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27 November 2017

Dr. Hon. Priscilla Leung, SBS, JP,
Chairman,
Panel on Administration of
Justice and Legal Services,
Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong

BY FAX (2840 0716)
AND BY POST

Dear Dr. Leung,

Panel on Administration of Justice and Legal Services
Meeting on 27 November 2017
Agenda Item IV – Transfer of the legal aid portfolio

The Legal Aid Committee of the Law Society of Hong Kong noted that the Administration would consult the Panel on the initiative announced in the Chief Executive's 2017 Policy Address to transfer the responsibilities for formulating legal aid policy and housekeeping the Legal Aid Department from Home Affairs Bureau to the Chief Secretary for Administration's Office.

The Committee would like to reiterate the position of the Law Society of Hong Kong made in 2013 that "*The re-positioning the Legal Aid Department (LAD) back to the office of the Chief Executive or the Chief Secretary for Administration might help enhance the role of the LAD, but it fails to address the institutionally flawed arrangement of retaining LAD within the Government structure.*"

A copy of the Law Society's submission dated 11 June 2013 (LC Paper No. CB(4) 794/12-13(05)) is attached for reference.

Yours sincerely,

Kally Lam
Assistant Director, Practitioners Affairs
Encl.





INDEPENDENT LEGAL AID AUTHORITY

SUBMISSION

The Law Society has reviewed *the Final Report on the Consultancy Study on the Feasibility and Desirability of Establishing an Independent Legal Aid Authority* ("Report") and has the following submissions.

Background

1. In 1998, the Legal Aid Services Council ("LASC") received a consultancy study on the setting up of an Independent Legal Aid Authority ("ILAA") in Hong Kong. The LASC considered that there was an inherent weakness in the existing arrangements whereby legal aid services were being delivered by a government department. It accepted the consultant's recommendation that an ILAA should be established. In its submission to the Chief Executive in September 1998, the LASC recommended, in relation to the establishment of the ILAA, that¹:
 - (a) an ILAA 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) there should be a phased transition to set up the ILAA with the aim that it would eventually employ its own staff, but initially these would be civil servants seconded from the Legal Aid Department ("LAD") for one year for senior directorate officers, or two years for the remaining staff; and
 - (c) the ILAA should be financed from the public purse; and

¹ See paragraphs 1.2, 1.3, 1.6 and 6.1 of "Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority (1998)" ("1998 Report").

- (d) continuation of the funding arrangements with no ceiling on expenditure on legal aid services.
2. The reasoning underlining LASC's above recommendations were unequivocal:²
- o it is an institutionally flawed arrangement for legal aid to be administrated by civil servants, as there is always the risk of pressure from the Government;
 - o an independent legal aid system is not merely a matter of perception, but of practical reality; legal aid is an integral part of the system of justice.
 - o a proper institutional structure insulates and protects those operating the system so they can provide independent and sound decisions which would not be influenced by the Government.
3. Both the Law Society and the Bar Association fully supported the establishment of an ILAA.
4. The Government decided in 1999 not to accept the recommendations. In 2007, the LASC revisited the independence issue and in October 2009 made its report to the Administration. No decision was made at that time on the establishment of an ILAA and the matter was put off until late 2011 / early 2012.³

2013 Report

5. In late 2011, LASC commissioned Deloitte Consultant (Hong Kong) Limited ("the Consultant") to carry out a further study on whether an ILAA should be established. The Consultant eventually presented its Report to LASC in March 2013. The following recommendations were made:⁴
- o there is no immediate need to establish an ILAA;
 - o LASC's oversight of LAD's delivery of legal aid services should be enhanced;
 - o LAD should be transferred from the Home Affairs Bureau back to the office of the Chief Executive or the Chief Secretary for Administration – this being its original arrangement before 2007.

² See paragraphs 5.3 and 5.7 of the 1998 Report.

³ See the letter from the Chairman of LASC to CE dated 16 October 2009.

⁴ See pages 9-12 of the Consultancy Report; see also paragraphs 194, 197 and 198 *ibid*.

U-Turn

6. The Law Society notes with regret that LASC accepted the recommendations in the Report that there is no need to establish the ILAA. Its current stance is the very antithesis of the position held since 1998. LASC has failed to provide any justification for its change of policy on this very important issue and the Report fails to provide any convincing reasons to reject the establishment an ILAA.
7. It is the view of the Law Society that the reasons which underpinned LASC's policy on the ILAA in 1998 still apply today. Notably, over the past 15 years, members of the public are *more* aware of their legal rights and have a legitimate expectation that legal aid should be made available, should their claims meet the eligibility and merits criteria.
8. LASC should provide a full explanation on why it made such a U-turn in its policy, not only to the legal profession, but more importantly to the public.

Political influence?

9. We note the Report⁵ stated that:

"Although it appears that the establishment of an independent LAA is largely desirable to the consulted stakeholders and feasible at the conceptual stage, there are major uncertainties and setbacks that may occur even if an independent LAA is set up as entity to administer legal aid. These include:

- i. *Whether there may still be influence from other external bodies, particularly political ones, which could exert substantial pressure in the decision-making process of the independent LAA...."* [emphasis supplied]

However, the Consultant has not cited any factual basis for its comments on the possible influence by political entities in its Report. This statement has no substance.

We invite the LASC to clarify with the Consultant the basis of its views on the abovementioned and reconsider accepting the recommendation on the setting up of the ILAA.

⁵ p.10 of the Report

Cases against the Government

10. The Consultant asserted there are "ample" examples of legal aid granted to applicants to pursue claims against the Hong Kong Government⁶ and argues that in reality, legal aid is already independent. The Report fails to make out this assertion. We note the Consultant quoted only two cases, namely:

- o Hong Kong – Zhuhai – Macau Bridge⁷; and
- o Domestic Helpers' right of abode case⁸.

Applicants who wish to initiate action against the Government may have the perception that refusal of such applications for legal aid will be due to the fact that LAD is a government department and its decisions on such applications lack independence.

11. We note the LAD may, where relevant, seek independent legal advice in respect of those legal aid applications which seek to challenge the Government. We are concerned about the independence of such a mechanism, as the choice of counsel, which now rest upon LAD, could have a significant bearing on the outcome of the legal aid applications concerned.

12. Provision of legal aid is an integral part of the administration of justice.⁹ The public regards the administration of justice as one of the core values of Hong Kong. They do not want to see any possible reduction of their entitlement to legal aid. It is our view that an ILAA will ensure that those who require legal advice should be able to do so absent undue pressure or influence from any source; this premise is fundamental to a fair and democratic society.

In conclusion

- o We are disappointed the LASC has endorsed the recommendation that there is no immediate need to establish the ILAA.
- o The re-positioning the LAD back to the office of the Chief Executive or the Chief Secretary for Administration might help enhance the role of the LAD, but it fails

⁶ See page 9 of the Consultancy Report.

⁷ *Chu Yee Wah v Director of Environmental Protection* (CACV 24/2011)

⁸ *Vallejos Evangeline Banao v Commissioner of Registration* (FACV 19 and 20/2012)

⁹ Paragraph 1.8 of the "Legal Aid – A report by the Working Party" (1988 by A J Scott): "Provision of legal aid is essential within our society as a way of enabling those of limited means to obtain legal representation in the Courts, and, thereby, to secure access to justice".

to address the institutionally flawed arrangement of retaining LAD within the Government structure.

**The Law Society
11 June 2013**

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