

# **Establishing an Independent Legal Aid Authority in Hong Kong: Lessons from Overseas Jurisdictions**

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## **1. Introduction**

1.1 This report is an interview based comparative study of the independence (institutional, operational and financial)<sup>2</sup> of Legal Aid Authorities ( LAA) in a range of advanced jurisdictions. It forms part of a larger report to the Hong Kong Legal Aid Services Council (LASC) who have commissioned the project. This part of the project sought, inter alia, to establish “the exact working relationship between the Government and the legal aid bodies and to determine the actual degree of independence of the latter” in each of the jurisdictions. In so doing the report analyses the independence of legal aid authorities with respect to a range of factors: the legal status of the legal aid authorities and their Boards (if any), accountability, staffing, the independence of the process of granting or refusing legal aid, responsibility for legal aid policy, and budgeting and finance.

## **2. The legal status of Legal Aid Authorities**

2.1 LAA can be ranged along a spectrum of institutional autonomy from their sponsoring Government Ministry. At one end is the Netherlands Legal Aid Board which is pure creature of legislation with a unique legal persona making it an independent (public) management body, like a private corporation except (1) that its funding all comes from the Ministry of Security and Justice (MOJ) or client contributions, and (2) it is accountable to the Ministry of Security and Justice (MOJ). Only marginally less autonomous is the non-departmental public body ( NDPB ) model adopted by LAA in the Scotland, Ireland,<sup>3</sup> Ontario,<sup>4</sup> British Columbia (BC),<sup>5</sup> Victoria and New South Wales (NSW) where the LAA is a body corporate established by statute which sits outside their sponsoring Government Ministry. “Independent of, but accountable to” as it has been described. Locating the LAA as an independent body corporate outside the Government stems from a widespread belief that there are a range of areas in public life where it is unwise for the Government to be seen to be making all the decisions. Where a person wishes legal aid to sue the Government or to judicially

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<sup>1</sup> The author gratefully acknowledges the assistance which he has received from interviews with senior legal aid officials in Scotland, England & Wales, Northern Ireland, Ireland, The Netherlands, Finland, New Zealand, Ontario, British Columbia, Victoria and New South Wales. Responsibility for any errors remains with the author.

<sup>2</sup> Institutional independence refers to the autonomy of the Legal Aid Authority from its sponsoring Ministry in terms of its location inside or outside Government. Operational independence refers to the LAA’s autonomy from Government ( and other influences ) in relation to the granting or refusing of legal aid. Financial independence refers to the LAA’s autonomy from others in relation to its funding.

<sup>3</sup> The Irish LAB is technically an agency of the MOJ but it is situated outside the MOJ.

<sup>4</sup> LA Ontario is described as an operational agency of the Government of Ontario but it is outside the Government.

<sup>5</sup> Described as a Crown Corporation which is not a Government agency.

review the acts of Government Departments or where the Government wishes to cap the legal aid fund in times of austerity there are advantages both for the Government and for the public if the allocation of financial assistance to individual applicants for legal aid is not in the hands of the Government.<sup>6</sup> Similarly, where the state is the prosecutor in a criminal case it strengthens democratic legitimacy through the rule of law and the independence of the justice system if those responsible for funding the defence are outside Government.

2.2 On paper, the least autonomous LAA of the jurisdictions surveyed was Finland because it is located within Government, being a division of the Ministry of Justice (MOJ). It has no special status in the Ministry from the other divisions (Courts, prosecution, law enforcement) and no special protections with respect to independence. However, in the last few years the Governments in New Zealand ( NZ) and England & Wales ( E & W) have moved their LAA from NDPB status outside Government to a Government agency within the sponsoring Ministry.<sup>7</sup> (In each case the Governments took the view that the LAAs had lost control of aspects of their budgets ).<sup>8</sup> Further, a Government initiated review in Northern Ireland (NI)<sup>9</sup> has recommended that it too should become a Government agency within its sponsoring Ministry, the Justice Department, although there the stated reasons are to give the Government control over policy and to tackle staffing problems in a small jurisdiction. The Hong Kong Legal Aid Services Council on the other hand has three times in the last 20 years commissioned reports<sup>10</sup> as to whether the LAA there should be moved out of the Government Department and become an NDPB.

#### *Boards / Advisory Councils*

2.3 All of the jurisdictions whose LAA is outside their sponsoring Ministry have a Board or Advisory Council. The Netherlands is the most unusual since its Board consists of the two Directors of Legal Aid who are both executive directors. They are appointed by the Minister of Security and Justice but there is no independent public appointments procedure for these posts. In future they will be filled by advertisement and interview but the Minister will not be required to accept the panel's nomination. Appointment as Director is for four year which can be renewed for a further four years. In practice the Minister cannot sack the Directors unless they are flagrantly incompetent or are convicted of a serious crime. This provides considerable independence to the Directors and the Legal Aid Board. There is an Advisory

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<sup>6</sup> This gives the Government the important protection of deniability – the decision was not taken by us, but by an independent body, the LAA.

<sup>7</sup> The change occurred in New Zealand in 2011 and in England and Wales on 1<sup>st</sup> April 2013.

<sup>8</sup> M. Bazely *Transforming the Legal Aid System - Final Report 2009*, I. Magee, *Review of Legal Aid Delivery and Governance 2010*.

<sup>9</sup> *Access to Justice Review*, Northern Ireland. August 2011. Summary of Responses and Way Forward: *Safeguards to protect the individual decisions on the granting of civil legal aid consultation* ( NI Department of Justice, June 2013 ). The Treasury may also have had concerns over the fact that the expenditure per capita on legal aid in NI is amongst the highest in the world.

<sup>10</sup> For an account of the first two initiatives see *Legal Aid in Hong Kong* ( Hong Kong, Legal Aid Services Council, 2006) chapter 1.

Council (with a composition set down in the legislation ) chosen by the Minister with no set procedure. The board can offer suitable names to the Minister. The Council receives all of the data and information which the Board gives to the MOJ and are regularly consulted by the Directors but it has no executive powers and the Directors need not take their advice.

- 2.4 With the exception of Victoria (which now has a five person part-executive Board) there is considerable similarity in the size and composition of the other Boards. Generally speaking they consist 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. Appointment of Board members is usually by the Minister of the sponsoring Government department. Under the standard NDPB model the CEO and senior management staff are responsible for operational matters<sup>11</sup> 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 from the Minister, 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. 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 the Scotland and Northern Ireland this mutual system of checks is thought to help the CEO's autonomy from both the Government and the LAA.
- 2.5 The efficacy of the NDPB 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 variations in the selected jurisdictions. In terms of members of the Board, in every jurisdiction this is in the hands of the relevant Minister ( with the partial exception of British Columbia),<sup>12</sup> however, in five of these ( BC, Ontario, NI, Scotland and Victoria ) there is a public appointments procedure which largely prevents political or Governmental interference, whilst in the remaining two (Ireland

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<sup>11</sup> The rigid divide between operational matters and governance is not always easy to adhere to, and in some instances members of the Board have been asked to perform operational tasks e.g in Scotland where Board members serve on Committees (with outside lawyers ) to review decisions of staff members of the board to refuse legal aid or to withdraw it.

<sup>12</sup> In British Columbia, 4 members of the Board are appointed by the legal profession and 5 by the Minister.

and NSW) there is not. However in those two (and in others ) some or all of the positions will be filled by stakeholder nomination or board suggestion. Whilst nomination curbs the potential for Government threats to independence it opens the door to members acting to protect sectoral interests or the status quo in terms of the balance of stakeholder interests on the Board. Chairs, too, are appointed by the Minister<sup>13</sup> under the same procedures, although nomination has less of a role to play.

- 2.6 In relation to CEOs the NDPB model is generally adhered to, with selection by the Board after competitive interview,<sup>14</sup> 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.<sup>15</sup> 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 NDPB model does not guarantee independence. In New Zealand, following a scathing (though not entirely substantiated ) report<sup>16</sup> 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.<sup>17</sup>
- 2.7 Neither in Finland nor in England and Wales or New Zealand (now) is there a Board (advisory or executive). When the NI LAA (the LSC ) moves into the Justice Department, the independent Board will go, replaced by a management board consisting of the CEO, the top management and a non-executive director. The review<sup>18</sup> suggested that in addition there should be an Advisory Council established by statute to ensure the independence of decision-making of the Agency, to act as an appeals panel for complex and difficult cases and as a source of independent advice for the Minister on Access to Justice matters. The lay chair might also serve as non-executive director on the management board. This was in accord with the Hong Kong LASC model. However, the 2013 proposals<sup>19</sup> now make no reference to an Advisory Council. Instead they endorse the English and Welsh proposal of a civil servant – probably the CEO of the Agency – acting as the statutory office holder

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<sup>13</sup> In British Columbia, however, the Chair is elected by the Board.

<sup>14</sup> In Scotland, although the CEO is employed by the Board, their appointment and removal would be matters with which the Minister has to agree.

<sup>15</sup> Although in Scotland and Northern Ireland they tend to have permanent contracts subject to appropriate performance.

<sup>16</sup> M. Bazely *Transforming the Legal Aid System - Final Report 2009*

<sup>17</sup> In the following year the Law Society censured the AG for his actions.

<sup>18</sup> Access to Justice Review, Northern Ireland. August 2011 par 7.22.

<sup>19</sup> Summary of Responses and Way Forward: *Safeguards to protect the individual decisions on the granting of civil legal aid consultation* ( NI Department of Justice, June 2013 ).

being responsible for individual grants and refusals of legal aid. The final shape of the proposed NI Agency has not yet been determined.

- 2.8 External observers (including several CEOs from other jurisdictions ) are sceptical that the new model for NZ, NI 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 ). Their concerns are rooted not just in experience but stem from an appreciation of the difficulties facing a civil servant in a Department whose promotion prospects depend on more senior civil servants within the same Department who may not see excessive independence from the Minister as being a meritorious quality.

### **3. Accountability and Independent monitoring**

- 3.1 In accordance with the NDPB model, in the LAA that were surveyed, accountability was 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 to the Parliament or (2) directly to the Parliament for financial matters and on other matters through the Board and Chair.<sup>20</sup> This includes the provision of financial information and trend data at regular intervals and an Annual Report (AR). The latter may go direct to Parliament or sometimes by way of the Minister and then to Parliament (Ireland, Victoria, 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 Governments 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 (NI). More often it is because the LAA will strive for very good reasons to maintain a reasonable working relationship with their sponsoring Ministry, both because that is where the great bulk of the funding comes from, and because they wish the Minister to accept their advice on policy matters
- 3.2 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 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 in some respects. This may suggest 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 NDPB 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

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<sup>20</sup> CEOs and Chairs of LAA are often asked to appear before Parliamentary Committees to answer questions related to legal aid.

accountability with very little threat to institutional, operational or financial autonomy.

- 3.3 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. The only other form of independent monitoring is peer review of a random sample of files which exists for all legal aid practitioners in Scotland, a large sample of practitioners in England & Wales, and to a small percentage of files and practitioners in the Netherlands and Finland.

#### **4. Staffing**

- 4.1 In jurisdictions where the LAA is located within the sponsoring Ministry (HK, NZ, E & W) 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.<sup>21</sup> 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<sup>22</sup> and public servants)<sup>23</sup> 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)<sup>24</sup> but they rarely have equivalent pension entitlements. Even more problematic is the fact that, particularly in the smaller jurisdictions, the NDPB LAA can be so small that the scope for promotion or a career progression is sufficiently

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<sup>21</sup> There are currently 41 such offices in Finland but the MOJ is looking to consolidate them into fewer centres.

<sup>22</sup> The civil servants, however, are subject to the Board's internal discipline procedures rather than those of the civil service.

<sup>23</sup> 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.

<sup>24</sup> In England & Wales the LSC staff were better paid than civil servants – which caused some complications when the LSC became a Government agency in 2013.

limited that there can be recruitment problems at the senior level.<sup>25</sup> (This was one of the factors which encouraged the recent NI review<sup>26</sup> to recommend that the NDPB 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 NDPB and a Government Agency in terms of the client. With the NDPB the “sharp end” is the customer or citizen for whose benefit the NDPB exists. In the case of the Agency 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 its staff are not civil servants does not ensure autonomy for the LAA since in some jurisdictions the Ministry retains the power to limit staff numbers, and pay, 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.<sup>27</sup>

#### *Salaried or in-house lawyers*

- 4.4 It is occasionally asserted – often by the private profession – that public defender lawyers employed by LAA in criminal cases are lacking in independence or perceived independence, especially if the LAA is located within the Ministry (where it may be in the same cluster as the prosecution department).<sup>28</sup> Leaving aside the fact that such complaints can be influenced by the private profession’s objections to what they regard as unfair competition from the existence of public defenders – objections which the state tends to see as evidence of anti-competitivism – Finland and New Zealand have acted to dispel such criticism. In Finland the assisted client has a free choice between the public lawyer and the private lawyer. In New Zealand the 200 or so public defenders have been placed under two regional Public Defenders and the Public Defender for New Zealand. The last reports to the Secretary for Justice and then to the Minister. It is not clear that this will be sufficient to counter the perceived threat to independence of action now that the NZ LAA is inside the Ministry of Justice.

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<sup>25</sup> The problems included a lack of flexibility when new skills sets were required.

<sup>26</sup> *Access to Justice Review*, Northern Ireland. August 2011 para 7.20.

<sup>27</sup> 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.

<sup>28</sup> However, public defenders can be more independent of their clients than private lawyers, since they have no pecuniary interest in their cases.

4.5 At the other end of the spectrum are the NDPB jurisdictions which have no public defenders for independence and other reasons, such as the Netherlands, Ireland or NI.<sup>29</sup> In the middle are jurisdictions such Scotland and England with a few public defenders - but which allow clients a choice of public or private lawyers and New South Wales and Victoria which do not. The most recent proposal in E & W that criminal legal aid contracts should be allocated on the basis of price competitive tendering ( PCT ) would have entailed the disappearance of client choice in criminal cases.<sup>30</sup> However, rather unexpectedly the Lord Chancellor ( Grayling ) stepped back from the brink following discussions with the Law Society and abandoned both PCT and the deprivation of client choice.<sup>31</sup> On the civil side there seems to be less concern about the independence of the salaried lawyers employed by the LAA, even where they are acting against the Government. Thus in Ireland (as in NSW and Victoria) assisted clients in civil cases cannot choose whether they go to a public lawyer or a private lawyer. In the Netherlands the LAB staff do not deliver even civil legal aid services. However the Board controls the 30 legal aid offices “Lokets” and their staff, who do provide initial legal advice to the public. To preserve their independence the Lokets comprise a single organisation with its own independent legal persona with 30 branches.

## **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 another Government Ministry. One of the greatest protections is a cultural one in that in every one of the jurisdictions studied the LAA staff and the Ministry civil servants shared the normative understanding that Government interference in relation to individual cases was simply not acceptable. This is understandable in the case of NDPB LAA but the strength of feeling was equally apparent where the LAA was located within the Ministry. In none of the jurisdictions studied was 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 counsel’s opinion which shows why the legislation does not implicitly allow such interference in individual cases.

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<sup>29</sup> Whilst British Columbia used to have public defenders and no longer does, this was due to austerity measures. Ontario does not yet have a public defender programme but, like BC, it employs a reasonable number of salaried duty counsel doing criminal and family work. However, the client has a free choice between duty counsel and a private lawyer.

<sup>30</sup> *Proposals for the Reform of Legal Aid in England and Wales* (Ministry of Justice, March, 2013).

<sup>31</sup> *Transforming Legal Aid : Next Steps* ( MOJ, September,2013)



- 5.2 Although all the jurisdictions recounted stories of assisted cases which were an embarrassment or an irritation to the Ministry e.g asylum cases, prisoner human rights cases,<sup>32</sup> deportation of foreign prisoners or the judicial review of alleged torture of terrorist suspects, none could provide examples of Ministers seeking formally to instruct the LAA to refuse to fund such cases or to withdraw funding from such cases.<sup>33</sup> The nearest examples were the *Evans* case<sup>34</sup> (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 minister (who was not the minister 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.
- 5.3 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 NDPB 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 Parliament 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 even if he or she is statutorily stated to be ‘independent’.
- 5.4 The inability of Governments to intervene in relation to individual cases, does not tell the whole story, since in some jurisdictions ( e.g. Ireland, Victoria ) the Ministry has the power<sup>35</sup> 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.<sup>36</sup> Similarly in NI

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<sup>32</sup> Relating to a prisoner’s right to vote or to basic amenities in their cells.

<sup>33</sup> This is not to deny that in some jurisdictions the Government e.g. in E & W is seeking to restrict the right to challenge certain Government decisions which, if successful, will reduce the availability of legal aid in such cases.

<sup>34</sup> [2011] EWHC 1146

<sup>35</sup> See e.g. The Irish Civil Legal Aid Act 1995 s 7(1)

<sup>36</sup> Victoria Legal Aid Act 1978 s.12M ( as amended ).

the Justice Department has the power<sup>37</sup> to give guidance to the NILSC as to the general performance of its functions and this too would extend to guidance as to prioritisation of civil cases, however, as in Ireland and Victoria the legislation expressly states that this power does not extend to individual cases. The latest NI proposals indicate that this will remain the position with all Ministerial guidance and direction communicated to stakeholders and often only after consultation with them.<sup>38</sup> As against this the Funding code<sup>39</sup> in NI and E & W places the LAA under a duty to take account of the public interest when deciding whether to fund a case. Presumably the guidance from the Ministry could stipulate that the “public interest” should include the interest of the state or the economy, although such a suggestion would be very unlikely and highly controversial.

5.5 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.<sup>40</sup> Here a petitioner in England issued judicial review proceedings against the Secretary of State for Defence, claiming that it was unlawful for United Kingdom officials to hand over captured detainees in Afghanistan to the intelligence services because to do so would expose them to a real risk of torture. Subsequently, the Government lawyers wrote to the NDPB LAA (the Legal Services Commission) of E & W asking them to “reconsider whether [the claimant] should be granted legal aid for the purposes of her threatened application for judicial review”. However, the LSC refused to buckle under Government pressure and at length granted public funding for the challenge.<sup>41</sup>

5.6 That, regrettably, was not the end of the story. The Minister for Defence then wrote to, and subsequently met with the Justice Minister and persuaded him to change the legal aid regulations (ostensibly on the grounds of saving money ) to make it much harder for individuals such as Ms Evans who did not have a personal ( as opposed to a public ) interest to obtain legal aid to challenge the Government in its dealings with detainees in Iraq and Afghanistan. The amendment was subject to a further judicial review by Ms Evans. The lead judge<sup>42</sup> rejected the purported amendments to the Funding Code with the robust observation: “ In plain language [ the Minister of Defence’s letter ] seems to me to assert that the consequences of an adverse result in such a public interest judicial review is a good reason for the denial of public funding to bring the case. It needs no authority to conclude that by law such a position is not

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<sup>37</sup> Access to Justice (NI) Order 2003 article 8

<sup>38</sup> Summary of Responses and Way Forward: *Safeguards to protect the individual decisions on the granting of civil legal aid consultation* ( NI Department of Justice, June 2013 ).

<sup>39</sup> Which governs the merits test for legal aid eligibility.

<sup>40</sup> [2011] EWHC 1146

<sup>41</sup> Had these events occurred in 2013 when the LSC had become an Agency in the MOJ this robust response might not have been so easily achieved.

<sup>42</sup> See Lord Justice Laws in *Evans v S of State* [2011] EWHC 1146

open to Government. For the State to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of Government. It would therefore be frankly inimical to the rule of law.”

- 5.7 Government involvement in the award of legal aid in individual cases is not always as suspect as it was in the *Evans* case. Thus in NI the Justice Minister can direct the NILSC to provide legal aid in exceptional funding cases that would otherwise be outside of scope. The provision also allows the NILSC to recommend to the Minister that he authorise legal aid in any proceedings which would not otherwise qualify. The Minister has indicated that he would expect such cases to have a significant wider public interest and be of overwhelming importance to the client.
- 5.8 Such an overt involvement of a Justice Minister in granting legal aid is very unusual, even if it appears benign. 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 the surveyed jurisdictions - 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<sup>43</sup> 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 all of the surveyed jurisdictions there is a requirement that LAA keep the case and personal details of those applying for, or receiving legal aid, confidential.<sup>44</sup> However, this blanket protection can come under threat from the desire of LAA CEOs to retain a reasonable working relationship with their sponsoring Ministry. 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 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 of the jurisdictions surveyed would be comfortable and shows the importance of having the

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<sup>43</sup> *Dietrich v The Queen* [1992] HCA 57 ( The High Court ).

<sup>44</sup> See e.g. Access to Justice (NI) Order 2003 article 32; Legal Aid, Advice and Assistance (NI) Order 1981 Art 24.

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 all of the jurisdictions 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 (NI, Ontario<sup>45</sup> and NSW<sup>46</sup>) 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.<sup>47</sup> 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. More typically in other jurisdictions 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 NI applications for legal aid to mount a judicial review against the LAA for refusing to grant legal aid or for withdrawing a grant are considered by a Special Committee of external lawyers which is independent of the LAA and the appeals panel and considers applications for legal aid in any proceedings against the Commission.<sup>48</sup> In Scotland the initial reviews are internal to the LAB and have a better than even chance of success.<sup>49</sup> 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<sup>50</sup> 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. 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 curtailed than that of LAA outside Government. Certainly it has been the area which has troubled the Governments in

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<sup>45</sup> After the independent area committees the final appeal goes to the Director of Appeals in the LAA.

<sup>46</sup> In NSW the committee also has a lawyer for the Ministry. The committees uphold 10-15% of appeals.

<sup>47</sup> In almost every case the Dutch LAA accepts the recommendations of this review committee.

<sup>48</sup> In Victoria such appeals go to an independent review by a nominee of the Attorney General.

<sup>49</sup> 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.

<sup>50</sup> 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.

NZ, E & W and NI who have or are considering bringing their LAA inside Government. In NZ the legislation has 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 new Legal Aid Review Panel located within the tribunals unit of the MOJ, to deal with appeals against refusals of legal aid.<sup>51</sup> In NI it is proposed that the CEO would become statutorily 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. The suggestion of an Advisory Council to handle appeals from refusals has now been abandoned but the Ministry's current proposal<sup>52</sup> is that appeals from the statutory office holder will go to an independent panel of three individuals selected by public appointments procedures. At least one of the individuals will have to be a lawyer.

5.13 England and Wales similarly have a departmental head with statutory independence however the Government ruled out paying for an independent review panel as in NZ and as proposed in NI, on expense grounds. Rather appeal is to a civil servant within the Ministry. 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.

5.14 It is rather too early to comment on how the independence of LAA which have moved into Government Departments in recent years, is working out. In NZ the Court of Appeal in 2013 ruled that the Minister in implementing a Criminal Fixed Fee and Complex Cases Policy was acting inconsistently with the Legal Services Commissioner's independence and fettering his discretion.<sup>53</sup> However, the success of the challenge seems to have turned on the particular wording of the Commissioner's remit which can easily be revised, thus it may not presage a rash of challenges to the independence of the new LAA agencies within Government departments.

5.15 Interestingly, however, Finland, the jurisdiction which has operated inside its sponsoring Ministry for longest has developed robust mechanisms for independent

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<sup>51</sup> The members of the panel are appointed by the Minister without a public appointments procedure and are unfortunately not well remunerated.

<sup>52</sup> Summary of Responses and Way Forward: *Safeguards to protect the individual decisions on the granting of civil legal aid consultation* ( NI Department of Justice, June 2013 ) para 26.

<sup>53</sup> *Criminal Bar Association of New Zealand v AG* [2013] NZCA 176.

decision-making. First, refusals of legal aid are not (as in Ireland ) centralised but concentrated in each of the 41 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. 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. As elsewhere the legal aid 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 (Finland and NZ) therefore, there is no disjunction between the location of the LAA and the policymaking function. For the NDPB jurisdictions, however, there is a constant tension between the institutional autonomy of the NDPB and the policymaking function. The standard division of labour has been to make the NDPB 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.<sup>54</sup> This can lead, as it did in E & W to a situation where for long stretches the Ministry found it difficult to fix on a settled strategic policy and then to stick to it.<sup>55</sup> Unsurprisingly the LSC response was to build up its own policymaking team. This approach, however, was always likely to be a cause of friction unless the LAA was able to manage its relations with its Ministry. Thus in 2010 one of the reasons stated in the Magee report for moving the LSC into the MOJ was because the policy unit in the LSC was of a size and significance that it duplicated the capacity within the Ministry and did not always agree with it.

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<sup>54</sup> 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.

<sup>55</sup> There were seven major policy initiatives by the Ministry in the nine years between 1986 to 1995 and in the next fifteen years there were nine reports, with thirty consultations between 2006 and 2010 alone. See A. Paterson, *Lawyers and the Public Good* ( Cambridge University Press, 2012 ) at p.86.

- 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<sup>56</sup> – 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 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. Nevertheless, the outcome in Canada and Australia has been that on occasion the more autonomous NDPB LAA are more strategic in their long term thinking about legal aid than their sponsoring Ministries.
- 6.3 Two of the most successful jurisdictions with institutionally independent LAA are Scotland and the Netherlands. Both LAA have managed to avoid the fate of E & W 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 Ministry. This works well, in part because decisions on overall policy are for Ministers.<sup>57</sup> Similarly in the Netherlands by retaining research and policy analysts on the LAB's staff they are able to monitor trends and statistics and through the LAB Directors can feed ideas for the future development of legal aid policy e.g. the introduction of the Lokets or the withdrawal of legal aid for trivial matters, into the MOJ.<sup>58</sup> In both Scotland and the Netherlands the LAA will monitor legislation for legal aid impact and discuss this with their Ministry. 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

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<sup>56</sup> 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.

<sup>57</sup> 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.

<sup>58</sup> Recently the MOJ proposed to make the percentage of the population eligible for legal aid (40% ) the same as those eligible for assistance with court fees. The LAB persuaded them that that would produce too steep a cut off, and that 60% of the population should be eligible for assistance with court fees. The Board had the ability to identify who those 60% were, making things easier for the MOJ.

to eliminate costly decisions, in order to promote more cost-effective access to justice programmes.<sup>59</sup>

### *Access to justice dialogues*

- 6.4 Whilst some NDPB LAA may have a surprising degree of input into legal aid policy in their jurisdiction, 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 the jurisdictions which were surveyed 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 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.

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<sup>59</sup> 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.



6.7 As several of the participating NDPB CEOs observed when discussing independence from Government, 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, than if their LAA was re-located within the Ministry and their career prospects could be threatened.<sup>60</sup> 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 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 NDPB 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.<sup>61</sup> 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

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<sup>60</sup> One NDPB 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 Minister's proposals first did not convince many external CEOs.

<sup>61</sup> Some LAA have responded by establishing small reserves to cushion themselves against a deficit.

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 country 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 and the immigration service will have to be shut down. The efficacy of such tactics turns in part on the ability of the LAA to speak publicly about the problem to stakeholders and the media,<sup>62</sup> an option which might not be available were the LAA to be inside Government.

- 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 NDPB LAA's institutional autonomy in budgetary negotiations with the Ministry as compared with the LAA which 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 has led to the waiting time for legal aid appointments with staff or private lawyers now extending into months and plans are being 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.<sup>63</sup> 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

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<sup>62</sup> Given the political nature of decisions like this, the Board and Chair would always be involved.

<sup>63</sup> So too is NI, but it may be destined to move into its sponsoring Ministry.

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.

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 years of the recession there have been 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.<sup>64</sup> As in E & W substantial cuts have been forced upon the MOJ /Justice Department as austerity measures. In Scotland the CEO of SLAB has worked closely with other stakeholders and the Government, whilst appearing before Parliamentary committees, to show how the cuts could be implemented. Reflecting SLAB’s role in relation to policymaking (see above) SLAB’s CEO has undoubtedly had far more input into the distribution and operation of the cuts than his English counterpart. As in E & W however, the political fallout for the cuts and their implementation (unlike Australia or Canada) falls on the Ministry. 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. 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 Minister 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 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 institutional, operational and financial independence the following emerges from this survey of jurisdictions.

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<sup>64</sup> 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.

### *Institutional autonomy*

8.2 The experience of the overseas jurisdictions indicates that most, but not all, LAA have an NDPB structure with either an executive Board of directors or a stakeholder Board. The use of a public appointments process ( with a reasonable security of tenure ) in the recruitment of the Board and Chair provides the greatest autonomy from Government although stakeholder nomination against a skills and competencies framework is also considered to bring a reasonable measure of autonomy. Similarly, CEOs who are appointed by Boards using a form of public appointments procedure, with robust security of tenure ( perhaps with a separate financial responsibility as Accountable Officer to Parliament ) are seen as having the greatest degree of institutional independence. If the preference is to locate the LAA within Government then the more autonomous option is the “non-Ministerial department” along the lines proposed by a recent review<sup>65</sup> in NI with a small executive board of senior managers together with an Advisory Council selected by a public appointments procedure. The role of the Advisory Council might cover ensuring the independence of decision-making by the LAA in relation to grants, refusals and withdrawals of legal aid, acting as an appeals panel for complex and difficult cases and as a source of independent advice for the Government on Access to Justice matters. The lay chair might also serve as non-executive director on the management board. Regrettably this is not the model that NI seems likely to take.<sup>66</sup>

### *Accountability*

8.3 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.

### *Staffing*

8.4 The evidence from overseas 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 NI and NZ), if the staff is not composed of civil servants – irrespective of whether the LAA is an NDPB (e.g. Ireland). However, NDPB 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. The evidence from other jurisdictions, however, does not suggest that the use of salaried public lawyers poses significant threats to the operational autonomy of the LAA.

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<sup>65</sup> Access to Justice Review, Northern Ireland. August 2011 par 7.22.

<sup>66</sup> Summary of Responses and Way Forward: *Safeguards to protect the individual decisions on the granting of civil legal aid consultation* ( NI Department of Justice, June 2013 ).

### *Grant giving independence*

- 8.5 The key protections of independence here are legislative and cultural, but in the view of most jurisdictions surveyed, ( 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 an NDPB. 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*

- 8.6 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*

- 8.7 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.

## **Coda**

- 9.1 Although structures and institutional, operational and financial protections can have an impact on autonomy, in the last analysis a LAA will only be as independent as its Board, Chair and CEO are determined that it shall be. An NDPB Board can fail to stand up to its Minister whilst a civil servant in charge of an LAA within the Ministry may be prepared to risk his / her career to preserve the independence of decision-making of the LAA. Nonetheless, it is also the case that it is easier for Boards and CEOs of LAAs to exercise autonomy and to work constructively with their Ministries if they have all the relevant protections in place, than if they do not.