

立法會
Legislative Council

LC Paper No. CB(2)1907/00-01(04)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background Paper prepared by Legislative Council Secretariat

Operation of the Legal Aid Services Council

Functions of Legal Aid Services Council (LASC)

The LASC was established on 1 September 1996. Section 4 of the Legal Aid Services Council Ordinance on the functions of the LASC and its relationship with the Legal Aid Department is extracted in **Appendix I**.

Panel meetings

2. Since the first term LegCo, the Panel held three meetings to discuss issues relating to the LASC, two of which were attended by representatives of the LASC -

Meeting on 15 September 1998

Following the completion of a consultancy study commissioned by the LASC to assess the desirability, practicability and cost-effectiveness of setting up an independent legal aid authority, representatives of the LASC briefed members on the LASC's recommendations. An extract of the minutes of meeting is in **Appendix II**.

Meeting on 13 October 1999

At the briefing by the Secretary for Justice and the Director of Administration on the Chief Executive's Policy Address 1999, the Director of Administration advised members that the Administration had completed its considerations of the recommendations of the LASC and had come to the conclusion that the establishment of an independent legal aid authority without a ceiling on legal aid expenditure was not supported. An extract of the minutes of meeting is in **Appendix III**.

Meeting on 18 January 2000

The LASC briefed members on its views on the Administration's decision not to establish an independent legal aid authority and its future plan. An extract of the minutes of meeting is in **Appendix IV**.

Present position

3. The Panel is aware that the LASC has reviewed the legislative framework within which it operates and proposed some amendments to the Legal Aid Services Council Ordinance and other relevant Ordinances. As agreed by the Panel on 15 May 2001, the LASC and the Administration have been invited to brief the Panel on the latest position regarding the matter at the coming meeting on 26 June 2001.

Legislative Council Secretariat
21 June 2001

**Extract of minutes of meeting on Administration of Justice
and Legal Services Panel held on 15 September 1998**

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IV. Study on an independent legal aid authority

(LC Paper Nos. CB(2)207/98-99(01); CB(2)229/98-99(01); CB(2)270/98-99(01); and "Report on the Feasibility & Desirability of the Establishment of an Independent Legal Aid Authority 1998" by Legal Aid Services Council)

20. The Chairman welcomed the representatives of the Legal Aid Services Council (LASC) to the meeting. On the invitation of the Chairman, the Chairman of LASC (Chairman, LASC) informed the Panel that following the completion of a consultancy study commissioned by the LASC to assess the desirability, practicability and cost-effectiveness of setting up an independent legal aid authority (LAA), the LASC had finalised its recommendations which had recently been submitted to the Chief Executive for his consideration. Copies of the LASC's Report were tabled at the meeting for members' information. The LASC's recommendations were summarized in Chapter One of the Report as follows -

- (a) An independent statutory LAA should be established, with a board to reflect relevant interests, including a member nominated by Duty Lawyer Service (DLS). LAA would advise the Government on legal aid policies and be accountable for the delivery of legal aid services currently under the Legal Aid Department (LAD).
- (b) The Director of Legal Aid (DLA), the Deputy Directors and Assistant Directors should be seconded to LAA upon its establishment. By the end of the first year, they will need to decide whether to apply to join LAA or to remain as civil servants and be redeployed elsewhere.
- (c) The rest of the staff in LAD should also be seconded to LAA upon its establishment to ensure sustained delivery of legal aid services. By the end of the second year, staff will need to decide whether to apply to join LAA or to remain as civil servants and be redeployed elsewhere.
- (d) Upon establishment of LAA, all new staff should be employed by LAA itself.
- (e) The operation of LAA should be financed from public revenue and current funding arrangements, with no ceiling on LAD's expenditure on legal services, should continue so as to ensure that operational independence will not be compromised by financial constraints.
- (f) An independent Official Solicitor's (OS) Office should be established,

with a dedicated OS.

- (g) The lay membership of DLS Council should be increased to the same number as members of the legal profession, i.e. eight for each type. Also, one of the lay members should be nominated from LAA's board. At the end of the third year of LAA's establishment, LAA should review the feasibility of DLS merging with it.

21. Chairman, LASC also drew members' attention to the proposed composition of LAA Board, which comprised a total of 11 members, as set out in Annex I of the Report.

22. In response to members' enquiries, Chairman, LASC said that LASC acknowledged the Consultants' findings that there were inherent weaknesses in the existing arrangements for legal aid which should be rectified. The Consultants had proposed a model which provided increased powers and resources to the LAA and made it the employer of the Director and Deputy Directors of Legal Aid. However, having taken into account the need to enhance effective operational management and service delivery and for the sake of a smooth transition, the LASC had made some revisions to the proposed model and recommended the adoption of a phased approach as mentioned above.

23. Regarding stakeholder groups' perceptions and public concern about the LAD's independence from the Government, Chairman, LASC said that many Members of the Legislative Council and the legal profession were in favour of the establishment of an independent LAA. Views among the legal aid practitioners and LAD clients about the need for change, however, were divergent. None of the community groups including voluntary organisations and trade unions consulted believed that LAD operated independently and accepted the existing structure. According to the public opinion survey, around one in five members of the general public considered the LAD did not operate independently. In so far as staff of the LAD was concerned, departmental staff such as legal counsels and law clerks were not in support of disestablishment of the LAD. In general, the staff were concerned about disruption to services, loss of job security, effect on morale and changes in terms and conditions of employment.

24. In response to Mr James TO's enquiry, Chairman, LASC said that the departmental staff of LAD maintained that they were more independent as civil servants than they would be as employees of LAA because they were employed on permanent terms of appointment and job security allowed them to perform their duties independently. However, the LASC was of the view that independence should be built upon an institutional framework which was independent of both the Government and the legal profession and that the administration of legal aid services through an independent LAA would enhance the rule of law.

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Views of the Law Society of Hong Kong

25. Mr Anthony CHOW said that the Law Society was in principle supportive of the establishment of an independent LAA. The Society would provide a written submission on the LASC's Report in two to three months' time.

Views of the Hong Kong Bar Association

26. Mr Philip DYKES said that it had been the long standing position of the Bar that there should be an independent body for the administration of legal aid services and it would like to see such a body to be set up in the near future. He added that the Bar would submit its response pending the Government's final views on the subject matter.

27. The Director of Administration (D of A) informed the meeting that the Administration had started examining the LASC's Report. The Administration would revert to the LASC and the Panel with its decisions in due course.

Clerk 28. The Chairman suggested that the subject matter be brought up for review at the meeting scheduled for December 1998.

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**Extract of minutes of meeting on Administration of Justice
and Legal Services Panel held on 13 October 1999**

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Policy objective of the Administration Wing

3. D of A summarized the policy objective of the Administration Wing, focusing on two major fronts –

Maintaining public confidence in independent redress

- (a) Fair, open and accessible avenues for members of the public to lodge appeals and complaints against administrative decisions and measures included the Administrative Appeal Board, the Municipal Services Appeals Board, the Ombudsman as well as the Visiting Justices of the Peace (JPs) under the JP System. The operation of these mechanisms for redress had been improved in the past year through increased manpower and resources for the two Appeal Boards so that appeals could be heard more efficiently, and extension of the jurisdiction of the Ombudsman to cover four additional statutory bodies. For the Visiting JP System, the Administration Wing had formulated a number of improvement proposals following the completion of a review of the System, which would be implemented in the coming year. Constant efforts would be made to ensure that these redress channels would become more effective and transparent.

Provision of efficient legal aid services

- (b) In the previous year, the Administration had completed its consideration of the recommendations of the Legal Aid Services Council and had come to the conclusion that the establishment of an independent legal aid authority without a ceiling on legal aid expenditure was not in the best interest of potential users of the legal aid scheme. According to the experience of a number of overseas jurisdictions (Australia, Canada, New Zealand and the UK) where 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 service. Furthermore, to replace the Legal Aid Department (LAD) with an independent legal aid authority with an unlimited budget would create other difficult problems for the Administration, such as accountability as to the means to ensure effective use of resources and efficient operations of the independent body. The necessity to establish an independent legal aid authority was further limited because, according to the consultancy study commissioned by the Legal Aid Service Council (LASC), the majority of the community groups consulted were of the view that legal

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aid was administered independently in Hong Kong. The public was more concerned about the quality of legal aid service than the status of the body providing the service. Taking into account all these factors and the possible unsettling effect which the disestablishment of the LAD could have on its staff, the Administration was of the view that the present legal aid system with an open-ended budget was best placed to achieve its objective.

- (c) The overriding objective of the provision of legal aid was to ensure that no one with reasonable grounds for pursuing a legal action was prevented from seeking justice because of lack of means. Over the past 10 years, the effort of the Administration to strengthen legal aid services had resulted in a six-fold increase in legal aid expenditure in terms of litigation cost, rising from \$81 million in 1988/89 to \$518 million in 1998/99. The LAD's estimated expenditure on litigation cost for 1999/2000 was \$669 million.
- (d) Arising from the Legal Aid Policy Review, a total of 17 recommendations, which sought both to expand the scope of the legal aid schemes and to improve existing services, were being progressively implemented through administrative and legislative means. A series of new services, such as provision of legal assistance to the next of kin of the deceased for cases of significant public concern and for "properly interested persons" in coroner's inquests, would be provided upon the enactment of the Legal Aid (Amendment) Bill 1999. The recommendations of the Review would allow 58% of the total number of households (over one million families) in Hong Kong to become financially eligible for legal aid, up from 48% (about 0.8 million families) under the existing arrangement.

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Independent legal aid authority and legal aid related matters

19. Mr Martin LEE and Ms Emily LAU deplored the Administration's decision not to establish an independent legal aid authority to replace the LAD, contrary to the recommendation of the LASC. Mr LEE said that the reasons adduced by the Administration, such as resource implications and the possible impact on staff morale in LAD etc. should not be the prime considerations. The issue of overriding importance was to ensure the fair protection of users of legal aid services. He said that the setting up of an independent body would remove worries and anxieties about fairness and independence in the administration of legal aid, especially at this time when there was an increasing number of civil proceedings being brought against the Government.

20. The Chairman added that the Administration's decision had drawn strong criticisms from the legal profession which had been championing long and hard for the setting up of an independent legal aid body.

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21. In response, D of A advised that in conducting the review, the Administration had focused its attention on the need for bringing real benefits to legal aid applicants. She said that the concern that legal aid was not administered fairly and independently was not justified, as evidenced by the fact that legal aid had been granted to the applicants in many cases involving huge litigation costs, such as in the right of abode cases. Furthermore, there were safeguards in the current system to protect the independence of legal aid administration. Such safeguards included, for example, a statutory requirement for the Director of Legal Aid (DLA) to consider all cases independently, and a mechanism whereby persons whose applications for legal aid were rejected by DLA could appeal to the Judiciary (Registrar, High Court). At present, the majority (about 75%) of the legal aid cases were briefed out to lawyers in private practice.

22. In reply to a question from Ms Emily LAU, D of A advised that there were about 1 000 appeals per year to the Judiciary against the DLA's decision not to grant legal aid. About 10% of the appeals were allowed.

23. Mrs Miriam LAU enquired about whether the LAD would consider assigning out a greater proportion of cases to private legal practitioners, thus allowing the LAD to focus its resources on processing legal aid applications and monitoring the assigned out cases. The Chairman said that she understood that most legally aided matrimonial cases were handled internally by the LAD.

24. D of A replied that the current brief-out rate was not an established policy. It could be adjusted depending on a number of factors, such as the availability of private lawyers who were prepared to take up the cases. In addition, it was considered necessary that a certain proportion of cases should be handled by in-house counsel of the LAD for the purpose of improving their experience and professional expertise. She agreed to review the matter with DLA having regard to Mrs Miriam LAU's views.

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Appendix IV

**Extract of minutes of meeting on Administration of Justice
and Legal Services Panel held on 18 January 2000**

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V. Independent legal aid authority

(LC Paper No. CB(2)229/98-99(01) – Submission dated 1 September 1998 from the Hong Kong Bar Association)

(LC Paper No. CB(2)848/99-00(04) - Letter dated 6 January 2000 from the Law Society of Hong Kong)

(LC Papers Nos. CB(2)379/99-00(07) and 848/99-00(05) - Papers provided by the Administration)

31. At the invitation of the Chairman, Mr LEE Jark-pui summarized the views of the Legal Aid Services Council (LASC) on the Administration's decision not to establish an independent legal aid authority as follows -

- (a) LASC was disappointed at the Administration's decision which went counter to the LASC's primary recommendation to set up an independent body in place of the Legal Aid Department (LAD). Yet, LASC did not feel restrained in its role to further pursue the cause. In fact, as required under the Legal Aid Services Council Ordinance, one of the major tasks of the Council was to advise the Government on legal aid policy, in particular the desirability and feasibility of establishing an independent legal aid authority. Given that statutory role, LASC was of the view that it could conduct a further review at some future time, taking into account new developments and changing social needs of the community relating to the demand for and delivery of legal aid services;
- (b) Pending that further review, LASC was in the course of embarking on a series of work targets with a view to enhancing its role and independent operation in overseeing the provision of legal aid services in Hong Kong, including -
 - i) to engage legal experts to review the existing provisions of the Legal Aid Services Council Ordinance and the Legal Aid Ordinance to consider if there was a need to introduce new measures to enable LASC to perform its functions more effectively;
 - ii) to enhance LASC's image of independence by recruiting its own staff; and
 - iii) to establish closer contact with relevant bodies and organizations such as those in the social service sector, to assess more accurately the needs of potential users of legal aid services, and to strengthen

education and publicity effort to give the general public a better understanding of the goals and objectives of the legal aid system.

32. The Chairman sought the Bar Association's views on the issue. In reply, Mr Andrew LI advised that the Bar Association's comments had been clearly stated in a previous submission made in September 1998 (LC Paper No. CB(2)229/98-99(01)). He said that the Bar Association and the Law Society were unanimous in supporting the establishment of an independent legal aid authority. That position had not changed. He summarized his views as follows -

- (a) An important common feature of the bodies that contributed significantly to the administration of justice in Hong Kong, e.g. the Judiciary, the Independent Commission Against Corruption and the Bar, was "independence". This element of independence was indispensable if Hong Kong were to preserve the rule of law and justice in the community;
- (b) In a fair and equitable society governed by the rule of law, it was not enough for justice to be done but also for justice to be seen to be done. The provision of legal aid services by an independent body free from any perception of conflict of interest and undue influence from the Government would undoubtedly contribute to enhancing public confidence in the fair administration of justice in the society;
- (c) In July 1993, the Legislative Council (LegCo) supported by a majority vote the establishment of an independent legal aid authority. Developments since then did not seem to have reversed the call for independence in the community. On the contrary, the increase in the number of constitutional litigation cases involving the Government in recent years and social changes in the community produced an even greater demand for an independent body to provide legal aid services to those in need; and
- (d) Regarding overseas experience, it should be noted that most advanced common law jurisdictions with a mature and well-developed legal aid system adopted an independent model. For example, an examination of the legal aid systems set out at Annex D of LC Paper No. CB(2)848/99-00(05) showed that legal aid services in all those countries were administered by an independent institution created by statute and not run by a Government department.

33. The Chairman requested the Director of Legal Aid (DLA) to respond to the views expressed. In reply, DLA said that safeguards were in place to ensure that legal aid was administered independently. Officers in LAD were bound by a statutory obligation as required under the Legal Aid Ordinance to consider all legal aid applications independently. In difficult cases, particularly cases against the Government involving public law issues, LAD would seek independent legal advice,

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which was given sufficient weight in reaching its decision. Moreover, all public law litigation, including judicial reviews against the Government or Government related bodies, and most criminal cases, were assigned to lawyers in private practice. On the proposal to set up a new and independent legal aid authority, staff of LAD had been consulted and they generally expressed a fairly opposite view. Their concern had been reflected to LASC.

34. DLA concluded that LAD was well aware of the need to preserve its image of independence in the administration of legal aid. It would continue to strive hard to improve service quality and transparency in performing its functions.

35. Mrs Elsie TU said that although she agreed in principle to the establishment of an independent body for the provision of legal aid services, she did not think that the setting up of an independent body was necessary at this point in time. She opined that the major issue of concern appeared to involve only the perception of independence, or lack of independence, of LAD. In her opinion, LAD was already making tremendous strides in improving the quality and transparency of its operation since the debate in LegCo seven years ago.

36. Deputy Director of Administration (DDA) said that it was of importance to take into account the perception of stakeholders in deciding whether there was a lack of operational independence in the provision of legal aid services. She pointed out that according to the consultancy study commissioned by LASC between 1997 and 1998, the majority of stakeholders, including the legal professional bodies, lawyers undertaking legal aid work, community groups, clients and staff of LAD as well as the general public at large, believed that legal aid was administered independently in Hong Kong. The consultants' conclusion was that, while there was some concern about the independence of legal aid administration from the Government, the focus of the concern was on the handling of a minority of sensitive cases that presented a particular challenge to the Government. DDA said that the Administration was not convinced that the conclusion indicated that legal aid administration was not independent. Indeed, the funding of numerous legal aid applications involving cases against the Government both before and after the reunification bore ample evidence to the fact that legal aid was administered independently. The Administration considered that the genuine concern of the public was over the quality of legal aid services. To address this concern, the Administration would continue to look at ways to improve service to achieve a high degree of public satisfaction.

37. Ms Emily LAU said that she was in support of an independent legal aid authority. Referring to the latest round of appeals brought by some several thousands of people from the Mainland claiming to have right of abode in Hong Kong, she said that the recent decision of DLA to grant legal aid to some of the appellants to pursue their claims appeared to be a dramatic "U-turn" from his earlier decision. She asked whether independent legal advice had been sought before DLA made those decisions. Ms LAU added that the result of those legal aid applications relating to the right of abode cases might give rise to doubts as to whether DLA had exercised his judgments

independently.

38. The Chairman declared interest as counsel acting for the applicants in the legal aid appeals. She also drew members' attention to Rule 41(2) of the Rules of Procedure of the Legislative Council, which stated that "*Reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the President or Chairman, might prejudice that case*".

39. In response to Ms LAU's queries, DLA said that the decision on 7 December 1999 to refuse to grant legal aid to the applicants was made on the basis of the Court of Final Appeal's ruling delivered on 3 December 1999, which upheld the legality and binding effect of the re-interpretation of certain Articles of the Basic Law on right of abode by the Standing Committee of the National People's Congress (NPCSC) in June 1999. The applicants then appealed to the Registrar of the High Court to review the decision to refuse legal aid, in the course of which counsel for the applicants put forward new submissions involving a separate issue of who were the people affected by the NPCSC's re-interpretation. He accepted the counsel's views that there were new grounds for proceedings. The parties subsequently agreed that legal aid should initially be granted to ten selected lead applicants for the purpose of testing their case in fresh proceedings to be initiated. DLA stressed that his decisions concerning legal aid for the claimants actually involved two types of applications of different nature in relation to different proceedings. The question of a "U-turn" decision did not arise.

40. Ms Emily LAU enquired about the monitoring role of LASC in respect of LAD's decisions on legal aid applications. In response, Mr LEE Jark-pui advised that LASC did not have the statutory power to direct LAD on the handling of individual cases. However, the Department should provide such information as was reasonably requested by LASC for the purpose of fulfilling its functions under the Legal Aid Services Council Ordinance, e.g. reports on cases of great public concern. He said that LASC might request a report from DLA on the right of abode cases after such cases had been decided. He agreed to inform the Panel of LASC's observations in due course.

LASC

41. The Chairman concluded that the issue of desirability and feasibility of the establishment of an independent legal aid authority was a matter of prime importance to those who shared a common interest in the fair administration of justice in Hong Kong. She opined that there was apparent concern that some problems existed in the present system of legal aid administration which needed to be carefully looked into. The Chairman said the Panel would continue to take a strong interest in the general question of independence of legal aid administration, and would continue to discuss the question with the Administration in future.

42. The meeting ended at 7:00 pm.

- (2) 法援局永久延續，並可以其法團名義起訴與被起訴。

4. 法援局的職能及與法援署的關係

(1) 法援局負責監督由法援署提供的法律援助服務的管理。法援署就該等服務的提供，向法援局負責。

(2) 法援局可——

- (a) 在不抵觸第(3)及(5)款的條文下，制訂政策以管限由法援署提供的服務，並就法援署的政策方向提供意見；
- (b) 不時檢討法援署的工作，並作出有利和適當的安排，以確保法援署能有效率地並合乎經濟原則地履行其職能和提供法律援助服務；
- (c) 檢討由法援署所提供的服務及其發展計劃；及
- (d) 就法援署的開支預算作出考慮及提供意見。

(3) 法援局無權就職員事宜以及法援署對個別案件的處理向法援署作出指示。

(4) 在不抵觸第(3)及(5)款的條文下，法援署須提供法援局為施行本條例而合理地要求的資料。

(5) 法援局是行政長官在關於獲公帑資助並由法援署提供的法律援助服務的政府政策上的諮詢組織，並須就下列事宜作出建議——

- (a) 就資格準則、服務範圍、提供服務的方式、未來的改善計劃、提供款項的規定及法律援助政策的未來發展；
- (b) 建立一個獨立的法律援助管理局的可行性及可取性；及
- (c) 由行政長官不時轉交法援局的任何其他方面的法律援助事項。 (由 1999 年第 26 號第 3 條修訂)

(6) 法援局不得被視為政府的代理人或僱員。

5. 法援局的成員

- (1) 法援局由下列成員組成——

(2) The Council has perpetual succession and is capable of suing and being sued in its corporate name.

4. Functions of the Council and relationship with the Department

(1) The Council is responsible for overseeing the administration of the legal aid services provided by the Department and the Department is accountable to the Council for the provision of such services.

(2) The Council may——

- (a) subject to subsections (3) and (5), formulate policies governing the provision of services by the Department and give advice on the policy direction of the Department;
- (b) review the work of the Department from time to time and make such arrangements as are expedient and proper to ensure the efficient and economical discharge of the functions and provision of legal aid services by the Department;
- (c) keep under review the services provided by the Department and the plans for development of the Department; and
- (d) consider and advise on the estimates of expenditure of the Department.

(3) The Council shall not have the power to direct the Department on staff matters and the handling of individual cases by the Department.

(4) The Department shall, subject to subsections (3) and (5), provide such information as is reasonably requested by the Council for the purpose of this Ordinance.

(5) The Council is the Chief Executive's advisory body on the policy of the Government concerning publicly funded legal aid services provided by the Department and shall advise on——

- (a) the eligibility criteria, scope of services, mode of service delivery, future plans for improvements, funding requirements and future development of legal aid policy;
- (b) the feasibility and desirability of the establishment of an independent legal aid authority; and
- (c) any other aspect of legal aid which the Chief Executive may from time to time refer to the Council. (Amended 26 of 1999 s. 3)

(6) The Council shall not be regarded as an agent or servant of the Government.

5. Membership of the Council

- (1) The Council consists of the following members——