

法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: (17) in LASC 5/5/41 Pt 5

Yr Ref :

E-mail : secy@lasc.hk

web-site : <http://www.lasc.hk>

Tel : 2838 5006

18 November 2009

Dr Honourable Margaret NG
Chairman, Panel on Administration of Justice
and Legal Services of the Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear

Margaret,

Research report on "Legal aid systems in selected places"

Thank you for your letter of 10 July inviting the views of the Legal Aid Services Council on the research report "Legal aid systems in selected places".

The various issues covered in the report were discussed in the recent meetings of the Council. I set out below our views on those matters relating to the provision of legal aid services in Hong Kong.

Authorities responsible for providing legal aid

The Council has reviewed the matter of independence of legal aid in Hong Kong in light of findings of the research report on the subject, and has advised the Chief Executive of the Hong Kong Special Administrative Region the views of the Council on the independence issue. A copy of our letter to the Chief Executive is enclosed for your reference.

Scope of legal aid services

It was reported that in Hong Kong, the current scope of legal aid does not cover legal advice and mediation. The Council realizes that

with the implementation of the Civil Justice Reform in April this year, legally-aided persons involving in civil proceedings, including matrimonial proceedings, are given funding support for mediation as an alternative means of resolving disputes. And following the Chief Executive's announcement in the 2007 Policy Address to develop mediation services in Hong Kong, a cross-sector Working Group on Mediation has been established by the Administration to review the current development of mediation in Hong Kong and to make recommendations on how mediation can be more effectively and extensively used to resolve disputes. The working group aims to complete its report in December this year. The Council looks forward to receiving the report and to give our views as appropriate.

As regards legal advice, we understand that currently, the Home Affairs Bureau provides funding to the Duty Lawyer Service to operate a Free Legal Advice Scheme which provides free preliminary legal advice to members of the public. Legal advice is therefore already available in Hong Kong although not under the purview of our Legal Aid Department. During our discussion however, there was suggestion that the extent of legal advice should be widened. It has been suggested that legal advice should be made available in police stations before interrogation to protect the rights of those placed under arrest. The Council considers the suggestion worth looking into and will refer the matter to a working party for indepth study and to advise the Council.

Financial eligibility limits for legal aid

The research report points out that in England and Wales, there are certain variations in the financial eligibility limits for different civil and criminal legal aid services. In Hong Kong, the financial eligibility limits for our Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme are clearly set, but that the Director of Legal Aid has the discretion to waive the upper financial eligibility limit in the interests of justice, and the Director did have exercised his discretion in the past. Thus, access to justice is protected. The Council considers that the current means testing method and its application straightforward and well managed. We do not see a need to introduce different eligibility limits for different types of cases for Hong Kong.

Legal aid service fees

The research report reveals that England and Wales operates a fixed and graduated fee schemes. In Ontario, private lawyers are remunerated on an hourly basis. In New South Wales, legal aid fees are generally less than the market rate. In Hong Kong, civil legal aid fees paid to assigned lawyers are generally at market rate. Lawyers undertaking criminal legal aid work are paid a scale fees as set out in the Legal Aid in Criminal Cases Rules. The Council understands that the legal profession was dissatisfied with the remuneration paid for criminal legal aid work. The Administration had subsequently conducted a review on the criminal legal aid fee system and proposed some improvements, including an adjustment to the current rates of fees. While both the Bar Association and the Law Society have reached agreement with the Administration on the revised fee structure, there is still the outstanding issue on the level of remuneration to solicitors to be accepted by the Law Society. The Council is concerned that if the matter is allowed to drag on, quality of criminal legal aid work will be affected. We have therefore written to the Administration voicing the concern. As there is no dispute on the revised fee structure, the Council has also suggested to the Administration to commence drafting the new rules first while negotiation with the Law Society continues. This will save time in implementing the revised fee system when agreement on the rates is reached.

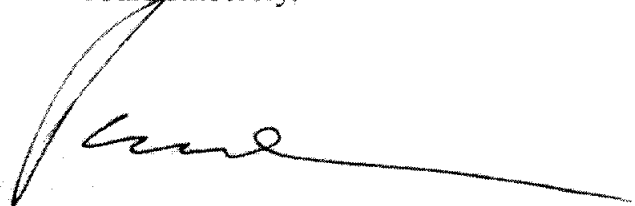
Legal aid expenditure per capita

The Council notes the different figures stated in the research report and their comparison with Hong Kong. The Council however does not consider it meaningful for a direct comparison per se. As we understand it the figures given for the three selected places appear to us to include the whole legal aid budget which comprised legal aid costs, rental and other administrative expenses whereas the \$528 million quoted for Hong Kong has only included legal aid expenditure on litigation and nothing else. It is therefore not a like-with-like comparison. We notice also that subvention for the Duty Lawyer Service has also not been included in the calculations either.

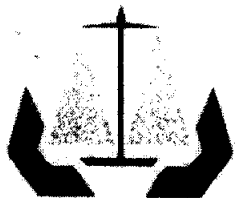
Legal aid services at the community level

All the three selected places have made available publicly-funded legal aid services at the community level. The Council is always supportive of proposals to widen access to legal aid and in promoting awareness of ones legal rights and obligations. We believe that timely and proactive legal advice is essential for a person to understand the nature of his problem and the channels available for resolution. We find the subject meaningful and will investigate into ways and means to enhance legal aid services at the community level in our 2010 work plan.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Paul M P Chan', with a long horizontal line extending to the right.

Paul M P Chan
Chairman



法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: (65) in LASC 5/4/2/3

Yr Ref :

E-mail : ceolasc@netvigator.com

web-site : <http://www.info.gov.hk/lasc/>

Tel : 2838 5006

16 October 2009

The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Upper Albert Road, Central
Hong Kong

Dear

Independence of Legal Aid

We have pleasure to report to you the findings of a recent review of the need for an independent legal aid authority in Hong Kong.

In July 2007, the responsibility of formulating legal aid policy and overseeing the implementation of the various legal aid schemes by the Legal Aid Department (LAD) was transferred from the Office of the Chief Secretary for Administration to the Home Affairs Bureau. The transfer however was met with criticism from the Panel on Administration of Justice and Legal Services of the Legislative Council, the Hong Kong Bar Association and some legal aid stakeholders. They all expressed concern on the operational independence of LAD after the transfer.

Although the dust of the controversy seems to have settled, the concern raised points to Council's statutory function in advising the Chief Executive on the feasibility and desirability of the establishment of an independent legal aid authority [Section 4(5)(b), Legal Aid Services Council Ordinance, Cap 489]. The Council feels it duty bound to review the independence issue again as the last review was done ten years ago.

In reviewing the independence of legal aid in Hong Kong, the Council has examined the question of whether civil servants may act independently to hold out against interference, if any, from the executive authorities, which prompted this review. On this point, the Council

acknowledges that the institutional arrangement of the LAD being a government department may create a perception of lack of independence because of perceived risk of pressure from the government. Independence in the decision-making process in the administration of publicly-funded legal aid must be guaranteed when legal aid is sought by an ordinary citizen, particularly so in respect of proceedings against the government or a public body. Investigation into the particulars of a legal aid application for both means and merits testing and the management of legally-aided cases should be undertaken neutrally and objectively, and be seen to be so. Conflict of interest and arrangements giving rise to a perception of influence should ideally be avoided. Thus, having the day-to-day operation of the legal aid service provider independent of government has apparent merit.

However, despite LAD's institutional position as part of the government, the Council recognizes that there are already sufficient safeguards in statute and in practice to ensure that the powers of the Director of Legal Aid are not abused. For example, the calculation for means test is well defined with no room for discretion. The applicant also has the right to appeal to the Registrar of the High Court or a judge against the refusal of legal aid by the LAD on merits ground. The Council has no reason to doubt the effective working of this appeal mechanism and the impartial decision-making by those holding judicial offices. And in respect of legal aid applications which seek to challenge a decision of the Administration, the LAD will seek independent counsel's opinion on merits of the application unless the point of law involved has been clarified in previous cases/judgments. This arrangement guarantees the impartial evaluation of merits of a case free from government interference.

The Council acknowledges that conflict of interest may arise under the present arrangement, but is not convinced that legal aid independence has been compromised. There is no evidence suggesting so and the Council itself is not aware of any cases where legal aid was refused upon pressure from the government or being influenced by a third party.

Some members point out that even if an independent legal aid authority is set up, the perception problem about influence by the government may remain. For example, the Administration may be seen as exerting influence through budget allocations and/or appointment of members serving on the legal aid authority.

The Council also recognizes that any changes in the institutional structure of the legal aid regime will also affect the staff of the LAD greatly. The Council therefore has sought views from them on the matter.

Majority of the LAD officers whom we have consulted, namely Legal Aid Counsel below the directorate level and the Law Clerks, do not support any proposal to delink LAD from the government. They are not convinced that legal aid is not administered independently merely because the Department remains an executive arm of the government. The directorate officers of the LAD held similar views, pointing out that there had not been cases where a legal aid applicant who was refused legal aid had ever complained to the Department that the refusal had any relation with staff of the LAD being civil servants. They submitted that the security of tenure rendered to the civil servants in fact ensures the independent evaluation of legal aid applications in the most professional manner and not the other way as suggested by some critics.

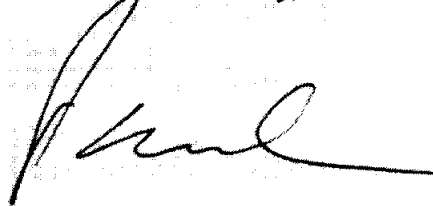
The question of independence, as Council sees it, is whether it is protected effectively and adequately. The checks and balances that are currently in place and the service quality of our legal aid system led Council to believe that the operation of our legal aid system is already highly independent, open and transparent.

The Council has reviewed the independence issue in light of the report "Legal Aid Systems in Selected Places" released by the Legislative Council Secretariat's Research and Library Services Division in July 2009. Part of the report deals with authorities responsible for providing legal aid which is relevant to, and may have bearing on Council's earlier deliberations on the independence issue. The report itself, as we notice, is essentially a literature review on the various components of legal aid. The Council notes that in the three jurisdictions selected for study, their legal aid authorities are directly accountable to the executive branch of the government but their independence, however, does not appear to be an issue in the respective jurisdictions. The Council has examined the independence issue in the circumstances of Hong Kong in light of the findings of the study. The Council is of the view that our current system is working very well, even when compared with these advanced jurisdictions.

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 independent legal aid authority. 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 independent legal aid authority. Notwithstanding, it is incumbent upon us to keep the independence issue under review given the statutory responsibility of the Council. This we propose to do in late 2011/early 2012 when hopefully the finances of the government will allow a greater flexibility in proposing changes to our legal aid regime. In the meantime, the opportunity shall be taken to investigate on ways and means to further enhance the scope and service quality of legal aid in Hong Kong to better serve the needs of the people.

Yours sincerely,



Paul M P Chan
Chairman

c.c. Secretary for Home Affairs

b.c. DLA