



法律援助服務局
LEGAL AID SERVICES COUNCIL

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Yr Ref :

E-mail : secy@lasc.hk

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

Tel : 2838 5006

30 April 2013

The Honourable C Y LEUNG, GBM, GBS, JP
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Tamar, Hong Kong

Dear Sir,

Independence of Legal Aid

I take pleasure to submit to you the Council's recommendations on the feasibility and desirability of the establishment of an independent legal aid authority in Hong Kong together with the report of a study on the issue for your consideration.

In accordance with Section 4(5)(b) of the Legal Aid Services Council (LASC) Ordinance, the Council is charged to advise the Chief Executive on the feasibility and desirability of the establishment of an independent legal aid authority. The Council first studied the issue in 1998 and conducted a review in 2008. As committed in the report to the then Chief Executive after the review, in late 2011, the Council engaged Deloitte Consulting (Hong Kong) Limited to carry out a fresh study on the matter.

In receipt of the report of the study, the Council has carefully examined the findings and deliberated the recommendations contained therein. The Council agrees with the consultant that there is no immediate need to establish an independent legal aid authority. Nevertheless, the Council considers that its function to oversee the delivery of quality legal aid services should be enhanced to strengthen the governance and operational transparency of the Legal Aid Department (LAD) with a view to enabling public confidence in the rule of law in Hong Kong. Notwithstanding the aforementioned conclusions, we also maintain the view that it would be

worthwhile to revisit the independence issue from time to time as the expectations of our society and our political system continue to evolve in stride. Specifically, the Council's major recommendations are given in the ensuing paragraphs.

Institutional Arrangement

As recommended by the consultant, the LAD should be retained as a government department because it is considered that the degree of independence upheld and exercised by LAD is sufficient. No substantiated example of the Government's interference on legal aid administration has been identified during the study. On the contrary, there are ample examples of legal aid being granted to applicants to pursue claims against the Hong Kong Government as long as the cases have reasonable grounds e.g. the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers' right of abode in Hong Kong. The Council agrees with the consultant that the problem of lack of perceived independence, which is more of an issue among different stakeholder groups, exists and it could be addressed by introducing measures of improvement without having to fundamentally change the LAD's institutional structure.

The Council concurs with the recommendation that LAD should be re-positioned and placed directly accountable to the Chief Secretary for Administration (CS), which was its former position before 2007.

The responsibility of formulating legal aid policy and overseeing the implementation of various legal aid schemes by LAD was indeed undertaken by the Office of the CS until 2007. The move then to transfer this responsibility to the Home Affairs Bureau (HAB) has attracted much criticism from the Panel on Administration of Justice and Legal Services of the Legislative Council, the Hong Kong Bar Association, the Law Society of Hong Kong and other legal aid stakeholders. These important stakeholders have expressed concern on the apparently "demoted" status of this policy portfolio and the consequential negative impacts on operational independence of LAD. The Council believes that the proposal to revert LAD back to the purview of the CS will leave these important stakeholders and the community in no doubt that the status and independence of LAD has been hitherto fully restored.

We prefer the above option of the consultant to the alternative of placing LAD under the Chief Executive (CE) as LAD would sit more closely related with the existing areas of the CS responsibilities such as Judiciary Services and the move is less likely to provoke another round of unnecessary speculation on our simple aim to restore LAD back to its status before being placed under HAB.

As to the Official Solicitor's Office (OSO), although the office of the Official Solicitor (OS) in most of the jurisdictions examined in the study is separate from the jurisdiction's legal aid body, the consultant considered that the operation of OSO should remain status quo and there is no need to set up a separate office. It is because the current setup of OSO is small and it will be more cost effective for OSO to stay within the LAD. The number of cases handled by OSO is not high and some of the cases are non-contentious or non-litigious. The number of litigious cases with the opposite parties being legally aided is few and there is standing arrangement that aided persons in those cases are all represented by private legal practitioners. As measures are in place to mitigate the potential conflicts of interest that may arise, there should not be a problem in having DLA serve also as the OS. Nevertheless, to strengthen the governance of OSO, the consultant recommended that the OSO should be monitored by the LASC. We accept the above conclusions of the consultant.

Regarding the staffing of LAD, the consultant recommended that the Director of Legal Aid (DLA) and Deputy Directors of Legal Aid (DDLAs) should be retained as civil servants to prevent disruption to legal aid service provision due to changes in personnel. In order to enhance the independence of the appointment of DLA and DDLAs, the consultant recommended LASC be given the power to nominate, on the basis of clear and transparent selection criteria, a pool of candidates eligible for the positions to the CS who will make the final decision. The consultant also considered that the performance of DLA and DDLAs should be evaluated by the LASC while other LAD staff will be assessed by their respective supervisors as at present. Whilst we welcome the opportunity to provide useful input and advice to the administration on the appointment and performance of these senior officials, the exact mode of operation will need to be further discussed with the administration in order not to place these officers in an unduly disadvantaged position relative to their equivalent counterparts in civil service.

Financial Arrangement

The LAD, though funded by the Government, enjoys a relatively high level of autonomy in allocating its fund within the given limits. Hong Kong's legal aid funding mechanism is recognized as one of the leading practices in the world with its uncapped legal aid fund and self-financing scheme i.e. Supplementary Legal Aid Scheme. Therefore, such arrangements should be maintained for the best interest of existing and future legal aid applicants.

Operational Arrangement

To address the perception problem identified in the study that LAD has a "preferred panel" for providing Section 9 opinions which tend to be in line with DLA's decisions, the consultant recommended that the Council should provide an oversight to the case assignment for obtaining Section 9 opinions. We accept the views of the consultant.

Governance

Under the existing arrangement, the DLA's decision to refuse legal aid could be reviewed by the Registrar of the High Court in civil cases and the Judge in criminal cases. The consultant recommended that a robust review mechanism should be introduced within LAD for refusals of civil and criminal legal aid applications and the LASC was recommended to be given the power to oversee the LAD's decisions. We are in general agreement with the consultant and would explore with LAD the best way forward to conduct such reviews.

Legal Aid Services Council

Under Section 4 of the LASC Ordinance, the Council is responsible for overseeing the administration of the legal aid services provided by the LAD within certain limits. The Council considers that the proposals of empowering LASC to provide input on DLA and DDLA candidates to CS for appointment; to assist in the evaluation of DLA and

DDLAs' performance, to oversee the assignment of Section 9 cases and the review of refusals of legal aid as well as to monitor the operation of OSO are measures to strengthen the Council's oversight role. Although the consultant has not provided much detail on how it should work and which the Council has to further discuss, the Council is well aware of the fact that depending how these enhanced functions are expected to be performed, there may well be implications on additional financial and staffing resources. We have also not ruled out the possibility to seeking legislative amendment to the current LASC Ordinance to better define the oversight role of LASC as and when necessary.

It has to be recorded that at a Council meeting held after the Council had already drawn a conclusion on the recommendations, one member, who was nominated by the Hong Kong Bar Association to join the Council in March 2013, provided different opinions on the recommendations. A summary of her views is attached at *Annex* for reference.

The Council believes that the recommendations reported in this letter, if accepted, will bring about benefits in terms of management accountability, operational transparency and ultimately demonstrable quality and characters of operational independence of our legal aid services. These will in turn enhance public confidence in the service. We therefore look forward to receiving your reply and having further productive dialogues with relevant government policy bureau and the LAD in order to work out the necessary implementation details.

In the meantime, the Council should be pleased to assist the Government in its deliberations on the above recommendations. Please feel free to contact me if you require any clarifications or additional information.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Eric L.", with a stylized flourish above the name.

Dr Eric Li Ka Cheung
Chairman
Legal Aid Services Council

Summary of Ms Josephine PINTO's Views on Legal Aid Services Council's Recommendations on Independence of Legal Aid

In the Council meeting held on 22 March 2013, Ms Josephine PINTO said that in 1998 the Legal Aid Services Council passed a resolution on the establishment of an independent legal aid authority after the independence issue had been studied in that year. While it was noted that the recommendation had not been accepted by the Government, she questioned why there was a need to conduct another study in 2011/2012. She opined that the Council should provide strong reasons to explain why its latest recommendations on the independence issue were different from those made previously. Ms PINTO also said that the Council was subject to statutory duties under the administrative law. She suggested that there would be a breach of the statutory obligation of the Council if it failed to do what she mentioned above and that the Council should seek legal advice on the matter.