



法律援助服務局  
LEGAL AID SERVICES COUNCIL

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Yr Ref : CB2/PL/AJLS

E-mail : [secy@lasc.hk](mailto:secy@lasc.hk)

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

Tel : 2838 5006

19 March 2010

Dr Hon Margaret NG  
Chairman  
Legislative Council Panel on  
Administration of Justice and Legal Services  
Legislative Council Building  
8 Jackson Road, Central  
Hong Kong

Dear

A handwritten signature in cursive script, appearing to read "Margaret", written in black ink.

**Independent Legal Aid Authority**

I refer to the letter of 28 January from the AJLS Panel in relation to a study on independence of legal aid undertaken by the Legal Aid Services Council (LASC).

The LASC appreciates the concerns of the Panel on the independence issue. I should perhaps take the opportunity to brief the Panel on the work covered by the aforesaid study and how the decision was taken by the LASC on the matter.

When the legal aid portfolio was transferred to the Home Affairs Bureau (HAB) in July 2007, some quarters of the community doubted the independent administration of legal aid after the transfer. In explanation of this move, the Administration gave the assurance that the transfer would in no way affect the Legal Aid Department's (LAD) operation and the discharge of its statutory duties. Notwithstanding the aforementioned assurance, the LASC took the initiative to look into the independence issue in the light of the concerns expressed. A working party, led by a senior lay member and comprising another lay member and two lawyer members of the Council, was formed and tasked with the responsibility. Its terms of reference were:

“Review, in light of LASC experience, the need for an independent legal aid body in Hong Kong and consider, if thought fit, the establishment of a new governance model for legal aid in Hong Kong.”

To be better informed of independence challenges as seen by stakeholders and to receive their views, the working party invited comments from the legal profession and staff of the LAD who provide legal aid services. Their views assisted the working party in examining the arguments for and against a change in the way that legal aid services is administered.

When consulted, the Bar Association urged the setting up of an independent legal aid authority. The data from the Bar pro bono scheme was obtained and considered. The Bar believed that putting legal aid under the HAB posed an increased risk to both the institutional independence as well as the operational independence of the LAD. The transfer raised grave concern as to whether the HAB, being responsible for formulating legal aid policy and overseeing the implementation of the various legal aid schemes, could properly discharge those duties and be seen to be able to do so when it simultaneously had responsibility for matters of Government which would frequently be the subject of litigation. The Bar’s view was that independence of legal aid was compromised as a result of the transfer.

The Law Society of Hong Kong regarded the transfer of the legal aid portfolio in neutral terms. As to independence of legal aid, the Law Society believed that there were already sufficient statutory checks and balances to ensure that legal aid was administered justly. Notwithstanding the safeguards, the Law Society supported the call for an independent legal aid authority to be set up.

The working party conducted consultation meetings with the staff associations of the LAD, and on the management side, the directorate officers of the Department whom by tradition were not represented by the Department’s staff associations.

The Legal Aid Counsel Association and the Law Clerks Association, when consulted, expressed that they did not favour any proposal to disestablish the LAD. They believed that legal aid already operated very independently. The Legal Aid Counsel was of the view that under current

arrangement, civil servants would be better placed to make independent judgment because of the security of office conferred on them. The directorate officers advised that in processing legal aid applications, they had always acted independently in accordance with the provisions of the Legal Aid Ordinance and there were sufficient checks and balances to prevent any possibility of interference by the Administration in cases involving the Government. They further advised that they were not aware of cases where a legal aid applicant who had been refused legal aid had ever complained to the Department that the refusal had any relation with staff of the LAD being civil servants. They were also concerned with disruption of service resulting from the disestablishment of the LAD.

In the course of its work, the working party had also considered the need to consult the public on the matter. Members noticed that in 1998 when a consultant was employed to advise the LASC on the feasibility and desirability of establishing an independent legal aid authority, views of the public and the community groups had been sought. Findings of the 1998 survey on members of the public revealed that majority of them believed that legal aid had been operated independently. Half of the population surveyed believed that LAD's services should be run by a government department. The results of the public opinion survey suggested that there was no general crisis of public confidence in legal aid administration.

The then consultant had also collected views and comments from a range of community groups, including the Human Rights Monitor, the Hong Kong Council of Social Service, the Consumer Council, the Hong Kong Federation of Trade Unions etc. The majority of those consulted believed that legal aid had been operated independently in Hong Kong. They did not perceive independence as a major issue. The main concern of the community groups was quality of service, not independence.

To date, there had been no cogent evidence that the public at large was too concerned about independence. Neither was there an apparent confidence crisis in the provision of legal aid services that would call for immediate reform. Therefore, the working party did not consider that a fresh survey was needed.

From what were presented to the working party, it was noticed that there were divergent views on independence. The Bar Association sees independence as a prerequisite for legal aid to be administered justly. They are mindful of a perception problem, which arises when legal aid is administered by civil servants. The working party noticed similar concern expressed by some legislative councilors. But on the other hand, the LAD management and its two staff associations are not convinced that legal aid is not administered independently. They do not see independence as an issue.

To the knowledge of members of the working party, the Secretary for Home Affairs' responsibilities in the context of legal aid were confined to policy matters and not the day-to-day administration of legal aid services. The concern raised related primarily to LAD's status as part of the Government which created a perception that the Administration might pressure it to take account of considerations other than those provided for in the relevant legislations. Stakeholders' concern on independence seemed to be on the handling of a small number of cases which would present a challenge to the Government. A perceived conflict of interest would arise when civil servants were to determine merits of an application which sought to challenge an administrative decision.

The working party had also made a comparative study of the institutions providing legal aid and in particular in England and Wales, Ontario and New South Wales. In this regard, the working party took into account the experience of Legal Aid New South Wales whom, when asked, advised that "there is no perception in the community that we are an arm of the government albeit we are government employees." It was observed that if the status of the LAD as a government department simpliciter would create a perception problem, the same could be said for any government-funded body.

The working party also considered whether independence is protected effectively and adequately by non-institutional mechanism that can withstand interference. In this regard, the checks and balances that are in place, e.g. procedures that are laid down in the Legal Aid Ordinance and Regulations, the seeking of independent counsel's opinion on judicial review applications, the statutory appeal mechanism against refusal of legal aid, the various complaint channels etc., have led the working party to believe that current operation of our legal aid system is sufficiently independent, open

and transparent.

Legal aid services are delivered through the LAD. Members of the working party recognized that any proposed change to the current institutional arrangements would have impact on the staff and officers of LAD and consequently the delivery of legal aid services.

The working party arrived at its conclusions in November 2008 when the adverse effects of the financial tsunami were being felt. It considered the resources implications in disestablishing the LAD and replacing it by an independent legal aid authority. Members generally felt that the finances of the Government at the time of their deliberation would not support any recommendation that would radically change the present structure in which legal aid was administered unless the current regime was seriously at fault. In 1998 when proposing the establishment of an independent legal aid authority, an amount of \$430 million was quoted as would be required to compensate the departmental staff of LAD by way of abolition of office. Since the level of remuneration of civil servants was a little higher than that of 1998, the working party estimated that some \$460 million would be required at today's value. Given a consolidated budget deficit announced in the 2008/09 budget speech which also forecasted consecutive deficits for the ensuing few years, any proposal to disestablish the LAD to address a perception problem to some, thereby incurring additional expenses in staff compensations and in setting up a new organization to continue the same kind of work, would unlikely meet serious consideration.

The working party therefore accepted that legal aid services had been delivered satisfactorily. While members remained mindful of the perception legal aid critics had on the independence of legal aid, balancing all considerations, it was not considered justified at that stage to disestablish the LAD merely to address a perception which arguably was not widely held. In the absence of any firm evidence that legal aid had been interfered with, the working party believed that continuation of the present system would be the most suitable option for the time being. The working party had suggested that a further review on the independence issue be conducted at a later date.

The LASC agreed with the views taken by the working party. Council members unanimously accepted that services currently provided by the LAD had been very satisfactory. The view was taken on the basis of Council's on-going monitoring of the work of the LAD and from feedbacks from aided-persons who responded to regular customer service surveys conducted by the LAD.

To a large extent, independence is the outcome of both institutional and financial arrangements of legal aid services. Some members of the Council, in deliberating the issue of independence, have cautioned that the perception about influence by the Government will remain even if an independent legal aid authority is set up. For example, Government may be seen as exerting influence through budget allocation and/or appointment of members to the legal aid authority. Complete independence is ideal but difficult to achieve because legal aid services will always depend on Government funding.

In any event, stakeholders' perception on independence needs to be further examined in order to gauge the level of public confidence. The LASC has decided therefore to seek a fresh examination of the independence issue in late 2011 / early 2012. We plan to seek funds from the Administration to engage consultants to assist us in this major study. It is hoped that Government's financial position at the time could allow a greater flexibility to accommodate proposed changes, if any, to the institutional structure of the legal aid regime to address the perception problem.

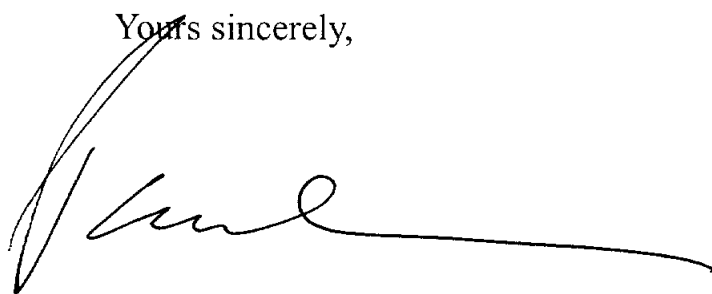
I hope the above gives a fuller picture of the thinking of the Working Party on Independence of Legal Aid and the Council's deliberations on the matter.

The Council noted your request for a copy of the report prepared by the working party. Your request was deliberated at length by the Council. I wish to advise that when the staff associations and the directorate officers of the LAD were consulted, there was the agreement that their views submitted were for internal reference by the LASC only and would be treated in strict confidence. The commitment aimed to foster frank exchange of views between the parties. In preparing its report, the working party had in mind that it was an internal document for Council's

reference and thus the report contained the full submissions from the staff side and the directorate officers. The Council considered it important to honour its confidentiality agreement so that in future study or consultation on this and other matters, the Council would have the trust and confidence of those approached to give their views. I hope you can understand our situation and allow us to keep the report within the Council. Nevertheless, the gist of the report and the thinking of the working party have been outlined in the earlier paragraphs of this letter.

I shall attend the meeting of the Panel scheduled for 29 March and shall be pleased to discuss the issue of independence of legal aid with honourable members.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Paul M P Chan', with a long horizontal flourish extending to the right.

Paul M P Chan  
Chairman