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Panel on Administration of Justice and Legal Services

Meeting on 24 June 2014

**Background brief on implementation of the measures
to strengthen the governance and operational transparency of the
Legal Aid Department**

Purpose

This paper summarizes Members' views and concerns on the establishment of an independent legal aid authority and the implementation of the measures to strengthen the governance and operational transparency of the Legal Aid Department ("LAD").

Background

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 LAD under the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme ("SLAS"). 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 Legal Aid Services Council Ordinance (Cap. 489) ("the Ordinance") to oversee the administration of legal aid services provided by LAD and to advise the Chief Executive ("CE") on legal aid policy. Under section 4(5)(b) of the Ordinance, LASC is tasked to advise CE on, inter alia, the feasibility and desirability of the establishment of an independent legal aid authority. 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.

Discussions at the Panel on Administration of Justice and Legal Services ("the Panel")

Consultancy study commissioned by LASC on the establishment of an independent legal aid authority in 1997

4. There have been long standing calls from some 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. 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.

5. At the Panel 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, and 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.

Administration's response to the recommendations made by LASC

6. At the Panel meetings on 13 October 1999 and 18 January 2000, some members deplored the Administration's decision not to accept LASC's recommendation to establish an independent legal aid authority, and were keen 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.

7. The Administration advised that there were safeguards in the current system to protect the independence of legal aid administration, e.g. the Director of Legal Aid ("DLA") should consider all applications according to established criteria and the decision was subject to appeal and rested with the Registrar of the High Court, and LAD would seek independent legal advice outside the Government for complicated cases against the Government in public law litigation all of which, including those against Government-related bodies, were assigned to lawyers in private practice. Moreover, LAD had to provide information in respect of its decisions on legal aid applications requested by LASC, e.g. reports on cases of great public concern.

8. The Administration considered that the genuine concern of the public was over the quality of legal aid services. It stressed that 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 establishment of an independent legal aid authority without a ceiling on legal aid expenditure as recommended by LASC was not in the best interest of users of legal aid services.

Transfer of the legal aid portfolio from the Office of the Chief Secretary for Administration ("CS") to the Home Affairs Bureau ("HAB") in 2007

9. At the Panel meeting on 28 May 2007, some members expressed concern that the proposed transfer of the legal aid portfolio to HAB would downgrade its status, undermine the independence of legal aid administration, and bring about potential conflict of interest.

10. The Administration explained that as legal aid was a complex stand-alone policy subject that involved the provision of services to the community, the proposal would not affect the day-to-day operation of LAD or the established independence in the delivery of legal aid services because the DLA would continue to exercise the statutory functions in an impartial, transparent and accountable manner.

11. In June 2007, LASC advised the Panel that while considering it appropriate to revisit the issue of setting up an independent legal aid authority, it would step up its supervisory role to ensure that the provision of legal aid services would be undertaken professionally and objectively by HAB without interference,

Review conducted by LASC on the setting up of an independent legal aid authority in 2008 and the way forward

12. In October 2009, LASC completed the captioned review and reported its findings to the Administration. While acknowledging that it would be ideal to establish a separate entity to administer legal aid to address the perception problem, LASC did not see a pressing need to disestablish LAD for the time being in view of the very satisfactory service currently provided by LAD, the views of the LAD staff on the matter and the present financial position of the Government. Nevertheless, LASC proposed to conduct a consultancy study on the independence issue again in late 2011/early 2012.

13. At the Panel meeting on 25 January 2010, members noted the Administration's view that legal aid services should continue to be operated in

the present manner and under the existing institutional setup. The two legal professional bodies and the Society for Community Organization also reiterated their long-standing call for the establishment of an independent legal aid authority.

14. Some members expressed grave dissatisfaction that the independence of legal aid was retrogressing, as evidenced by the transfer of the legal aid portfolio from the Administration Wing to HAB in 2007 and the significant departure of the findings of LASC's review in 2008 from those in its 1998 study. These members queried the basis for LASC's view that the service of LAD was very satisfactory, and pointed out that as both DLA and members of LASC were appointed by CE, there was a risk that legal aid matters would be subject to, or perceived to be subject to, the interference of the Executive authorities. They reiterated their support for the establishment of an independent legal aid authority. However, some other members were of the view that it was neither necessary nor urgent to establish an independent legal aid authority, as LAD had been operating well and an appeal mechanism was in place to ensure that the powers of DLA were not abused. These members considered it more important to improve access to legal aid service by raising the financial eligibility limits and expanding the scope of cases covered by legal aid.

"Report of the Consultancy Study on the Feasibility and Desirability of Establishing an Independent Legal Aid Authority" issued in March 2013

LASC's view on independence of legal aid

15. On 30 April 2013, LASC submitted to CE its recommendations¹ on the feasibility and desirability of the establishment of an independent legal aid authority in Hong Kong, together with a copy of the Consultancy Study. LASC agreed with the consultant that there was no immediate need to establish an independent legal aid authority.

16. LASC concurred with the recommendation to revert LAD back to the purview of the CS to restore its status and independence.. As to the Official Solicitor's Office ("OSO"), given that its current set up was small, LASC agreed with the consultant that it would be more cost-effective for OSO to stay within the LAD and for DLA serving as the Official Solicitor. Nevertheless, LASC accepted the consultant's recommendation for it to monitor OSO. Regarding the staffing of LAD, LASC welcomed the consultant's recommendation for it to provide useful input and advice to the Administration on the appointment and performance of DLA and Deputy Directors of Legal Aid.

¹ Ms Josephine PINTO, a member of LASC, held different opinions on the recommendations of LASC. Her views were provided at the letters to CE dated 30 April 2013 (Annex to LC Paper No. CB(4)747/12-13(02)) and 27 May 2013 (LC Paper No. CB(4)747/12-13(01)).

17. LASC considered that the arrangements of having an uncapped legal aid fund and self-financing scheme, i.e. SLAS, should be maintained for the best interest of existing and future legal aid applicants. LASC also agreed with the consultant's recommendations to provide an oversight to the case assignment for obtaining Section 9 opinions², and the review of refusal of legal aids.

Panel meeting on 25 June 2013

18. At the Panel meeting on 25 June 2013, the Panel met with LASC on the report of the Consultancy Study and received views from five relevant organizations on the establishment of an independent legal aid authority. Members noted that the Society for Community Organization, the Hong Kong Confederation of Trade Union and the two legal professional bodies supported the need for an independent legal aid authority. Members of the Legal Aid Counsel Association, however, were divided on such a need. They did not agree with the recommendations of the report of the Consultancy Study except the re-positioning of LAD back to CS's Office.

19. Some members expressed grave disappointment that LASC had agreed with the consultant's conclusion that there was no immediate need to establish an independent legal aid authority, and that such an authority would be subject to even more political pressure in the decision-making process. Some other members, however, did not see such a need because the existing arrangement had worked well for years and there was no substantiated example of Government interference on legal aid administration had been identified.

20. The Administration advised that stakeholder groups consulted were generally more concerned about the quality of the legal aid services rather than the independence issue, and hence the problem of lack of perceived independence could be addressed by introducing improvement measures without having to fundamentally change the institutional structure of LAD. LASC advised that its functions to oversee the delivery of quality legal aid services should be enhanced to strengthen the governance and operational transparency of the LAD with a view to enhancing public confidence in the rule of law in Hong Kong. LASC would reconsider the independence issue from time to time.

21. Members noted the Hong Kong Bar Association's view that the "uncapped budget" of LAD was a myth in that the Administration had never

² According to the consultancy report, Section 9(d) of the Legal Aid Ordinance gives DLA the discretion and a channel to seek external professional opinions ("Section 9 opinions") when evaluating a legal aid application. However some legal practitioners are concerned that the DLA has a "preferred panel" of counsel and solicitors who might provide Section 9 opinions they tend to be in line with the DLA's decisions.

sought supplementary provision from the Finance Committee and had maintained a stable trend in expenditure.

22. According to the information paper provided by LAD of HAB (LC Paper No. CB(4)983/12-13(01)), a person's access to justice would not be hindered by LAD's fiscal position and an application for legal aid that had passed both the means and merits tests would not be refused due to insufficient legal aid funding. LAD's annual estimates of Subhead 208 "Legal aid costs" are drawn up holistically taking into account past actual expenditure and estimated costs. For administrative purpose, an approved funding amount is set at the beginning of each financial year. However, the exact rate of increase in applications is difficult to estimate as legal aid applications are demand-driven. The need for litigation will neither arise automatically nor increase proportionately once more people become financially eligible or as more types of proceedings fall within the scope of legal aid. In exceptional circumstances where the costs exceed the approved provisions within a financial year, supplementary provision would be sought according to the relevant provisions of the Public Finance Ordinance (Cap. 2) to ensure that no legal aid applications would be turned down owing to lack of funds.

Council question

23. At the Council meeting of 27 February 2013, Hon Dennis KWOK raised a question on the establishment of an independent legal aid authority. He urged LASC to make public the report of the Consultancy Study and to provide a timetable for implementing the recommendations made in the report.

Latest position

24. The Administration will brief the Panel at its regular meeting on 24 June 2014 on implementation of the measures to strengthen the governance and operational transparency of LAD.

Relevant papers

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

Independent statutory legal aid authority

List of relevant papers

Date	Meeting/Event	References
Panel on Administration of Justice and Legal Services	15.9.1998 (Item IV)	Report prepared by the Legal Aid Services Council Agenda Minutes
	13.10.1999	Agenda Minutes
	18.1.2000 (Item V)	Agenda Minutes
	28.5.2007 (Item III)	Agenda Minutes Legal Aid Service Council's follow-up paper Administration's follow-up paper
	25.1.2010 (Item IV)	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)]
	25.1.2010 (Item V)	Agenda Minutes

Date	Meeting/Event	References
Council Meeting	27.2.2013	Written reply from the Administration to a question raised by the Hon Dennis KWOK
Panel on Administration of Justice and Legal Services	25.6.2013 (Item IV)	Agenda Minutes

Council Business Division 4
Legislative Council Secretariat
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