

**The Hong Kong Bar Association's Position Paper
on Proposed Reorganisation Concerning the Legal Aid Department**

Under the recent Government re-organisation proposal, the responsibilities for formulating legal aid policy and overseeing the implementation of various legal aid schemes by the Legal Aid Department ("LAD") will be transferred from the Administration Wing of the Chief Secretary for Administration's Office to Home Affairs Bureau ("Proposal"). The Hong Kong Bar Association ("HKBA") expresses regret and concern about this Proposal. The following is a summary of the HKBA's position on this Proposal:

1. Access to justice is a crucial element of the rule of law. Its importance hardly requires elaboration.
2. The LAD is instrumental in facilitating access to justice. For more than 10 years, there have been calls from time to time to establish an independent body to oversee and implement the provision of legal aid. The Government did not accede to such calls. The current structure of putting the LAD under the Administration Wing, which in turn is under the Chief Secretary for Administration, is the least acceptable way to ensure the independence of the LAD.
3. The present Proposal comes as a surprise. There has not been any consultation amongst the stakeholders. Certainly the HKBA has not been consulted. As far as we know, the Law Society of Hong Kong also has not been consulted. More importantly, we understand that the Legal Aid Services Council ("LASC") has not been consulted.

4. Under section 3 of the Legal Aid Services Council Ordinance (Cap. 489), the LASC is established to advise the Chief Executive on legal aid policy. Its advisory role is clearly set out in section 4(5) of the same Ordinance. By failing to consult the LASC, the Government is acting contrary to the intent and spirit of the Legal Aid Services Council Ordinance and the aim of establishing the LASC.
5. Not only is there a complete failure to conduct consultation before putting forward this Proposal, there is also no or no satisfactory explanation as to why the Government sees fit not to conduct consultation. The HKBA finds such a state of affairs regrettable, if not unacceptable.
6. In paragraph 4 of the Response to issues raised by Members of the Legislative Council at the meeting on 8 May 2007 prepared by the Constitutional Affairs Bureau dated 10 May 2007, it is suggested that the Proposal is "purely a matter of re-distribution of responsibilities within the Government Secretariat". If that is the reason why the Government saw fit not to conduct any consultation before putting forward the Proposal, we regret to say that the Government is apparently insensitive to issues which may have a significant impact on the rule of law.
7. Putting aside the failure to conduct consultation, the HKBA has grave concern about the wisdom of this Proposal.
8. In the first place, the Proposal clearly raises questions of the LAD's independence or the extent to which the Government is prepared to ensure the LAD's independence. As stated above, there have all along been calls for an independent body to administer the provision of legal aid. The need for an independent body cannot be gainsaid. Besides, not only should the LAD be independent, it is also of crucial importance to ensure that the LAD would be seen to be independent. Failure to do so will undermine the public's confidence in the legal aid services.

9. By putting it under Home Affairs Bureau, the LAD becomes or at least will be seen to have become just another government department under the control and supervision of Home Affairs Bureau. This is totally contrary to the concept that the LAD should be as independent as possible.
10. Further, it also raises question as to whether the LAD will be subject to tighter control of the new Secretary for Home Affairs, whether in respect of the provision of legal aid in cases against the Government or in respect of the allocation of resources to the LAD.
11. Equally of importance is the question of potential conflict of interest. The Secretary for Home Affairs and the Director of Home Affairs are vested with numerous statutory powers such as licensing, trust funds and village representative elections. Decisions made pursuant to these powers are amenable to judicial review. By putting the LAD under the purview of Home Affairs Bureau, there is a potential conflict of interests when decisions have to be made whether to grant legal aid to application for judicial reviews against such decisions.
12. On the whole, the HKBA does not think that the Proposal is advisable and urges the Government to abandon this Proposal. Instead, it is high time that the Government should pay heed to the call for a truly independent LAD.

Hong Kong Bar Association
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