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Yr Ref :

E-mail : secy@lasc.hk

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

Tel : 2838 5006

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The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Upper Albert Road, Central
Hong Kong

Dear

Independence of Legal Aid

We have pleasure to report to you the findings of a recent review of the need for an independent legal aid authority in Hong Kong.

In July 2007, the responsibility of formulating legal aid policy and overseeing the implementation of the various legal aid schemes by the Legal Aid Department (LAD) was transferred from the Office of the Chief Secretary for Administration to the Home Affairs Bureau. The transfer however was met with criticism from the Panel on Administration of Justice and Legal Services of the Legislative Council, the Hong Kong Bar Association and some legal aid stakeholders. They all expressed concern on the operational independence of LAD after the transfer.

Although the dust of the controversy seems to have settled, the concern raised points to Council's statutory function in advising the Chief Executive on the feasibility and desirability of the establishment of an independent legal aid authority [Section 4(5)(b), Legal Aid Services Council Ordinance, Cap 489]. The Council feels it duty bound to review the independence issue again as the last review was done ten years ago.

In reviewing the independence of legal aid in Hong Kong, the Council has examined the question of whether civil servants may act independently to hold out against interference, if any, from the executive authorities, which prompted this review. On this point, the Council

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acknowledges that the institutional arrangement of the LAD being a government department may create a perception of lack of independence because of perceived risk of pressure from the government. Independence in the decision-making process in the administration of publicly-funded legal aid must be guaranteed when legal aid is sought by an ordinary citizen, particularly so in respect of proceedings against the government or a public body. Investigation into the particulars of a legal aid application for both means and merits testing and the management of legally-aided cases should be undertaken neutrally and objectively, and be seen to be so. Conflict of interest and arrangements giving rise to a perception of influence should ideally be avoided. Thus, having the day-to-day operation of the legal aid service provider independent of government has apparent merit.

However, despite LAD's institutional position as part of the government, the Council recognizes that there are already sufficient safeguards in statute and in practice to ensure that the powers of the Director of Legal Aid are not abused. For example, the calculation for means test is well defined with no room for discretion. The applicant also has the right to appeal to the Registrar of the High Court or a judge against the refusal of legal aid by the LAD on merits ground. The Council has no reason to doubt the effective working of this appeal mechanism and the impartial decision-making by those holding judicial offices. And in respect of legal aid applications which seek to challenge a decision of the Administration, the LAD will seek independent counsel's opinion on merits of the application unless the point of law involved has been clarified in previous cases/judgments. This arrangement guarantees the impartial evaluation of merits of a case free from government interference.

The Council acknowledges that conflict of interest may arise under the present arrangement, but is not convinced that legal aid independence has been compromised. There is no evidence suggesting so and the Council itself is not aware of any cases where legal aid was refused upon pressure from the government or being influenced by a third party.

Some members point out that even if an independent legal aid authority is set up, the perception problem about influence by the government may remain. For example, the Administration may be seen as exerting influence through budget allocations and/or appointment of members serving on the legal aid authority.

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The Council also recognizes that any changes in the institutional structure of the legal aid regime will also affect the staff of the LAD greatly. The Council therefore has sought views from them on the matter.

Majority of the LAD officers whom we have consulted, namely Legal Aid Counsel below the directorate level and the Law Clerks, do not support any proposal to delink LAD from the government. They are not convinced that legal aid is not administered independently merely because the Department remains an executive arm of the government. The directorate officers of the LAD held similar views, pointing out that there had not been cases where a legal aid applicant who was refused legal aid had ever complained to the Department that the refusal had any relation with staff of the LAD being civil servants. They submitted that the security of tenure rendered to the civil servants in fact ensures the independent evaluation of legal aid applications in the most professional manner and not the other way as suggested by some critics.

The question of independence, as Council sees it, is whether it is protected effectively and adequately. The checks and balances that are currently in place and the service quality of our legal aid system led Council to believe that the operation of our legal aid system is already highly independent, open and transparent.

The Council has reviewed the independence issue in light of the report “Legal Aid Systems in Selected Places” released by the Legislative Council Secretariat’s Research and Library Services Division in July 2009. Part of the report deals with authorities responsible for providing legal aid which is relevant to, and may have bearing on Council’s earlier deliberations on the independence issue. The report itself, as we notice, is essentially a literature review on the various components of legal aid. The Council notes that in the three jurisdictions selected for study, their legal aid authorities are directly accountable to the executive branch of the government but their independence, however, does not appear to be an issue in the respective jurisdictions. The Council has examined the independence issue in the circumstances of Hong Kong in light of the findings of the study. The Council is of the view that our current system is working very well, even when compared with these advanced jurisdictions.

The Council acknowledges that it will be ideal for a separate entity to administer legal aid independent of the government to deal with the perception problem. However, in view of the very satisfactory service

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currently provided by the LAD, the views of the LAD staff on the matter, and having considered the present financial position of the government, the Council does not see a pressing need to disestablish LAD and substitute it by an independent legal aid authority. The perception problem is acknowledged but it is not a priority issue for legal aid in Hong Kong. The Council has concluded that it is not the opportune time to pursue with further study on the establishment of an independent legal aid authority. Notwithstanding, it is incumbent upon us to keep the independence issue under review given the statutory responsibility of the Council. This we propose to do in late 2011/early 2012 when hopefully the finances of the government will allow a greater flexibility in proposing changes to our legal aid regime. In the meantime, the opportunity shall be taken to investigate on ways and means to further enhance the scope and service quality of legal aid in Hong Kong to better serve the needs of the people.

Yours sincerely,

Paul M P Chan
Chairman