

The Hong Kong Bar Association's 2nd Position Paper
Re: Proposed Transfer of the Legal Aid Portfolio to the Home Affairs Bureau

1. On 28 May 2007, the Hong Kong Bar Association (“HKBA”) issued the first Position Paper on this subject. On the same day, representatives of the HKBA attended the Meeting held by the Legislative Council’s Panel of Administration of Justice and Legal Services (“Panel Meeting”). The following is a summary of the HKBA’s responses to the points raised and discussed at the Panel Meeting as well as some further observations.

2. As stated in our first Position Paper, the need for an independent body to administer the provision of legal aid cannot be disputed. At the Panel Meeting, the Administration did not appear to deny this. In any event, the HKBA does not see how this fundamental principle can be disputed. In the circumstances, one asks these questions: What are the reasons for the proposed organization? Are those reasons valid? What are the pros and cons of the proposed organizations? Can there be any other alternatives?

3. In paragraph 3 of the LC Paper No. CB(2)1968/06-07(04) submitted by the Administration to the Panel, the reason for the proposal is stated as follows:

“Legal aid is a stand-alone policy subject that is getting increasingly detailed and complex. Accordingly, the Administration considers it appropriate to place the subject on par with other equally important policies, viz. under a Director of Bureau. Taking into account the fact that legal aid involves

the provision of services to the community, the Administration intends to place the portfolio within the purview of the HAB [i.e. Home Affairs Bureau].”

4. The HKBA does not dispute that legal aid is and should be a stand-alone policy subject. However, this does not justify the proposed reorganization. Nor does the fact that the legal aid portfolio is getting increasingly detailed and complex. On the contrary, both considerations support the call for independence. The short-term solution is to provide more resources for operating the legal aid portfolio under the current structure. The long term solution, a solution that the HKBA urges the Administration to implement as soon as possible, is to have a completely independent body to administer the provision of legal aid.
5. Before we can have a completely independent body, the short-term solution proposed above is far more desirable than the proposed reorganization. As stated in the HKBA’s first Position Paper, the proposed reorganization runs contrary to the fundamental principle that the administration of legal aid should be as independent as possible. The short-term solution suggested above does not, though it will not be as desirable as having a completely independent legal aid body.
6. At the Panel Meeting, there were suggestions that the proposed reorganization will not diminish the independence or the perception of independence of the Legal Aid Department (“LAD”).The reason put forward is that the LAD operates in accordance with the provisions in the Legal Aid

Ordinance. Further, it was stressed that refusal of legal aid is subject to appeal to the Registrar.

7. The HKBA does not agree with these observations. The Legal Aid Ordinance sets out the key policy objectives. However, it vests considerable discretion in the administration of legal aid. A notable example is section [] of the Legal Aid Ordinance.
8. Furthermore, provisions in the Legal Aid Ordinance cannot provide any answer to the concern of possible conflict of interest expressed in paragraph 11 of the HKBA's first Position Paper. If the proposed reorganization is implemented, the LAD may have to seek independent opinion from private practitioner under section 9 of the Legal Aid Ordinance so as to avoid such possible conflict of interest. This will mean more public funding will be incurred when it can be avoided.
9. On the whole, the picture is crystal clear. On the one hand, the proposed reorganization will bring about adverse consequences. The proposed reorganization will make the legal aid portfolio more enmeshed in the bureaucracy. It will put the LAD under more "leadership" than before. The independence or at least the perception of independence will be questioned. It also raises the question of whether the legal aid portfolio will be subject to the overall budgetary limit of the Home Affairs Bureau.

10. On the other hand, such adverse consequences can be avoided if the Administration is to keep the current structure but to provide for resources for the legal aid portfolio.
11. In the circumstances, the HKBA cannot see why the Administration should insist on implementing the proposed reorganization.
12. More importantly, the time for having a completely independent legal aid body is long overdue and the HKBA repeats that the Administration should work towards that direction without further delay.

The Hong Kong Bar Association
7 June 2007