



GOVERNMENT BUDGET 2020-2021 LAW SOCIETY SUBMISSION

1. The Law Society of Hong Kong makes the following submissions on the Government Budget 2020 – 2021.
2. We wish to draw the Government's attention to five specific matters. The first is on legal aid. Legal aid services form an integral part of the legal system in Hong Kong. It is imperative that all those who comply with the regulations of the Legal Aid Ordinance (Cap. 91) and have reasonable grounds for pursuing or defending a legal action in the courts of Hong Kong will not be denied access to justice due to a lack of means. In line with this policy intent, we have last year identified and relayed to the Government the following issues of concerns and sought discussions.
 - (i) Financial Eligibility Limits;
 - (ii) Further expansion of the Supplementary Legal Aid Scheme;
 - (iii) Payment of Costs to assigned solicitors and barristers; and
 - (iv) Community Legal Assistance - Green Form Scheme and Law Centres.

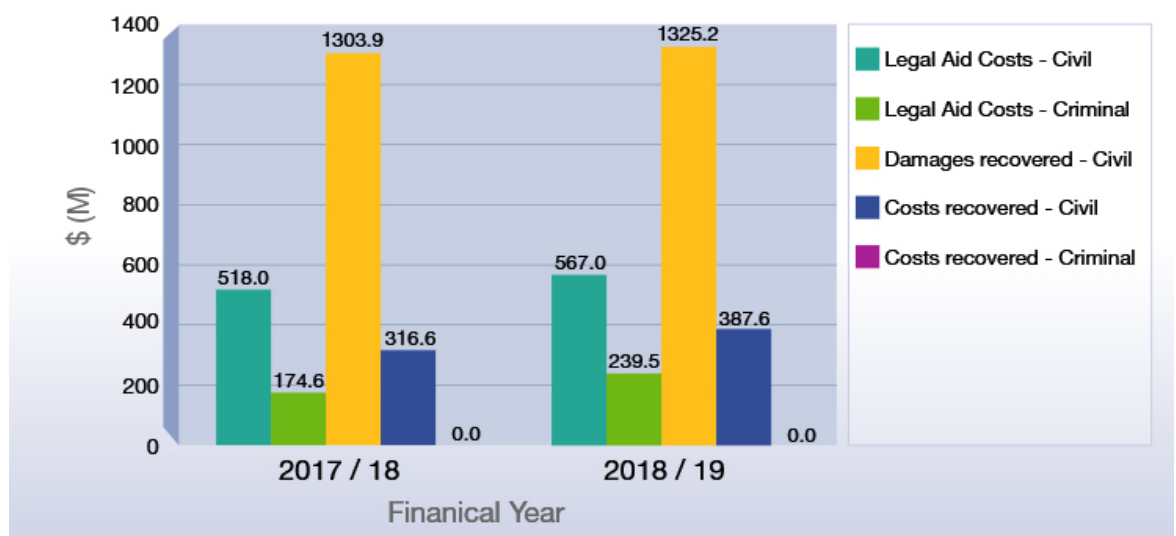
While we look forward to further discussions with the policy bureau and government department on the above, we shall add to the list a review of the criminal legal aid fees.

3. At the moment, the Government reviews criminal legal aid fees on a biennial basis to take into account changes in Consumer Price Index (CPI) (C) during a reference period. In conducting biennial reviews, the Government takes into account mainly general price movements during

that reference period and whether there has been difficulty in engaging the services of solicitors and barristers.

4. Adjustments to the criminal legal aid fees are largely mechanical. In our previous communications with the Government, we have already pointed out that that is not appropriate or adequate.
5. In this regard, we note from the webpage of the Legal Aid Department a comparison of legal costs expended in criminal and civil cases. By reference to the figures shown, it seems to us that there could be much room for a comfortable expansion for payouts for criminal legal aid, by comparison with the payouts for civil legal aid (or otherwise).

Legal Aid Costs Expended, Damages and Costs Recovered



Source: <https://www.lad.gov.hk/eng/statistics/cost.html>

6. It goes on without saying that the Government should ensure that funding for legal aid continues to be adequate. This is particularly relevant for criminal legal aid. Demands for criminal legal assistance are expected to rise, in the light of recent protests and demonstrations where a large number of people were arrested.

The above remarks apply *mutatis mutandis* to the funding for the Duty Lawyer Scheme.

7. The second matter that we raise for the attention of the Government is the strategic importance of updating and reforming the insurance law regime in Hong Kong. The Marine Insurance Ordinance (Cap.329) ("MIO") is the principal ordinance that codifies the law relating to marine and (despite its title) non-marine insurance in Hong Kong. It came into effect in 1961, and received little or no amendment of substance in the past 50 years. In the same period of time, there are far-reaching and substantial changes in the related UK legislation (on which the MIO was modelled). These, together with keen competitions with our neighbours, accentuate the need for a substantive reform to the MIO.
8. The third matter relates to our previous suggestion to the Chief Executive for a Mediation Pilot Scheme to resolve the disputes relating to the recent civil unrest in Hong Kong. We consider that mediation can provide an alternate platform for disputing parties to resolve a wide range of civil, social and community disputes in an effective and amicable manner; and thus invite the Government to revisit this suggestion and provide sufficient funding and resources to support the implementation of the proposed Mediation Pilot Scheme. The proposed Mediation Pilot Scheme (without appendix) is set out in an annexure to this submission.
9. The fourth matter relates to the mental health regime for Hong Kong, the update of which is long overdue.
10. Hong Kong is having an aging population; death, dementia and other terminal illnesses are not a matter of choice to the general public. Insofar as the mental health regime for Hong Kong is concerned, the regime itself is seriously outdated. The Mental Health Ordinance (Cap. 136) ("MHO") was enacted in 1960 to amend and consolidate the law relating to mental incapacity and the care and supervision of mentally incapacitated persons. There was no significant update at all to the MHO in the past 50 years. At the same time, there have been huge changes in the socio-economic landscape in Hong Kong. While the

Government has in the past decade proposed various policy initiatives for the elderly populace and has, for example, set up the Special Needs Trust in March 2019 to provide affordable trust services for parents of children with special needs, there is no matching review of the mental health regime. Questions such as (a) whether and in what way the preparation and the signing of wills, enduring powers of attorney or continuing powers of attorney (if put in place) and advance directives could be simplified thereby rendering them to be more affordable and (b) how legal assistance could be made more readily available to the elderly and the vulnerable, deserve a careful deliberation. We have for example already received suggestions on the setting up of a “*Legal Care Voucher Scheme*” (similar to the *Elderly Health Care Voucher Pilot Scheme* already in place) in order to subsidize professional services required for the preparation and execution of the testamentary and related documentation.

11. The Government should engage the relevant stakeholders to thoroughly discuss the mental health regime for Hong Kong, and/or consider inviting the Law Reform Commission to initiate an in-depth review of the subject matter. At the same time, adequate resources should be made available for the relevant policy initiatives.
12. The last matter that we raise for the attention of the Government relates to stamp duty on residential property transactions in Hong Kong.
13. The Government should consider removing the measures that were specifically designed to dampen economic activities, at least in the residential property sector, by normalizing the cost of transacting in residential properties back to what it was up until the early 2000s, when Hong Kong was recovering from SARS and then, later on, from the Global Financial Crisis.
14. A series of measures in the form of Special Stamp Duty (SSD), Buyers Stamp Duty (BSD) and increased rates of Ad Valorem Stamp Duties (AVSD) were introduced by the government from 2010 through to 2018. The stated purposes of these additional stamp duty measures (namely, to manage demand, give HK people priority to access the property

market, and to curb speculation) justified the measures in an environment of 'exuberant state' of the residential property market, increasingly tight supply, low interest rate and influx of capital from the Mainland and overseas. However, the economic conditions that prevailed when the measures were introduced have all but come to an abrupt end. The stated justifications for introducing these additional measures no longer exist.

15. In an economic environment when Hong Kong people are at risk of business failures and losing jobs, it would be unfair and wrong to penalize people, who wish or need to sell their residential property investments or even homes to weather the economic storm. Stamp duty as a tax on instrument or on transaction is particularly punitive as it is applicable even if the sale generates no profit or even results in actual loss. It would be dire if a person in difficult economic predicament would be forced to rely on the stamp duty exemptions for foreclosure, mortgagee sale or bankruptcy. For these reasons, *we propose that SSD should be removed.*

16. The higher rates of AVSD, along with the BSD, were both designed to deter buyers other than Hong Kong Permanent Resident (HKPR) first home buyers to buy into the residential property market. These measures have always skewed economic activities and impeded property transactions where HKPRs, for legitimate asset protection or succession planning purposes, would otherwise have wanted to buy or transfer their properties into corporate vehicles or family trusts. However, the exemptions for HKPRs and for transfers among 'close relatives' were too narrowly drafted. Increased rates of AVSD have also created hardship, including for HKPRs; who wish to change properties as they cannot be sure that they can sell the property they already own and so they dare not buy first. In the present economic conditions the fear is that there will not be sufficient buyers in the market, so there is hardly any justification retaining the high AVSD and the BSD to create disincentives for buyers. *To conclude, we propose for AVSD to revert back to the old Scale 2.* If the Government is minded to continue to maintain the disincentive for buyers who are not HKPRs, *we further propose for the exemption for both AVSD and BSD to be reviewed to*

exempt transactions involving corporate and trust structures that are determined to be ultimately held by or for one or more HKPRs.

**The Law Society of Hong Kong
18 February 2020**



A SUGGESTION FOR A MEDIATION PILOT SCHEME

SYNOPSIS

The harmony and smooth functioning of the society of Hong Kong have seriously been hampered by recent social unrests and the violence outbreaks. The conflicts arising in the protests and demonstrations have spread to different walks of life including workplace, families, organisations and government departments. There is a pressing need to resolve these conflicts. As the dispute resolution mechanisms currently available are unable to address and resolve these conflicts, the Law Society of Hong Kong (the “Law Society”) suggests that a Pilot Scheme be put in place to resolve these conflicts by way of mediation.

The Pilot Scheme aims to achieve the following outcomes:

- (i) To provide a neutral platform to the parties to voice out and reconcile their differences in a productive manner under the Scheme;
- (ii) To assist the parties to resolve their differences and disputes covered by the Scheme speedily and in an independent, flexible, confidential and amiable manner;
- (iii) To provide an alternative route for effective dispute resolution in addition to the existing dispute resolution means (e.g. the courts); and
- (iv) To build consensus within and / or among government bureaux and departments and restore harmony among civil servants.

BACKGROUND

1. In February 2019, the Hong Kong Government introduced the *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill*. This Bill eventually triggered a series of massive protests that took place almost endlessly since March 2019.
2. These protests and the related “uncooperative movements” continue as of the date of this Paper. Almost all the protests have escalated into

heated confrontations between the Hong Kong Police and the protesters. On some occasions, they lead to outbreaks of violence. Hong Kong Police among other things face severe criticism. Law and order in Hong Kong are put in peril.

3. It is unlikely that the existing dispute resolution channels or mechanisms (i.e. litigation) could effectively resolve the above confrontations and public disputes.

MEDIATION USED TO RESOLVE PUBLIC DISPUTES

4. Mediation is an effective and efficient dispute resolution process for disputes that involve multiple factors, particularly social and emotional factors (e.g. personal values, social ideologies). It could particularly be relevant and suitable to resolve the above public disputes, as it is
 - (a) voluntary;
 - (b) amiable;
 - (c) preserves party autonomy;
 - (d) interest based;
 - (e) flexible;
 - (f) less confrontational;
 - (g) confidential;
 - (h) time and cost effective; and
 - (i) can offer remedies that are not available in litigation and other dispute resolution.
5. Hong Kong has experience in using mediation to resolve disputes that attracted much public attention and that had great social impact. An example of referential value is the *Lehman-Brothers-Related Products Dispute Mediation and Arbitration Scheme* launched by the Hong Kong Monetary Authority ("HKMA") in October 2008. The above scheme set up after the Lehman Brother saga and administered by the HKIAC helped resolve disputes between the participating financial institutions and their clients. These disputes included financial and *non-financial* issues such as professional conduct, trust relationship, etc.
6. According to the HKMA, the above scheme received 250 requests for mediation and 85 mediations were conducted under the said scheme. 75 mediations reached a full settlement and the success rate of the scheme was around 85%. It is said that the above scheme received good feedback from the users and the general public.

THE PROPOSAL

7. Drawing on the above and related experience, the Law Society proposes the following to the Office of the Chief Executive.

Objectives

8. By way of mediation, the Scheme aims to help resolve disputes arising from the recent civil or social unrests and disputes, in an independent, impartial, confidential and amiable manner. The overall objective is to rebuild confidence, and enhance the harmony and smooth functioning of the society of Hong Kong.
9. The Pilot Scheme aims to achieve the following outcomes:
 - (a) To provide a neutral platform to the parties to voice out and reconcile their differences in a productive manner under the Scheme;
 - (b) To assist the parties to resolve their differences and disputes covered by the Scheme speedily and in an independent, flexible, confidential and amiable manner;
 - (c) To provide an alternative route for effective dispute resolution in addition to the existing dispute resolution means (e.g. the courts); and
 - (d) To build consensus within and / or among government bureaux and departments and restore harmony among civil servants.

Implementation

10. We propose the Scheme to be implemented in two phases (with no time frame or duration proposed for each phase at this time).
11. The Scheme should have a light-touch start in *Phase 1*, to focus on disputes that relate to, among and/or within the government bureaux and departments and public bodies. An example could be disputes between the Hong Kong Police and hospital workers.
12. We note the Government bureaux and departments have signed the "Mediate First Pledge".
13. The experience gained in the Phase 1 would help fine-tune the Scheme for *Phase 2*. In Phase 2, the Scheme shall be fully operational and shall handle all civil and public disputes under the Scheme, including those from business sectors and other public sectors.
14. Promotional activities, reviews and training to be held in appropriate time.
15. We ask that the Pilot Scheme should be set up as soon as possible.

Management of the Scheme

16. The Scheme shall be administered by an independent body (the

“Management Committee”).

17. There shall be a Secretariat to help the daily operation of the Scheme.
18. We anticipate the Secretariat should have a scheme administrator, to be assisted by a case officer(s) and an assistant(s).

Mediation

19. The Management Committee shall decide upon the terms of reference and the procedures for the Scheme. By reference to other mediation schemes, the following protocol could be considered.
 - (a) A party who is having a dispute that falls within the term of reference of the Scheme may apply to the Secretariat for mediation. The Secretariat would process the applications.
 - (b) Mediations eligible for the Scheme shall be conducted according to the established mediation rules. We recommend the Mediation Rules of the Law Society of Hong Kong with relevant modifications. This set of Mediation Rules is widely accepted.
 - (c) There could be Emergency Mediation and General Mediation.

Mediators

20. The Scheme shall establish and maintain a panel of HKMAAL accredited mediators which could consist of solicitor-mediators and other mediators.
21. Cases will be assigned by the Secretariat to the panel mediators by roster.
22. Panel mediators shall be remunerated by the HKSAR Government.

Indemnity

23. The Management Committee, its Secretariat and panel mediators shall all be fully indemnified by the HKSAR Government.

Funding and Resources

24. The Scheme shall be fully funded by the HKSAR Government. The source of funding for the Scheme as a matter of principle should not affect the independence of the Scheme.
25. A rough working budget (calculated on an approximation of 100 mediation cases handled per year) is set out on an Appendix to this paper. The budget is intended only to give a rough estimation, from the

industry's perspective of the funds likely to be involved. It is subject to variables, and is not meant for budgetary purpose for Government's Finance. The Law Society shall assume no responsibility on the itemisation or the accuracy of the calculation set out therein.

26. For avoidance of doubt, the Law Society's role is only to make this Proposal. At this stage we prefer not to be involved in the set-up or the supervision of the Scheme, or to take up its Secretariat. We are however pleased to discuss further this Proposal, and to respond to any questions thereon.

**The Law Society of Hong Kong
August 2019**