

For discussion on
16 November 1999

**Panel on Administration of Justice and Legal Services
Of the Legislative Council**

**Legal Aid Services Council's Recommendation
To Establish an Independent Legal Aid Authority**

Purpose

The paper sets out the Administration's considerations on the Legal Aid Services Council's recommendation to establish an independent legal aid authority, and other legal aid services.

Background

2. The Legal Aid Services Council (LASC) was established in September 1996 under the Legal Aid Services Council Ordinance (Cap. 489) to oversee the administration of legal aid services provided by the Legal Aid Department (LAD), and to advise the Chief Executive on legal aid policy. The terms of reference of the LASC is at Annex A.

3. The LASC commissioned a consultancy in October 1997 to study all publicly funded legal services provided by LAD and the Duty Lawyer Service (DLS), with reference to similar services offered in other common law jurisdictions.

Recommendations of the LASC Consultants

4. The study was completed in April 1998 and included recommendations

on the operation of service by the Legal Aid Department, the Duty Lawyer Service and the Official Solicitor.

- (i) On the Legal Aid Department, the consultants identified five models, ranging from the adoption of procedural improvements within the current institutional framework for legal aid administration to establishing a non-Government body that directly employs its own staff to perform the current activities of LAD. The consultants concluded that the most appropriate option in relation to independence, which offer the best value for money, was to increase the powers and resources of a new Legal Aid Authority (currently LASC), make the Director and Deputy Director of Legal Aid employees of the LAA;
- (ii) On the Duty Lawyer Service, the consultants pointed out that, with the governance of the DLS controlled by the legal profession, potential conflict of interest may arise given the profession's economic interest in legal aid work. However, the disruption which would be brought about by bringing it under the control of the LAA do not justify any likely benefits. They therefore recommended preserving the status quo with regard to the DLS; and
- (iii) On the Official Solicitor, the consultants considered the establishment of an independent Official Solicitor's Office, with a dedicated Official Solicitor (OS), desirable. Nevertheless, the consultants pointed out that separating the roles of the OS and DLS is not critical to address the independence issue, since the OS only deals with a small number of cases and the risks are mitigated.

A summary of the consultancy report is at Annex B.

Recommendations of the LASC

5. The LASC submitted its recommendations to the Chief Executive on 8 September 1998. The LASC considers it an institutionally flawed arrangement for legal aid to be administered by civil servants, as there is the risk of pressure from the Government. It considers that the present institutional set-up encourages the perception of a lack of independence. It also considers that there

are sufficient concerns over the independence issue to justify the establishment of a new and independent Legal Aid Authority. An executive summary of LASC's report is at Annex C. In brief, the LASC recommended that -

- (a) an independent statutory legal aid authority be established to advise the Government on legal aid policies and ultimately be accountable for the delivery of all legal aid services in Hong Kong;
- (b) the authority will eventually employ its own staff, but initially these would be civil servants seconded from LAD for one year for senior directorate officers, or two years for the rest of the staff; and
- (c) the authority should be financed by public revenue and the current funding arrangement, with no ceiling on expenditure on legal services, should continue.
- (d) as regards DLS, it should have the same number of lay members as the legal profession (i.e. 8 for each type) while one of the lay members should be nominated by the LAA. At the end of the third year of LAA's establishment, LAA should review the feasibility of DLS merging with LAA; and
- (e) an independent OS's Office, with a dedicated OS, be established.

The LASC has thus gone further than its consultants in that all LAD staff should become employees of the proposed legal aid authority and that ultimately all forms of legal aid service (including DLS) should be delivered by one single institution.

The Administration's Consideration

I. An Independent Legal Aid Authority

A. The Need for an Independent Institution

6. The consultants state in its report that "(t)he main data on operational independence are the perceptions of the key stakeholders in legal aid administration." It is therefore of prime importance to take into account the perception of the stakeholders in deciding whether there is a lack of operational independence. The consultants have interviewed the relevant stakeholders,

including the legal professional bodies, lawyers undertaking legal aid work, community groups, clients of LAD, LAD staff, and the general public at large. The consultants' conclusion is that, while there is some concern about the independence of legal aid administration from the Government, the focus of this concern is on the handling of a minority of sensitive cases that present a particular challenge to the Government. The consultants pointed out that "(i)t is generally acknowledged that legal aid is administered independently in the majority of cases, including many in which legal aid is granted to people with cases against the government".

7. We are not convinced that such a conclusion indicates, as suggested by the LASC, that legal aid administration is not independent and that there are sufficient public concern to justify the disestablishment of the LAD and the establishment of a new independent LAA. The LASC did not provide further evidence to support its claim. Indeed, the funding of numerous legal aid cases against the Government both before and after the reunification bears ample evidence to the fact that legal aid is administered independently in Hong Kong.

B. Funding Arrangement

8. LASC acknowledges in its report that "(o)ne of the great strength in Hong Kong is that there is no ceiling on LAD's expenditure on legal services", which "means that there are no funding constraints to prevent those who meet the statutory criteria from receiving legal aid". It also acknowledges that "(in) some other countries where there are funding constraints there is a strong perception that the Government has sought to influence the legal aid authority's priorities in its use of limited funds by indicating its preferences for the administration of legal aid." The consultants also recognised that "the absence of ceilings on LAD's expenditure on legal aid services removes mechanisms for Government intervention in legal aid administration that are observed on some other countries". LASC's recommendation with regard to the funding arrangement for the independent LAA is that LAA should be funded by public revenue with no ceiling set on expenditure on legal services.

9. It is against the Government's long established public finance management principle to provide an infinite budget for a body that is independent from the Government. Difficult questions involving accountability and cost-effectiveness will arise with the establishment of an independent legal aid

authority with an infinite budget as recommended by the LASC. Also, no solutions to these questions have been put forwarded by the LASC, or other supporters for the establishment of an independent legal aid authority.

10. We have studied the consultants' report, and have separately sought information with regard to the funding arrangements for independent legal aid authorities in other common law jurisdictions. Our findings suggest that legal aid budgets are invariably finite for jurisdictions which have in place an independent legal aid authority. The countries that the consultants, and ourselves, have studied are invariably faced with the pressure to contain cost and reduce service, and are in fact moving towards a more restrictive legal aid system at different pace. For instance, the scope of legal aid services have been reduced in England, Ontario, and Queensland in recent years with the elimination of certain types of civil cases from the scope. Spending cap for individual cases, particular criminal ones, are widely imposed in Canada and Australia. This highlights the difficulties which overseas jurisdiction with an independent legal aid authority are invariably facing. The passage of the Administration of Justice Act 1999 in England and Wales further suggests that, contrary to common belief, an open-ended budget managed by an independent authority is not a viable option in the face of rapid growth of legal costs and an ever-increasing demand for legal aid services.

11. There is no evidence to prove that LAD is not meeting our policy objective of ensuring that our target clients receive the assistance they need. In addition, it is the interest of the potential legal aid recipients that might be jeopardized if an independent legal aid authority with a fixed budget have to be established.

C. Staff Morale

12. It should be noted that, while the LASC believed that civil servants might find it difficult to exercise discretionary powers against the Government when they are themselves part of the Government, staff interviewed by the consultants expressed a fairly opposite view. They believed that being civil servants, their job security allowed them to perform their duties independently. They also believed that a culture of independence already existed among LAD staff. Judging from the granting of legal aid cases to applicants against the Government, LAD is proven to be working independently without fear of possible interference.

We find it difficult to justify the disestablishment of the LAD, which is generally operating efficiently and effectively, and is meeting our policy objective. The unsettling effect of a disestablishment exercise cannot be underestimated.

D. Existing Safeguards for Independence

13. Critics of the Government's decision not to proceed with the LASC's recommendation often suggest that any risk or perception of lack of independence would be completely removed with the establishment of an independent LAA. Indeed, existing safeguards, which are often overlooked, exist to ensure that legal aid service is administered independently. Such safeguards include-

- (a) Director of Legal Aid (DLA) is required to consider all applications in accordance with the Legal Aid Ordinance.
- (b) In complicated cases against the government in public law litigation, LAD would as a matter of practice seek independent legal advice outside the Department which will be given sufficient weight in reaching its decision. Moreover, **all** public law litigation (including judicial reviews against the government or government related bodies such as the Housing Authority), and criminal work (except some instructing solicitors' work) are assigned to lawyers in private practice.
- (c) Decisions on legal aid applications are made by LAD's professional officers in the exercise of their powers vested in them by the Ordinance. For judicial review cases, immigration cases, common law claims, Bill of Right cases and cases under the Supplementary Legal Aid Scheme, the approval of a directorate officer is required for refusal. The applicant will be informed of the reasons for refusal and his statutory right of appeal.
- (d) An appeal against LAD's decision not to grant legal aid lies with the Registrar of the High Court whose decision will be final. If the Registrar disagrees with LAD's decision, he may allow the appeal and the case is referred back to DLA who, subject to means test, would grant legal aid to the applicant in question.

In the past three years, about 1,000 appeals against DLA's decision were

lodged per year, of which about 8% were successful.

- (e) Apart from the statutory appeals system, LAD also has in place a formal complaints system. In 1998, a total of 154 complaints were received by LAD, representing a 37% drop when compared with 1997.

All these measures serve to ensure independence in legal aid administration.

II. The Duty Lawyer Service

14. The DLS is run by the legal profession with full government subvention. The membership of the DLS is at present 26, of which 13 are nominated by the Bar Association, and 13 are nominated by the Law Society. These members form the supreme body of the DLS. The DLS Council, the policy-making body of the DLS, consists of 4 barristers nominated by the Bar Association, 4 solicitors nominated by the Law Society, and 3 lay members. Subject to a means test, it provides legal aid to persons who have committed a list of over 200 statutory and common law offences and are faced with trial in any magistrate's courts. We agree with the consultants that the costs of institutional change, in terms of the disruption of service to be provided to the public, would not be justified on independence grounds. The LASC's recommendation of cross-membership for DLS and the LAA is in practice achievable through existing arrangements, since the legal professional bodies are represented in both the LASC and the DLS Council. We do not see any compelling reasons for introducing changes to the current arrangement with regard to the DLS.

III. Official Solicitor's Office

15. At present, DLA is also the OS. The OS's Office is staffed with four officers. The main duties of the OS are:

- (a) to act as guardian ad litem or next friend to any person under a disability of age or mental capacity, in proceedings before any court;
- (b) to act on behalf of a person committed to prison for contempt who is unable or unwilling to apply on his own behalf for release;
- (c) on appointment under the Mental Health Ordinance, to act as committee

of the estate of a mentally incapacitated person, as guardian of an infant relative or next-of-kin, etc.; and

- (d) to act for any party involved in proceedings under the Protection of Women and Juveniles Ordinance relating to the care and protection of a child or juvenile on the request of the Juvenile Court.

The OS's Office received 140 new cases in 1998-99.

16. The consultants have pointed out that separation of the roles of the OS's Office and DLA is not critical to address independence issues in the light of the small number of cases handled by the OS's Office, and the fact that private practitioners are assigned to conduct cases on behalf of the OS and DLA, and that staff in OS's Office and LAD are prohibited from contacting each other regarding individual proceedings. LASC recommends the establishment of a separate OS's Office to allow direct public access to the OS and enable the OS to handle more litigation.

17. We see certain logic in separating the OS's Office from DLA. We shall study the issues involved, including the possible expansion in the purview of the OS in the light of socio-economic developments, and the resource implications of such a move. We will consult the Judiciary, the Health and Welfare Bureau and the welfare sector before coming to a view on the issue.

Conclusion

18. Our policy objective is to ensure that no one with reasonable grounds for pursuing a legal action is prevented from seeking justice because of lack of means. There is no evidence to prove that the current legal aid system is not meeting this objective. Moreover, LAD strives to ensure that its target clients receive the assistance they need.

19. To ensure that the system continues to meet our policy objective and changing social circumstances, we shall conduct periodic review and keep an open mind to suggestions that enhance the independence of legal aid administration.

Administration Wing

Chief Secretary for Administration's Office
November 1999

**Functions of the Council and relationship
with the Department**

(1) The Council is responsible for overseeing the administration of the legal aid services provided by the Department and the Department is accountable to the Council for the provision of such services.

(2) The Council may—

- (a) subject to subsections (3) and (5), formulate policies governing the provision of services by the Department and give advice on the policy direction of the Department;
- (b) review the work of the Department from time to time and make such arrangements as are expedient and proper to ensure the efficient and economical discharge of the functions and provision of legal aid services by the Department;
- (c) keep under review the services provided by the Department and the plans for development of the Department; and
- (d) consider and advise on the estimates of expenditure of the Department.

(3) The Council shall not have the power to direct the Department on staff matters and the handling of individual cases by the Department.

(4) The Department shall, subject to subsections (3) and (5), provide such information as is reasonably requested by the Council for the purpose of this Ordinance.

(5) The Council is the Governor's advisory body on the policy of the Government concerning publicly funded legal aid services provided by the Department and shall advise on—

- (a) the eligibility criteria, scope of services, mode of service delivery, future plans for improvements, funding requirements and future development of legal aid policy;
- (b) the feasibility and desirability of the establishment of an independent legal aid authority; and
- (c) any other aspect of legal aid which the Governor may from time to time refer to the Council.

(6) The Council shall not be regarded as an agent or servant of the Government.

Summary

Terms of Reference

- 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 statutory 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.

Organisational analysis

Institutional independence

- Institutionally the LAD is not independent of the Government. It is part of the civil service. This creates scope for the perception that its decision-making is not independent from the Government.
- The Legal Aid Services Council (LASC) provides a more independent element in the oversight of the 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 potential conflicts of interest, to the extent that work for the DLS is perceived by the profession as a business opportunity.

Summary (cont'd)

Financial independence

- Both LAD and DLS are dependent on Government funding.
- There are no ceilings on LAD's expenditure on legal aid services. 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

Summary (cont'd)

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 organised 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
 - 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 scrutinising the LAD's plans and performance
 - 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
 - Model 3: establish the LAA as a statutory body that employs directly all the staff engaged in performing the current activities of the LAD
 - Model 4: as in Model 3, but establish the LAA as a non-Government body, constituted along the lines of the DLS

Summary (cont'd)

- 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 a separate organisational unit within that body
 - Model D: the DLS is merged organically into the new body created under Model 3 or 4 above, with rationalisation of activities between the former LAD and the former DLS

- 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

Summary (cont'd)

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, recognising 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 gives 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
- This combination of roles has not emerged from our fieldwork as a source of public concern about the independence of legal aid administration, and the potential conflicts of interest that arise are few in number and in practice are mitigated by the way in which they are handled by the OS/DLA. We therefore consider that separation of the role of OS from the LAD is not essential in the interests of the independence of legal aid, but that it is desirable in the interests of removing these potential conflicts of interest and ensuring that the role of the Official Solicitor is widely understood and used.

Summary (cont'd)

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 services 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 scrutinise the value for money provided through legal aid expenditure as being of value in maintaining the public acceptability of this approach.

Chapter One

Summary of Recommendations

1.1 The Legal Aid Services Council (LASC) recommends that:-

- in the long term, legal aid services should be as independent as possible;
- ultimately all forms of legal aid service should be delivered by one single institution; and
- to achieve these objectives, a phased approach is desirable.

Specifically, the Council recommends that:

1.2 An independent statutory legal aid authority (LAA) should be established, with a board to reflect relevant interests, including a member nominated by Duty Lawyer Service (DLS). LAA would advise the Government on legal aid policies and be accountable for the delivery of legal aid services currently under the Legal Aid Department (LAD). [Paras 6.1 - 6.4]

1.3 The Director of Legal Aid (DLA), the Deputy Directors and Assistant Directors should be seconded to LAA upon its establishment. By the end of the first year, they will need to decide whether to apply to join LAA or to remain as civil servants and be redeployed elsewhere. [Paras 6.5 - 6.6]

1.4 At the same time, the rest of the staff in LAD should also be seconded to LAA upon its establishment to ensure sustained delivery of legal aid services. By the end of the second year, staff will need to decide whether to apply to join LAA or to remain as civil servants and be redeployed elsewhere. [Paras 6.7]

1.5 Upon establishment of LAA, all new staff should be employed by LAA itself. [Para 6.8]

1.6 The operation of LAA should be financed from public revenue and current funding arrangements, with no ceiling on LAD's expenditure on legal services, should continue so as to ensure that operational independence will not be compromised by financial constraints. [Para 6.11]

1.7 An independent Official Solicitor's (OS) Office should be established, with a dedicated OS. [Para 6.12]

1.8 With regard to DLS, the lay membership of DLS Council should be increased to the same number as members of the legal profession, i.e. 8 for each type. Also, one of the lay members should be nominated from LAA's board. At the end of the third year of LAA's establishment, LAA should review the feasibility of DLS merging with it. [Paras 6.13 - 6.14]