

**Summary of the Consultant's Report on the
feasibility and desirability of establishing
an independent Legal Aid Authority**

Terms of Reference

- We set out in this report the results of a consultancy study that we were commissioned to carry out for the Legal Aid Services Council (LASC).
- Our study terms of reference are to:
 - examine the overall feasibility and desirability of establishing an independent legal aid authority (LAA) in Hong Kong;
 - compare various operational models for an independent LAA and examine their merits/demerits and costs/benefits.
- Our terms of reference encompass the legal aid services provided by both the Legal Aid Department (LAD) and the Duty Lawyer Service (DLS).
- In this report we use the term 'LAA' to refer to a body set up to oversee legal aid administration, including both the current LASC and any future body that might replace it, e.g. a statutory body that might become the employer of the staff of a disestablished LAD.

Organizational analysis

Institutional independence

- Institutionally the LAD is not independent of the Government. It is part of the civil service. This creates potential for LAD's decision-making to lack independence from the Government.
- The LASC provides a more independent element in overseeing LAD. Its powers and resources, however, are too limited to provide strong assurances that LAD is not subject to pressure from the Government.
- Institutionally the DLS is independent of the Government, although it is

subject to tight financial controls by the Administration Wing because of its dependence on Government funding. Its governance is controlled by the legal profession. Governance by the legal profession could give rise to conflicts of interest, to the extent that work for the DLS is perceived by the profession as a business opportunity.

Financial independence

- Both LAD and DLS are dependent on Government funding.
- There are no ceilings on LAD's expenditure on legal aid cases. This gives LAD some financial independence in that:
 - no-one who meets the legal aid criteria is prevented from receiving legal aid services of high quality by funding constraints;
 - there is no need to make priority choices among those whom the LAD has statutory powers to assist.
- There are cash limits on all DLS's expenditure, although it may make a supplementary bid for funds in-year if required.

Stakeholder perceptions

- There is some public concern about the LAD's independence from the Government:
 - the concern is marked in the case of the Bar Association and the Law Society, which have in the past issued joint statements calling for an independent LAA, and whose position on that issue remains unchanged;
 - there is also marked concern on the part of some of the former and current legislators whom we have consulted;
 - we consulted a range of community groups with an interest in legal aid, including for example voluntary bodies and trade unions, and the majority of these (though not all) believe LAD operates

independently and consider that it is not desirable to change the current institutional arrangements;

- views among the legal aid practitioners whom we consulted are mixed, with some expressing marked concern about the independence of the current arrangements and calling for institutional change, and others considering that the LAD operates independently and that institutional change is unnecessary or undesirable;
- the views of LAD clients also were mixed, some considering that institutional change would be desirable and others that it would not be;
- in a survey of public opinion among 1,000 randomly selected members of the public, 55% of those who had heard of the LAD believe that it operates independently while 21% believe that it does not.

Options

Issues to be addressed

- We have considered ideas and options for addressing the following four main issues:
 - what should be the future institutional structure for the LAD, DLS and LAA (currently the LASC)?
 - what should be the composition and method of appointment of the members of the LAA?
 - how should the functions of the Official Solicitor (whose role is currently performed by the Director of Legal Aid) be organized and managed in future?
 - how should legal aid be funded?

Institutional structure

- We have considered a range of different institutional options for the LAD, which vary significantly in the degree of change involved and their cost:

- Model 0 - make procedural improvements within the current institutional framework, at minimal cost;
- Model 1 - increase the powers and resources of the LAA (currently the LASC) by giving it powers to give the LAD directions on staff matters and the handling of individual cases, and by providing to it a professional secretariat in addition to the current administrative secretariat to assist the LAA in scrutinizing the LAD's plans and performance, at an estimated annual cost of \$2.5 million;
- Model 2 - as in Model 1, but provide the LAA with increased resources by making it the employer of the Director and Deputy Directors of Legal Aid (DLA/DDLAs) instead of providing a professional secretariat, at an estimated net present value up to \$35 million*;
- Model 3 - establish the LAA as a statutory body that employs directly all the staff engaged in performing the current activities of the LAD, at an estimated net present value up to \$427 million*;
- Model 4 - as in Model 3, but establish the LAA as a non-statutory body, constituted along the lines of the DLS, at an estimated net present value up to \$427 million*.

* the costs involved are mainly staff-related costs associated with disestablishing offices.

- We have in addition considered a range of institutional options for the DLS, which again vary significantly in the degree of change involved:

- Model A - the LAA continues to have no role in relation to the DLS;
- Model B - the LAA oversees and supervises the activities of the DLS, but the DLS continues in its present institutional form as an independent company limited by guarantee**;

- Model C - the DLS is merged into the new body created under Model 3 or 4 above, but remains as separate organizational unit within that body**;
- Model D - the DLS is merged organically into the new body created under Model 3 or 4 above, with rationalization of activities between the former LAD and the former DLS**.

** cost neutral as far as the Government is concerned.

- We consider that the most appropriate options in relation to independence, which offer the best value for money, are Model 2 (provide the LAA with increased resources by making it the employer of the Director and Deputy Directors of Legal Aid) and Model A (LAA continues to have no role in relation to the DLS). This evaluation of the options takes into account the following points:

- the current institutional arrangements for the LAA/LAD give rise to a lack of transparency in the relationships between the Government and LAD, because institutionally the relationships are not at “arm’s length”;
- there is some public concern about the independence of the operation of LAD, but this concern is not widely and deeply held among all relevant stakeholder groups, and it is confined to certain types of cases that present a particular challenge to the Government;
- Models 3 and 4, involving disestablishment of the LAD, are much more costly than any of the other models, in terms of both financial cost and disruption of LAD operations during transition to the new structure;
- our fieldwork revealed no public concern about the independence from the Government of the DLS, and we consider that the potential conflicts of interest that arise from the legal profession’s control of the governance of the DLS do not justify bringing it under the control of the LAA.

Composition and method of appointment of members of the LAA

- The composition and method of appointment of the LAA is crucial in achieving a greater degree of independence. In our opinion the independent-mindedness and overall effectiveness of the LAA can best be achieved by:
 - use of nomination by relevant bodies as a basis for appointment of the majority of members;
 - involvement of the Bar Association and the Law Society in nominating members, in order to ensure the necessary degree of legal knowledge and expertise on the LAA, but only for a minority of the members, recognizing the potential conflict of interest that would arise if the legal profession were to have control of the governance of the LAA;
 - nomination by relevant bodies of members identified as having specific knowledge and experience of the needs of legally aided people, for example the Social Workers Registration Board;
 - nomination of members identified as having specific management knowledge and experience relevant to ensuring value for money, including quality of service and efficiency and the economical purchasing of legal services, for example the Hong Kong Society of Accountants.

The Official Solicitor

- We consider it desirable to establish an independent Official Solicitor's (OS) Office, with a dedicated OS. The current situation, whereby the DLA is also the OS, is not ideal because:
 - it may give rise to potential conflicts of interest where the OS and the DLA are involved on opposite sides of the same case;
 - the demands on the time of the DLA may be inconsistent with active promotion of the role of the OS.

Funding

- Legal aid administration is not fully independent of the Government if the Government funds it. Furthermore, in some other countries the imposition of public expenditure constraints on legal aid has led to Government involvement in legal aid administration, leading to potential threats to its independence. In these circumstances we have considered whether there are any viable alternatives to Government funding.

- The most promising option for raising the funds required for legal aid is a levy on all legal services transactions. Such a levy is in use in British Columbia (although the funds are treated as general revenue), and levies are also used to raise funds for particular purposes in Hong Kong also, for example the employees' retraining levy.

- In the absence of any current plans to impose expenditure ceilings on legal aid cases in Hong Kong, and the difficulties in terms of practicality and acceptability of imposing a levy on legal services, we believe continuation of the present funding regime is the most beneficial option. We see appointment of individuals to the LAA who are well qualified to scrutinize the value for money provided through legal aid expenditure as being of value in maintaining the public acceptability of this approach.
