Legal Aid Governance Models and Independence

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1. Introduction

1.1 In 2016 the Council of Europe commissioned the production of a report "Assessment of the Free Secondary Legal Aid System in Ukraine in the Light of Council of Europe Standards and Best Practices".[2] One key set of recommendations in this Report related to the desirability for greater independence of CCLAP from other bodies, including the Ministry of Justice. In particular the Report called for (a) greater day to day independence of the CCLAP and its Director from the CoM and the MoJ whilst retaining their accountability to the CoM and the Parliament and (b) appointing a Supervisory or Advisory Board whose members are selected by a free, open, transparent and fair public appointments procedure and then approved by the MoJ.[3] The Report further suggested that measures should be taken to strengthen the independence of the position of the Director of the CCLAP e.g. the Director of the CCLAP should be appointed on merit by an independent public appointments procedure, with final approval by CoM and the tenure of the Director of CCLAP should be enshrined in the LA Law.[4] Finally, it proposed that the role of the MoJ in the day to day management and operation of the FSLA scheme, should be reduced.[5]

1.2 In 2017 the MoJ in cooperation with key international partners developed the rules for a merit-based public selection and appointment procedure of the CCLAP Director, which was adopted by the Ministry of Justice in autumn 2017.[6] At the same time, preparation of the concept for further development of FLA system, including strengthening its independence was agreed as one of the key priorities for action. In 2018 greater independence for the FLA system was inserted into the Government's plan of priority actions for 2018.

1.3. As a follow-up to these initiatives in 2018 Council for Europe, in conjunction with the Canadian Bureau of International Education, launched work aimed to commission a further Report drawing on best practice internationally to identify possible options for enhancing the independence of the governance of the CCLAP including the establishment of a Supervisory or Advisory Board for the CCLAP. Accordingly this comparative report will analyse different governance models for Legal Aid Authorities (LAA) from the perspective of independence: This will include - the legal status of the legal aid authorities and their Boards (where applicable), accountability, staffing, the independence of the process of granting or refusing legal aid, responsibility for legal aid policy, and budgeting and finance.

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2 Mr Peter van den Biggelaar, Ms Nadejda Hriptievschi, Professor Alan Paterson, Mr Oleksandr Banchuk and Mr Gennadiy Tokarev, Report for Council of Europe September 2016.

3 Recommendation 6.1.

4 Recommendation 6.2.

5 Recommendation 6.3.

6 See at: http://zakon2.rada.gov.ua/laws/show/z1101-17

2. The legal status of LAA

2.1 The UN Global Report on Legal Aid[7] found that 90% of responding countries claimed to have specialised structures to oversee the provision of legal aid domestically. Of these Legal Aid Authorities 43% were located in the Ministry of Justice and 57% outside the Ministry (split between Public Defenders, Legal Aid Boards and Bar Associations). Further analysis suggests that in jurisdictions where state funded legal aid programmes are most developed (in terms of longevity, expenditure or having separate legal aid legislation) the trend is for LAA to be located externally of the Ministry either in Public Defender organisations or independent legal aid boards.[8]

2.2 In part this is because organisations which spend substantial sums of public money from a sponsoring Ministry in providing a public service pose a challenge for policymakers in democratic countries. This is the awareness that there are a range of areas in public life where it is unwise for a Government to be seen to be making all the decisions – especially if there is a real or apparent conflict of interest in so doing. Thus where a person wishes legal aid to sue their Government or a public body financed by the Government, or where the Government wishes to cap the legal aid funding or to introduce significant court fees in times of austerity, there are advantages both for the Government and for the public if the allocation of legal aid funds is not also in the hands of the Government. For Ministers who face awkward questions in the legislature or the media as to why a certain unpopular litigant or class of litigants (e. g. asylum seekers or migrant workers) is receiving public money to sue the Government an independent LAA offers a convenient scapegoat. Again, if the LAA runs out of funding to defend murder cases two thirds of the way through the year, it is very helpful for the state to be able to say that it's the fault of the LAA for not managing its budget more effectively, secure in the knowledge that only if relations between the LAA and the Ministry are very poor indeed that the LAA will respond in public. Similarly, where the state is the prosecutor in a criminal case the conflict of interest which arises if the state is also responsible for funding the defence is plain to see – much better if responsibility for funding the defence lies with a body outside Government. Having the LAA outside the Ministry also separates policymaking from policy execution.

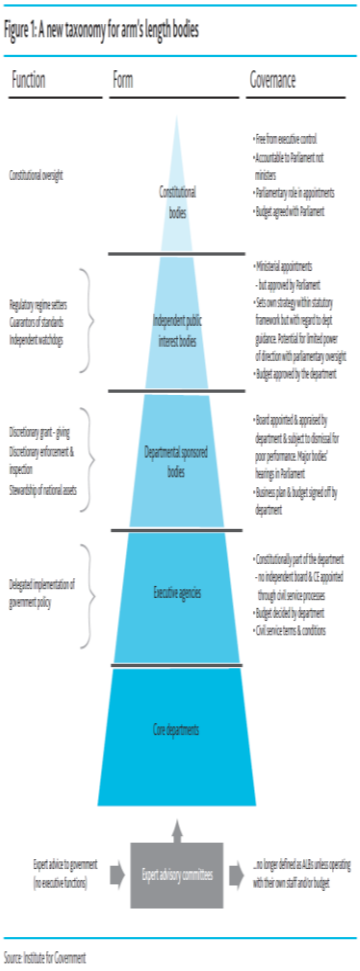
2.3 The UN Principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems Resolution 67/187 (2012) Guideline 11 on A Nationwide Legal Aid System recommends LAA should be independent of Government and free from undue political, judicial or external interference or control in the performance of their functions. The Guidelines do not specify that

[7] UNODC, 2016

[8] The trend is also to intentionally move away from Bar Associations being responsible for the administration of legal aid because of the inherent conflict of interest which they experience in running the programme and being responsible for paying their members to deliver the programme.

LAA should be outside their sponsoring Ministry but for the reasons given in para 2.2 above and the need for LAA to be independent from inappropriate influence, there are clear advantages to LAA being located outside their sponsoring Ministry or at least being as independent as possible in the performance of their functions, particularly the awarding or refusal of legal aid to individual citizens.

2.4 The suggestion that there are clear advantages to LAA being located outside their sponsoring Ministry nevertheless needs to be tempered by the fact that the dichotomy between an LAA being within or outside their sponsoring Ministry is too stark. Recent policy work indicates that bodies which spend substantial sums of public money to provide a public service, such as LAA, can be ranged along a spectrum of institutional autonomy from their sponsoring Ministry. Thus the UK think tank, The Institute for Government has recently argued that such bodies can be said to fall into five different categories:



Thus within the Ministry the LAA could either be a core department with relatively little autonomy or an Executive Agency with sometimes a considerable degree of autonomy, but

usually no Board, staffing provided by the civil service and accountability restricted to the Ministry. Finland is unusual for a jurisdiction with a long established and well developed LAA by locating it within a core department of the Ministry of Justice. Hong Kong is also a well established legal aid programme where the LAA has always been a core department. However, recently they have been joined by the LAA in New Zealand, England and Wales and Northern Ireland which have moved from being external to their Ministries to becoming Executive Agencies. External observers (including several CEOs from other jurisdictions) are sceptical that the new model for NZ and E & W will be sufficiently autonomous, even if the power to grant, refuse or withdraw legal aid in individual cases is adequately protected (see below).

2.5 LAA located outside their sponsoring Ministries – "arms length" bodies can be classified as (i) Constitutional bodies with little input (except funding) from the Ministry and accountability to the legislature rather than the Ministry (ii) independent public interest bodies with a mixture of influence and accountability between the legislature and the Ministry or (iii) departmental sponsored bodies which are more influenced and accountable to the Ministry than to the legislature. Few, if any LAA are constituted as Constitutional bodies. Most long established and highly developed LAA are nearer to public interest bodies or departmental sponsored bodies. One with perhaps the greatest degree of autonomy from its sponsoring Ministry is the Netherlands Legal Aid Board which was established by Article 2 of the Dutch Legal Aid Act 1994 as an independent public management body governed by the Act and by the national law for independent public bodies.9 It has only an Advisory Board in practice, and is principally accountable to the Ministry. Only marginally less autonomous are the LAA which are a body corporate established by statute which sits outside its sponsoring ministry. "Independent of but accountable to" as the relationship has been described.

Examples include, Scotland, Ireland,[10] most Canadian provinces including Ontario,[11] and British Columbia (BC),[12] and most Australian states including Victoria and New South Wales (NSW), South Africa, Sierra Leone, Kenya and Zambia.

2.6 *Supervisory or Advisory Boards / Councils* Having a Board or Council with external members which can offer advice, guidance or direction is usually seen as strengthening the autonomy of a LAA. Where such bodies exist, typically the Government sets the mandate of the legal aid plan, sets the structure and composition of the legal aid governance model, and retains residual authority to direct and constrain the legal aid authority (LAA) through the

9 Law on Framework for Independent Public Bodies (Kaderwet Zelfstandige Bestuursorganen, 2006 November 2nd

10 The Irish LAB is technically an agency of the MOJ but it is situated outside the MOJ.

11 LA Ontario is described as an operational agency of the Government of Ontario but is outside the Government. It was established in 1999 by *The Legal Aid Services Act* as an independent, but publicly funded non-profit corporation

12 Described as a Crown Corporation which is not a Government agency the BC Legal Services Society LSS was created in 1979 by *the Legal Services Society Act* as an independent non-profit organization.

regulation or replacement of the Board. The role of the Board varies from one jurisdiction to another in part because of the difference between Advisory Boards (who can only advise or provide oversight as to the operation of the LAA) and Supervisory Boards (who have decision-making powers and can therefore administer the programme on a day to day basis and take steps to ensure the quality of service provided by the programme). Whatever the role of the Board they are thought to enhance the independence of the LAA from undue external influence because they:

a) Introduce a separation between policy making and policy execution;
b) Encourage policy implementation through contact with providers with a knowledge of the local context;
c) Provide the administrators with more time for reflection and protection against spontaneous upcoming issues;
d) Reduce ministerial and political influence on the day to day running of the legal aid programme;
e) Depending on the composition of the Board it can provide a valuable counterweight to the pleadings of special interest groups;
f) Boost the confidence of key stakeholders – the public, the profession, parliamentarians and donors in the autonomous operation of the legal aid programme;
g) Enable parliamentarians to engage with informed advisers / Board members;
h) Foster innovation and experimentation;
i) Encourage efficient governance; and
j) Enhance accountability for public funds[13]

As Mark Benton[14] has recently observed,[15] "the typical work of [Board members] involves a significant amount of time advising the chief executive and attending to issues that may effect the good reputation of the organization. The Board… approach enhances the leadership of legal aid and that is not only important for accountability and good governance but contributes to confidence in the legal aid program, and confidence in the justice system. These broader networks of advice and influence also benefits government as the legal aid plan serves not only as a key justice service provider but can also provide policy analysis and an independent and reliable perspective on the justice system issues."

[13] See e.g. Governance of Legal Aid Schemes – Martin Friedland, Report of the Ontario Legal Aid Review, 1997 at p.1017.
[14] CEO of the Legal Services Society of British Columbia.
[15] Briefing Note to the author 4th April 2018

2.7 LAA which are located within their Ministries usually do not have Supervisory or Advisory Boards, especially if they are located in core departments. Thus Finland and New Zealand have no Board. England Wales has a Board with seven members of the LAA (including the CEO as Chair) and three Non-Executive Board members. The three independent members were selected by public appointments procedure for their expertise in Finance, Audit and the Law. This resembles the board of a business corporation and the numbers alone when combined with the specialist expertise of the non-executive members indicates the limitations of this model for feeding in innovations and policy change. However, in Hong Kong although legal aid is administered by a core department – the Legal Aid Department (LAD), in 1996 a Legal Aid Services Council was set up as an independent statutory body to provide greater direct public participation in legal aid administration and policy formulation. The Council has ten members including the Chairperson none of whom are members of the LAD, and - ex officio - the Director of Legal Aid (DLA). All except the DLA are appointed by the Minister but four of the members must be practising lawyers. It can advise on the eligibility criteria, scope of services, mode of service delivery, future plans for improvements, funding requirements and future development of legal aid policy. The LASC is also empowered to review the work of the LAD from time to time and as such the LAD is accountable to the LASC for the provision of its services. However the legislation does not permit the LASC to direct the legal aid department on staffing matters or on the handling of individual cases. The LASC is well respected and its advice is taken seriously. A few years ago it commissioned a Report to look into the case for legal aid to be taken outside the Ministry. It currently has working groups on the scope of legal aid, public legal education and legal aid, and enhancing the service.

2.8 In Northern Ireland, unusually, the Legal Services Agency (which was taken into the Ministry in 2015) has a Board with four staff members and three independent members. The independent members and the CEO of the Agency are appointed by a public appointments procedure. The Board is both an Executive and an Advisory Board being led by the CEO to manage the running of the Agency. Legal Aid policy is determined by the Minister. However, the Board may discuss policy in the context of analysing options for operational management and delivery. In the policy area, the Board operates in an advisory and consultative capacity, offering guidance when required. The role of the Independent Board Members includes:

- providing strategic advice to the Board, contributing to decision-making and supporting the good corporate governance of the Agency
- using their experience to challenge and support the Board, acting corporately
- ensuring that the Board obtains and considers all appropriate information

- notifying the Board of any matters that threaten the regularity, propriety or value-for-money with which the Agency carries out its business

All Board members are required to adhere to the Seven Principles of Public Life. Experience indicates that the independent Board Members have interpreted their role in a robust manner.

2.9 All of the jurisdictions whose LAA is outside their sponsoring Ministry have a Supervisory or Advisory Board/Council. The Netherlands is the most unusual in that it has an executive Board of one member – the CEO. There is in addition an Advisory Board composed of a maximum of five members. The composition and qualifications for the Advisory Board is regulated by law. The members of the Advisory Board are selected by open competition (see below) for their skills in certain areas – IT, Finance, Human Resources, Political Administration. Membership attracts a small honorarium but members of the Advisory Board sit in their personal capacity and not as representatives of particular stakeholder groups. Their role is to have regard to the general state of legal aid in the Netherlands and they are empowered to have access to the LAB's data (including finances) and to talk to staff on the LAB about any problem areas. The Advisory Board has five or six meetings a year with the LAB. It receives a wide range of information and data, and provides information and advice to the LAB. It always discusses the reports from the LAB, the annual plan, the annual report and the spent budget. It also has a meeting with the Minister every year. Although the Advisory Board has no executive power and therefore the Director does not have to follow its advice, in practice the Director takes the Board's advice very seriously and in consequence, in reality, the Dutch Board exercises many of the functions of a Supervisory Board. The Minister of Justice appoints the member(s) of the Board and the Advisory Board and appoints the Chair of the Advisory Board. The term of all members (including the CEO) is a period of 4 years but there is provision for re-appointment. However, the Minister can only choose from candidates selected by a public appointments procedure with open advertisement, job descriptions and interview. That said the HRM manager of the Ministry is responsible for the pre-interview sift for the executive Board. The selection panels[16] can see the names of all candidates who apply and will try to produce a single name for the Minister. The Advisory Board runs its own contests using a public appointments procedure and offers at least two names to the Minister.

2.10 The members of the LAB have a high degree of security of tenure since the Minister can only suspend or sack the members of the LAB for reasons of clear incompetence or incapability and in case of conviction e. g. fraud or for other very important reasons or on own request.[17]

[16] The selection panels are composed of staff members of LAB, the Advisory Board, the Bar, the legal services counters and the Ministry.

[17] There is a right of appeal against dismissal.

2.11 With the exception of Victoria (which now has a five person part-executive Board) there is considerable similarity in the size and composition of many "arms length" body boards. Generally speaking they are Supervisory Boards consisting of around ten members and a Chair, drawn from various stakeholder communities (the judiciary, solicitors, barristers, the courts, community groups and the business world) and the legislation will frequently specify the skills set required of the Board, which will always include some with an understanding of budgets and management. Only one (Ireland) specifies that there must be an approximate gender balance on the Board.

2.12 Under the standard "arms length" body model the CEO and senior management staff are responsible for operational matters relating to the LAA (e.g. grant giving or payments to providers) whilst the Board and Chair are responsible for governance, namely, ensuring that the LAA operates in accordance with the Board's statutory remit, policies, procedures, budgeting and the law. By making the Board (rather than the Minister) responsible for the hiring and firing of the CEO the model provides a measure of institutional and operational autonomy for the CEO and staff whilst providing the necessary accountability through the Chair and Board to the Minister and Parliament. In addition, in Scotland and Northern Ireland the CEO tends to be selected by the Chief civil servant in the Government as the Accountable or Accounting Officer.[18] The Accountable / Accounting Officer is responsible to the Parliament for the LAA's expenditure, signing the accounts and achieving best value. This enables the CEO to act as a check on financial decisions of the Board that he /she considers to be risky. Equally the Board and Chair can hold the CEO to account for his or her actions. In Scotland and Northern Ireland this mutual system of checks is thought to help the CEO's autonomy from both the Government and the LAA.

2.13 The efficacy of the "arms length " model in providing operational independence and political accountability in part turns on the degree of control exercised by Governments over the appointments and removal of the Board and its senior staff. Here there are widespread global variations. In terms of members of the Board, in many jurisdictions this is in the hands of the relevant Minister. However, in many of these (e.g. BC, Ontario, NI, Scotland, Victoria) there is a public appointments procedure with open advertisement, job descriptions and interviews by an independent panel, which largely prevents political or Governmental interference, although there are some exceptions (e.g. Ireland and NSW). In those two (and in others) some or all of the positions will be filled by stakeholder nomination or board suggestion. Indeed in British Columbia and Nova Scotia almost half of the LAA are nominated by the lawyers' professional body. The Chair will usually be chosen by the Government often after a form of public appointments procedure or one in which there is a significant input from legal

[18] In England and Wales the CEO is the Accountable Officer but he /she accounts to Parliament through the senior civil servant in the Ministry who is the Accountable Officer to Parliament for the whole Ministry of Justice.

stakeholder bodies, including the board itself. Sometimes, as in British Columbia and Nova Scotia the chair is selected by the Board. Common to many of the "arms length" boards is the role to preserve the independence of legal aid services from inappropriate government interference.[19]

2.14 One of the keys to the success of Boards is their composition and competencies. As we have seen, whether the LAA is situated inside or outside its sponsoring Ministry, and whether it is an Executive, Advisory or Supervisory Board, the regulations (and sometimes the statutes) will stipulate that the Board has a mix of skills and competencies in its membership. Typically, some members of the Board will be required to have expertise in (a) the justice system, (b) the legal needs and social conditions of low income citizens (c) human resource issues and (d) financial and public administration (including knowledge of government decision-making), as well a strong grasp of governance. Sometimes, as in Legal Aid Ontario (LAO), there is also a requirement that the Board's membership should reflect the geographic diversity of the jurisdiction.[20] In British Columbia the list of board competencies also includes organisational leadership experience and leadership experience in an aboriginal organisation. Often jurisdictions will seek to have a balance of non-lawyers and lawyers on their boards and LAO's statute provides that a majority of its members must be non-lawyers.

2.15 The Canadian experience of Boards is that their value is partly dependant on their composition. Thus David McKillop,[21] has observed that "An advisory board can be an important source of independent advice and perspective in the governance of legal aid. Depending on the strength of its composition, it can bring valuable 'on the ground' experience to the table, and present independent and unconflicted advice on a range of subjects including supports for service quality, the need for service improvement or expansion, and opportunities to advocate for or support justice system reforms and efficiencies. Also, depending on its composition, the views of an advisory board can act as a valuable counterweight to the pleadings of special interest groups."[22]

2.16 Whilst the presence on Boards of members who are drawn from various of the stakeholder bodies makes perfect sense, and does curb the potential for Government threats to Board independence, it seems to make a significant difference whether the members are nominated by stakeholder bodies or simply drawn from those bodies by self selection, namely, applying for appointment through a public appointments procedure. The experience from Canada is that the former or "stakeholder boards" do not work in practice. Unsurprisingly, the

[19] Mark Benton, "Adding Value Through Independence: Legal Aid Governance in British Columbia" Paper at International Legal Aid Group conference, The Hague 2013.

[20] *Legal Aid Services Act*, 1998

[21] Vice-President Policy, Research and External Relations at Legal Aid Ontario.

[22] D. McKillop, "Board governance: input from Legal Aid Ontario" (April 2018)

stakeholder nominees are confused as to whom they owe their allegiance – the stakeholder body or to the Board. All too often they resorted in Board meetings to lobbying for their own interests. In Canada and Scotland "fiduciary boards"[23] (even those containing publicly appointed members who are drawn from stakeholder groups) have proven considerably more effective in helping to ensure that Legal Aid plans are meeting the needs of vulnerable groups. In part this because fiduciary boards tend to be more innovative than stakeholder boards. A further factor which influences the success of Boards is the degree of capacity building that they provide for. Induction training (accompanied by Board manuals covering the breadth of the Board's functions) retreats, visits to providers, team-building sessions, specialist training courses, appraisal and self-evaluation are all elements which tend to enhance group solidarity and to avoid the factionalised weaknesses of stakeholder boards.

2.17 In relation to CEOs the "arms length" model is generally adhered to, with selection by the Board after competitive interview,[24] with the exception of Victoria, NSW and the Netherlands where appointment is in the hands of the Minister. Generally speaking CEOs will have a fixed term contract which can be renewed.[25] Non-renewal is a legitimate sanction for poor performance as is removal for complete incompetence or misconduct. More concerning from an independence perspective is the position in Victoria and NSW which allows the Minister to remove the CEO more or less at will, with little or no notice. It is widely believed that the CEO for NSW was removed by the Attorney General (AG) in September 2011 for being too independent of his Minister. Even the "arms length" model does not guarantee independence. In New Zealand, following a scathing (though not entirely substantiated) report[26] on the operation of legal aid, two thirds of the LAA and the CEO resigned, having been asked by the Minister to consider their positions. Even more strikingly, the AG dismissed the whole Board of the BC LAA in 2001 (with the CEO stepping down very shortly thereafter) for failing to accept a proposed cut in the legal aid budget of 38% over three years.[27]

3. Accountability and Independent monitoring

3.1 One route for setting out the mutual roles and responsibilities of the LAA and the Ministry (which is used particularly in Canada) is for the two bodies to sign a Memorandum of Understanding every few years, which establishes an accountability framework for issues that

[23] Where the members owe their allegiance to the Board as an entity.

[24] In Scotland, although the CEO is employed by the Board, their appointment and removal would be matters with which the Minister has to agree.

[25] Although in Scotland and Northern Ireland they tend to have permanent contracts subject to appropriate performance.

[26] M. Bazely *Transforming the Legal Aid System - Final Report* 2009

[27] In the following year the Law Society censured the AG for his actions. The AG's actions came with a price – he is still widely remembered in BC as being the AG who sacked the whole Board.

are not included in the legislation.[28] In the Netherlands there is a management agreement between the Ministry and the LAB derived in part from the LAB Annual Plan. The LAB has to report to the Ministry at regular intervals as to the progress being made with implementing the management agreement. The management agreement is a way of encouraging financial and other support from the Ministry for special projects. In keeping with the normal expectations for "arms length" bodies, in the great majority of LAA located outside their sponsoring Ministry accountability is from the CEO as accountable officer (particularly for the budget) either (1) to the Board and Chair who in turn are accountable to the sponsoring Minister and through the Minister to the legislature or (2) in a few jurisdictions e.g. Scotland, directly to the Parliament for financial matters and on other matters through the Board and Chair.[29] This includes the provision of financial information and trend data at regular intervals, regular business or service plans setting out the strategic priorities of the LAA. The Board plays a critical role in engaging in dialogue with government on a regular basis on matters such as how government action is driving up cost for the legal aid system. The business/ service plan must necessarily be independent. Equally important, is the interdependence of the Board with the government in supporting the operation of the LA plan.

3.2 A key aspect of accountability is the Legal Aid Annual Report (AR). This may go direct to Parliament to more often it goes to the Minister and then to Parliament (Ireland, Victoria, Ontario, British Columbia). Whilst the indirect route might be thought to reduce the autonomy of the LAA (because of the potential for Ministerial objection to the contents of AR which are critical of the Government's policies or actions in the field), in practical terms the autonomy of the LAA is only marginally affected by the route taken by the AR. This is because sometimes the Minister has no power to interfere with the content of the AR or to delay its submission. More often it is because the LAA will avoid publicly criticising their sponsoring Ministry in order to maintain a reasonable working relationship with the Ministry, both because that is where the great bulk of the funding comes from, and because the LAA wishes the Minister to accept their advice on policy matters.

3.3 It follows that even the most institutionally independent LAA will generally provide the Minister with a preview of the Annual Report or of any elements within in it which are critical of the Government's policies or actions. Sometimes the LAA and the Minister will agree to differ over a matter of contention e.g. the low level of financial eligibility in civil cases, but it is rare by the time the AR reaches the Parliament for the critical comment to come as a surprise to the Minister and it is not unusual for it to have been watered down substantially. This may suggest

[28] The Ontario MOU sets out in detail the accountabilities of the Minister, the Chair and the Board. Enforcement is theoretically through the Courts or by mediation but this has never happened – perhaps because of the loss of political capital to the LAA if they were to go that far in a dispute with the Minister.

[29] CEOs and Chairs of LAA are often asked to appear before Parliamentary Committees to answer questions related to legal aid.

that accountability brings with it some tempering of independence. Certainly it is the case, as with judicial independence and judicial accountability, that there is a tension between the two imperatives. However, particularly where the LAA is an "arms length" body whose Board, Chair and CEO have a robust security of tenure, the pursuit of a reasonable working relationship with the Minister can provide formal and informal accountability with very little threat to institutional, operational or financial autonomy.

3.4 In relation to monitoring, one or two of the LAA are required to account separately on financial matters to the Treasury or Finance Ministry but more commonly the LAA are subject to regular audit by independent auditors or the Public Audit Office. Both sets of auditors concentrate on financial issues but in the case of the latter, elements of propriety, governance and best value will be looked at including random samples of files. Whilst the auditors might check to see that the client was eligible for legal aid this will be a cursory process since few auditors will have mastered the complex provisions relating to the merits and reasonableness tests. Most of their scrutiny will be directed to payments and checking that they conform to the LAA's policies and regulations.

3.5 Another form of independent monitoring of the programme of service provision delivered by the LAA is quality assurance. According to the UN's Global Survey of Legal Aid (UNODP, 2016) 57% of the responding jurisdictions relied on complaints as their primary quality assurance mechanism and a further 26% relied on client satisfaction surveys. However it is widely recognised that these approaches provide a only a partial and limited indicator of the general level of quality of performance by legal aid lawyers. Research has shown that client complaints are reactive rather than proactive, they suffer from substantial underreporting and individual, one-off, clients and complainers are usually not best equipped to assess the quality of the legal advice or drafting which they receive, whether the case or transaction was completed within a reasonable timeframe and finally whether the cost was reasonable.[30] Nevertheless, there are about a dozen or so jurisdiction globally (following pioneering work in England and Scotland)[31] which have an objective quality assurance system of the performance and outcomes achieved by legal aid funded lawyers based on peer review of their files or performance in court.[32]

[30] Paterson, A. & Sherr, A. June 2017. "Peer Reivew and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession". *Conference Paper, International Legal Aid Group Conference, Johannesburg.*

[31] Sherr, A. & Paterson, A., 2008. *Professional competence, peer review and quality assurance in England and Wales and in Scotland*. Alberta Law Review, 45(5), pp. 151-168.

[32] Paterson & Sherr (2017)

4. Staffing

4.1 In jurisdictions where the LAA is located within the sponsoring Ministry (HK, NZ, England & Wales, Northern Ireland) the staff of the LAA are civil servants whether or not they are also lawyers. This entails that they are subject to the normal discipline provisions for civil servants, that they receive the same salaries and pension entitlements as other civil servants and that they have unrestricted access to promotion or transfers to other parts of the civil service. The Ministry will also determine the number and grade of the staff even where (as in Finland) most of the legal aid staff are employed by and located in one of the local legal aid offices.[33] For the other jurisdictions which have an LAA outside the Ministry the staff are typically not civil servants (Ireland is an exception with its staff being a mixture of civil servants[34] and public servants)[35] although in some jurisdictions (e.g. Ontario) they are classified as public servants with some similarities to civil servants in terms of discipline and ethics if not in terms of salary and pension.

4.2 Where the staff are not civil servants their salary may match those of civil servants (but not always)[36] but they rarely have equivalent pension entitlements. Even more problematic is the fact that, particularly in the smaller jurisdictions, the "arms length " LAA can be so small that the scope for promotion or a career progression is sufficiently limited that there can be recruitment problems at the senior level.[37] (This was one of the factors which encouraged the recent NI review[38] to recommend that the "arms length" LAA in NI should become a Government agency with its staff becoming civil servants). Most difficult of all in terms of autonomy is the fact that civil servants often have a rather different culture from public servants or LAA workers.

4.3 As one senior staff member who had experience of working inside and outside the civil service, observed, there is a fundamental difference between an "arms length" body and a Government Agency or core Department in terms of the client. With the "arms length" body the "sharp end" is the customer or citizen for whose benefit the LAA exists. In the case of the Agency or Department the client / sharp end is the Minister and your job as a civil servant is to protect and serve the Minister. This means that policy may change more quickly in an Agency if the Minister changes. On the other hand, just because the LAA is outside the Government and

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[33] There are currently 23 such offices in Finland.

[34] The civil servants, however, are subject to the Board's internal discipline procedures rather than those of the civil service.

[35] Public servants are employees who are subject to some of the same restraints and discipline as civil servants but with different salary and pension arrangements. In Ireland they tend to be specialists e.g. lawyers rather than the generalists, who are civil servants.

[36] In England & Wales and in Northern Ireland the LSC staff were better paid than civil servants – which caused some problems when they both became Government Agencies.

[37] The problems included a lack of flexibility when new skills sets were required.

[38] *Access to Justice Review*, Northern Ireland. August 2011 para 7.20.

its staff are not civil servants does not ensure autonomy for the LAA in this area, since in some jurisdictions the Ministry retains the power to limit the number and salary grades of the staff (e.g. Scotland), sometimes keeping the salary of the LAA lawyers below that of lawyers in the Ministry, thus causing recruitment and retention problems. In Ireland whether the staff are civil servants or public servants they are employed by the LAB but their number and grade is the product of negotiations between the MOJ and the Ministry of Finance.[39]

5. The independence of the process for granting or refusing legal aid

5.1 Irrespective of where a LAA lies on the spectrum of institutional independence, the key question is what measures exist to ensure the absolute operational autonomy of the LAA to grant, refuse or withdraw legal aid applications independent of any interference by its sponsoring Ministry, or indeed any other external influence (e.g. the media, or the bar association) or another Government Ministry. As the UN Principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems Resolution 67/187 (2012) Guideline 11 para 59(a) on A Nationwide Legal Aid System specifies, LAA should:

> "Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure."

5.2 One of the greatest protections is a cultural one in that in well developed legal aid programmes the LAA staff and the Ministry civil servants share the normative understanding that Government interference in relation to individual cases is unacceptable. This is understandable in the case of "arms length" LAA but the strength of feeling is equally apparent where the LAA is located within the Ministry. In none of the jurisdictions discussed in this Report is there a formal power for the Minister of the sponsoring Department to intervene in individual cases. Indeed, in a range of them (e.g. Ireland, E & W, NI) there is an express statutory provision against this happening e.g. The Civil Legal Aid Act 1995 s.7 (3) in Ireland provides that nothing in the Act shall enable the Minister to exercise any power or control in relation to any particular legal aid case. In the countries where no such provision is on the statute book, there is often expert legal opinion which shows why the legislation does not

[39] The civil servants have their salary, grades and pension determined by the civil service. They tend to be generalists and have mobility. The public servants tend to be specialists, often lawyers, though their pay and pension are similarly determined and they are less mobile. Because of austerity measures, notably a Public Service staff embargo, staff who leave through retirement or otherwise are not replaced.

implicitly allow such interference in individual cases. In a number of the Canadian LAA (e.g. Ontario) the MOU indicates that the LAA must operate independently of the Government.

5.3 Although many jurisdictions have stories of assisted cases which were an embarrassment or an irritation to the Ministry e.g. asylum cases, prisoner human rights cases[40] or the judicial review of alleged torture of terrorist suspects, few have provided examples of Ministers seeking formally to instruct the LAA to refuse to fund such cases or to withdraw funding from such cases. The nearest examples were the *Evans* case[41] (see below) and a case in another country where there was an application for legal aid by someone accused in a civil action of being responsible for multiple deaths following a terrorist bomb incident. A Government minster (who was not the minster for the sponsoring department) wrote complaining as to award of the legal aid application, and requesting that the certificate be revoked. The LAA wrote back to indicate firmly but politely that the matter was nothing to do with him.

5.4 However, what is the position behind the scenes? Do Governments seek to apply pressure informally on LAA in particular cases? Here there have been occasional instances where Ministers have expressed informal concerns about legal aid being granted in a case which was embarrassing to Government. In one jurisdiction the LAA CEO could recall senior civil servants expressing disquiet to him about the granting of legal aid in one or two such cases, but immediately adding that they were aware, of course, that the LAA was independent of Government. Another civil servant in the MOJ of a country with an "arms length" LAA confirmed that he had on a number of occasions had to remind Ministers that it was not open to them to make comments in prisoner human rights cases suggesting that they should not get legal aid, or to interfere to seek to stop them getting legal aid. In that jurisdiction most of the politically difficult cases arise when those who are considered by the tabloid press to be "bad people" want legal aid e.g. a convicted offender trying to keep a public benefit. This can lead to situations where the Minister feels under pressure from his backbenchers in the legislature and wants to be seen to do something. If he indicates that he will speak to the LAA about it, the response will be that the LAA informs the Minister's civil servants that such a conversation will not take place since the legislation prevents the Minister from interfering with decisions to grant or refuse legal aid. However, if the head of legal aid is a civil servant within the MOJ taking a stance in this way may not be so straightforward.

5.5 The prohibition on Governments intervening in individual cases does not go far enough to ensure the operational autonomy of LAA. There should also be a protection against the Minister having the power to give directions or guidance to the LAA which interferes with their operations in providing legal aid. South Africa, Sierra Leone and Kenya all have express

[40] Relating to a prisoner's right to vote or to basic amenities in their cells.

[41] [2011] EWHC 1146

prohibitions against their Boards being subject to direction or control in this way. However, in some jurisdictions (e.g. Ireland, Ontario and Victoria) the Ministry has the power[42] to give "such general directives to the LAB as to policy in relation to legal aid and advice as he or she considers necessary" and this can extend to guidance as to which categories of civil cases should be prioritised.[43] The Ministry could, of course, like all justice Ministries exclude a complete category of case from legal aid scope e.g. divorce, defamation, money claims, if it had the parliamentary votes to change the legislative provisions and provided the reform could withstand judicial review or it did not infringe the human rights of their citizens under Art. 6 of the European Convention on Human Rights. A very clear example where this power became mixed up with a Government's desire to influence the granting of legal aid in particular cases was the *Evans* case in England and Wales.[44]

5.7 Occasionally Governments retain a power to provide legal aid in exceptional cases – as in Northern Ireland but more often, as we have seen, jurisdictions seek to immunise the granting, refusing or withdrawal of legal aid applications by the LAA from Government interference. One further way to achieve this – which is becoming rarer in jurisdictions with longstanding legal aid programmes - is to leave the granting of legal aid in certain types of case (usually criminal cases) with the courts. However, the consistent trend in jurisdictions is to take such decisions away from the courts because it is much harder to achieve consistency and predictability of decision than if it is given to the LAA. That said, in both Australia[45] and Canada the courts have the power to stay criminal proceedings if they consider that representation is required to ensure a fair trial. This has prompted Governments to provide funding (administered by the LAA) for the representation, whether or not the accused qualifies for legal aid in the normal way.

5.9 An additional factor which reduces the temptation for Governments to intrude on decisions in individual cases, is the fact that in most jurisdictions there is a requirement that LAA keep the case and personal details of those applying for, or receiving legal aid, confidential. However, this blanket protection can come under threat from the desire of LAA CEOs to retain a reasonable working relationship with their sponsoring Ministry, and the Ministry's liking for a "no nasty surprises" element in the relationship with the LAA. Generally speaking, therefore, CEOs will provide a warning to their Ministries of significant cases involving Government interests or potential embarrassment which have come to their attention – without providing details of the individuals concerned. Whilst this may seem a reasonable balance to strike in a few cases a year, one LAA who had received legal advice that their duty to furnish reports to the Minister "on any matter relating to legal aid" covered the details of individual applicants and their cases, found itself discussing 3 or 4 cases a week with its sponsoring Ministry (without

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42 See e.g The Irish Civil Legal Aid Act 1995 s 7(1)

43 Victoria Legal Aid Act 1978 s.12M (as amended).

44 [2011] EWHC 1146

45 *Dietrich v The Queen* [1992] HCA 57 (The High Court).

permitting them any say in the disposal of the application), in order to forewarn the Minister of matters that he might be questioned about by parliamentarians. This is not a position with which most independent jurisdictions would be comfortable and shows the importance of having the respective roles and responsibilities of the LAA and the Ministry enshrined in statute.

5.10 The final protections for the operational independence of LAA are the provisions which govern the refusal of legal aid applications or the withdrawal of legal aid grants. In almost every jurisdiction the disappointed member of the public can ask for an internal review of the decision – usually by a more senior LAA official. If that does not succeed there is the potential for a review by a committee. In some cases the committee is outside the LAA made up of independent lawyers and laypersons (Ontario[46], Victoria, and NSW[47]) in others it is a Committee of the LAA composed (as in Ireland) of just Board members, or Board members plus external lawyers or (in the Netherlands) the judiciary.[48] If the review rejects the appeal, the applicant in the Netherlands has a right of appeal to the Administrative Court and then on to the Highest court. In some cases legal aid can be awarded to fund these appeals, but this is rare. More typically in other jurisdictions (e.g. Scotland) refusals to grant legal aid are open to challenge by way of judicial review through the courts. However the operation of the legal aid merits test would make it unlikely for such a challenge to receive legal aid (Ontario, NSW, Victoria).

5.11 In Scotland the initial reviews are internal to the LAB and have a better than even chance of success.[49] However, where the case may be controversial or contentious e.g. where legal aid is sought to sue the Government, the case will go to a Committee[50] of Board members and external lawyers. Applicants who are turned down by the Committee may seek to judicially review the LAB for not granting legal aid. In such instances the case will be sent to a senior judge for a ruling on whether the applicant should get legal aid for the judicial review. It is rare for such appeals to lead to a grant of legal aid. In all there have been only been a handful of cases where legal aid has been granted for judicially reviewing the LAB's decision not to grant legal aid to a party.

5.12 The above descriptions of the autonomy of LAA in relation to granting, refusing or withdrawal of grants of legal aid have been taken from jurisdictions where the LAA is located outside their sponsoring Government Ministry. It would seem a reasonable hypothesis to posit that the operational autonomy of LAA located within Government departments will be more

[46] After the independent area committees the final appeal goes to the Director of Appeals in the LAA.

[47] In NSW the committee also has a lawyer for the Ministry. The committees uphold 10-15% of appeals.

[48] In almost every case the Dutch LAA accepts the recommendations of this review committee.

[49] This is not necessarily an indication that the original refusal was wrong. Often it is because the solicitor has provided the further and better particulars required to enable the grant to be given.

[50] The Services Cases Committee – it deals with only 150 or so cases a year – although refusals of civil legal aid applications are running at 6,000 a year.

curtailed than that of LAA outside Government. Certainly it has been the area which has troubled both commentators and Governments in the jurisdictions which have recently brought their LAA inside Government. In NZ the legislation created a statutory official – the Legal Services Commissioner – a career civil servant within the MOJ who is responsible to the Secretary for Justice (the top civil servant within the MOJ) to take decisions on applications. There is also a Legal Aid Review Panel located within the tribunals unit of the MOJ, to deal with appeals against refusals of legal aid.[51] In NI the CEO of the LSA is also the Director of Legal Aid Casework. By statute the Director is required to make decisions on legal aid applications independently, without any input from the Minister, any political institution or staff in the core of the justice department.

5.13 However the Minister can direct or give guidance to the Director as to his functions. The former must be obeyed. The latter only needs to be "had regard to". Neither directions nor guidance can relate to individual cases. There is statutory provision[52] for an independent appeals panel comprised of lawyers and laypersons, recruited by a public appointments procedure, to deal with appeals against the refusal of legal aid or the granting of legal aid subject to conditions. Such is the volume of such appeals that the LSA is currently operating with five separate panels. If there is a desire to appeal against a panel's decision the appropriate route is judicial review. However, if legal aid is not given for judicial review, appeal lies to another independent appeals panel. In England and Wales, as in NI there is a Director of Legal Aid Casework and that civil servant cannot is subject to direction and guidance in relation to individual cases, in exactly the same fashion as in NI. There is no independent appeals panel in England and Wales.

5.14 It would be fair to say that a number of CEOs in the surveyed jurisdictions were sceptical as to the effective independence of a structure where the civil servant's promotion prospects and career progression is dependent on not falling out with their immediate supervisor or the Minister. The situation would be even more problematic if legal aid is being sought to judicially review the Justice Minister. Given that the test of impartiality focuses on the appearance of impropriety as much as any impropriety itself, it is perhaps understandable that several CEOs expressed doubt that a senior civil servant within the Justice Minister's department would be totally impartial in that situation. Without a robust appeal mechanism the English and Welsh Government could be opening itself up to political battles on a secondary front (the funding issue) when the original challenge might not be a strong one in the first place.

[51] The members of the panel are appointed by the Minister without a public appointments procedure and are unfortunately not well remunerated.

[52] Legal Aid & Coroners' Courts Act (NI) 2014

5.15 Interestingly, two of the well developed LAA which have always been core departments within their Governments, Hong Kong and Finland, have developed their own robust autonomy measures when it comes to the granting, refusal or withdrawal of legal aid. In Hong Kong the protections come from the long established and respected Legal Aid Services Council which oversees the work of the LAA and in the independent appeal mechanism where legal aid is refused or withdrawn. The appeal lies to the Registrar of the High Court (a judicial officer) who hears the matter de novo and must adhere to the rules of natural justice. If the legal aid is for an appeal or leave to appeal in the Court of Final Appeal in Hong Kong the Registrar must sit with a barrister and a solicitor to review the case. The decision of the Registrar is final. [53]

5.16 Finland, has also developed robust mechanisms for independent decision-making. First, refusals of legal aid are not (as in Ireland) centralised but concentrated in each of the 23 local legal aid offices. These are independent of each other (each has its own budget) and of the Ministry and there is no central association or body of legal offices. There is no formal mechanism by which the MOJ could seek to get an application for legal aid accepted, or to have it rejected. The legal provisions do not allow for it. Nor have there been informal attempts in recent years. Grants (or refusals) of legal aid are done by support staff or by a lawyer within each office but they are not subject to direction in this function either from the MOJ or the Manager of the office. The MOJ can neither provide general guidance on the awarding of legal aid nor specific guidance in an individual case. They could only alter the scope of legal aid by changing the legislation or regulations in the normal way to exclude a whole category of cases. Each legal aid office has to provide data to the MOJ on its caseload every six months – which helps the Government to formulate policy – but the offices are under an obligation to keep details as to those who have applied for legal aid and in what cases, confidential. If legal aid is refused to an applicant by the legal aid office, the applicant can request an internal review. Thereafter they can appeal to the District Court against the refusal and from there to the Court of Appeal or even the Supreme Court. There is no formal provision for legal aid in an appeal against the refusal of legal aid, although it may be awarded in practice. There is no record of legal aid having been given for an appeal to the Supreme Court against a refusal to grant legal aid. In the great majority of appeals against the refusal to award legal aid, the applicant will represent themselves or a lawyer will act for them pro bono. Finally, the payment of fees for private lawyers are decided by courts and paid by the MOJ. That money is open ended although the budget for the legal aid offices is capped.

6. Access to Justice Policy

6.1 Quintessentially policymaking is a Government function. For jurisdictions where the LAA is situated within the Ministry therefore, there is no disjunction between the location of the

[53] Legal Aid Services Council, *Legal Aid in Hong Kong*, 2006 at p.127.

LAA and the policymaking function. For the "arms length bodies" jurisdictions, however, there is a degree of tension between the institutional autonomy of the LAA and the policymaking function. The standard division of labour has been to make the "arms length" LAA responsible for day to day policy and the Ministry responsible for strategic planning. However, this does not always mitigate the tension since the expertise in relation to legal aid largely resides within the LAA.[54] It is important therefore, for the LAA and the Ministry to reach a clear understanding as to which body should be responsible for which aspects of policy planning.

6.2 However, in Canada and in Australia there are signs that the policymaking function at the level of state or provincial Government is on the wane[55] – the ground is being ceded to the LAAs. Indeed, in the Australian states and territories generally strategic planning in legal aid is now more the function of the LAA several of whom have been given control over the three principal levers, scope, eligibility and payment rates and can adjust them whenever rationing is required. This degree of apparent autonomy[56] has to be understood in the political context of legal aid in Australia. Eligibility limits are relatively low and the standard budgetary settlements from Government tend not to err on the generous side. Without the ability to run with a deficit for any length of time, and little ability to cater for downstream legal aid costs caused by the activities of others in the justice system, the LAA can be forced into rationing – or threatening to ration mid-year and relying on the protests from the profession and the media to cajole more money out of the Government. Similarly in British Columbia the Legal Services Society (LSS) controls eligibility and lawyer fees, but is only middle of the rankings of Canadian LAA in terms of resource per capita. Legal Aid Ontario (LAO) in contrast has amongst the highest per capita spend but has less influence on eligibility and lawyer fees. Nevertheless, the outcome in Canada and Australia has been that on occasion the more autonomous "arms length" LAA are more strategic in their long term thinking about legal aid than their sponsoring Ministries. [57]

6.3 Two of the most successful jurisdictions in Europe with institutionally independent LAA are Scotland and the Netherlands. Both LAA have managed to avoid the fate of England and Wales LSC in that they have succeeded in building up a policy team within their LAA without alienating their Ministries. In Scotland the level of trust between the Ministry and the LAA is such that the LAA has more policy staff and more dedicated research capacity than the parent

[54] This may be due to over-rapid civil servant rotation, cuts in staff within the Ministry or simply because the LAA is at the coalface.

[55] Whilst in both countries the federal authorities provide a minority of the LAA's funding their policy interests tend to be confined to the areas for which they are providing resources e.g. high cost criminal cases, refugee and asylum cases and some family cases.

[56] Which would be pretty rare in Europe.

[57] In Canada it has been observed that "arms length " LAA are well positioned to provide input on aspects of Access to Justice by virtue of their reach down into the grassroots level and their finger on the pulse of daily needs and priorities. This, however, requires LA plans to have robust data gathering systems and analytical capacity in place to be able to strategic bring forward these issues to the political level for consideration.

Ministry. This works well, in part because decisions on overall policy are for Ministers.[58] Similarly in the Netherlands overall policy decisions are for the Ministry but within the political process[59] there is always room for several options to bring policy into practice. Here is where the Legal Aid Board plays an important role as a co-policy developer since by retaining research and policy analysts on the LAB's staff they are able to monitor trends and statistics from which to derive evidence based policy making. In cooperation with stakeholders the LAB Director can feed into the MOJ these ideas for the future development of legal aid policy e.g. the introduction of the Lokets (High street legal advice clinics) Rechtwijzer (an expert system for separation cases), the electronic exchange with the tax–office for assessment purposes, the new duty solicitor's scheme, or the withdrawal of legal aid for trivial matters. In both Scotland and the Netherlands the LAA will monitor legislation for legal aid impact and discuss this with their Ministry who may seek reimbursement from other ministries if they are putting forward legislation which will increase the legal aid bill. Indeed in both jurisdictions the leaders of the LAA will meet with their Ministries at very regular intervals to discuss long and short term issues and to advise them about holistic reform of the justice system, proposing changes in legal procedures, court organisation, simplifying the law, and engaging with other Government departments to eliminate costly decisions, in order to promote more cost-effective access to justice programmes.[60]

Access to justice dialogues

6.4 Whilst some "arms length" LAA may have a surprising degree of input into legal aid policy in their jurisdiction, as we have seen such a degree of autonomy is not always accompanied by a similarly high degree of financial autonomy. This is because policy autonomy has less salience politically if budgets are kept tight with little room for manoeuvre if there is unexpected demand, possibly the result of other initiatives in the justice system that the LAA does not control. All it does is to transfer the opprobrium when the fund threatens to run out part way through the year onto the LAA rather than the Minister. Moreover, implementing day to day policy that puts the LAA into persistent deficit is a sure way of provoking the Minister into counter measures aimed at the institutional autonomy of the LAA or at its administrative budget.

6.5 Governments and Ministers do not like adverse media comment on areas that fall within their responsibility. Not surprisingly therefore that some of the sponsoring Ministries of

[58] Part of the success of Scotland here is due to the clarity of the legislation which sets out that whilst Ministers are responsible for overall legal aid policy, the Scottish LAA has a duty to advise Ministers on the operation of legal aid, including possible policy developments.

[59] Which includes the evolution in treaty standards from the UN, EU Directives and initiatives from the Council of Europe and the OECD, as well as the challenges of coalition governments.

[60] In fairness it should be noted that some other jurisdictions give their LAA the duty to advise their sponsoring Minister on matters related to legal aid and access to justice, e.g British Columbia and Ontario.

the jurisdictions described in this Report tended to be more concerned about the way the LAA engaged with them (and other stakeholders) than the fact that they were handling policy matters. Thus the Ministry may have no objection to the LAA engaging with them in private about the low levels of financial eligibility in that jurisdiction but will tend to be much more sensitive if the matter appears in the LAA Annual Report or if the LAA starts to overtly lobby members of parliament on the matter. Similarly in a jurisdiction where the publicly salaried lawyers of the LAA are paid rather less than those in the Ministry, private memos asking permission to pay them more will be tolerated much more than an attempted alliance with the legal profession to apply pressure on the Minister.

6.6 In jurisdictions where the CEO and the Board have limited security of tenure such an overt challenge might be counter-productive. Even in jurisdictions where the security of tenure is stronger, courage comes with a price. In one country the Ministry wished to introduce a "full cost recovery" strategy – under which the parties are required to pay the full cost of using the courts including the buildings, the staff and the judicial salaries. The key stakeholders in the Access to Justice field and some of the other Government Ministries, opposed this proposed change. The LAA leaders signed a petition to the Parliament with other stakeholder opponents of the new policy, including the legal profession. This was not well received within the Ministry who took the view that the LAA should not openly attack their Minister, and veiled budgetary threats were made. The LAA took the view that the position of legal aid clients was at stake and if the Ministry chose not choose to consult and negotiate with stakeholders before announcing a policy change they should not be surprised if the LAA, amongst others, conducted the debate in public.

6.7 External observers (including some CEOs) have commented, when discussing independence from Government, that LAA which are outside Government are in a stronger position to engage with the media, form alliances with other stakeholders, to respond critically to consultation papers or to appear before parliamentary committees in situations where the Minister is planning to introduce major changes to legal aid,[61] than if their LAA was re-located within the Ministry and their career prospects could be threatened.[62] Whilst this seems entirely convincing, Finland offers a counter-example. There the staff members and lawyers in the local public legal aid offices are free to oppose policy initiatives from the Ministry and may combine with other stakeholders (e.g. the Bar) to lobby the Ministry or members of parliament. This

[61] This can be exaggerated. More than one "arms length" CEO told me that they would not consider publicly criticising their Minister, or joining a stakeholder alliance against the Government because of the damage that this might cause to long term relations. They remained adamant that they would criticise the Minister privately.

[62] One "arms length" CEO observed that he could organise to meet with his Minister quite easily, but that if he were a departmental head within the Ministry he would find the senior civil servant in the Ministry and the Minister's staff blocking his path to similar access to the Minister. The counter –argument that if you are within the Ministry you will hear of the Minster's proposals first did not convince many external CEOs.

freedom of expression is not resented by the Government and is protected by the trade unions. However, it seems more likely that this is attributable to the culture of public engagement which pervades the civil service in Finland.

7. Budgeting and Financial Independence

7.1 Governments may cede large measures of institutional, operational and policy making autonomy to "arms length" LAA as we have seen, however, they are more wary when it comes to financial independence. Like any substantial form of public expenditure, legal aid is expected by the Treasury to be demonstrably cost-effective and value for money. None of the jurisdictions examined in this study demonstrated financial autonomy in the sense that their budgets were derived largely from non-Government funding or even a ring-fenced pot of Government money (such as is used to fund the judiciary) which is protected from significant parliamentary scrutiny. Rather the financial autonomy relates to the restrictions imposed by the Ministry as to annual levels of spend on cases, staff and on administration, and the constraints on the LAA's freedom to spend as they see fit within these limits. It is here that the importance of having a good working relationship with the Ministry comes into its own.

7.2 The trend in legal aid jurisdictions is for budgets *relating to cases* to be capped (although sometimes this will only apply to civil cases, with the level of criminal legal aid spend remaining uncapped). This stems not just from difficulties of coping with an open ended commitment but also from the habit which grew up in a wide range of jurisdictions of the LAA underestimating their expenditure by substantial margins (up to 25%) on a year on year basis. As money got tighter such practices were frowned on. In order to make the cap stick Ministries generally restrict the ability for LAA to operate with a deficit of any significance, for any appreciable period, and reinforce this by holding the CEO as accountable officer closely to account.[63] One commentator in Australia was of the opinion that if a LAA ran out of money during the year the CEO would be likely to be disciplined or even sacked. In Canada there is more variation – Legal Aid Ontario can operate with a deficit, but not make extra borrowings – whilst in British Columbia a CEO who tried to run a deficit for a sustained period would struggle to retain his / her job. Indeed in BC the legislation is understood to make the Chair and the CEO personally liable if the LAA runs a deficit and it may even be an offence. This provision has never been put to the test but it must give an edge to discussions with the Ministry as to whether the CEO and LAA can be indemnified if there is a budgetary shortfall caused by an unanticipated growth in demand in a field of law, perhaps prompted by the actions of another Government Ministry. However, pressure is a two way street. If the budget in a jurisdiction covers 800 refugee cases a year and 500 arrive on one boat in one day, the LAA is likely to inform the relevant Ministry that unless more money is forthcoming there will be no representation in court for any of the 500

[63] Some LAA have responded by establishing small reserves to cushion themselves against a deficit.

and the immigration service will have to be shut down.[64] The efficacy of such tactics in what was a politically charged atmosphere turned in part on the ability of the LAA to speak publicly about the problem to stakeholders and the media,[65] an option which might not have been available had the LAA been inside Government and without an strong Supervisory Board.

7.3 Budget caps have led to two developments. First, the block grant for legal aid in Australia and Canada tends to come as fixed sum equivalent to legal aid spend in the previous year plus an allowance for inflation. As Treasuries try to hold down expenditure, LAAs will tend to find that the allowance for inflation has been downrated because of required efficiency savings. Particularly where the LAA is lumped into a cluster of other justice budgets, inter-departmental skirmishes are likely to emerge, partly reducing the advantages of the "arms length" LAA's institutional autonomy in budgetary negotiations with the Ministry as compared with the LAA who is inside the Ministry.

7.4 Secondly, budget caps have meant, unsurprisingly, that in recent years LAA have been focusing on improving their projections for spend on cases in different categories throughout the year. In the past the cap meant that legal aid grants in certain types of cases e.g. divorces would not be available in the later parts of a year, if it became clear that the funds would not stretch. Such crude, and high profile, forms of rationing are less common now because LAA have a better ability to predict expenditure overshoots which enables them to cut back in grants in low priority matters or by tightening the means test. However, in one jurisdiction the need to stay within the capped budget led to the waiting time for legal aid appointments with staff or private lawyers extending into months and plans were considered to introduce a form of triage for clients at an earlier stage.

7.5 Countries where there is still an open ended, uncapped, demand led legal aid budget are becoming scarcer and are usually successful programmes where there is a good working relationship (and a large measure of trust) between the LAA and the sponsoring Ministry. Scotland and the Netherlands are two such jurisdictions. In the Netherlands the MOJ ultimately sets the budget based on a formula contained in Regulations which include the volume of cases in the past year and the unit price for pieces of work. The Board can negotiate with the MOJ on the basis of its figures and its understanding of the market. It has an excellent track record in projecting its outturn accurately. Since the MOJ can rely on the detailed facts and the figures of the LAB they can predict the cost of the legal aid budget in advance and place themselves in a good position when it comes to dealing with the Ministry of Finance and have time to make proposals for changes if needed. The Dutch LAB may build up reserves to a maximum of 10%

[64] This happened in British Columbia in 2013. See Mark Benton, "Adding Value Through Independence: Legal Aid Governance in British Columbia" Paper at International Legal Aid Group conference, The Hague 2013.

[65] Given the political nature of decisions like this, the Board and Chair would always be involved.

and equally run a deficit of 10%. If the deficit continues for two years, by law the Ministry must provide the funds to eliminate the deficit. The Dutch LAB employs an independent person within the LAB who has access to the data of the LAB (including its finances) who may liaise directly with the Advisory Board about matters that seem problematic.

7.6 In Scotland the Government sets the estimated level of spend in consultation with the Scottish Legal Aid Board (SLAB) and there is a three year spending review on a rolling basis from which SLAB develops its corporate plan stating what its projected spend is for the next few years. In the early years of austerity there were considerable "overspends" on the civil side but these were predicted since SLAB has developed forms of trend planning to warn the SG in advance of the likely "overspend or undershoot" in expenditure.[66] As in England and Wales there were substantial reductions in expenditure on legal aid - around 16 % in a three year period. However, in England and Wales these were cuts forced upon the MOJ /Justice Department as austerity measures, whereas in Scotland a majority of the reduction in spend was due to a decline in demand – both civil and criminal. In Scotland the CEO of SLAB worked closely with other stakeholders and the Government, whilst appearing before Parliamentary committees, to show how the cuts that did occur in Scotland could be implemented. Reflecting SLAB's role in relation to policymaking (see above) SLAB's CEO undoubtedly had far more input into the distribution and operation of the reduction in spend than his English counterpart. In England and Wales the political fallout for any cuts and their implementation (unlike Australia or Canada) fell on the Ministry.[67] The CEO of the Netherlands LAB has played a similar role in shaping proposals for the MOJ as to how best to implement austerity measures. It is difficult to envisage how the CEO of a LAA within a MOJ would be able to play as high status and high profile role in defending legal aid expenditure.

7.7 Financial independence in relation to an LAA's administrative budget is even harder to protect than the cases budget. In times of austerity the Ministry will expect even greater efficiency savings than in the case of the Legal Aid Fund, or will be offered it by experienced CEOs.[68] However, in economically stronger times the administrative budget is still vulnerable from attack from the Minister if the LAA has resisted his pressure on any significant matters. Even where the administrative budget is renewed at a reasonable level, in some jurisdictions (and not just those where the LAA is within the Ministry) the Minster may be able to influence or control the number, grade and pay of the LAA staff (including their public lawyers) or what the research budget is spent on. Nonetheless where a LAA is not constrained by its Ministry as

[66] SLAB tell the SG on a monthly basis what their forecasts are for next 12 months and every quarter go into much greater detail and adjust their projections.

[67] In Scotland blame for the cuts should have fallen on the Government but because some of the cuts stemmed from a tightening up on the application of the legal aid regulations (a task that fell to SLAB to implement) in fact some of the antagonism to the cuts has fallen at SLAB's door.

[68] In Scotland the Government "Grant in Aid" budget to run the Scottish Legal Aid Board fell from £13.2million in 2007/08 to £11.8 million in 2016/17 a decline of 10% which would be even greater if adjusted for inflation.

to how to divide its administrative budget between salaried lawyers and the private bar (including the imposition of cuts) the need to retain good relations with the private profession may inhibit the LAA from seeking to keep down redundancies for its salaried staff by cutting back more severely in the use of private lawyers.

8. Conclusion:

8.1 In terms of factors which effect the institutional, operational and financial independence of a Legal Aid Authority the following emerges from this survey of jurisdictions.

Institutional autonomy

8.2 The experience of jurisdictions with long established and well developed legal aid programmes indicates that many LAA have an "arms length" body structure with a supervisory board. The use of a public appointments process, with stakeholder input and a reasonable security of tenure (enshrined in the legislation), seems to be the best guarantee of independence from Government or other inappropriate interference in the recruitment of the Board and Chair. The Supervisory Board should be a fiduciary board rather than a stakeholder board, but this does not prevent the composition being drawn from the stakeholder communities in open competition (although no one stakeholder – including the LAA staff - should form a dominant element in the board). Similarly, CEOs who are appointed by Boards using a form of public appointments procedure, with robust security of tenure enshrined in the legislation (perhaps with a separate financial responsibility as Accountable Officer to the legislature) are seen as having the greatest degree of institutional independence. If the LAA is within Government then the more autonomous option is to follow the models in Northern Ireland[69] or Hong Kong[70] with an Advisory Board or Council selected by a public appointments procedure. The role of the Advisory Board / Council should, as in Hong Kong, cover:

(a) oversight of the delivery of legal aid in the jurisdiction;

(b) ensuring the independence of decision-making by the LAA in relation to grants, refusals and withdrawals of legal aid.

(c) ensuring that there is a robust independent appeals panel for complex and difficult cases

(d) acting as a source of independent advice for the Government on Access to Justice matters and to this end being able to commission research (as Hong Kong has done) to underpin evidence based policy making, into aspects of autonomy, the scope of legal aid, enhancing access to justice in rural areas, and public legal

[69] Access to Justice Review, Northern Ireland. August 2011

[70] Legal Aid Services Council, *Legal Aid in Hong Kong*, 2006

education e.g. the dissemination of information to the public as to the working of the scheme.

(e) communication with stakeholders through seminars, conferences and public legal education

8.3 The statutory framework for legal aid should set out the limits of the ability of the Minister to provide direction or guidance to the LAA or to intrude in the running of the legal aid programme. In addition there should be a Memorandum of Understanding or a Framework Document between the LAA and the Ministry setting out the roles and responsibilities of each and containing protections on the independent operation of the LAA.

Accountability and Independent Monitoring

8.4 Whilst there will always be a tension between accountability and independence, provided suitable structures and processes are in place (preferably enshrined in legislation) to preserve the autonomy of the LAA and its senior staff (which will support a good working relationship between the LAA and the Government) accountability mechanisms – including independent monitoring need not inhibit the proper functioning of the LAA and FLA. Indeed, the establishment of objective quality assurance programmes as part of the monitoring function, provides a vehicle for continuous improvement in the functioning of the FLA.

Staffing

8.5 The evidence from Western countries suggests that in small jurisdictions there can be difficulties in recruitment at senior levels or in acquiring the flexible skills set needed for today's complex legal aid programmes (as there have been in Northern Ireland and New Zealand), if the staff is not composed of civil servants – irrespective of whether the LAA is external to Government. However, non-Governmental LAAs are considered to be more autonomous where the Government does not seek to control the number, grade, salary and pension entitlement of LAA staff.

Grant giving independence

8.6 The key protections of independence here are legislative and cultural, but in the view of most common law and developed jurisdictions, (though not in Finland) the threat of Governmental interference with individual legal aid grants or withdrawals is seen as higher where the LAA is within Government than where it is outside Government. That said – wherever the LAA is situated – there are a range of measures that are considered to enhance autonomy (especially if they are contained in legislation):

a) a legal prohibition on the Government interfering with the grant, refusal or withdrawal of legal aid in individual cases;

b) clear limits on any power of the Government to give guidance to the LAA as to its functions in relation to grant giving and payments;

c) clarification that any references to "the public interest" in the merits test for legal aid cannot be read to mean interest of the state or state security, or the interests of the economy;

d) a strengthening and clarification of the confidentiality obligation with clear limits as to what may be passed to the Government by the LAA as advanced warning of legal aid cases in the pipeline;

e) a robust internal review system for refusals and withdrawals of legal aid, coupled with an appeal committee that is independent of Government and the LAA together with provision for a review mechanism by a judge or the courts, where legal aid is being sought where the LAA or the Government is being legally challenged.

Policymaking

8.7 The general trend is to locate policymaking more in the hands of the LAA rather than the Government, except where the LAA is located inside the Government. This is thought to encourage autonomy and self-confidence without posing a threat to the Government who still control financial independence. The general view was that LAAs which are outside Government are in a stronger position to engage with the media, form alliances with other stakeholders, respond critically to consultation papers or to appear before parliamentary committees in situations where the Government is planning to introduce major changes to legal aid, than if their LAA was in the Government.

Budgeting and Financial independence

8.8 Finally, although no jurisdiction affords its LAA complete budgetary autonomy, some LAAs are afforded considerably more independence than others. Whilst most now operate in an environment of budget caps and rationing, it is still possible to be an open-ended uncapped demand led jurisdiction provided the LAA retains the confidence and trust of its Government.