

立法會 *Legislative Council*

LC Paper No. CB(2)782/09-10(06)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 25 January 2010

Independent statutory legal aid authority

Purpose

This paper summarises the discussions held by the Panel on Administration of Justice and Legal Services (the Panel) on the establishment of an independent statutory legal aid authority since the First Legislative Council (LegCo).

Background

Existing institutional framework for legal aid services

2. The Legal Aid Ordinance (Cap. 91), enacted in 1967, sets out the legal framework for the administration of legal aid. Legal aid is provided by the Legal Aid Department (LAD) under the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme. Legal aid will be granted to applicants who satisfy the means test and the merits test.

3. The Legal Aid Services Council (LASC) was established on 1 September 1996 under the LASC Ordinance (Cap. 489) to oversee the administration of legal aid services provided by LAD and to advise the Chief Executive (CE) on legal aid policy. While LAD is accountable to LASC for the provision of legal aid services, LASC does not have the power to direct LAD on staff matters and the handling of individual cases.

Consultancy study commissioned by LASC on the establishment of an independent legal aid authority in 1998

4. There have been long standing calls from some LegCo Members and the two legal professional bodies for the setting up of an independent legal aid body to administer legal aid in place of LAD. Under section 4(5)(b) of the LASC Ordinance, LASC is tasked to advise CE on, inter alia, "the feasibility and desirability of the establishment of an independent legal aid authority". In October 1997, LASC commissioned a consultancy study to assess the desirability, practicability and cost-effectiveness of setting up an independent legal aid authority with reference to the practices in other common law jurisdictions. The study was completed in April

1998 and LASC submitted its recommendations to CE in September 1998. LASC recommended, inter alia, that –

- (a) an independent statutory legal aid authority be established to advise the Government on legal aid policies and ultimately to be accountable for the delivery of all legal aid services in Hong Kong;
- (b) the authority would eventually employ its own staff, but initially these would be civil servants seconded from LAD for one year for senior directorate officers, or two years for the rest of the staff; and
- (c) the authority should be financed by public revenue and the current funding arrangement with no ceiling on expenditure on legal aid services should continue.

A summary of LASC's recommendations is in **Appendix I**.

5. LASC briefed the Panel on its recommendations at the meeting on 15 September 1998. Members noted LASC's view that it was an institutionally flawed arrangement for legal aid to be administered by civil servants, as there was a risk of pressure from the Government and a perception of lack of independence. LASC also considered that its limited powers, its reliance on LAD for information and analysis, and its exclusion from involvement in reviewing individual cases had constrained its effectiveness in safeguarding LAD's independence. LASC therefore came to the view that there were sufficient concerns over the independence issue to justify the establishment of an independent legal aid authority. Members also noted that the two legal professional bodies were in support of the establishment of an independent legal aid authority to enhance public confidence in the administration of justice.

6. The Panel was informed of the Administration decision not to accept LASC's recommendation of establishing an independent legal aid authority at its meeting on 13 October 1999. The Panel further discussed the matter at its meeting on 18 January 2000. The Administration did not agree that legal aid administration was not independent. It stressed 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. However, funding of numerous legal aid cases against the Government both before and after the reunification bore evidence to the fact that legal aid was administered independently in Hong Kong. The Administration considered that the genuine concern of the public was over the quality of legal aid services.

7. On LASC's recommendation that the proposed independent legal aid authority should be financed by public revenue with no ceiling on legal aid expenditure, the Administration advised that it was against the Government's long established public finance management principle to provide an infinite budget for a body that was

independent from the Government, which would create problems such as accountability as to the means to ensure effective use of resources. The Administration considered that the establishment of an independent legal aid authority without a ceiling on legal aid expenditure was not in the best interest of users of legal aid services. According to the experience of a number of overseas jurisdictions (Australia, Canada, New Zealand and the United Kingdom (UK)) where an independent legal aid authority was in place, there was invariably pressure to contain costs through capping the funds provided for legal aid and narrowing the scope of service. The Administration also cautioned about the unsettling effect of a disestablishment exercise on staff morale. According to the Administration, staff of LAD generally expressed a fairly opposite view to the proposal to set up a new and independent legal aid authority when being consulted.

8. Some members deplored the Administration's decision not to establish an independent legal aid authority as recommended by LASC. They pointed out that the reasons adduced by the Administration, such as resource implications and the possible impact on staff morale in LAD, should not be the prime considerations. The issue of overriding importance was to ensure the provision of legal aid services by an independent body free from any perception of conflict of interest and undue influence from the Government, particularly in face of the increasing number of public law litigations brought against the Government in recent years.

9. The Administration stressed that there were safeguards in the current system to protect the independence of legal aid administration. Such safeguards included a statutory requirement for the Director of Legal Aid (DLA) to consider all applications according to established criteria and a mechanism whereby an appeal against LAD's decision not to grant legal aid rested with the Registrar of the High Court. Members were also advised that in complicated cases against the Government in public law litigation, LAD would as a matter of practice seek independent legal advice outside the Government which would be given sufficient weight in reaching its decision. Moreover, all public law litigation, including judicial reviews against the Government or Government related bodies, and criminal work were assigned to lawyers in private practice.

10. On the monitoring role of LASC in respect of LAD's decisions on legal aid applications, the Panel was advised that LASC did not have the statutory power to direct LAD on the handling of individual cases. However, LAD had to provide such information as was reasonably requested by LASC for the purpose of fulfilling its functions under the LASC Ordinance, e.g. reports on cases of great public concern.

Recent review conducted by LASC on the setting up of an independent legal aid authority

11. During the discussion on the transfer of the legal aid portfolio from the Administration Wing of the Chief Secretary for Administration's Office to the Home Affairs Bureau (HAB) at the Panel meeting on 28 May 2007, some members expressed

concern that the proposed transfer of the legal aid portfolio to a policy bureau would downgrade its status and undermine the independence of legal aid administration. They pointed out that there was potential conflict of interest as some decisions made pursuant to the statutory powers of the Secretary for Home Affairs and the Director of Home Affairs were amenable to judicial review. The Administration explained that as legal aid was a complex stand-alone policy subject that involved the provision of services to the community, it was considered appropriate for the subject to be placed under the purview of HAB. The proposal would not affect the day-to-day operation of LAD or the established independence in the delivery of legal aid services. There were safeguards to ensure that DLA would continue to exercise the statutory functions vested in him in an impartial, transparent and accountable manner.

12. LASC advised the Panel in June 2007 that while the majority of its members did not have strong views on the transfer of the legal aid portfolio to HAB, it would step up its supervisory role to ensure that the provision of legal aid services was undertaken professionally and objectively without interference. LASC also advised that although its recommendation of setting up an independent statutory legal aid authority in 1998 was not accepted by the Administration, it considered it appropriate to seek a review of the issue.

13. In October 2009, LASC completed its review of the need for an independent legal aid authority. LASC acknowledges that the institutional arrangement of LAD being a government department may create a perception of lack of independence and it will be ideal to establish a separate entity to administer legal aid to address the perception problem. However, LASC does not see a pressing need to disestablish LAD and substitute it by an independent legal aid authority considering that the present system is working well, there is no evidence to suggest that legal aid independence has been compromised, and having regard to the views of the LAD staff on the matter and the present financial position of the Government. Nevertheless, LASC proposes to review the independence issue again in late 2011/early 2012. The findings of the recent review of LASC, as set out in the LASC Chairman's letter to CE dated 16 October 2009 (issued to members vide LC Paper No. CB(2)357/09-10(03)), are in **Appendix II**.

Relevant motion moved at Council meeting

14. When Dr Hon Priscilla LEUNG moved a motion on "Relaxing the eligibility criteria for legal aid" for debate at the Council meeting of 11 February 2009, Hon Albert HO moved an amendment to the motion proposing the establishment of an independent body for assessing and approving applications for legal aid. The motion moved by Hon Albert HO was negated.

Research report

15. At the request of the Panel, the Research and Library Services Division of the LegCo Secretariat has undertaken a research on the legal aid systems in UK, the

Province of Ontario of Canada and the State of New South Wales of Australia (RP01/08-09). A comparison table setting out the authority responsible for providing legal aid in Hong Kong and the selected places as extracted from the research report is in **Appendix III** for members' reference.

Relevant papers

16. A list of the relevant papers which are available on the Legislative Council website (<http://www.legco.gov.hk>) is in **Appendix IV**.

Council Business Division 2
Legislative Council Secretariat
19 January 2010

Appendix I

Chapter One

Summary of Recommendations

1.1 The Legal Aid Services Council (LASC) recommends that:-

- in the long term, legal aid services should be as independent as possible;
- ultimately all forms of legal aid service should be delivered by one single institution; and
- to achieve these objectives, a phased approach is desirable.

Specifically, the Council recommends that:

1.2 An independent statutory legal aid authority (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). [Paras 6.1 - 6.4]

1.3 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. [Paras 6.5 - 6.6]

1.4 At the same time, 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. [Paras 6.7]

1.5 Upon establishment of LAA, all new staff should be employed by LAA itself. [Para 6.8]

1.6 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. [Para 6.11]

1.7 An independent Official Solicitor's (OS) Office should be established, with a dedicated OS. [Para 6.12]

1.8 With regard to DLS, the lay membership of DLS Council should be increased to the same number as members of the legal profession, i.e. 8 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. [Paras 6.13 - 6.14]

Source : "Report on the feasibility and desirability of the establishment of an independent legal aid authority" published by the Legal Aid Services Council in 1998



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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

Appendix III

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Authority responsible for legal aid	The Legal Aid Department (LAD) of the Government of the Hong Kong Special Administrative Region.	The Legal Services Commission (LSC).	Legal Aid Ontario (LAO).	The Legal Aid Commission of New South Wales (LAC).
Status	LAD is a government department.	LSC is a non-departmental public body established under the <i>Access to Justice Act 1999</i> , which is not a servant or agent of the Crown, and does not enjoy any status, immunity or privilege of the Crown.	LAO is a statutory corporation established under the <i>Legal Aid Services Act 1998</i> , which is not an agent of Her Majesty nor a Crown agent. It is independent from, but accountable to, the Ontario government.	LAC is a statutory body established under the <i>Legal Aid Commission Act 1979</i> .
Appointment of members to the governing board of legal aid authorities	Not applicable.	LSC comprises not fewer than seven members and not more than 12 members appointed by the Lord Chancellor, who is the responsible Minister for LSC.	LAO is governed and managed by a board of directors appointed by the Lieutenant Governor in Council on recommendation from the Attorney General of the Ontario government (the responsible Minister for LAO) or the Law Society.	LAC is governed and managed by a board, the members of which are appointed by the NSW Attorney General, who is the responsible Minister for LAC.

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Requirements for membership on the governing board of legal aid authorities	Not applicable. The departmental staff are all civic servants.	LSC's members must have experience in or knowledge of: <ul style="list-style-type: none"> (a) the provision of legal aid services under LSC's Community Legal Service (CLS) and Criminal Defence Service (CDS); (b) the work of the courts; (c) consumer affairs; (d) social conditions; and (e) management. 	The directors of LAO's board must have certain knowledge, skills and experience in the areas that the Attorney General considers appropriate, including: <ul style="list-style-type: none"> (a) business, management and financial matters of public or private sector organizations; (b) law and the operation of courts and tribunals; (c) special legal needs and provision of legal services to low-income individuals and disadvantaged communities; (d) operation of community legal clinics; and (e) social and economic circumstances associated with the special legal needs of low-income individuals and disadvantaged communities. <p>The Attorney General is also required to ensure that the majority of the board members must be persons who are not lawyers and no more than three of the appointed members are members representing the Law Society in Ontario.</p>	LAC's board members must include: <ul style="list-style-type: none"> (a) lawyers representing the law associations in NSW; (b) representatives of community legal services; and (c) representatives of workers, consumers and community welfare interests.

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Budget control by the executive	LAD's annual budget is determined by the Government.	LSC's budget is part of the departmental budget of the Ministry of Justice and must be approved by the Lord Chancellor.	LAO's annual budget is part of the budget of the Ministry of the Attorney General and must be approved by the Attorney General. It must also be reviewed by the Management Board of the Cabinet of the Ontario government.	LAC is responsible for preparing its annual budget, and is not statutorily subject to the executive branch's approval.
Framework for operation/guidance from the executive	LAD operates based upon the Government's set policies.	LSC's operation, use of financial resources and relationship with its sponsoring government department (currently the Ministry of Justice) is specified in the Legal Services Commission Framework Document formulated by the government in consultation with LSC. The Lord Chancellor may also give guidance to LSC about the discharge of its functions, and LSC must take into account any such guidance. However, such guidance cannot touch on individual cases.	LAO and the Ministry of the Attorney General must enter into a memorandum of understanding under which LAO is accountable to the Attorney General for its expenditure of public funds and provision of legal aid services. The Attorney General may apply for a court order to appoint an Administrator to administer LAO if LAO's board of directors fails to discharge its duties.	LAC's operation is not bound by any framework document involving the executive or guidance from the executive, except that it may enter into an agreement with the federal government for the provision of legal aid relating to Commonwealth matters in NSW.

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Accountability to the executive and the legislature	The Home Affairs Bureau is responsible for setting legal aid policies for LAD to implement, while the provision of legal aid services by LAD is supervised by the Legal Aid Services Council, which is an advisory body established under the Legal Aid Services Council Ordinance. The work of LAD is also monitored by the Legislative Council.	LSC's annual plans must be approved by the Lord Chancellor. LSC must also submit its annual report to the Lord Chancellor, who causes the report to be laid before Parliament and is accountable to Parliament for LSC's activities and performance.	LAO is required to submit an annual report to the Attorney General, who must submit it to the Lieutenant Governor in Council and table it before the Legislative Assembly of Ontario.	LAC reports to the Attorney General and submits an annual report on its work and activities to the Attorney General, who must lay it before the NSW Parliament.
Whether legal aid services include legal advice	Legal aid services do not include legal advice.	LSC's legal aid services include legal advice, which requires a means test.	LAO's legal aid services include legal advice, which requires a means test.	LAC's legal aid services include legal advice, which does not require a means test.
Whether legal aid services include mediation services	Legal aid services do not include mediation services.	LSC's legal aid services include mediation services, which require a means test.	LAO's legal aid services include mediation services, which require a means test.	LAC's legal aid services include mediation services, which require a means test.

Independent statutory legal aid authority

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Panel on Administration of Justice and Legal Services	15 September 1998	<p>Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority prepared by the Legal Aid Services Council [LC Paper No. CB(2)268/98-99]</p> <p>Summary of the Consultant's Report provided by the Legal Aid Services Council [LC Paper No. CB(2)207/98-99(01)]</p> <p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)229/98-99(01)] (<i>English version only</i>)</p> <p>Minutes of meeting [LC Paper No. CB(2)428/98-99]</p>
	13 October 1999	<p>Minutes of meeting [LC Paper No. CB(2)648/99-00]</p>
	18 January 2000	<p>Papers provided by the Administration on "Legal Aid Services Council's recommendation to establish an independent legal aid authority" [LC Paper Nos. CB(2)379/99-00(07) and CB(2)848/99-00(05)]</p> <p>Submission from the Hong Kong Bar Association [LC Paper No. CB(2)229/98-99(01)] (<i>English version only</i>)</p> <p>Letter dated 6 January 2000 from the Law Society of Hong Kong [LC Paper No. CB(2)848/99-00(04)] (<i>English version only</i>)</p> <p>Minutes of meeting [LC Paper No. CB(2)1419/99-00]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
	28 May 2007	<p>Administration's paper on "Re-organisation of the Government Secretariat : Proposed transfer of the legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)1968/06-07(04)]</p> <p>Supplementary information provided by the Administration [LC Paper No. CB(2)1968/06-07(05)]</p> <p>Minutes of meeting [LC Paper No. CB(2)2540/06-07]</p> <p><u>Follow-up papers:</u></p> <p>Legal Aid Services Council's letter dated 4 June 2007 on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2058/06-07(02)] (English version only)</p> <p>Administration's paper on "Re-organisation of the Government Secretariat : Proposed transfer of legal aid portfolio to the Home Affairs Bureau" [LC Paper No. CB(2)2117/06-07(01)]</p>
Legislative Council	11 February 2009	Motion moved by Dr Hon Priscilla LEUNG on "Relaxing the eligibility criteria for legal aid"
Panel on Administration of Justice and Legal Services	--	<p>Letter dated 16 October 2009 from the Chairman of the Legal Aid Services Council to the Chief Executive on independence of legal aid [Appendix to LC Paper No. CB(2)357/09-10(03)] (English version only)</p>