

DISCUSSION PAPER

LEGAL AID SERVICES COUNCIL

**Proposed Amendments to Legal Aid Services Council Ordinance
and other relevant Ordinances**

This paper deliberates the objectives and justifications for proposing amendments to the Legal Aid Services Council Ordinance (LASCO), the Legal Aid Ordinance (LAO) and the Personal Data (Privacy) Ordinance.

BACKGROUND

2. In the course of its operation since 1996 when it was established, the Council has encountered difficulties arising from the provisions of the LASCO and the LAO. These were not positively addressed because legislative amendments could be a lengthy process and the Council was considering the question of an independent legal aid authority which might eventually replace the Council. In the event, the Administration did not accept the Council's recommendation for an independent legal aid authority, and the Council therefore believes it is timely to review the legislative framework within which it operates.

OBJECTIVES

3. The objectives of the review are firstly to enable the Council to

function fully as a body corporate within the meaning of the Companies Ordinance, secondly to enhance the Council's role in overseeing the administration of the legal aid services provided by the Legal Aid Department, and thirdly to strengthen the independent operation of the Council.

4. Consultants were subsequently employed to facilitate the review, and having considered the findings of the consultants, the Council has come to the conclusions as set out in the following paragraphs.

PROPOSALS

5. According to advice from the Secretary for Justice and the Director of Administration, the Council may not act in any way not provided for in the LASCO. The LASCO however is written in such a way that many of the functions of a body corporate are excluded, contrary to other ordinances governing statutory bodies. The shortcomings of the LASCO have clearly affected the operation of the Council as a body corporate within the meaning of the Companies Ordinance, and the powers listed in the law are much reduced compared with other similar institutions. The Council therefore proposes to put back into the LASCO those powers currently missing in the law. The proposed draft clause for Section 3 of the LASCO is at item 1 of *Appendix I*.

6. There has been difficulty for the Council in discussing issues relating to the delivery of legal aid services as the Director of Legal Aid (DLA) is unable to discuss without disclosing information that may have led to revealing the identity of legal aid clients. Equally, the Council should be alerted of policy initiatives of the Administration at an early stage before a

position is likely to be taken. Accordingly, the Council proposes that, subject to preserving secrecy (see paragraph 7 below), the LASCO be amended so that DLA may be able to discuss matters that have occurred in practice. The draft clause 3A to be added to Section 4 of in the LASCO is at item 2 of *Appendix I*.

7. Current provisions of the Legal Aid Ordinance and the Personal Data (Privacy) Ordinance would preclude DLA from passing to the Council information which may lead to identifying a particular applicant or aided person. This would have adverse implications on the effective functioning of the Council in terms of overseeing the operation and reviewing legal aid policy whether in terms of general or operational policy. In order to allow the DLA to disclose the information, Council members and staff should be subject to adhere certain secrecy arrangements. A proposal to this effect to amend the LASCO is at item 3 of *Appendix I*.

8. Section 9(2) of the LASCO stipulates that at least 6 members and the Chairman have to be present to achieve a quorum. Since its establishment in 1996, the Council has experienced difficulty in obtaining a quorum and this in turn affects the smooth functioning of the Council. It should be noted that according to existing provisions, the quorum is 70% of total Council membership. This high percentage may be regarded as unusual. Therefore, to enable the Council to operate more smoothly and to avoid dominance by a particular sector at a meeting, the quorum is proposed to be reduced to 5 members plus the chairman. To ensure that there is sufficient contribution from lay members, it is further proposed that among the 5 members, two should be from members of the non-legal sector, two lawyers nominated by the professional bodies and one member appointed under Section 5(1)(d) (i.e. the DLA) or his representative. The proposed

change to Section 9(2) is at item 4 of *Appendix I*.

9. The Council would like to take this opportunity of revising Section 12(1) of the LASCO as submission of the annual report can be delayed for practical reasons. The amendment will enable the Chief Executive to extend time for submission of the report, if necessary. The proposed amendment is at item 5 of *Appendix I*.

10. As a result of the proposal to allow DLA to pass information to the Council, consequential amendment will be necessary in respect of Section 24 of the LAO in that disclosure of information by the DLA to the Council under this Ordinance be allowed. The proposed amendment is at item 6 of *Appendix I*.

11. Subject to the advice of the Privacy Commissioner for Personal Data, consequential amendment will similarly have to be made to the Personal Data (Privacy) Ordinance to accept the disclosure of information by the DLA to the Council under the LASCO. The proposed addition of Section 62A to the Personal Data (Privacy) Ordinance is at item 7 of *Appendix I*.

FINANCIAL AND STAFFING IMPLICATIONS

12. The proposals (and therefore the Bill) do not increase the workload of the Council or the staff of its Secretariat. Accordingly they have no staffing or financial implications.

DECISION

13. Subject to members' agreement, the proposals set out in the paper will be forwarded to the Director of Administration for further action.

File Ref :LASC/CR 2/2/3

Date :25 August 2000

{DP 12/00 (ref: DP 02/00[R1])}

Proposed Amendments to the Legal Aid Services Council Ordinance

1. Powers of the Council

Section 3 be amended by adding:

" The Council may:-

- (a) appoint such committees as it considers necessary for securing the efficient discharge of its functions and may delegate to any such committee any of its powers and duties:

Provided that no delegation made hereunder shall preclude the Council from exercising or performing at any time any of the powers and duties so delegated.

- (b) appoint such persons as may be necessary for the efficient carrying out of its duties and functions under this Ordinance;
- (c) enter into, assign or accept the assignment of, and vary or rescind any contract or obligation;
- (d) acquire, take on lease, purchase, hold and enjoy any property, and sell, let or otherwise dispose of the same;
- (e) promote, control, become a member of, take part, act as agent for, manage, superintend or otherwise assist any association or institution which has, either wholly or in part, objects which are the same as or similar to those of the Council;
- (f) publish periodicals, booklets and other written material, and produce or sponsor the production of documentary films and other audio-visual material, and distribute the same by sale or by loan, hire or otherwise with or without charge as the Council thinks fit;

- (g) act as trustees of such trusts as may further such objects or as may be otherwise considered desirable, either gratuitously or otherwise; and
- (h) do all such things as are calculated to facilitate, or as are incidental or conducive to, the better carrying out of the objects of the Council;

The expenses of the Council and the salary or benefits payable to any person appointed under subsection (b) are to be paid out of monies appropriated for that purpose by the Legislative Council."

2. Functions of the Council

Section 4 is amended by adding -

"(3A) The Council may consult with the Department on operational matters having regard to any issues that have arisen in practice. The Director of Legal Aid may refuse to disclose material to the Council if the disclosure of the material may have a prejudicial effect on the proceedings to which the material relates and he certifies that it will have that effect."

3. Secrecy requirements

- (1) Except in the performance of his duties under this Ordinance, a person who has been appointed under or who is employed in carrying out the provisions of this Ordinance -

- (a) must preserve and aid in preserving secrecy with regard to the affairs of any client of a legal aid scheme that come to his knowledge in performing his duties under this Ordinance,
 - (b) must not communicate any matter referred to in paragraph (a) to any person other than the person to whom the matter relates or his executor or the authorized representative of the person or executor;
 - (c) must not permit or allow any person to have access to the records in the possession, custody or control of the Council relating matters referred to in paragraph (a).
- (2) A client of a legal aid scheme is any person who -
- (i) has applied for legal aid,
 - (ii) is a legally aided person, or
 - (iii) having applied for legal aid, was rejected.
- (3) A member of the Council and a person employed in carrying out the provisions of this Ordinance must, before acting under this Ordinance, take and subscribe to an oath or make an affirmation undertaking to maintain secrecy as to any relevant material that may come into the member's or person's possession or knowledge as a result of being a member or being so employed.
- (4) A person required to take an oath or make an affirmation under this section cannot be required to produce in any court any document or to divulge any information that is protected by the secrecy provision in subsection (1)(a). A certificate under the

hand of the Chairman of the Council is sufficient evidence of the fact that the information or document is protected by the secrecy provision in subsection (1)(a).

- (5) A person required to take an oath or make an affirmation under this section may permit the Director of Audit or an officer of that department duly authorized in that behalf to have such access to any records or documents as may be necessary for the performance of official duties. The Director of Audit and any authorized officer is taken to be a person employed in the carrying out of the provisions of this Ordinance for the purposes of this section.

Offences relating to breach of secrecy

A person who -

- (a) acts under this Ordinance without taking an oath or making an affirmation of secrecy as required under section 5A;
- (b) acts contrary to the requirements of section 5A; or
- (c) aids, abets or incites another person to act contrary to section 5A,

is guilty of an offence and liable to a penalty at level 5.

4. Meetings

Section 9(2) is amended by repealing "at least 6 other members" and substituting "5 other members, of whom 2 are members appointed under section 5(1)(b), another 2 members appointed under section 5(1)(c) and 1 member appointed under section

5(1)(d) or his representative,".

5. Reports

Section 12(1) is amended by adding "or such further time as the Chief Executive permits" after "Chief Executive".

6. Consequential amendments - Legal Aid Ordinance (Cap. 91)

Section 24 of the Legal Aid Ordinance (Cap. 91) is amended by adding -

"(4A) Subsection (4) does not prevent the Director from disclosing information to the Legal Aid Services Council to perform its duties under the Legal Aid Services Council Ordinance (Cap. 489)."

7. Consequential amendments - Personal Data (Privacy) Ordinance (Cap. 486)

The Personal Data (Privacy) Ordinance (Cap. 486) is amended by adding-

"62A. Certain data passed between the Director of Legal Aid and the Legal Aid Services Council exempt.

If material is passed between the Director of Legal Aid and the Legal Aid Services Council to comply with the Legal Aid Services

Council Ordinance (Cap. 489) which material contains data that would otherwise be subject to this Ordinance, the data is exempt from the requirements of this Ordinance."

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