

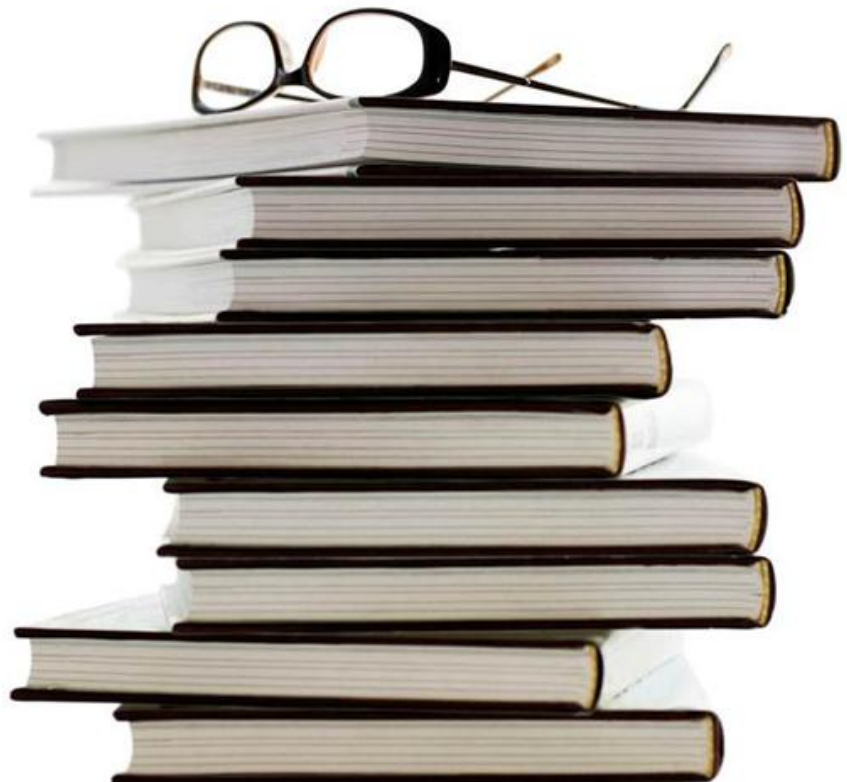
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Consultancy Study on the Feasibility and
Desirability of Establishing an Independent
Legal Aid Authority

Final Report (Executive Summary)

March 2013



Executive Summary

Background of the Study

Deloitte Consulting (Hong Kong) Limited ("Deloitte") was engaged by the Legal Aid Services Council ("LASC"), in late 2011 to carry out a consultancy study ("the Study") on the feasibility and desirability of establishing an independent legal aid authority in Hong Kong. The Legal Aid Services Council ("LASC"), which was established in 1996 under the Legal Aid Services Council Ordinance (Cap. 489), is a statutory body set up to oversee the administration of legal aid services provided by the Legal Aid Department ("LAD") and to advise the Chief Executive ("CE") of the Hong Kong SAR on legal aid policy.

The LAD processes all legal aid applications, and grants legal aid to successful applicants according to the Legal Aid Ordinance (Cap. 91) and Legal Aid in Criminal Cases Rules (Cap. 221D). Due to the LAD's status as a part of the Government, the possibility of establishing a legal aid authority which is independent of the Government's administration has been under consideration for a number of years. An internal Working Party was formed in 1985 to conduct a study concerning the law, practice, administration and finance relating to the provision of legal aid, where the findings and recommendations are documented in the Scott Report.

Under Section 4(5)(b) of the LASC Ordinance, the LASC is obliged to advise on the "feasibility and desirability of the establishment of an independent legal aid authority." The LASC formed the Working Party on Independent Legal Aid Authority in 1997 to commission a third-party consultant to study the issue in 1998, and formed the Working Party on Independence of Legal Aid in 2007 to revisit the issue in 2008.

In the 2008 review, the LASC proposed to keep the LAD's independence under consideration, and defer the opportunity to revisit the issue until late 2011/early 2012. For this reason, the LASC engaged Deloitte to conduct this study..

Project objectives and approach

Together with our external consultants, Professor Alan Paterson (University of Strathclyde) and Professor Frank Stephen (University of Manchester), we have defined four dimensions of legal aid independence – institutional, financial, operational and governance – along which the degree of independence is determined.

Through literature review, news research and consultation with key stakeholders in the legal aid administration – including legal practitioners, legislators, community groups, representatives of Government departments and public bodies, trade unions, district councillors, reporters, academics, political parties, LAD staff and LASC members – we have developed an evidence-based approach to examine the current level of independence in legal aid administration, as well as to map stakeholders' expectations of legal aid independence.

Under the guidance of two overseas subject-matter experts, we have looked into nine overseas legal aid practices in order to compare and contrast the identified strengths and weaknesses in Hong Kong's legal aid administration as well as to consider how particular areas can be improved. The nine overseas legal aid practices include common law jurisdictions such as England & Wales, Scotland, Northern Ireland, Ireland, New Zealand, Ontario (Canada), and New South Wales (Australia), as well as civil law jurisdictions such as the Netherlands and Finland.

Given that it is members of the general public who will be the key users of legal aid services, we have solicited their views through a large-scale telephone survey. Opinions from the general public who have never used the LAD's service have been analysed and compared with the views from existing or previous legal aid service users, i.e., legal aid applicants. Views of legal aid applicants have been collected through a paper-based survey. Respondents in both surveys have been selected at random.

Key findings on legal aid administration

We have identified four dimensions – institutional, financial, operational and governance – which are considered to be crucial to the independence of legal aid. Key findings with regard to each of the four dimensions of independence are summarised as follows:

- 1) Institutional dimension:
 - i. Unlike many overseas jurisdictions that adopt a non-departmental public body ("NDPB") structure for their legal aid bodies, Hong Kong's LAD is within the Government and, therefore, not institutionally independent.
 - ii. The LAD's institutional independence is thought by some to have been undermined when its policy portfolio was transferred from the Administration

Wing of the Chief Secretary for Administrations Office to the Home Affairs Bureau in 2007.

- iii. The LASC, as a statutory body, was set up to enhance the institutional independence of the legal aid administration. However, some parties have also expressed disappointment that the LASC has not been sufficiently empowered to insulate the LAD from potential pressure from government.
- iv. The Official Solicitor's Office ("OSO"), being a part of the LAD, creates potential or perceived conflict of interests in some cases.
- v. From our local news review, we have not found any record of comments made by the general public on the subject of the LAD's independence.

2) Financial dimension:

- i. In line with the nine legal aid bodies in overseas jurisdictions examined in the Study, the LAD is funded by the Government and, therefore, not financially independent.
- ii. Given that there is no jurisdiction observed that does not rely on any Government funding, the focus of financial independence should be on a legal aid body's ability to receive sufficient income to meet its running costs, as well as its freedom to allocate its funding within given limits. From this perspective, the financial independence of legal aid in Hong Kong is considered fairly strong, with an uncapped legal aid expenditure and a self-financing Supplementary Legal Aid Scheme ("SLAS") in place.
- iii. Although there has been no cap on expenditure on legal aid services over the past ten years, the LAD has not sought supplementary provisions. It has maintained a stable trend in expenditure, and granted similar numbers of legal aid certificates during this period. Such scenario might create the perception that the LAD is bound to exercise tight control on its legal aid spending.

3) Operational dimension:

Operational independence gauges the degree of autonomy that LAD staff experience as members of the civil service. On the one hand, as civil servants, LAD staff benefit from job security, income stability and pensions which are preventions against them succumbing to potential pressure from any parties, including the Government. On the other hand, LAD staff members might work in favour of the Government because, as civil servants, they might see it as being in their best career interests to do so.

Operational independence also needs to take into consideration the perceptions of various key stakeholders in legal aid administration. There is a perception that the Government might pressure LAD staff through informal (or formal) means, particularly when determining whether legal aid should be granted in certain politically-sensitive cases.

Section 9(d) of the Legal Aid Ordinance gives the Director of Legal Aid ("DLA") the discretion and a channel to seek external professional opinions (Section 9 opinions) when evaluating a legal aid application. However some legal practitioners are concerned that the DLA has a "preferred panel" of counsel and solicitors who might provide Section 9 opinions that tend to be in line with the DLA's decisions.

4) Governance dimension:

Legal aid administration is subject to monitoring by legislative parties such as the LASC, the Legislative Council ("LegCo"), and the Ombudsman. The LAD also has a formal internal system and procedure for receiving and handling complaints.

As reflected in examples of overseas practices presented in this Study, another form of protection for operational independence of a legal aid body is the statutory appeal provision against the refusal of legal aid applications, (except in the case of criminal cases). In Hong Kong's legal practice, a civil legal aid applicant who is aggrieved by any order or decision of the DLA has the statutory right under the Legal Aid Ordinance to appeal to the Registrar of the High Court, whose decision will be final. Although there is no statutory avenue to appeal against refused legal aid applications for criminal cases, judges of the Courts are empowered pursuant to the relevant provisions of the Legal Aid in Criminal Cases Rules (Cap. 221D) to grant legal aid in certain circumstances to financially qualified applicants.

Key findings on stakeholder perceptions

Stakeholder groups that we have met with or participated in the survey have different opinions on the current degree of independence exercised by the LAD, and there are mixed views on the establishment of an independent legal aid authority.

Stakeholders who have strong or fairly strong confidence in the current level of independence include members of the LAD staff, legal aid applicants and various Government departments and public bodies. District councillors, media reporters, trade unions and general public are generally more concerned about the quality of the legal aid service rather than the issue of independence itself. Although some stakeholders consider the establishment of an independent legal aid authority an appropriate move to enhance perceived independence, the majority do not have a strong opinion in this matter.

There are mixed views among legal practitioners, LASC members, academics and community groups. Compared with the survey results from the general public and legal aid applicants, the legal practitioners who participated in the survey have an overall lower level of confidence in the current level of independence. In particular, those who specialise in criminal cases and judicial reviews tend to show a stronger desire for an independent legal aid authority than those who specialise in other areas. Legislators and representatives from political parties tend to have split views. While the pan-democrats tend to be in favour of the establishment of an independent legal aid authority, cohorts from the pro-establishment camp have concerns over the cost-benefit relationship.

The Hong Kong Bar Association and the Law Society of Hong Kong consider the level of independence as not sufficiently independent.

Options

The existing setup of Legal Aid in Hong Kong is well-recognised and commended for its uncapped financial budget, treatment in judicial review cases, effective management in upholding the relevant Ordinances, as well as the politically neutral workforce.

However our Study has found that there are still areas of concern regarding:

- i. Whether institutional independency has been undermined when its administration was transferred to the Home Affairs Bureau;

- ii. Whether the LAD might have a “preferred panel” for providing Section 9 opinions;
- iii. The lack of an established appeal mechanism against refused legal aid application for criminal cases; and
- iv. The lack of public information about the appointment criteria for members in the LASC and the directorate of the LAD.

These issues support the case for a break-away from the status quo and for changes to be made.

To address each of the issues identified, we have proposed a spectrum of options and further elaborated how effectively each option could solve the issues along the institutional, financial, operational and governance dimensions.

At one end of the spectrum, the “Status quo option” maintains the current service and staffing structure, and brings no change to the current LAD administration. At the other end of the spectrum, the “Fully independent option” refers to the establishment of an independent legal aid authority as a statutory body which is governed by a Board of Directors.

Recommendation

Our recommendation takes a holistic and balanced approach, by aiming to address each identified issues with reference to the solicited views from stakeholder groups composed of both legal professionals and those from a non-legal background, as well as lessons learnt from overseas practices,. All the recommended options together form a coherent recommended model for a legal aid administration, which is meant to be rational, pragmatic and improvement-oriented.

At the end of the Study, our conclusion and proposal are that the LAD should be retained within the government because we consider the level of independence exercised by the LAD as sufficient. No substantiated example of the Government’s interference on legal aid administration has been identified during this Study. On the contrary, there are ample examples of legal aid being granted to cases against the Hong Kong Government as long as the cases have reasonable grounds e.g. the case of Hong Kong-Zhuhai-Macao Bridge and the domestic helpers’ right of abode in Hong Kong.

Although it appears that the establishment of an independent LAA is largely desirable to the consulted stakeholders and feasible at the conceptual stage, there are major uncertainties and setbacks that may occur even if an independent LAA is set up as a separate entity to administer legal aid. These include:

- i. Whether there may still be influence from other external bodies, particularly political ones, which could exert substantial pressure in the decision-making process of the independent LAA;
- ii. Whether an independent LAA is still subject to *de facto* controls given that the majority of funding will still come from the Government.

In fact, the lack of perceived independence among different stakeholder groups is more of an issue, which can be addressed by introducing various measures of improvement without having to change the LAD's institutional structure itself. For example, we consider the concerns regarding the scope of legal aid services and the financial eligibility limit as issues of resource allocation rather than of institutional independence. By allowing the LAD to stay within the government, a stabilised workforce will be able to maintain or even enhance the service quality of the legal aid services.

On the basis that the current standard of legal aid services will be maintained, certain improvements can be introduced under the current legal aid administration framework to further enhance transparency of legal aid approval, LASC member appointment, as well as lawyer assignment for the provision of Section 9 opinions. We propose to retain all LAD staff as civil servants, including the DLA and DDLAs. The LASC would nominate a pool of candidates eligible for the positions of DLA and DDLAs to the CE or CS. The CE or CS, who will be the final appointing body, could only appoint from this short-listed group which would thereby limit any conflict of interest. An improved level of management can be achieved by giving transparency to the criteria for the selection of the DLA and DDLAs, as well as the roles and remit of the LASC. A career path that could lead to being selected to the DLA / DDLA candidate pool would provide incentive and reward for top-performing employees. All these measures are considered effective in addressing the issues of perceived independence, strengthen the public's confidence in legal aid service provision, and motivate existing staff.

Taken together, we recommend that the most cost-effective and efficient legal aid service is to retain it within the Government. Our recommendation is based on the provision of a

sustainable and consistent legal aid service in the long term, while maintaining its autonomy in decision-making and governance by improving the current governance and operational structure.

Diagram I and Table I summarise the recommended model for our proposed legal aid administration. In this model, the LAD will remain as a part of the Government with direct accountability to the Chief Executive or Chief Secretary of Administration ("CS"). LAD staff will remain as civil servants, including the Director and Deputy Directors of Legal Aid ("DLA" & "DDLAs"). The OSO will remain part of the LAD's structure, which will then allow the LASC to be significantly empowered to monitor multiple aspects of the LAD operations.

Diagram I: Recommended Model of Legal Aid Administration

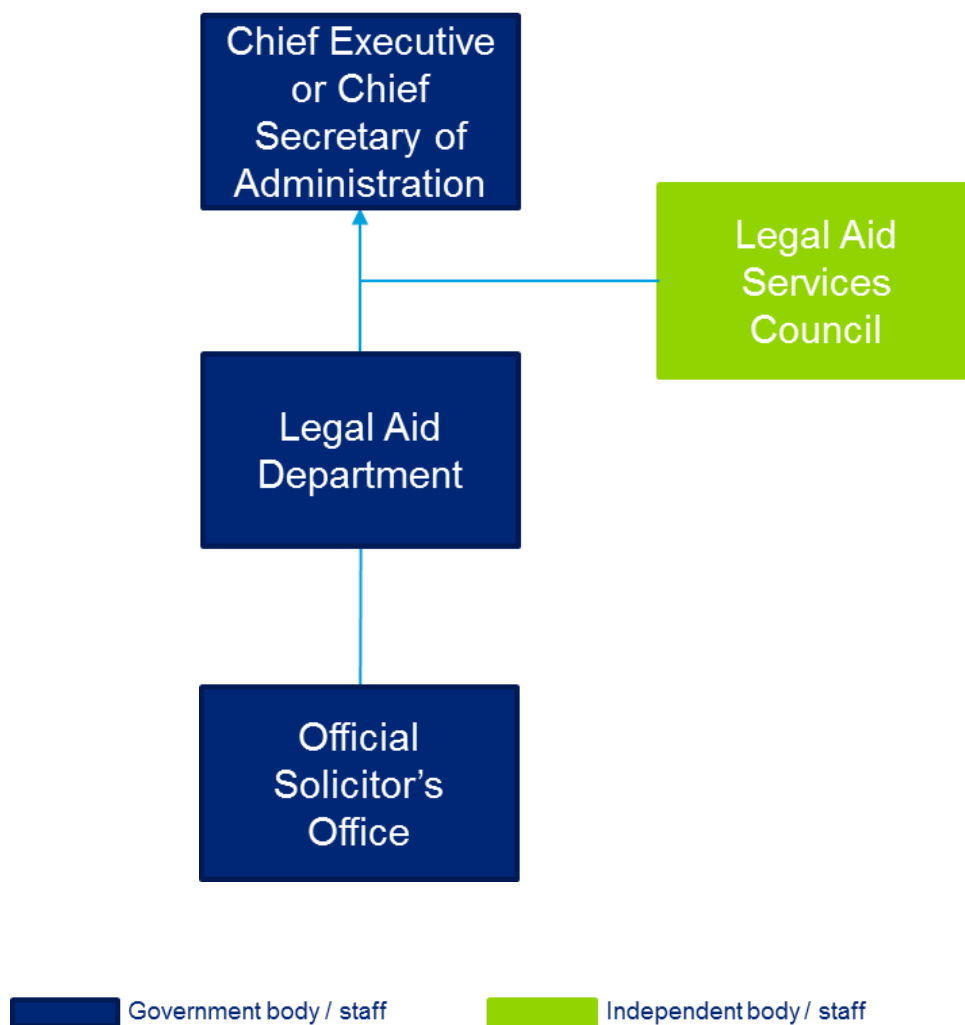


Table I: Key Responsibilities of Key Role in the Recommended Model

Key Role	Key responsibilities
Chief Executive or Chief Secretary of Administration	<ul style="list-style-type: none"> • Holds accountability for LAD • Appoints the DLA and DDLAs from a pre-selected group nominated by the LASC • Defines competency requirements for appointment of LASC members • Appoints LASC members based on competency requirements
Legal Aid Services Council	<ul style="list-style-type: none"> • All LASC members will continue to be appointed by the CE • LASC members are nominated by a range of stakeholder organisations based on defined competencies • LASC members have the right to recommend DLA and DDLA candidates to the CE or CS who will make the final decision to employ short-listed candidates • Evaluates DLA and DDLAs • Oversees Section 9 opinion • Monitors the operation of OSO
Legal Aid Department	<ul style="list-style-type: none"> • Remains within the Government • Becomes directly accountable to the CE or CS • All LAD staff continue to be civil servants, including DLA and DDLAs • DLA and DDLAs are directly evaluated by the LASC • Remaining LAD staff continue to be evaluated by their respective supervisors • Current financial arrangement is maintained, including uncapped legal aid fund and SLAS
Official Solicitor's Office	<ul style="list-style-type: none"> • OSO continues to stay within the LAD • To be monitored by LASC