

**THE BAR ASSOCIATION'S VIEWS  
ON THE NEED TO ESTABLISH AN INDEPENDENT  
LEGAL AID AUTHORITY**

1. The Bar Association supports the decision of the Legal Aid Services Council to call for the establishment of an independent Legal Aid Authority (LAA).
2. In a civilized society that is committed to observance of, and respect for, the rule of law the provision of legal aid to those who cannot afford the costs of legal representation themselves is a basic requirement and not a luxury.
3. In this respect the Bar Association notes that the provision of free or subsidized legal representation in criminal cases is a basic human right guaranteed by *Article 14(3)(d) International Covenant of Civil and Political Rights*. This is made part of our law by the *Hong Kong Bill of Rights Ordinance and Article 39 Basic Law*.
4. In other cases legal aid may be said to be a constitutional right because *Article 35 Basic Law* provides that Hong Kong residents shall have the right to access to the courts. It is certainly arguable that in order for this right to be other than theoretical it calls for the provision of free or subsidized legal assistance in the more difficult civil cases where, because of complexity and what is at stake, a lay person cannot reasonably be expected to act as his own advocate.
5. The Bar Association and the Law Society have long maintained that there was a need for an independent LAA. This was the view of Legco too in July 1993 when it called for such a body in a debate on the Consultative Paper on Legal Aid. Thirty-seven members voted for an independent body and only two voted against.
6. It was partly because of the call for an independent LAA that the Administration proposed the establishment of the LASC in 1995. It was accepted then that one of the main tasks of the LASC was to inquire into the feasibility and desirability of an independent LAA. It was in order to achieve this objective that the LASC, which started to function at the end of 1996, commissioned the consultancy study from Coopers and Lybrand which was released in April.
7. The Bar Association believes that, as regards the issue of whether it is desirable that legal aid services should be provided by a body that is independent of the Administration, the arguments are all one way and in favour of such a body.

8. An independent LAA will command public confidence. There can be no question of its decisions being influenced by pressure being brought to bear on the Director or his staff by the Administration.
9. In this connection the Bar Association notes that in the 1993 Legco debate on the subject there was a question whether a former Director of Legal Aid had been urged by a senior member of the Administration to take into account 'public opinion' when dealing with legal aid applications by Vietnamese asylum seekers.
10. The Administration may say, as it did in 1993, that it does not interfere with the Legal Aid Department but, whether that is true or not, there is a problem of perception. It is a fact that the Legal Aid Department is a government department. It is manned by civil servants. Its head is accountable to the Chief Secretary's office. If a person makes an application to the department for legal aid to sue the government or to bring judicial review proceedings in respect of an administrative decision and is turned down, how can the Director of Legal Aid, as a civil servant, convince the applicant, a layman, that his decision was dictated by the application of legal principle and not a wish to save the Administration the trouble and expense of fighting a difficult and embarrassing case?
11. The importance of perceptions and the potential for a conflict of interest was behind the decision of the U.K. Royal Commission on Legal Services rejecting the idea of a state run legal aid scheme. The Commission said  
  
*If all the lawyers available to assist an individual at public expense depended on the authorities for position and advancement, there would be a risk that an individual's case might be conducted not in the way which best served his interests or complied with his wishes, but in a way which avoided difficulties and gave least offence to those in authority.*
12. The Bar Association also believes that it is also feasible to create an independent LAA.
13. It is accepted that the disestablishment of the Legal Aid Department will involve expense. It is also noted that some of the civil servants working in the department would not like to see the *status quo* changed.

14. However, there are broader issues at stake than cost and staff sentiments. The most important is what is in the public interest. The LASC is a statutory body. It carries out its responsibilities in the public interest. It has considered all the options presented in the management consultant's report. It has noted specifically the expense and institutional problems of change. It is however the very body that was specifically entrusted with the task of deciding whether there should be an independent LAA. Its conclusion that the public interest calls for such a body is one that deserves respect and should be implemented.
15. The Bar Association believes that the arguments against disestablishment are not sufficiently weighty so as to prevail. For a start, where there has been a perceived need for an independent body to carry out functions that used to be performed by government then questions of expense or inconvenience have not got in the way of change. By way of illustration there are the examples of the ICAC, the Ombudsman and the staff of Legco who used to be seconded civil servants.
16. It is to be noted also that the Legal Aid Department is a relatively small department manned by specialists. Dismantling it would not be so difficult compared to the disestablishments which led to the setting up of the Health and Housing Authorities.
17. We do not believe that the existing arrangement, namely, a Legal Aid Department run by civil servants and supervised by an independent monitoring body, the LASC, is satisfactory. This kind of half-way house arrangement does not command the same degree of public confidence as an independent body would do. It is also exceedingly difficult for members of the LASC, who all serve on a part-time basis, to effectively supervise or monitor the day-to-day operation of the Legal Aid Department. The difficulty is only aggravated by the fact that a significant number of members on the LASC are not familiar with the operation of legal aid, legal practice or the legal profession.
18. As for the feelings of staff, so long as the new authority can offer terms and conditions of employment at least as favourable as the civil service then there is no reason whatsoever why the staff should not accept the new terms. The Administration has, after all, a good track record in bringing about changes in terms and conditions of employment in the public interest.

19. In conclusion, the Bar Association looks forward to contributing to the public discussion about the LASC's recommendation. It is confident that through debate and informed discussion the case for establishing an independent LAA will be proved to be even stronger.

Dated 1st September 1998