for the old pension scheme published by the Civil Service Bureau.
2. *Ex gratia* payments are assumed to be equivalent to six months of the highest monthly pensionable emoluments given that there is no standardised methodology for calculating the payments.
3. The expected retirement age is based upon the guide for the new pension scheme and the guide for the old pension scheme published by the Civil Service Bureau.
4. Incentive payments are assumed to be equivalent to three months of the highest monthly pensionable emoluments given that there is no standardised methodology for calculating the payments.

Non-staff-related disestablishment expenditure

301. The following types of non-staff-related expenditures will result in the event of the disestablishment of the LAD. Expenditure includes administration costs of the disestablishment, as well as costs associated with the physical establishment of the new offices.

	PMO cost	Refurbishment cost	Relocation cost
Definition	Costs of the Project Management Office (PMO) to manage the implementation of the LAD disestablishment and the miscellaneous administration costs involved	Costs of refurbishment of the new offices	Costs of relocation to the new offices
Estimation (HK\$,000)	13,500	42,100 – 50,500	421 - 841
Assumptions	<ul style="list-style-type: none"> • Implementation is assumed to take 36 months • The PMO is assumed to consist of 1 project manager and 3 executive officers. • The 3 executive officers are assumed to be at grade points 25, 35 and 45. 	<ul style="list-style-type: none"> • Refurbishment cost per sq. ft. is assumed to be \$500-\$600 • Total net floor area in the new offices is assumed to be equivalent to that of the original LAD offices, which is approximately 84116 sq. ft. 	<ul style="list-style-type: none"> • Relocation cost per sq. ft. is assumed to be \$5-\$10 • Total net floor area in the new offices is assumed to be equivalent to that of the original LAD offices, which is approximately 84116 sq. ft.

Note:

1. Refurbishment and relocation costs are referenced to that of premium office space in Hong Kong.

On-going operation costs

302. Provided that the new non-governmental legal aid authority will no longer stay in a Government complex, rent and rates of its office space in any commercial property will cause the most substantial financial burden to the operation of legal aid services. Provided that the new legal aid authority will deploy a staff structure that is similar to the LAD's existing one, other sources of operating costs, such as personal emoluments and utilities, are not expected to be significantly higher or lower than the LAD's existing level.

	Rent and rates	Personal emoluments	Utilities cost
Range (HK\$,000)	2,380 – 7,510 per month	15,900 – 19,400 per month	71 – 225 per month
<i>Assumptions</i>	<ul style="list-style-type: none"> <i>Rental cost per sq. ft. is assumed to range from \$20-\$100.</i> <i>Total net floor area in the new offices is assumed to be equivalent to that of the LAD's original offices, which is approximately 84116 sq. ft.</i> <i>New offices are assumed to have the same net floor area in the same or nearby districts.</i> 	<ul style="list-style-type: none"> <i>Personal emoluments applied to the non-governmental legal aid authority are assumed to be ±10 percent of LAD's existing level</i> 	<ul style="list-style-type: none"> <i>Utilities cost is assumed to be 3 percent of rental cost</i>

Note:

1. Rental rates are referenced to that of commercial buildings in Mong Kok, Tsim Sha Tsui, Wan Chai, Admiralty and Central.
2. Utilities cost are referenced to that of premium office space in Hong Kong.

Appendix G – Details of the SLAS

A. Objectives of the SLAS

303. The Supplementary Legal Aid Scheme ("SLAS") provides legal assistance to the "sandwich class," whose financial resources exceed the upper limit allowed under the Ordinary Legal Aid Scheme (HKD \$260,000), but are below HKD \$1,300,000.

B. Significance of the SLAS

304. The SLAS allows more people to have access to legal aid services who would otherwise be ineligible under the Ordinary Legal Aid Scheme ("OLAS").

305. It is one part of the legal aid service delivery which can be self-sufficient and does not rely on the Government's funding for its on-going operations.

C. Scope of the SLAS

306. Under SLAS, legal aid is available to claims involving personal injuries or death, or medical, dental and legal professional negligence, where the claim is likely to exceed \$60,000. It also covers claims brought under Employees' Compensation Ordinance (Cap. 282) irrespective of the amount of the claim.

307. Since 30 November 2012, the scope of SLAS has already been expanded to cover:

- i. Claims of the following categories where the amount of claims is likely to exceed HK \$60,000:
 - professional negligence claims against certified public accountants (practising), registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorized land surveyors, registered landscape architects and estate agents;
 - negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products; and
 - monetary claims against the vendors in the sale of completed or uncompleted first-hand residential properties; and
- ii. Representation for employees in appeals brought by either the employer or the employee against awards made by the Labour Tribunal, regardless of the amount in dispute.

D. Expenses of the SLAS

308. The Supplementary Legal Aid Fund is a fund administered by the DLA, consisting of the following:

- i. proceeds of any loan or grant made to the DLA for the purposes of the Fund
- ii. contributions payable from persons granted legal aid under the SLAS
- iii. the proceeds of and interest on any investments of the moneys of the Fund
- iv. money paid or repaid to the DLA or retained where the aided person is aided under the SLAS, and such other money as may be prescribed.

**THE HONG KONG BAR ASSOCIATION'S SUBMISSION ON THE NEED TO
ESTABLISH AN INDEPENDENT LEGAL AID AUTHORITY**

I. INTRODUCTION

1. For decades the Hong Kong Bar Association (HKBA) has supported the establishment of an Independent Legal Aid Authority ("ILAA"), which has been proved to be all the more necessary by recent events. Institutional conservatism and lack of response to societal changes fostered by a lack of institutional independence has resulted in unmet needs and major shortfall in legal aid services to those in need.
2. Hong Kong is committed to the observance of the Rule of Law, and access to justice is essential to ensure that the Rule of Law is observed. The proper provision for Legal Aid is a key element to access for those who cannot afford the costs of legal representation themselves. This is a basic right.
3. We note that the provision of free or subsidized legal representation in criminal cases is a basic human right guaranteed by Article 14 (3) (d) of the International Covenant of Civil and Political Rights which is incorporated into Hong Kong Law, by Article 39 of the Basic Law, and the Hong Kong Bill of Rights Ordinance Cap. 383.
4. Article 35 of the Basic Law provides that Hong Kong residents shall have the right to access to the courts. This right should not be theoretical, and should be wide enough to cover those cases where because of complexity of the law and/or because of what is at stake, a lay person cannot and should not be forced to be his own advocate in his case.
5. The HKBA and the Law Society have long maintained for good reasons that there was a need for an ILAA (see, for instance, Submissions of HKBA dated 1st September 1998, 28th May 2007, 7th June 2007, 28th December 2007 and 4th September 2009).

6. The fact that there has *hitherto* been no ILAA established requires some examination of the issue. The history of the community effort to fight for an ILAA is outlined herein.

II. PREVIOUS ATTEMPTS TO ESTABLISH AN ILAA

7. The HKBA has outlined the moves towards an ILAA (see Chronology of Events at Appendix 1).

- a. The Working Party on Legal Aid recognized in its 1986 report (the "Scott Report") that giving the Legal Aid Department independent status would enhance its neutral position and recommended that the Department should be re-titled "*Legal Aid Commission*" with a status outside the civil service, like the Department of Audit (see Scott Report at Para. 5.14).

- b. In 1993, a motion was passed in Legislative Council in favour of independence of legal aid. On 21st July 1993, The Honorable Moses Cheng said the Government's role in legal aid, however effective and well-intentioned:

"[is] simply counter to common principles of independent judicial propriety. In most developed democratic societies the justice systems have evolved sufficiently to separate the role of Government and remove any lingering doubts over conflicting or self-serving interest . . . The powerful perception of "the fox guarding the hen-house" must be washed away from our justice system".

(see Report of the Sittings of Legislative Council of Hong Kong (Session 1993/94), pp. 4929-4931).

- c. The motion of the Legislative Council in 1993 was not carried into effect. Instead, the Legal Aid Services Commission ("LASC") was established on 1st September 1996 chartered with the function (under s.4(5) of the Legal Aid Services Council Ordinance, Cap. 489) to advise the Government on:

"(b) the feasibility and desirability of the establishment of an [ILAA]".

- d. Thereafter, in its report entitled "The Feasibility & Desirability of the Establishment of an Independent Legal Aid Authority" published in 1998 (the "1998 Report"), the LASC (then under the Chairmanship of Mr. Lee Jark Pui, JP) observed that:
- i. ". . .it is an institutionally flawed arrangement for legal aid to be administered by civil servants because of the risk of pressure from the Government. Moreover, the present institutional set-up encourages the perception of a lack of independence. Normal fairness principles require those who administer legal aid not only to be independent and impartial but manifestly seen to be independent and impartial. As the Government funds legal aid services, there may be an impression that "he who pays the piper calls the tune". Institutional independence for legal aid, therefore, is even more important." (at Para. 5.3 of 1998 Report)
 - ii. The establishment of an [ILAA] is the natural conclusion of more than three decades of debate in the community (see Para. 5.16 of the 1998 Report).
- e. Unfortunately, the recommendation of the LASC in 1998 was turned down by the Administration on assertions, in summary, that the payer *should* call the tune because most of the time the payer did not interfere, which was an unprincipled approach founded on complacency about the inherent risks from the few cases where rights could be compromised by decisions arising from lack of independence (see LC Paper No. CB(2)379/99-00(07) at Paras. 6 to 13). In particular, the Administration argued that:
- i. it was generally acknowledged that legal aid had been administered independently in the majority of cases, including many in which legal aid was granted to people with cases against the government;
 - ii. that an "uncapped" budget for legal aid services would mean that Legal Aid Department should remain within the institution of government in the

name of accountability (see Paragraph 10 of LC Paper No. CB(2)379/99-00(07), referring to the enactment of Administration of Justice Act 1999 (in UK) for the assertion that:

"contrary to common belief, an open-ended budget managed by an independent authority is not a viable option in the face of rapid growth of legal costs and ever-increasing demand for legal aid services" ;

- iii. staff morale of Legal Aid Department would be affected;
 - iv. there were sufficient safeguards to ensure independence of the Director of Legal Aid.
8. The reliance on the Administration of Justice Act 1999 (in UK) as justification for Legal Aid Department (with an uncapped budget) to remain within Government structure is wholly inapt. To start with, in UK there has never been the equivalent of SLAS in Hong Kong, which is self-sufficient, and the 1999 Act was aiming at cutting the legal aid budget, for instance, by introducing Conditional Fee Agreements. What is (or is not) done in UK is hardly an excuse to delay the establishment of an ILAA.
9. Incidentally, even after the Administration of Justice Act 1999, the lack of legal aid for the defendants in the case taken out by McDonald's Restaurant in UK was held by the European Court of Human Rights to be a violation of the entitlement to a fair hearing under Article 6 of the European Convention Human Rights and Fundamental Freedoms (see Steel & Morris v. The United Kingdom (2005) 18 BHRC 545). Notwithstanding that that case involved defamation, which, as matters now stand, would also not have been covered if it had happened in Hong Kong, the importance of 'equality of arms' or equal access to justice as a matter of human right is well demonstrated.
10. HKBA has for decades maintained the same stance as to the need for an ILAA. This is reflected in HKBA's submissions on divers dates in 2007 opposing the transfer of the Legal Aid Department to be under the "portfolio" of the Home Affairs Bureau ("HAB").

11. Despite the very strong opposition of the HKBA by its submissions dated 28th May 2007, 7th June 2007 and 28th December 2007, the Legal Aid Department was put under the "portfolio" of HAB. The *de facto* "downgrading" of the independence of the Legal Aid Department was completed. Instead of deriving and projecting a degree of independence from other departments by being under the aegis of the highest level Bureau with no particular exposure to litigation, it came under the control of a Bureau whose decisions affect those most likely to be applicants for Legal Aid and whose decisions are sometimes under challenge in the courts.

12. Thereafter, matters took place which demonstrated the adverse consequences of the lack of independence. The current situation has proved to be unsatisfactory and the disadvantages of being under a government department are not just a matter of perception but are matters of substance which go to the heart of lack of regard for public or professional opinion, poor decision making, poor governance, inefficiency, and lack of consideration for the unmet needs of society for Legal Aid. These are the hallmarks of a non-independent, non-accountable system. The need for reform became clear. On 16th October 2009, in the purported discharge of its function under s.4(5(b) of the LASC Ordinance, in the absence of any consultation with the legal profession or solicitation of public opinion by survey, LASC (under the chairmanship of Mr. Paul Chan, JP) issued a letter to the Chief Executive of HKSAR citing the same factors identified in 7(e) above concluding that:

"The Council acknowledges that it will be ideal for a separate entity to administer legal aid independent of the government to deal with the perception problem. However, in view of the very satisfactory service currently provided by the LAD, the views of the LAD staff on the matter, and having considered the present financial position of the government, the Council does not see a pressing need to disestablish LAD and substitute it by an [ILAA]. The perception problem is acknowledged but it is not a priority issue for legal aid in Hong Kong. The Council has concluded that it is not the opportune time to pursue with further study on the establishment of an [ILAA]".

13. The lack of public consultation before the LASC's recommendation and/or conclusion has attracted much criticism in the meeting of the Panel on Administration of Justice and Legal Services (the "AJLS Panel") held on 25th January 2010. Despite the request of the AJLS Panel, LASC refused to disclose the Report of the Working Party (of LASC), which apparently led LASC to the conclusion that there was no pressing need to establish an ILAA.

14. In the subsequent meeting of AJLS Panel on 29th March 2010, Mr. Paul Chan, whilst acknowledging the criticism for the handling of review, still refused to disclose the report compiled by the Working Party citing confidentiality agreement with the staff of Legal Aid Department in the course of consultation as the reason (see Minutes of Meeting of AJLS Panel (LC Paper No. CB(2)1581/09-10) at Para. 23(b)). However, it is inexplicable why the report of the Working Party could not be disclosed with names of staff (if any) obliterated.
15. Instead of producing the Report of the Working Party, LASC gave a summary of the findings and recommendation of the Working Party in a letter dated 19th March 2010 (LC Paper No. CB(2) 1156/09-10(04). The HKBA notes with astonishment that in this letter, LASC claims that the working party "*invited comments from the legal profession*" (at p.2/7 of LASC's letter). This is incorrect. In any event, the lack of transparency and accountability arising from the non-independent set up was obvious. The failure to state the law and principles in favour of independence or refer to the LASC book Legal Aid in Hong Kong, 2006, Chapter 9, on the subject coupled with the degree of complacency towards the status quo made it appear that even the independent minded LASC had succumbed to the inertia which is the consequence of working with a government department under the current interim arrangement.
16. In fact, no comment from the HKBA was sought in 2008 or 2009 for the purpose of any review by LASC as to the feasibility and desirability of establishing an ILAA. It was fortuitous that around the same time (i.e. about July 2009), the Legislative Council published a "Research Report on Legal Aid Systems in Selected Places" (the "Research Report").
17. By a letter from the AJLS Panel (dated 10th July 2009), HKBA was invited to comment on the Research Paper. In reply, HKBA furnished a detailed written submission in September 2009 (with Appendix I - Note on SLAS and Appendix II - "The Authority Responsible For Providing Legal Aid" which highlighted the need for an ILAA).
18. Meanwhile, the Law Society also independently responded to the Research Report by way of a Submission (dated 1st September 2009) reiterating that:

"The Law Society has long advocated and continues to advocate for the establishment of an independent statutory Legal Aid Authority".

19. In the circumstances, it is not correct for LASC to assert in its letter to AJLS Panel (dated 19th March 2010) that:

"The Law Society of Hong Kong regarded the transfer of the legal aid portfolio in neutral terms. As to independence of legal aid, the Law Society believed that there were already sufficient statutory checks and balances to ensure that legal aid was administered justly. Notwithstanding the safeguards, the Law Society supported the call for an [ILAA] to be set up".

20. Pausing there, it is noteworthy that since the transfer of Legal Aid Department to HAB in about late 2007 or early 2008 (amidst the strong opposition from the HKBA), the financial tsunami had struck in October 2008. The Lehman Brothers cases involving the mis-selling of financial products (giving rise to close to 20,000 complaints lodged by investors with the Hong Kong Monetary Authority) and the manipulation of voting of minority shareholder in a meeting of PCCW on 9th February 2009 had caused major repercussions. All these events called for action, rethink and expansion of the legal aid system. Regretfully, nothing was done by LASC, HAB or the Legal Aid Department, prior to the publication of the Research Report.
21. The foregoing tends to show that the LAD and LASC were complacent, following the *status quo*, echoing the line of the Administration that there was no urgency to establish an ILAA. The lack of institutional independence was reflected in the lack of independent initiatives to identify the unmet needs for legal aid to provide access to justice to more people in more types of cases.
22. Events over the last decade have shown that the legal aid budget has shrunk in real terms, and the coverage has dropped. In contrast, the government is deploying seemingly disproportionate sums of public funds on infrastructure and other developments. Despite the theoretical "uncapped" budget, for a number of years the Director of Legal Aid has not applied (or would not apply) for supplemental funding from the Legislative Council

to fulfill unmet needs in the provision of legal aid services. By way of comparison, the budget of the Department of Justice has increased substantially.

23. The HKBA believes that the arguments for the establishment of an ILAA are all one way. They should be part of the New Administration's Programme to re-establish the commitment to access to the Rule of Law for people in need, public official's honesty and to help re-instill public confidence, which the current Administration has obviously lost.
24. If the ILAA is established, then there can be no question as to whether the ILAA's decision making can be influenced by pressure brought to bear on the authority. There is a distinct impression at present, whether through indifference, or through a policy feeling that "*everything is all right, don't rock the boat*" mentality, which seeks to uphold the *status quo*. This may have been the current Administration's policy, but it is now time to move on.

III. LACK OF AWARENESS OF HAB (AND LEGAL AID DEPARTMENT) AND INSUFFICIENCY OF LASC TO ADVISE GOVERNMENT ON EXPANSION OF SLAS

25. Despite the detailed recommendations of the Interest Group of the LASC on the desirability to expand the scope of SLAS, which was supported by HKBA by way of submission of HKBA before the AJLS Panel meeting on 25th April 2002, nothing was done by the Administration.
26. The issue of expansion of SLAS was only resurrected after the publication of the Research Report (in about July 2009), followed by submission of the HKBA in September 2009. It was only then that the LAD and/or HAB saw fit to look into the expansion of the scope of SLAS again.
27. This process has taken 2 years, and many meetings with the professions to achieve modest improvements in the provision of Legal Aid (see Chronology of Events at the Appendix 1 hereto). It seems that the HAB has had little experience about legal aid and

the present Legal Aid Department have felt initially threatened, and then co-operative with the professions' wishes.

28. It is possible that LASC has become less pro-active because it could see no prospect for reform and improvement within the non-independent set up. Nevertheless, despite the unmet needs being identified by the Interest Group of the LASC and supported by HKBA back in April 2002, nothing was done by LASC or Legal Aid Department over the years to seek to expand Legal Aid in order that timely legal assistance might be rendered to the thousands of Lehman Brothers retail bank clients, who lost modest sums on average less than HK\$200,000 through mis-selling of mini-bonds and other structured financial products.
29. The Administration had to step in to keep protestors off the streets, and set up the Compensation Scheme. These people could not afford to take on the banks in this mis-selling scandal. So Legal Aid should have been granted quickly. Legal Aid in the preceding decades, in the 1980's, and 1990's has always quickly responded to societal needs, by quickly expanding the coverage of legal aid to meet these needs.
30. Meanwhile, the Interest Group of LASC had been reconvened on 21st April 2009 to follow-up on the expansion of SLAS (see the Appendix to the "Further Report on SLAS" produced by Interest Group of LASC, November 2010).
31. Notwithstanding that the Government was supposed to seek advice from LASC, HAB informed the AJLS Panel on 29th March 2010 that it had decided that the increase in Financial Eligibility Limits (FEL) meant that there could be no expansion of coverage of SLAS. This astonishing position was taken by HAB without waiting for the results of an updated assessment by LASC and/or the Interest Group of LASC (see Minutes of Meeting of AJLS Panel held on 29th March 2010, at Para. 54).
32. The conduct of HAB, supposedly on advice of Legal Aid Department, has given rise to understandable concern as to the independence of legal aid services. In view of the lack of progress, at the AJLS Panel meeting on 21st July 2010, HKBA produced a draft amendment to the Legal Aid Ordinance (Cap. 91) to set the tone and pace of reform to bring about an expansion of coverage of SLAS. A motion was unanimously passed at the

AJLS Panel meeting and HAB was asked to follow-up on the "package" of reforms and improvements propounded by HKBA by way of the draft amendment.

33. In September 2010, contrary to previous understanding, HAB came up with a position out of the blue as to the criteria for expansion of coverage of SLAS (at Para. 15 of LC Paper No. CB(2)2298/09-10(01) dated September 2010) that :

"To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio".

34. This erroneous view was maintained by HAB throughout despite it being contrary to the LASC book Legal Aid in Hong Kong Chapter 9 page 227, and despite repeated submissions of HKBA to put the principles and the record straight (see HKBA's Submissions before AJLS Panel meetings held on 30th September 2010, 22nd November 2010, 21st December 2010 and 28th March 2011).

35. In the foregoing submissions, HKBA repeatedly emphasized that the principles for expansion of SLAS are as follows:

- a. Significant injury or injustice to the individual, currently reflected in the case of having to be worth \$60,000 (see Schedule 3 of SLAS).
- b. Involve monetary claims and have a reasonably good chance of success (see Government Consultation Paper on Legal Aid 1993, at Para. 22 and s.10(3) of Legal Aid Ordinance, Cap. 91).
- c. Expenses and difficulty and costs are not an argument against expanding SLAS to cover more justified types of claims (see Report of the Reconvened Working Group on Legal Aid Policy Review (July 1994), at Para. 6.6).
- d. Worthy candidates for inclusion can be considered when SLAS is financially capable for further expansion (Para. 6.7 of 1994 Report).

- e. The purpose of SLAS is to help the sandwich class so those above the line are excluded and discretionary inclusion would be subject to abuse and increase LAD workload (Para. 6.8 of 1994 Report).
 - f. Class actions were only excluded because the Hong Kong legal system does not yet provides for class actions (see Para 13 onward of Government Consultation Paper 1993).
36. In light of the HKBA's submission as aforesaid, HAB eventually acknowledged the historical development of SLAS to cover "*monetary claims and have a reasonably good chance of success*" but in the same breath still maintained that "*The high chance of recovery of damages helps ensure, to a large extent, the financial sustainability of the scheme*" (see Paras. 12 and 13 of LC Paper CB(2)600/11-12(01) from HAB dated 20th December 2011).
37. Once again, HKBA had to reiterate the principles for expansion of SLAS in a written submission put before AJLS Panel meeting on 20th December 2011 (see LC Paper CB(2)648/11-12(01)).
38. In short, HAB has misled itself as to the underlying principles and the original design of SLAS and sought to elevate "*high chance of success with good damages to costs ratio*" - which is probably a misreading of the observations made of the past performance of SLAS in funding personal injuries claims (see Legal Aid In Hong Kong published by LASC (2006) at p.226) - to become a criteria for the expansion of SLAS and for identification of the additional types of cases to be covered.
39. Regrettably, despite repeated clarification by the HKBA, the same misconception has crept back in HAB's paper (HAB/CR 19/1/2) in March 2012. This misconception on the part of HAB has led to much and unnecessary delay in the determination on the scope of expansion of SLAS.

40. Labouring under the misconception of *"high chance of success with good damage to costs ratio"* as a criteria, the Legal Aid Department (at the behest of HAB) saw fit to rely on the dismal experience under OLAS (in respect of non-Personal Injury cases) to argue that non-PI cases (with a success rate of only 70%) did not have *"high chance of success with good damage to costs ratio"* and argue against expansion of SLAS (see HAB's paper put before AJLS Panel meeting held on 22nd November 2010).

41. The said argument of Legal Aid Department (and HAB) was only based on 5 non-PI cases (in 2008) and 8 non-PI cases (in 2009) funded by OLAS). Common sense dictates that the results of such small number of cases can hardly be representative. The fact that HAB (and LAD) sought to deploy such small statistics to argue against expansion of SLAS give rise to concern as to the conviction of the Administration.

42. After many rounds of discussion, a number of types of cases, in addition to the recommendations of LASC (dated 13th December 2010), have been included in the expansion of SLAS. Notably, upon the recommendation and insistence of the HKBA, the following categories of cases have now been included and consequential legislative amendments are in the pipeline.
 - a. Professional negligence claims against Planners (as defined in Planners Registration Ordinance, Cap. 418), Estate Agents (as defined in Estate Agents Ordinance, Cap 511); and Landscape Architect (under Landscape Architects Ordinance, Cap. 516);
 - b. claims arising from negligence of an insurer, insurance agent or authorized insurance broker as defined in s.2 of Insurance Companies Ordinance, Cap. 41;
 - c. claims arising from mis-sale of first-hand property.

43. The upshot of the outcry for expansion of SLAS is that it has now been proposed that OLAS be amended to allow legal aid to be granted for claims arising from the sales of derivatives and structured financial products where fraud, misrepresentation or deception is/or may be involved. This is however still not satisfactory, since such claims are not yet covered by SLAS. The "sandwich class" are most likely to be victims in such cases and most likely to be in need of Legal Aid to have access to justice, but would still be kept out of the Legal Aid umbrella.

44. The lack of conviction of the Administration and the lack of vigour of the LASC in promoting the expansion of SLAS give rise to serious concern that both the LASC and HAB are falling into a sense of complacency and are in a state of lethargy. This is typical of a government department which is not accountable to its client base or to the public.
45. It is most regrettable that in the initial process of deliberation on the expansion of SLAS, LASC tended to drag its feet and simply echoed the Administration's line. Again, the need for an ILAA is accentuated.
46. On a different note, on the issue of criminal legal aid, the same degree of reluctance to change is observable. Criminal procedure has now become more complex. In particular, in appeal case, in order to prepare proper grounds of appeal, counsel would invariably read through massive amount of court transcripts. It was not until very recently that some form of remuneration was provided to Assigned Counsel for the work.
47. The level of counsel fees paid for legally aided criminal cases is so out of tune with the prevalent economic conditions over the last few decades that the scheme could hardly attract and retain more experienced barristers to defend the legally aided defendants. Consequently the un-equal access to justice is aggravated and perpetuated. It is to the credit of the members of the legal profession that despite the derisory fees scale, they have nevertheless taken on the duties and shouldered the responsibility of representing those who otherwise cannot afford private representation.

IV. FAILURE TO MAKE TIMELY RESPONSES BY EXPANDING LEGAL AID TO COVER SOCIAL NEEDS

48. This was patently noted in the Lehman Brothers' Cases; Legal Aid should have been involved, either by an *ad hoc* scheme under SLAS or a quick amendment to the Legal Aid Ordinance to embrace these new types of claims, which would have brought 10% of a \$19 billion settlement into the SLAS Fund. There has been a failure to keep up with the needs of society, despite this being discussed in Legal Aid in Hong Kong, 2006 Chapters 7 and 8.

49. There was a public perception that the Administration had come to some arrangement with the Banks which mis-sold these products or where, in some cases, criminal offences were involved. The net result was there was a Compensation Scheme in which only the banks were required to pay back part of the principal to some investors (not the promised interest) in exchange for a quick payment, and no criminal prosecutions.
50. The perception was that Legal Aid was kept out of the picture deliberately by the Administration. The general perception is that if Legal Aid had been involved and test cases brought to the Courts, proper settlements could have been reached and full compensation achieved. The law would have been clarified and the number of further cases reduced.
51. Instead of the recent Legislative Council Sub-Committee Report blaming government officials and demanding political solutions, there would have been a legal solution and more justice. Protestors were on the streets until very recently in early 2012. This can hardly be the best advertisement or testament for the proper functioning of the Rule of Law and the due administration of justice and the image of Hong Kong being a safe and well regulated haven for investors.
52. The Consumer Council has only funded less than 10 of these cases and these are just coming to court now. Practitioners know that the numbers of other complainants are in the 1000s and many more have registered complaints, now that the time bar is drawing near.

V. BLINKERED PERCEPTION THAT EVERYTHING IS ALL RIGHT WITH THE SYSTEM

53. In the view of the HKBA, this is typical problem for a non-independent body or government department mindset. There was a promise to review the system every 5 years. This has not happened. When the HKBA initiated the last round of improvements since September 2009, there was strong resistance to the need to extend SLAS (see Letter from the LASC to the Chief Executive dated 13th December 2010). It has taken some 12 debates in the AJLS Panel to reach the proposed amendments to cover the additional type of cases (as identified in Paragraph 42 above) which were all along included in the

HKBA's recommendation but initially rejected by LASC and HAB without any valid reason (see also Paragraphs 73 to 74 below).

54. The HKBA believes that if there was an ILAA established, there would be a clear mandate to properly monitor and review its operations annually, deal with adjustments required to the Financial Eligibility Limits (FELs) and at the same time actively engage the professions in discussion about new areas for the provision of Legal Aid.
55. There would be a lesser need or frequency to go back to the Legislative Council, for an inquisition on the failures of government departments and to expose the inertia of those advising the government or failures of the Hong Kong Monetary Authority, etc. There would be no need to wait for the next scandal or issue to erupt, which will further expose the un-met needs for legal redress in our society.

VI. THE PROCESSES BY WHICH NEW AREAS OF LEGAL AID COULD BE EXTENDED

56. The HKBA believes that if our excellent system of administration of justice is to be fully utilized, then Legal Aid must develop and be engaged in the new areas of law as well as social, environmental and financial problems, which constantly come to the fore.
57. Members involved in the recent past discussions have come across repeated intransigence to accept that new areas of law and societal needs should be looked at. This is because, we suggest, that the Legal Aid Department is either out of touch with professional practice or has no section tasked at looking at new areas of law to cover and the unmet needs. Even if it did have such a section, and it suggested reform, it could find itself overruled by the senior officials in HAB who at that level have no mandate for independent thinking or action. It is therefore not surprising that there is neither incentive nor initiative to innovate, reform and improve.
58. By way of example, it is obvious that Class Actions should be covered (see Paragraph 35 above). The Consumer Council has taken very few of these claims over the past few years. The scathing observations made by Rogers VP in the PCCW Case (CACV No. 85

of 2009 (unrep) with Reasons handed down on 11th May 2009 following pronouncement of judgment on 22nd April 2009) shows that shareholders' rights are being abused.

59. If Hong Kong is to have a more credible financial regulatory system, then the establishment and protection of individual shareholders' rights should form an integral part of that system. Lamentably, HAB and Director of Legal Aid have hitherto still not accepted the value and social justice involved in funding minority shareholder cases.
60. Other public interest areas, such as environmental protection to protect the health and wellbeing of a cross-section of individuals and groups of people also come to mind, but they fail to have legal aid support. In consequence, Hong Kong's quality of life continues to fall behind other jurisdictions, despite we being parties to the obligations in various international conventions.

VII. THERE BEING NO CHANGE IN THE JUSTIFICATION AND ASPIRATION FOR AN ILAA, IS LEGAL AID SERVICES IN HONG KONG SADDLED WITH THE STARK CHOICE BETWEEN "UNCAPPED" FUNDING AND INDEPENDENCE ("HOBSON'S CHOICE")

61. Current experience shows the present system is failing the public in a number of crucial ways. The Administration and the LASC, have been extremely slow to respond to the need for timely responses and changes, and anyone who has been to the AJLS Panel debates over the last 3 years, senses there has been a lack of urgency in the whole process. The HKBA believes that this inertia is brought on by lack of accountability and the false sense of complacency that everything must be all right. A basic cause for this attitude and this unsatisfactory result is the lack of institutional independence of the LAD.
62. The basic aspiration for independence has not changed. Unless there is a change in the position of the LASC since the 1998 Report (see above), LASC should be (and should be seen to be) taking all necessary and pro-active steps to advocate and facilitate the establishment of an ILAA.

63. The fact that LASC issued the review report on 16th October 2009 (without seeking the views of the legal profession or any public consultation) adopting the same argument of the Administration in 1999 in rejecting the need for the establishment of an ILAA has reinforced the concern about the institutional flaw identified in its 1998 Report.
64. The HKBA believes that the LASC should take the lead to expose the lack of cogency in the Administration's position and the Hobson's choice between (a) an "uncapped" legal aid administered under government structure; and (b) an ILAA with a capped budget.
65. The transfer of Legal Aid Department to HAB (in 2007) was a retrograde step from independence. As a matter of common knowledge, all Bureaux of government operate under a budget. Although the legal aid fund is theoretically uncapped, it is unknown when was the last time the Legal Aid Department applied for supplemental funding. It gives rise to the perception that the benefits of an uncapped legal aid budget is more apparent than real.
66. It is a matter of fundamental principle that needs to be clarified once and for all. In short, the virtues and benefits of having an ILAA should not give way to the exigencies of administrative convenience and perceived better accountability of a government department. This is particularly so when in its present operation it is handicapped by the defects and shortcomings arising from being a government department discussed herein.
67. Conversely, if it is accepted that as a matter of principle, in order to enjoy the benefit of the so-called "uncapped" legal aid funding, the institution responsible for its administration has to be within the government structure, there is no point in LASC doing its periodical reviews on the "*feasibility and desirability for the establishment of an [ILAA]*" in the discharge of its function under s.4(5)(b) of Cap. 489.
68. To put it bluntly, if, contrary to its findings and recommendation contained in 1998 Report, LASC now subscribes to the Government's argument that Legal Aid Department should remain part of government in order to benefit for an uncapped budget, the HKBA believes that it is meaningless for LASC to purport to conduct periodical review on the establishment of an ILAA, since it would be a foregone conclusion.

69. Should the case be otherwise, LASC should take the stance that the sooner the Legal Aid Department is moved out of HAB and the government, the easier is the transition and the least is the cost and the impact on staff morale.

VIII. IS THE LEGAL AID SERVICES COUNCIL WORKING?

70. Clearly the LASC was set up as a stop-gap measure in 1996. Unfortunately, it appears to have also fallen into the same inertia groove of a government department, when instead it should have made a clarion call for public debate and a considered revision of the Legal Aid System by about 2006. No papers have been disclosed by the LASC that it even considered recommending the extension of Legal Aid to Lehman Brothers' Cases. Nor was there any evidence of LASC initiating reform proposals of its own during the period 2006-2010. It was prodded into action in late 2009, and its recommendations to the Chief Executive were then inappropriate.
71. The HKBA has the distinct impression over the last few years, that the members of the LASC, who are busy people, do not have independent legally trained support staff to be regularly reviewing the unmet legal aid needs in Hong Kong. Constant independent review should have been dealt with by a proper administrative and legal and technical team behind them. Doing LASC work requires a great deal of time and expertise and it takes much time to become conversant enough with the concepts and working procedures and problems of Legal Aid.
72. Members of the Bar who sit on LASC, give their time for free, and have been called upon to work and produce papers in the last current review period which went well beyond the call of unpaid members of this Council. They had to call for help from other members of the Bar to put up proposals in the LASC consultation paper. The HKBA is left with the impression that members of the LASC have been struggling to cope with the issues raised over the last 3 years, and their backup support has been minimal.
73. Certainly the LASC has had little time or inclination to deal with the new subject areas identified by HKBA in July 2010 (*c.f.* LASC's recommendation to the Chief Executive dated 13th December 2010). By way of example, in LASC's recommendation, consideration for areas of claims involving Professional Planners, Landscape Surveyor,

Estate Agents, Insurance Agents, Insurance Consultants, sales of new flats, Small Marine Accidents were *deferred* for no valid reason. Class Action was *ignored*, which would have been most relevant in cases involving sales of goods and provision of services and environmental cases. Claims involving Minority Shareholders' Rights was *rejected* mainly on the ground that it was also not covered under OLAS!

74. It was only at the insistence of the HKBA that some of the deferred or rejected types of claims have now been included in the expansion of SLAS (see Paragraph 42 above). There is an impression that the LASC members are too busy to deal with important matters of detail and policy and for the proper extension of the Legal Aid scheme. The HKBA is not being critical of the members of LASC per se because they contribute their free and unpaid time to undertake this public service. The problem is with the lack of independent backup and resources that LASC is provided with such that LASC does not have the ability to go ahead with reforms, which would appear not to be favoured by HAB and the Legal Aid Department.

75. Conclusion on the function of LASC: This kind of half way house arrangement does not command nor instill public confidence. Under Section 4 of Cap.489 the LASC is not permitted to direct staff and is remote from individual cases, which would provide live examples for needs of reform. It is difficult to monitor the day-to-day workings of the Legal Aid Department, and hence it is difficult for LASC to obtain the managerial material or data so as to form a realistic and informed view about its shortcomings and unmet needs, so as to advise on matters of principle (see Paragraph 3.6 of 1998 Report). The Legal Aid Department is under the HAB. In management terms it is not independent, and it is not accountable to LASC which is mainly advisory. The legal and professional resources allocated to it, are minimal. Hence the Recommendations in Chapter 6 of the 1998 Report. LASC should be abolished and replaced by a supervisory board of an ILAA. This is the way forward if the Rule of Law is to be maintained and preserved. The new Administration has a golden opportunity to show its commitment to the Rule of Law and to make access to justice a reality for the people of Hong Kong.

IX. THE IMPORTANCE OF PERCEPTION OF LACK OF INDEPENDENCE OF THE DLA

76. Legal Aid is a complex subject and takes years to understand, let alone reform. Unfortunately part-time LASC members with no legal knowledge are in the hands of Legal Aid Department, who influence the perception that everything is fine. The HKBA believes that the members of the public and the members of the professions have the perception that the Legal Aid Department does not act independently of the Administration. For the reasons set out above, this may be due to the *“everything in the garden is smelling roses and don’t rock the boat”* syndrome combined with complacency in outlook that is engendered by a government department, and also given the lack of time or expertise of those in the LASC.
77. We have mentioned the obvious lack of participation by the Legal Aid Department in the Lehman Brothers’ cases. Certainly in the 1980’s there was a perception that Legal Aid should take account of the then Administration’s views upon legal aid applications by Vietnamese Asylum seekers, see Legal Aid in Hong Kong, 2006, page 202-203. There are other less obvious instances.
78. The Administration may state that it does not interfere with the Legal Aid Department, but the fact is that it is a government department, manned by civil servants, and the head is now accountable to the Secretary for Home Affairs. No one suggests that the Secretary for Justice should be accountable to the Secretary for Home Affairs. He is independent and gives his own view of matters to the whole Administration. This gives the appearance of, and is in fact a downgrade of the independence of Legal Aid.
79. Putting Legal Aid under the HAB is against the international trend. In the view of HKBA, it is to misunderstand its constitutional and legal role. It poses an increased risk to both. The Director of Legal Aid should be free to report to the members of the public in the same way that the Ombudsman does; and not to report to the Secretary for Home Affairs. Budget expansion issues have obviously been put on the back burner for a decade or more.

80. This downgrade problem goes deeper, and in particular in cases where the individual litigant wishes to sue the government or bring judicial review proceedings in respect of administrative acts. His application to be provided with legal representation for seeking leave for judicial review is often turned down. Subsequently when he has managed to obtain leave then only he may be given legal aid. How can the Director of Legal Aid as a civil servant convince him, that his decision was dictated by legal principle of lack of merits (or means) rather than wishing to save the administration the trouble and expense of fighting a difficult and embarrassing case?
81. The importance of perceptions, lack of trust or credibility, and the potential for a conflict of interest was behind the decision of the UK Royal Commission on Legal Services in rejecting a state run legal aid scheme when it stated that:

“The main objection of principle is that legal aid services are required more and more by private individuals who are in dispute with authority in one of its many forms, and to protect the interest of clients in such cases, the independence of the legal profession is of paramount importance. If all the lawyers available to assist an individual at public expense depended upon the authorities for position and advancement, there would be a risk that an individual’s case might be conducted not in the way which best served his interests or complied with his wishes, but in a way which avoided difficulties and gave least offence to those in authority”.

82. Members of the HKBA who attended the AJLS Panel meetings formed the distinct view that the HAB were ill-prepared, and did not bother to report to the Bar or the Law Society on a timely basis. Again this gave the important impression that the HAB did not seriously consider proper consultation with stakeholders was required, and Legal Aid provision was not a matter of importance, with low appreciation of how important is access to justice in a society where the rule of law is the only redress against the government. It would appear that the HAB fails or does not consider that access to justice in an orderly manner promotes stability and confidence in government and is preferable to public demonstrations which emphasise the failings in other departments of government.
83. By way of example, following a brief public announcement on 23rd March 2010, the important proposals contained in HAB's paper "Five-yearly Review of the Criteria for

Assessing the Financial Eligibility of Legal Aid Applicants" (LC Paper No. CB(2)1148/09-10(01) were given to HKBA on the 27th March for an AJLS Panel meeting on the 29th March. The Law Society was not even given those papers until either the same day of the debate or at the earliest the night before.

84. These proposals would have to be discussed by each entity in Committee and a communal response prepared for the debate. How could that happen in these circumstances? This is a reflection of the importance that the administration places on consulting with the stakeholders on important matters of principle involving access to justice by the common man in Hong Kong society. Regrettably, on a number of occasions the HAB did not come prepared, as they had promised, on a number of issues, and appeared to treat the AJLS Panel meetings as if they were a boring irrelevance, or used the excuse of intervening holidays for not producing papers to the Legislative Council or interested parties for 5 months. This was a total downgrade in response by the Administration of the treatment of important issues-
85. In passing, at Paragraph 27 of the said LC Paper, HAB categorically asserted that "*The LASC's Interest Group on Scope of Legal Aid has looked into the issue of expanding the scope of SLAS and considered it not appropriate, for the time being, to recommend any extension. It is understood that the Group will continue to study all the issues relating to SLAS including its scope with a view to bring further improvements to the Scheme*".
86. This is in line with HAB's position at the AJLS meeting on 29th March 2010 that since the FELs were to be increased, there would be no room for "*expansion of its scope to cover other categories of cases*" (see Minutes of AJLS Panel Meeting on 29th March 2010 (LC Paper CB(2)1581/09-10), at Para. 54).
87. In fact, in a letter dated 26th March 2010, LASC stated that the expansion of SLAS was still being considered by its Interest Group. As a matter of fact, the Interest Group held 5 more meetings (between 10th June 2010 and 25th October 2010) and some recommendations on expansion of SLAS were made (see Appendix to "Further Report on SLAS" prepared by Interest Group of LASC in November 2010).

88. The conduct of HAB brings home HKBA's views expressed in their letter of the 28th December 2007 to LASC (opposing the transfer of Legal Aid Department to HAB) wherein it is said at Para. 3(a)(ii): "The potential for and the ramifications of an under-funded or under resourced Legal Aid Department are obvious."
89. When the HKBA called for the expenditure figures and the grant of applications in 2009, it was disturbing to see that in actual number terms between 1997 and 2008, the actual Legal Aid Department vote of fund was static, or had declined. This looks far worse when adjusted for inflation and when compared with the 50% increase in the Department of Justice/Secretary for Justice's vote or budget, when they used to be on a par with that of the Legal Aid Department.
90. In conclusion, in Paragraph 4 (b) in our letter of the 28th December 2007, we said that *"the Legal Aid Department has moved from being a beacon for the underprivileged who would be otherwise deprived of access to justice, to a bureaucracy whose procedures are an inhibition to people seeking legal recourse. These procedures typically include a lengthy process of repeated interviews, onerous demands for evidence, both as to means for the use in the prospective litigation. The result is that many are discouraged, rather than encouraged to exercise their basic legal rights. Others have turned to recovery agents"*. We see no reason to change this view.
91. Our experience is, that particularly in personal injury cases, the Legal Aid Department has given in to the machinations of recovery agents. Despite the efforts set out in Legal Aid in Hong Kong page 205, the Department has failed to stop litigants using them, and their "tied-in lawyers" who are nominated as being their "solicitors of choice". We have not seen any review or consultation process to try to stop this practice. Rather we have witnessed the considerable shrinking of this part of the litigation work of the Legal Aid Department, to its detriment.

X. PRACTICALITIES OF ESTABLISHING AN INDEPENDENT LEGAL AID AUTHORITY

92. The Legal Aid Department started as an organ of the Judiciary, with an assigned District Court Judge in charge, before it became a department reporting to the Chief Secretary. The downgrade to being in the portfolio of the HAB means dis-establishment of the Department will involve relatively little difficulty and expense. There will have to be revision of the establishment salaries to retain competitive professional officers of the highest calibre.
93. Despite the recommendations of the LASC in the 1998 Report, and subsequently in 2003, the Department has retained opposition to the proposed changes. Civil Servants may like the *status quo*, but the question the HKBA asks is, whether the public are being appropriately and adequately served by this attitude? In the light of experience in recent years, the answer is no. Furthermore, in the view of the HKBA there are broader issues at stake than just the question of cost and staff sentiments. The overriding principle of access to justice should not be sacrificed at the altar of administrative convenience and seeking to preserve and maintain a status quo that has lost its mandate and credibility.
94. Like the LASC in 1998, the HKBA sees no difficulty in setting up the ILAA, as staff can be seconded from the Legal Aid Department. Existing staff can apply for jobs with the new authority and presumably will be offered at least as favourable terms for transfer. This has happened in the establishment of the ICAC, the Office of the Ombudsman, the Housing Authority and the Hospital Authority.
95. We see no problems with the secondment of purely legal staff to the new ILAA, as it involves just one discipline. The establishment of the Housing Authority and Hospital Authority involved many professional disciplines, and has proved successful and worthwhile. We see the dis-establishment of the Legal Aid Department as much simpler.

XI. CONCLUSION

96. The reliance on the public opinion referred to in 1999 that legal aid services were administered independently without an updated survey is hardly convincing. Undue weight has been given to the obduracy to change *apparently and allegedly* expressed by the staff of the Legal Aid Department.
97. LASC is echoing the line of the government back in 1999 instead of having conducted an independent review. The refusal to release the report of the Working Group, on the ground of confidential agreement with the staff of Legal Aid Department only serves to add to the perception. This perception should cease and it should start now.
98. This concern is compounded by its lack of conviction in the review of expansion of SLAS. The approach of HAB and Legal Aid Department (with the ostensible acquiescence of LASC) is disturbing. As the results now demonstrate, it is feasible to expand SLAS to cover proved needs in a lot more types of cases, than that originally recommended by LASC in December 2010.
99. The initial outright rejection by HAB (in March 2009) of any expansion of SLAS to cover more types of cases without waiting for the completion of the Report to be submitted by the Interest Group of LASC demonstrates the lack of genuine consultation. One would expect LASC to be more astute to guard against usurpation of its function.
100. Importantly, in the process of debates as to the expansion of SLAS, it is inexplicable that LASC has made no effort to disabuse the Administration as to the original purpose and design of SLAS so that the Administration has continued to mislead itself as to the need for "*high chance of success with good damage to costs ratio*" in the identification of types of cases to be covered. Consequently much delays were caused and unnecessary debates engendered. It is hoped this high threshold is not being applied in other decision making processes within the Department so that hard decisions are being avoided to the detriment of litigants.

101. In short, both LASC and Legal Aid Department (under the behest of HAB) would appear to have lost their direction and have failed to adequately and timeously to respond to unmet social needs, which is well illustrated, for instance, in the Lehman Brothers and PCCW cases. These are matters of substance and not just perception.

102. The entrenched resistance exhibited by HAB and Legal Aid Department to embrace changes and support the long overdue expansion of SLAS demonstrates that institutional inertia has set in and it is time for reform. This is to be done by the establishment of an ILAA. The new Administration is in the unique position to bring about this long needed and necessary change for the benefit of the community at large.

Dated 22nd day of June 2012

Hong Kong Bar Association

CHRONOLOGY OF EVENTS

- 1993 In the early 1990's the Bar Association and the Law Society pushed for an ILAA. The Legislative Council debated the matter in July 1993 when it considered the Consultative Paper on Legal Aid. Out of 39 members of the Legislative Council, only 2 voted against it. So the case for the ILAA was firmly established by the legislature.
1995. Amidst the call for an ILAA, the Administration proposed the establishment of the LASC.
- 1996 The LASC was established and called for an investigation of an ILAA. Coopers & Lybrand issued a report, which was released in April 1998.
- 01.09.1996 LASC established.
- 15.09.1998 LASC presented to AJLS Panel the "Report on The Feasibility & Desirability of the Establishment of an Independent Legal Aid Authority" and made recommendations for the establishment of an ILAA in place of Legal Aid Department with detailed solution as to logistical arrangement including initial secondment of staff and costs implication (see Extract of Minutes of AJLS Meeting on 15th September 1998 in Appendix II to LC Paper No. CB(2)1907/00-01(04))
- 13.10.1999 Director of Administration formally rejected the recommendations of LASC made in the 1998 Report citing "uncapped" budget and accountability as a reason (see Extract of Minutes of AJLS Meeting on 13th October 1999 in Appendix III to LC Paper No. CB(2)1907/00-01(04)).

- 18.01.2000 Both the Chairman of LASC (Mr. Lee Jark Pui, JP) expressed his disappointment as to the Administration Decision. The HKBA, represented by Mr. Andrew Li recited the HKBA's position in support of an ILAA.
- Nothing further was done by the Administration but only an avowed commitment to Review Legal Aid System every 5 years.
- 16.04.2002 Interim Report of the LASC Interest Group on the Scope of Legal Aid submitted to AJLS Panel for meeting to be held on 25th April 2002.
- April 2002 HKBA submitted position paper "A Review of the Provision of Legal Aid
- 25.04.2002 AJLS Panel Meeting
2003. Further AJLS Panel Meeting. The LASC calls for the establishment of an ILAA.
- SARS and Decline in the Economy – the issue of ILAA dropped
- June 2006 Legal Aid In Hong Kong book published by LASC
- July 2009 In July 2009, following the publication of the Research Report - HKBA and Law Society made submission in September 2009 to resurrect the issue of ILAA
- 16.10.2009 Letter from Chairman of LASC (Mr. Paul Chan, JP) to Chief Executive concluding that there was "no pressing need to de-establish LAD and substitute it by an [ILAA]"
- 2009-2011 HKBA attended some 11 meetings of the AJLS Panel (also attended by representatives of the Law Society) to rekindle the debates with Home Affairs Bureau and DLA as to the need for an ILAA, raising Financial Eligibility Limits (FELs) under OLAS and SLAS and expansion of coverage of SLAS.
- 25.01.2010 AJLS Panel Meeting in which LASC was asked to produce Report of Working Party leading to the conclusion in its letter dated 16th October 2009.

- 19.03.2010 LASC's letter to AJLS Panel explaining the recommendation but refused to produce Report of Working Party
- 29.03.2010 AJLS Meeting in which HAB announced not to expand SLAS to cover other cases.
- 21.07.2010 AJLS Panel unanimously passed a motion requiring the Administration to look into the "package" of improvement to SLAS including increase in FELs and additional types of cases to be covered in accordance with a draft amendment to the Legal Aid Ordinance furnished by HKBA (dated 20.7.2010).
- Sept 2010 HAB wrongly asserted that *"To maintain its financial viability, SLAS was by design aimed at cases that carry a high chance of success with good damages to costs ratio"* (see LC Paper CB(2)2298/09-10(01))
- 13.10.2010 Chief Executive announced HK\$100 million to be made available for the enhancement of the SLAS Scheme (see letters from HAB to HKBA and LASC both dated 13th October 2010).
- March 2011 Resolution passed for legal aid (FELs) to be increased (with effect from May 2011)
- \$175,800 to \$260,000 (for OLAS)
- \$488,400.00 to \$1.3m (for SLAS) - This was less than \$3.0m the HKBA contended for based on existing principles but was a start. ILAA issue shelved.
- 2012 Announcement that Deloitte has been commissioned to canvass views about setting up an ILAA.

March 2012 Proposed Resolution to amend the Legal Aid Ordinance (Cap. 91) to:

- (a) remove restriction under OLAS to allow monetary claims in derivatives of securities, currency futures contracts when fraud, misrepresentation or deception is involved
- (b) expand SLAS to cover claims against Architect, Professional Engineer, Surveyor, Planner, Land Surveyor, Estate Agents, Insurance Agents and claims from mis-sales of first hand property and Labour Tribunal Appeals.

Hong Kong Bar Association

Dated: 22 June 2012



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

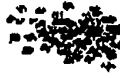
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01-AUG-2011 16:03 FROM LEGAL AID DEPT

TO 284P1706

P.01



HADDY FY
LEE/LAD/HKSARG
01.08.2011 16:58

+852 2877 5122
aaprite@baskervillech.com

cc
bcc

Annexure 1

Subject Legal aid statistics

High Importance Return receipt Sign Encrypt

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	7 837	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	595	2 537

Legal aid costs

Year	Civil (\$m)	Criminal (\$m)	Total (\$m)
2006/2007	313.189	105.488	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	115.205	505.308

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

本署檔號 Our Ref: LA GR/1-200/7/2
來函檔號 Your Ref:
電話Tel: 2867 3096
圖文傳真Fax: 2869 0755

28 June 2012

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

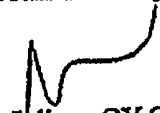
Dear Mr. Pirie,

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

Annexure 3

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 CRI)	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%).

Hearing nature	/ 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%)	56/92 (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.

+852 2523 2042

香港司法機構
司法機構政務處



JU

本函編號 OUR REF:

來函編號 YOUR REF:

電話 TEL: 2825 0486

圖文傳真 Fax: 2523 2042

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.**

2. Thanks for your attention.

Yours sincerely,

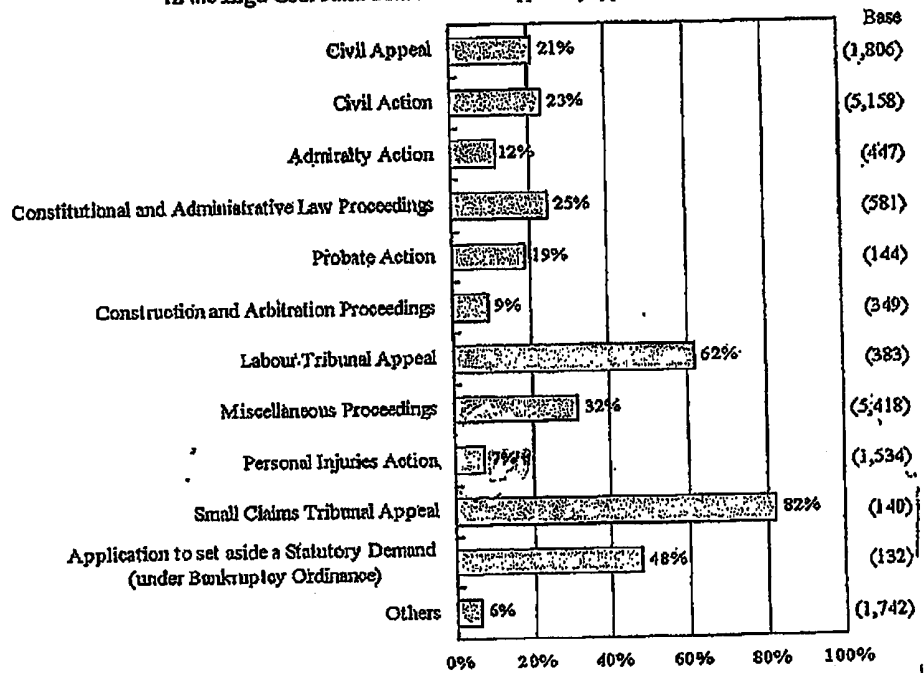
Roger Law
(Roger LAW)
for Judiciary Administrator



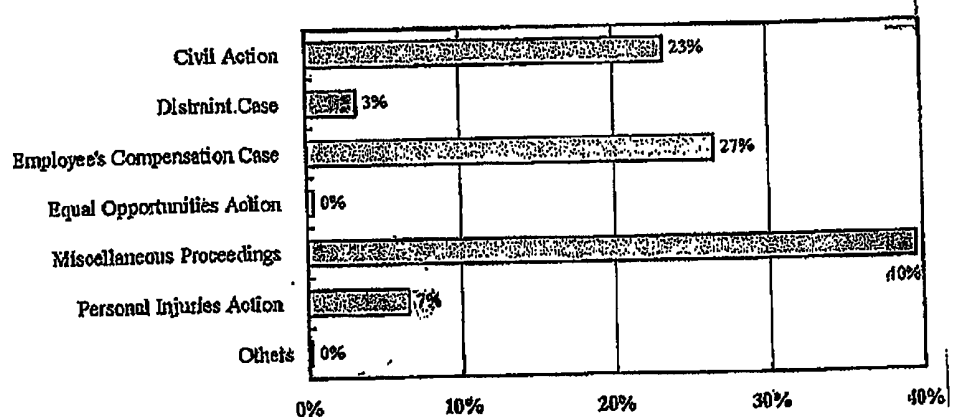
Annexure 4

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



Appendix I – Abbreviations

CE	Chief Executive
CS	Chief Secretary of Administration
DDLAs	Deputy Directors of Legal Aid
DLA	Director of Legal Aid
DoJ	Department of Justice
HAB	Home Affairs Bureau
ImmD	Immigration Department
LAA	Legal Aid Authority
LAD	Legal Aid Department
LASC	Legal Aid Services Council
LegCo	Legislative Council
MOJ	Ministry of Justice (applicable only to overseas jurisdictions)
NDPB	non-departmental public body
OLAS	Ordinary Legal Aid Scheme
OS	Official Solicitor
OSO	Official Solicitor's Office
SLAS	Supplementary Legal Aid Scheme
SME	subject-matter expert