

The Hong Kong Bar Association's 2nd Position Paper
Re: Proposed Transfer of the Legal Aid Portfolio to the Home Affairs Bureau

1. On 28 May 2007, the Hong Kong Bar Association ("HKBA") issued the first Position Paper on this subject. On the same day, representatives of the HKBA attended the Meeting held by the Legislative Council's Panel of Administration of Justice and Legal Services ("Panel Meeting"). The following is a summary of the HKBA's responses to the points raised and discussed at the Panel Meeting as well as some further observations.

2. As stated in our first Position Paper, the need for an independent body to administer the provision of legal aid cannot be disputed. As pointed out in the Panel Meeting, the 2005 International Forum on Legal Aid adopted a Joint Statement declaring that legal aid institutions should be independent in structure, operation and delivery of services. Legal aid services are an integral part of administration of justice and should not be viewed as a form of social welfare.

3. At the Panel Meeting, the Administration did not appear to deny this. In any event, the HKBA does not see how this fundamental principle can be disputed. In the circumstances, one asks these questions: What are the reasons for the proposed organization? Are those reasons valid? What are the possible impact of the proposed organizations? Can there be other alternatives?

4. In paragraph 3 of the LC Paper No. CB(2)1968/06-07(04) submitted by the Administration to the Panel, the reason for the proposal is stated as follows:

“Legal aid is a stand-alone policy subject that is getting increasingly detailed and complex. Accordingly, the Administration considers it appropriate to place the subject on par with other equally important policies, viz. under a Director of Bureau. Taking into account the fact that legal aid involves the provision of services to the community, the Administration intends to place the portfolio within the purview of the HAB [i.e. Home Affairs Bureau].”

5. The HKBA accepts that legal aid is and should be a stand-alone policy subject. However, this does not justify the proposed reorganization. Nor does the fact that the legal aid portfolio is getting increasingly detailed and complex support the Administration's argument.
6. Before we can have a completely independent body, one of the short-term solutions is to provide more resources for operating the legal aid portfolio under the current structure. As stated in the HKBA's first Position Paper, the proposed reorganization runs contrary to the fundamental principle that the administration of legal aid should be as independent as possible. The short-term solution suggested above will not attract the same consequences as the proposed reorganization, though it will not be as desirable as having a completely independent legal aid body.

7. At the Panel Meeting, there were suggestions that the proposed reorganization will not diminish the independence or the perception of independence of the Legal Aid Department ("LAD"). The reason put forward is that the LAD operates in accordance with the provisions in the Legal Aid Ordinance. It was also stressed that refusal of legal aid is subject to appeal to the Registrar.
8. The HKBA does not agree with these observations. The Legal Aid Ordinance sets out the key policy objectives, but it also vests considerable discretion in the administration of legal aid. Notable examples include the powers conferred under sections 9 and 10(3) of the Legal Aid Ordinance. The fact that the LAD has to operate in accordance with the Legal Aid Ordinance cannot be an answer to the call for independence.
9. Further, provisions in the Legal Aid Ordinance cannot provide any answer to the concern of possible conflict of interest expressed in paragraph 11 of the HKBA's first Position Paper. If the proposed reorganization is implemented, the LAD may have to seek independent opinion from private practitioner under section 9 of the Legal Aid Ordinance on a more frequent basis so as to avoid such possible conflict of interest. This of course means the use of public funding.
10. The picture is crystal clear. The proposed reorganization will bring about adverse consequences. It will make the legal aid portfolio more enmeshed in the bureaucracy. It will put the LAD under more "leadership" than before. The

independence or at least the perception of independence can be questioned on even stronger grounds. It also raises other questions such as whether the legal aid portfolio will be subject to the overall budgetary limit of the Home Affairs Bureau, or whether the works currently undertaken will be adversely affected.

11. In the circumstances, the HKBA cannot see why the Administration should insist on implementing the proposed reorganization. The time for having a completely independent legal aid body is long overdue and the HKBA repeats that the Administration should work towards that direction without further delay.

The Hong Kong Bar Association
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