

法律援助的獨立性

Independence of Legal Aid

根據《法律援助服務局條例》第4(5)(b)條，法援局負責就建立一個獨立的法律援助管理局的可行性及可取性向行政長官作出建議。本局於1998年首次研究有關議題，並在2008年進行檢討。如在檢討報告中，向行政長官承諾，本局於2011年年底，聘請顧問，即德勤企業管理諮詢（香港）有限公司，就該議題進行新一輪的研究。

顧問於2012年完成研究，與本局多次討論後，最終完成了研究報告。本局經小心分析調查結果，仔細審議報告內所載建議後，同意香港沒有迫切需要去建立一個獨立法律援助管理機構，以及認同本局應加強監督法援署提供高質素的法律援助服務的職能，透過提高對法援署的管治，增加公眾對香港法治的信心。儘管有前述的結論，本局仍認為值得不時檢討法援的獨立性，以回應不斷轉變的社會期望和政治制度。具體而言，本局主要的建議詳列下文。

制度安排

如顧問所建議，法援處應保留為政府部門，因為該署已有足夠的自主權去處理問題。在研究進行期間，沒有發現政府干預法援管理的實證例子，相反，有不

In accordance with Section 4(5)(b) of the Legal Aid Services Council (LASC) Ordinance, the Council is charged to advise the Chief Executive on the feasibility and desirability of the establishment of an independent legal aid authority. The Council first studied the issue in 1998 and conducted a review in 2008. As committed in the report to the Chief Executive after the 2008 review, the Council engaged Deloitte Consulting (Hong Kong) Limited in late 2011 to carry out a fresh study on the matter.

The consultant completed the study in 2012. The report of the study was finalised after various discussions with the Council. Having carefully examined the findings and deliberated the recommendations contained in the report, the Council agrees that there is no immediate need to establish an independent legal aid authority and the Council's function to oversee the delivery of quality legal aid services should be enhanced to strengthen the governance of the Legal Aid Department (LAD) with a view to enabling public confidence in the rule of law in Hong Kong. Notwithstanding the aforementioned conclusions, the Council also maintains the view that it would be worthwhile to revisit the independence issue from time to time as the expectations of our society and our political system continue to evolve in stride. Specifically, the Council's major recommendations are given in the ensuing paragraphs.



少例子證明只要案件有合理理由，向香港政府提出申索的申請人都能獲批法律援助，例如港珠澳大橋和外傭居留權等案件。本局同意顧問指不同持份者都存有法援署缺乏獨立性的觀感，但解決該問題只需要引入改善措施而無需從根本上改變法援署的體制結構。

本局同意顧問的建議，法援署應一如2007年以前的安排，直接由政務司司長管轄。

政務司司長辦公室在2007年以前一直負責制定法律援助政策和監督由法援署實施的各項法援計劃，其後這職責被轉移至民政事務局。這決定引來立法會司法及法律事務委員會、香港大律師公會、香港律師會和其他法援持份者的批評。這些重要持份者對這政策職責的地位遭明顯降級，及對法援署的獨立運作所帶來的負面影響表示關注。本局相信建議將法援署重新編制入政務司司長的工作範圍，會讓這些重要持份者和社會人士明白，法援署的地位和獨立性將得以完全恢復。

本局認為上述的建議較將法援署置於行政長官轄下可取，因為法援署的工作較接近政務司司長現時的工作範疇，例如司法服務，此舉亦較能減少引起另一輪對本局回復法援署在被調入民政局以前的原來地位的簡單目的，而作出不必要的揣測。

至於法定代表律師辦事處方面，雖然在大部分被納入研究的司法管轄區的法定代表律師辦事處是與其法援組織分開，但顧問認為法定代表律師辦事處的運作應維持現況，沒有需要另設一個辦事

Institutional Arrangement

As recommended by the consultant, the LAD should be retained as a government department because it is considered that the degree of independence upheld and exercised by LAD is sufficient. No substantiated example of the Government's interference on legal aid administration has been identified during the study. On the contrary, there are ample examples of legal aid being granted to applicants to pursue claims against the Hong Kong Government as long as the cases have reasonable grounds e.g. the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers' right of abode in Hong Kong. The Council agrees with the consultant that the problem of lack of perceived independence, which is more of an issue among different stakeholder groups, exists and it could be addressed by introducing measures of improvement without having to fundamentally change the LAD's institutional structure.

The Council concurs with the recommendation that LAD should be re-positioned and placed directly accountable to the Chief Secretary for Administration (CS), which was its former position before 2007.

The responsibility of formulating legal aid policy and overseeing the implementation of various legal aid schemes by LAD was indeed undertaken by the Office of the CS until 2007. The move then to transfer this responsibility to the Home Affairs Bureau (HAB) has attracted much criticism from the Panel on Administration of Justice and Legal Services of the Legislative Council, the Hong Kong Bar Association, the Law Society of Hong Kong and other legal aid stakeholders. These important stakeholders have expressed concern on the apparently "demoted" status of this policy portfolio and the consequential negative impacts on operational independence of LAD. The Council believes that the proposal to revert LAD back to the purview of CS will

處，因為現時法定代表律師辦事處的規模很小，留在法援署編制內會更具成本效益。目前，法定代表律師辦事處處理案件的數量不多，其中部份是無可爭辯或非訴訟性的，加上與獲得法援的對訟人進行訴訟的案件很少，而在該情況下，受助人通常是由私人執業律師代表，由於已有機制處理可能產生的潛在利益衝突，因此由法援署署長兼任法定代表律師並無問題。不過，為加強對法定代表律師辦事處的管治，顧問建議法定代表律師辦事處應由法援局監察。本局接納顧問上述的建議。

在法援署職員編制方面，顧問建議法援署署長和副署長應繼續為公務員，以防止由於人事更替而影響法援服務。為了加強法援署署長和副署長任命的獨立性，顧問建議法援局獲授予提名的權力，以清晰和透明的甄選準則，提名符合要求的候選人名單給政務司司長作最後決定。顧問同時認為，法援署署長和副署長的工作表現應由法援局評核，其他法援署職員則按現有安排，由其上司評核。本局歡迎給予機會，可以向行政當局在高級管理人員的任命和工作表現方面，提供意見和建議，但認為實際運作模式則仍需與行政當局再作磋商，以免令這些人員比同級公務員，陷於過份不利的境地。

leave these important stakeholders and the community in no doubt that the status and independence of LAD has been hitherto fully restored.

The Council prefers the above option of the consultant to the alternative of placing LAD under the Chief Executive as LAD would sit more closely related with the existing areas of the CS responsibilities such as Judiciary Services and the move is less likely to provoke another round of unnecessary speculation on the Council's simple aim to restore LAD back to its status before being placed under HAB.

As to the Official Solicitor's Office (OSO), although the office of the Official Solicitor (OS) in most of the jurisdictions examined in the study is separate from the jurisdiction's legal aid body, the consultant considered that the operation of OSO should remain status quo and there is no need to set up a separate office. It is because the current setup of OSO is small and it will be more cost effective for OSO to stay within the LAD. The number of cases handled by OSO is not high and some of the cases are non-contentious or non-litigious. The number of litigious cases with the opposite parties being legally aided is few and there is standing arrangement that aided persons in those cases are all represented by private legal practitioners. As measures are in place to mitigate the potential conflicts of interest that may arise, there should not be a problem in having Director of Legal Aid (DLA) serve also as the OS. Nevertheless, to strengthen the governance of OSO, the consultant recommended that the OSO should be monitored by the LASC. The Council accepts the above conclusions of the consultant.

Regarding the staffing of LAD, the consultant recommended that the DLA and Deputy Directors of Legal Aid (DDLAs) should be retained as civil servants



to prevent disruption to legal aid service provision due to changes in personnel. In order to enhance the independence of the appointment of DLA and DDLAs, the consultant recommended LASC be given the power to nominate, on the basis of clear and transparent selection criteria, a pool of candidates eligible for the positions to the CS who will make the final decision. The consultant also considered that the performance of DLA and DDLAs should be evaluated by the LASC while other LAD staff will be assessed by their respective supervisors as at present. Whilst the Council welcomes the opportunity to provide useful input and advice to the Administration on the appointment and performance of these senior officials, 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 equivalent counterparts in civil service.

財政安排

法援署雖由政府撥款，但在運用設定限額以內的撥款時，它仍享有相對較高的自主權。香港的法律援助不設援助金額上限，而法律援助輔助計劃更是財政自給，此等皆被譽為全球先進的法律援助資助機制之一。因此，為了維護現在和將來的法援申請者的最佳利益，有關安排應予保留。

運作安排

為了應對研究報告內提出有關法援署根據〈法律援助條例〉第9條尋求意見時，會選用「優先的律師名冊」中那些傾向贊同法援署長決定的大律師的觀感問題，顧問建議本局應監督法援署外委律師為根據第9條提供意見。本局接受顧問的意見。

Financial Arrangement

The LAD, though funded by the Government, enjoys a relatively high level of autonomy in allocating its fund within the given limits. Hong Kong's legal aid funding mechanism is recognized as one of the leading practices in the world with its uncapped legal aid fund and self-financing scheme i.e. Supplementary Legal Aid Scheme. Therefore, such arrangements should be maintained for the best interest of existing and future legal aid applicants.

Operational Arrangement

To address the perception problem identified in the study that LAD has a "preferred panel" for providing Section 9 opinions which tend to be in line with DLA's decisions, the consultant recommended that the Council should provide an oversight to the case assignment for obtaining Section 9 opinions. The Council accepts the views of the consultant.

機構管治

根據現行安排，被法援署署長拒批的民事案件和刑事案件的法援申請，可分別由高等法院司法常務官和法官覆核。顧問建議應在法援署內加設一個健全的上訴機制，審視被拒的民事及刑事案件的法援申請，並提議授權法援局監督法援署的覆核決定。本局大致認同顧問的意見，會與法援署探討落實有關建議的最佳方法。

法律援助服務局

根據《法律援助服務局條例》第4條的規定，本局在指定範疇，負責監督由法援署提供的法律援助服務。本局認為授權法援局在提名擔任法援署署長和副署長的人選，為政務司司長提供意見；協助評核法援署署長和副署長的工作表現；監督外委律師根據〈法律援助條例〉第9條提供意見和覆核法援被拒的案件，以至監察法定代表律師辦事處，都是加強法援局監督的角色。雖然顧問未有詳列如何落實細則和哪些事宜需要本局進一步討論，本局意識到或有必要增加額外的財政和人力資源，但需要與否將取決於行政當局期望本局新增職能所達到的成效。本局亦不排除在適當和有需要時，尋求更改《法律援助服務局條例》的現行條例，以更恰當釐定法援局監察的角色。

本局相信以上的建議如獲接納，將對法援服務在管理問責和運作透明度方面帶來好處，甚至可顯出本港法援服務的質素和運作的獨立性，最終可加強公眾對法援服務的信心。

Governance

Under the existing arrangement, the DLA's decision to refuse legal aid could be reviewed by the Registrar of the High Court in civil cases and the Judge in criminal cases. The consultant recommended that a robust review mechanism should be introduced within LAD for refusals of civil and criminal legal aid applications, and the LASC was recommended to be given the power to oversee the LAD's decisions. The Council is in general agreement with the consultant and would explore with LAD the best way forward to conduct such reviews.

Legal Aid Services Council

Under Section 4 of the LASC Ordinance, the Council is responsible for overseeing the administration of the legal aid services provided by the LAD within certain limits. The Council considers that the proposals of empowering LASC to provide input on DLA and DDLA candidates to CS for appointment; to assist in the evaluation of DLA and DDLAs' performance, to oversee the assignment of Section 9 cases and the review of refusals of legal aid as well as to monitor the operation of OSO are measures to strengthen the Council's oversight role. Although the consultant has not provided much detail on how it should work and which the Council has to further discuss, the Council is well aware of the fact that depending how these enhanced functions are expected to be performed, there may well be implications on additional financial and staffing resources. The Council has also not ruled out the possibility to seeking legislative amendment to the current LASC Ordinance to better define the oversight role of LASC as and when necessary.

The Council believes that the above recommendations, if accepted, will bring about benefits in terms of management accountability, operational transparency and ultimately demonstrable quality and characters

有一點要記錄在案，在本局對建議達成結論後的一次法援局會議上，有一位於2013年3月由香港大律師公會提名加入本局的成員，對建議提出不同的意見。

本局已於2013年4月提交上述建議給行政長官，並會視乎行政當局的回應，在適當時機給予意見。如果這些建議獲得支持，本局會與相關政府政策局和法援署商討，以制訂執行細則。

of operational independence of our legal aid services. These will in turn enhance public confidence in the service.

It has to be recorded that at a Council meeting held after the Council had already drawn a conclusion on the recommendations, one member, who was nominated by the Hong Kong Bar Association to join the Council in March 2013, provided different opinions on the recommendations.

The Council submitted the recommendations to the Chief Executive in April 2013. It will keep in view the responses of the Administration and give comment as and when appropriate. If the proposals are endorsed, the Council will discuss with the relevant government policy bureau and the LAD to work out the implementation details.