

**For discussion on
24 June 2014**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**The Legal Aid Services Council's Recommendations
on the Independence of Legal Aid**

INTRODUCTION

On 30 April 2013, the Legal Aid Services Council (LASC) submitted its recommendations on the feasibility and desirability of the establishment of an independent legal aid authority, together with the consultancy report of the study, to the Chief Executive (CE) (LC Paper No. CB(4)747/12-13(02)). At the Legislative Council Panel on Administration of Justice and Legal Services Panel meeting on 25 June 2013, LASC and deputations were invited to brief Members on its recommendations and present their views respectively. This paper briefs Members on the Administration's position on the way forward.

THE ADMINISTRATION'S POSITION

2. After careful assessment of LASC's recommendations, views from stakeholders, as well as policy considerations on the continuity in overseeing the legal aid portfolio, the Administration has decided –

- (a) to accept in principle LASC's recommendation that the responsibilities for formulating legal aid policy and "housekeeping" the Legal Aid Department (LAD) should be vested with the Chief Secretary for Administration's Office (CSO) and the Director of Legal Aid (DLA) should report directly to the Chief Secretary for Administration (CS), with the implementation timetable be reviewed in the light of various commitments of CSO in this term of Government and the progress of various on-going reviews¹ which the Home Affairs Bureau (HAB) is undertaking; and

¹ In March 2013, HAB launched a "Two-year Pilot Scheme to Provide Legal Advice for Litigants in Person" (LIPs Scheme) and a Steering Committee chaired by the former High Court Judge Mr Pang Kin-kee has been set up to oversee and advise on the operation of the LIPs Scheme. The Steering Committee is expected to advise the Secretary for Home Affairs on the way forward after the end of

- (b) to follow-up on LASC's other major recommendations regarding LAD's governance and operational transparency while maintaining the existing legal framework governing LASC's oversight role under the LASC Ordinance (Cap. 489) and legal aid funding support for LAD.

JUSTIFICATIONS

LASC's Recommendations

3. LASC was established in 1996 under the LASC Ordinance to oversee the administration of legal aid services provided by LAD and to advise CE on legal aid policy. The current membership list of LASC is at Annex. In accordance with Section 4(5)(b) of the LASC Ordinance, LASC is tasked to advise CE on the feasibility and desirability of the establishment of an independent legal aid authority. LASC first studied the issue in 1998 which recommended the establishment of an independent legal aid authority (ILAA). However, the Government decided in 1999 not to accept the recommendation. In the second study conducted in 2008, LASC acknowledged that the institutional arrangement of LAD being a government department might create a perception of a lack of independence. However, it recognised that there were already sufficient safeguards in statute and in practice to ensure the operational independence of LAD. Hence, LASC did not see a pressing need to substitute LAD with an ILAA and proposed to revisit the issue in late 2011 / early 2012 in the context of the current study. In late 2011, LASC engaged an external consultant to carry out a fresh study and the recommendations were submitted to CE on 30 April 2013.

4. In essence, having examined the institutional, financial, operational and governance dimensions of LAD, LASC considered that there is no immediate need to establish an ILAA, although it would be worthwhile to revisit the independence issue from time to time. LASC considered that its function to oversee the delivery of quality legal aid services should be enhanced to strengthen the governance and operational transparency of LAD, and its major recommendations are as follows –

the pilot scheme in March 2015. HAB and LAD are also conducting reviews on the scope and financial eligibility limits of the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS), as well as the rates of criminal legal aid fees payable to lawyers in private practice engaged to undertake litigation work on behalf of LAD.

- (a) there is no immediate need to establish an ILAA. LAD should remain a government department, as the degree of independence upheld and exercised by LAD is considered sufficient. The perception among some people that LAD lacks independence could be addressed by introducing improvement measures without having to fundamentally change LAD's institutional structure;
- (b) LAD should be re-positioned and made directly accountable to CS, which was the arrangement prior to July 2007;
- (c) the DLA and Deputy Directors of Legal Aid (DDLAs) should remain civil servants. The consultant recommended that LASC be given the power to nominate a pool of candidates eligible for these positions to the CS, who will make the final decision on their appointments. The consultant also recommended that the performance of these officers should be evaluated by LASC. That said, LASC reckoned that 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 counterparts in the civil service;
- (d) DLA should retain his role as Official Solicitor². Nevertheless, to strengthen the governance of the Official Solicitor's Office (OSO), LASC's oversight role should be extended to cover the OSO;
- (e) the existing legal aid funding arrangements (i.e. legal aid budget for OLAS and the self-financing SLAS) should be maintained;
- (f) to address the perception problem that LAD has a "preferred panel" for providing Section 9 opinions³ which tend to be in line with DLA's decisions, LASC should exercise an oversight to the case assignment for obtaining Section 9 opinions; and

² The Official Solicitor, appointed in accordance with the Official Solicitor Ordinance (Cap. 416), is a public officer who represents the interests of persons under a disability of age or mental capacity in proceedings (i.e. persons under the age of 18 or mentally incapacitated persons). Section 7 of the Ordinance designated DLA as the first Official Solicitor. OSO is an independently operated unit separate from other sections of LAD.

³ Under Section 9(d) of the Legal Aid Ordinance (Cap. 91) (LAO), DLA may refer an application to counsel or solicitor, whose name is on the appropriate panel, to investigate the facts and make a report thereon or to give any opinion thereon or on any question of law arising out of the application.

- (g) a robust review mechanism should be introduced within LAD for refusals of civil and criminal legal aid applications and LASC should be given the power to oversee LAD's decisions⁴. LASC is in general agreement with the consultant and would explore with LAD the best way forward to conduct such reviews.

Institutional arrangement of LAD

5. The Administration agreed with LASC's recommendations in paragraphs 4(a) and (b) above that LAD should remain a government department, and be re-positioned to report directly to CSO which was the arrangement prior to the re-organisation of the Government Secretariat in July 2007.

6. From an institutional point of view, although HAB oversees policy matters on legal aid, it is not involved in the day-to-day operation of LAD. Further, sufficient safeguards in statute and in practice are in place to ensure LAD's operational independence. Specifically, the statutory means and merits tests have been the only criteria provided by LAO in assessing legal aid applications, which are not subject to the Administration's policy considerations or financial constraints⁵. There is currently a statutory appeal mechanism as appeals against LAD's decisions in civil and criminal legal aid applications can be lodged with the Judiciary, whose decision shall be final. In fact, both LASC and the consultant acknowledged that the degree of independence upheld and exercised by LAD is sufficient. Any suspicion about the lack of independence is more of a perception issue, which can be addressed by introducing improvement measures to the legal aid administration framework without the need to change LAD's institutional structure itself.

⁴ At present, under Section 26 of the LAO, if a civil legal aid application is refused by LAD, the applicant may appeal to the Registrar of the High Court whose decision shall be final. For criminal cases, if legal aid is refused on merits, the applicant may apply to the judge for legal aid provided that the applicant passes the means test. In cases involving charges of murder, treason or piracy with violence, the judge may grant legal aid or exemption from payment of contribution even if the applicant cannot pass the means test.

⁵ In fact, up until 2005-06, LAD's Subhead 208 "Legal aid costs" was annotated with an asterisk in the Estimates, similar to other services such as the Comprehensive Social Security Assistance and Social Security Allowance schemes and student financial assistance, denoting that these subheads were not by definition cash limitable. From 2006-07 onwards, the practice of annotating subheads with asterisks was discontinued in a purely formatting change as the annotation itself did not obviate the need for the Government to seek the Legislative Council Finance Committee's approval for any variation to a subhead exceeding \$10 million. That said, an explanation was made in the Introduction to the Estimates for the same year that certain recurrent expenditure subheads are by nature non-cash limitable because the demand for the relevant services is beyond the control of the controlling officer.

7. As the issue of “independence” is more of a perception issue, we agree with LASC’s recommendation that reverting LAD to CS’s policy charge could address the concerns of some quarters in the community.

Legal aid portfolio and timing of transfer

8. Apart from overseeing LAD, the legal aid portfolio also includes policy responsibility on the provision of free legal advice services and subventions for the Duty Lawyer Service (DLS)⁶ and LASC. Hence, the above policy responsibilities and subventions will need to be transferred to CSO as part and parcel of the legal aid portfolio.

9. On the timing of transfer, it will be reviewed in the light of various commitments of CSO in this term of Government. Specifically, besides dealing with cross-bureaux issues in the current-term Government, CS personally oversees the work of two priority policy areas, namely poverty alleviation and population policy, supported by the Policy and Project Co-ordination Unit set up in the CS’ Private Office under CS’ direct supervision. She has also assumed the chairmanship of the Steering Committee to Promote the Sustainable Development of the Recycling Industry, and is heading the Task Force on Constitutional Development.

10. Moreover, as HAB is currently undertaking various reviews including the review on criminal legal aid fees, the on-going reviews on the scope and financial eligibility limits of OLAS and SLAS as well as the way forward on the provision of legal advice for litigants in person, the timing of transfer could be determined subject to the satisfactory progress of the above reviews for better continuity.

Other recommendations of LASC

11. As regards LASC’s other recommendations, the Administration’s decision is as follows –

⁶ DLS is a company limited by guarantee, and implements legal assistance schemes to complement the legal aid services provided by LAD. It is fully subvented by the Government and is independently managed and administered jointly by the Hong Kong Bar Association and the Law Society of Hong Kong through the Council of DLS. It currently operates four legal assistance schemes, namely (a) the Duty Lawyer Scheme; (b) the Free Legal Advice Scheme; (c) the Tel-Law Scheme; and (d) publicly-funded legal assistance scheme for non-refoulement claimants.

- (a) ***Performance evaluations and nominations of DLA and DDLAs*** – we do not agree with the consultant’s recommendation on LASC’s involvement in the appointment and appraisal of DLA and DDLAs in paragraph 4(c), which would represent a fundamental deviation from the prevailing civil service mechanism that has been devised to uphold the fundamental principle of appointing the most suitable person for the job through an open, fair and competitive process. For appointment to an office at a promotion rank, there is a well-established and transparent mechanism for conducting a promotion exercise, including convening of promotion boards and their composition, formulation of selection criteria for promotion, openness of the promotion exercise, etc. Such a mechanism is applicable service-wide. It may also not be legally in order for LASC to nominate candidates for the posts of DLA and DDLAs under the existing legislation⁷. That said, there should be scope for the views of the Chairman of LASC be reflected in performance evaluations of DLA and DDLAs;
- (b) ***LASC’s oversight role to cover OSO*** – as regards LASC’s recommendation in paragraph 4(d) above, so far as the OSO is concerned, the Official Solicitor is appointed under the Official Solicitor Ordinance and is a public officer who represents the interest of persons under disability of age or mental capacity in proceedings. OSO is housed under a separate office with its own dedicated staff performing functions that do not relate to the provision of legal aid. As LASC’s function is confined to overseeing LAD’s provision of legal aid services, we do not see any strong justifications for expanding the role of LASC beyond legal aid to cover OSO;
- (c) ***LASC’s power to oversee LAD’s case assignment for obtaining Section 9 opinions*** – to address the perception problem that LAD has a “preferred panel” of lawyers which provides “Section 9” opinions⁸ that favour DLA’s interpretation of the legal merit of the case, we will work with LASC and LAD to see if there is room to enhance LASC’s oversight on LAD’s case assignments under Section 9(d) of LAO without interfering with the handling

⁷ Section 4(3) of the LASC Ordinance states that the Council shall not have the power to direct the Department on staff matters. It is arguable that nomination of candidates to the posts of DLA and DDLAs fall under the definition of “staff matters”.

⁸ See footnote 3 above.

of individual cases as prescribed under Section 4(3) of the LASC Ordinance⁹; and

- (d) ***LASC’s power to oversee LAD’s decisions on refusals of civil and criminal legal aid applications*** – as LASC’s primary statutory responsibility is to oversee the administration of legal aid services provided by LAD, we will work with LASC to see if there is room to enhance its role in overseeing LAD’s overall handling of cases.

OVERSEAS EXPERIENCE

12. According to LASC’s consultancy report, legal aid authorities in England and Wales, New Zealand, Finland and Northern Ireland are established within the Government, while the authorities in Scotland, Ireland, Canada (Ontario) and Australia (New South Wales) are non-departmental public bodies (NDPBs). The consultant rated the Netherlands’ non-departmental legal aid authority as the most independent¹⁰.

13. It is noted that in recent years, several overseas jurisdictions have reverted their ILAAs back to government agencies to enhance service quality, budgetary discipline and financial sustainability of the services. In particular, the then ILAA in England and Wales has now become an executive agency of the Ministry of Justice with effect from April 2013. Prior to that, legal aid services in England and Wales were provided by the Legal Services Commission (LSC), which had been an NDPB sponsored by the Ministry of Justice since April 2000. However,

⁹ Section 4(3) of the LASC Ordinance states that the Council shall not have the power to direct the Department on the handling of individual cases.

¹⁰ However, the Netherlands’ ILAA still depends on funding from its Ministry of Justice and is accountable to the Ministry on the budgetary allocations, and has to adjust its scope of service in view of the overall provision level. Should there be any significant changes to the budget, the Netherlands’ ILAA would need to adjust the scope of legal aid service so as to keep expenditure within the overall financial provision. For example, the Dutch government mandated in 2008 and 2010 that the funding level be reduced by 50 million euros respectively (total expenditure for those two years were 440 million and 486 million euros). As a result, the Netherlands’ ILAA had to introduce spending cuts, including tightening the scope of legal aid by increasing the financial significance of a case for qualifying for legal aid, increasing clients’ contributions, and adjusting lawyers’ fees. That said, the funding for the Dutch system is “open-ended” in the sense that, should a case fall within the scope of service, it would be funded. It also tightly controls the funding available for each case by setting a fixed lawyer fee for different type of cases, and does not cover the costs incurred by the opposing party if the aided person loses his/her case. This greatly limits the expenditure of the Dutch system which is **not** applicable in the Hong Kong context as our taxation matters are governed by the Rules of the High Court.

after some 13 years' of operation, the UK House of Commons Committee of Public Accounts "found confusion and uncertainty about the respective roles of the LSC and the Ministry of Justice which had led to duplication of effort on some issues and a lack of clarity about who should be responsible for others." It also found LSC "an organisation with poor financial management and internal controls and deficient management information", and the Ministry of Justice acknowledged that the governance arrangement of LSC being an NDPB, intended to provide a separation between Ministers and decisions for delivering legal aid services, "may no longer be appropriate"¹¹. Following a proposal to reform legal aid to enhance management and financial control in 2010, the Legal Aid, Sentencing and Punishment of Offenders Act was enacted in 2012 to implement the Ministry of Justice's proposal by replacing LSC with an executive agency, and reducing legal aid spending by significantly curtailing the scope of civil legal aid.

14. Similarly, legal aid services in New Zealand used to be provided by an independent Legal Services Agency prior to July 2011. With effect from 1 July 2011, the independent agency has been disbanded and legal aid services have been subsumed under the Ministry of Justice by virtue of the Legal Services Act 2011. Apart from service quality, the major justification cited for the change was that legal aid costs were rising rapidly, and the reform was introduced to control costs with a view to ensuring that the legal aid system was financially sustainable and value for money¹². On a separate note, Northern Ireland will also be transitioning its NDPB Legal Services Commission into an executive agency of the Department of Justice with "statutory protection for independence of decision-making" to enhance management and financial control, and their Minister of Justice has appointed a Transitional Board in August 2013 to see through the transition scheduled for July 2014¹³.

¹¹ UK House of Commons Committee of Public Accounts, "The Procurement of Legal Aid in England and Wales by the Legal Services Commission – Ninth Report of Session 2009-10", January 2010.

¹² New Zealand Ministry of Justice, "Key reasons for legal aid reform" (<http://www.justice.govt.nz/services/legal-help/legal-aid/reform/drivers>), retrieved October 2013.

¹³ Northern Ireland Department of Justice, "Minister Appoints Transition Board to Northern Ireland Legal Services Commission", 7 August 2013.

WAY FORWARD

15. Whilst the transfer of the legal aid portfolio from HAB to CSO is accepted in principle, the Administration will work out the implementation timetable in the light of various commitments of CSO in this term of Government and the satisfactory progress of various on-going reviews which HAB is undertaking for better continuity.

16. In the meantime, the Administration will follow up with LASC on its other major recommendations regarding LAD's governance and operational transparency as set out in paragraphs 11(c) and (d) above. Towards this end, we note that the LASC has recently set up a Task Force on Dissemination of Legal Aid Information¹⁴ with a view to, inter alia, making recommendations on the enhancement of LAD's operational transparency. The Administration will continue to support LASC's work in overseeing the delivery of quality legal aid services and the strengthening of governance and operational transparency of LAD within the existing legal framework.

ADVICE SOUGHT

17. Members are invited to note the Administration's position in taking forward LASC's recommendations on the independence of legal aid.

Home Affairs Bureau
June 2014

¹⁴ The task force is chaired by the LASC Chairman, comprising members of LASC and external experts from the financial information dissemination, information technology and statistics collection fields.

Membership of the Legal Aid Services Council
(current term from 1 September 2012 to 31 August 2014)

Chairman

Dr Eric LI Ka-cheung, GBS, JP
(李家祥)

Members

Ms Virginia CHOI Wai-kam, JP
(蔡惠琴)

Dr Witman HUNG Wai-man
(洪為民)

Ms Anna KWONG Sum-ye, MH
(鄺心怡)

Mr Edward LEUNG Wai-kuen, JP
(梁偉權)

Ms Juliana CHOW Hoi-ling *
(周凱靈)

Ms Josephine Antonetta PINTO *

Mr Billy MA Wah-yan #
(馬華潤)

Mr Joseph LI Chiu-wah #
(李超華)

Director of Legal Aid (Ex-officio)

* Barrister member recommended by the Hong Kong Bar Association

Solicitor member recommended by the Law Society of Hong Kong