

CHAPTER 1

Introduction

The Legal Aid Services Council was established on 1 September 1996, following the enactment and coming into operation of the Legal Aid Services Council Ordinance (Cap 489). According to section 4(1) of the Ordinance, the Council is responsible for overseeing the administration of the legal aid services provided by the Legal Aid Department and the Department is accountable to the Council for the provision of such services.

The Council is also the Chief Executive's advisory body on the policy of publicly funded legal aid services provided by the Legal Aid Department pursuant to section 4(5) of the Ordinance.

With its membership being drawn from the legal profession and members of the public not connected with the practice of law, the Council serves to provide greater and more direct public participation in the formulation of policies pertaining to the provision of legal aid and in the administration of legal aid. The independence of legal aid administration is to a certain extent enhanced through the interposition of the Council between the Legal Aid Department and the Chief Secretary for Administration, who, through the support of the Administration Wing, Chief Secretary for Administration's Office, is responsible for policy-making on the provision of legal aid.

THE WORKING PARTY ON THE INSTITUTION OF LEGAL AID

Approaching its tenth anniversary, the Council considered that a "stock-taking" of the law, procedure and practice of the provision of legal aid was appropriate and to this end, in April 2003 established the Working Party on the Institution of Legal Aid. Membership of the Working Party is drawn from members of the Council, the two branches of the legal profession in Hong Kong, local universities, and non-governmental organizations. The list of members is as follows:

Chairman

Mr. Ruy Barretto SC

Member of the Council (replacing Mr. John Mullick upon his death)

Members

Professor Johannes M. M. Chan SC (Hon)	Dean, Faculty of Law, The University of Hong Kong
Dr. Joseph C. W. Chan	Associate Professor, Department of Politics and Public Administration, The University of Hong Kong
Mr. William Chan	Deputy Director of Legal Aid
Dr. Andrew S. L. Chuang, SBS JP	Member of the Council
Mr. Paul Harris	Founding Chairman, Hong Kong Human Rights Monitor (up to September 2005)
Mr. Junius K. Y. Ho	Member of the Council
Mr. Andrew S. Y. Li	Barrister (nominated by the Hong Kong Bar Association)
Ms. Gladys Li SC	Senior Counsel (from September 2005 to succeed Mr. Harris)
Mr. Michael Lintern-Smith	Solicitor (nominated by the Law Society of Hong Kong, up to 1 July 2004)
Professor Lui Tai Lok	Department of Sociology, Chinese University of Hong Kong
Mr. Amirali Bakirali Nasir	Solicitor (nominated by the Law Society of Hong Kong, from 2 July 2004, to succeed Mr. Lintern-Smith)
Mr. Ng Shui Lai, BBS JP	Member of the Council
Professor Tsang Shu Ki	Department of Economics, Hong Kong Baptist University

Secretary

Mr. Li Tin Yiu	Secretary of the Council (up to 2 October 2005)
Mr. Li Yun Choi	Secretary of the Council (from 3 October 2005)

The terms of reference of the Working Party are:

- (1) To set out a framework for proceeding with producing a document on the philosophic and rational basis for the institution of legal aid in Hong Kong including fundamental issues such as human rights, equal access to justice, and affordability.
- (2) To draw an outline for the content of the document.
- (3) To examine the following issues, though not exclusively:
 - (a) compilation of a list of principal sources of information on legal aid;
 - (b) the basic principles of legal aid;
 - (c) the relationship between legal aid and human rights;
 - (d) the role of legal aid in the structure of the administration of justice;

- (e) the need for legal aid within the social and economic structure of the society;
 - (f) the forms of legal aid which can be available;
 - (g) the part the legal profession can play; and
 - (h) an estimate of the cost of the project.
- (4) To oversee the compilation of such a document.
- (5) To report to the Council on completion of each phase of work as set out in the framework under (1).

The Working Party began to meet in September 2003. With the assistance of the Administration Wing of the Chief Secretary for Administration's Office and the Legal Aid Department, it obtained and studied documents relating to the establishment and development of the system for the provision of legal aid, and the debates on the provision of legal aid, drew up an outline of the Document and identified the principles of legal aid in Hong Kong.

The Working Party recognized that the services of a consultant were necessary for accomplishing its terms of reference, particularly at the drafting stage of the Document. The Council accepted the Working Party's recommendation and engaged the services of Mr. P. Y. Lo, barrister-at-law, in February 2005.

LEGAL AID IN HONG KONG

The present Document represents the fruits of labour of the Working Party and, to a significant extent, of Mr. P. Y. Lo. It follows an outline adopted by the Working Party early on in the course of its examination of the history of the development of legal aid in Hong Kong, as supplemented from research done by Mr. Lo on the philosophical or theoretical foundation of legal aid, and of socio-legal and comparative studies of legal aid systems in different parts of the world. The efforts of Miss Jane Ho, pupil of Mr. Lo between March and June 2005, in examining the statistical data on the funding and operation of legal aid in Hong Kong are also acknowledged.

The remainder of this Chapter describes in outline form the different chapters of this Document, representing the variety of perspectives in which one can discuss the state of legal aid in Hong Kong.

Although the statutory remit of the Legal Aid Services Council is confined to the publicly funded legal aid services provided by the Legal Aid Department, for the purpose of this Document, the ordinary and thus broader meaning of legal aid as understood by the general public and also the more comprehensive meaning as developed by socio-legal academics should be adopted. Hence it will not be confined to legal services provided by the Legal Aid Department, but will include those by other institutions such as the Duty Lawyer Service. It will likewise not be confined to legal aid provided through representation in litigation, but will include legal aid provided through advice and assistance in the non-contentious context, and the making available of information on the law and associated procedures and practices.

The spectrum of legal services now provided as legal aid in Hong Kong is the result of over 45 years of development, both in terms of identification of need and establishment of modes of delivery and their gradual expansion and enhancement. A concise historical account of the development of legal aid is the subject of Chapter 2.

The justification for the institution of legal aid is discussed separately. The discussion will have regard to contemporary understanding, as opposed to the intention of earlier times. Chapter 3 will present the major reasons and values underpinning the institution of legal aid in Hong Kong.

The Legal Aid Services Council is one of many actors involved in or concerned with the provision of legal aid services. Chapters 4 and 5 are devoted to describing and examining the part(s) played by each of them. The important role of the Government in the development and provision of legal aid services is recognized in the dedication of one chapter, Chapter 4; this consists of formulating policies, providing funding, and serving as the principal service provider of legal aid. Chapter 5 describes the roles played by others in mainly the delivery, monitoring and accounting for the provision of legal aid services. Such others include the Legal Aid Services Council itself, the Legislative Council (especially its Panel on Administration of Justice and Legal Services), the Judiciary, the Legal Aid Department, the Duty Lawyer Service, the two branches of the legal profession, the Equal Opportunities Commission, and the Consumer Council.

This Document is intended to be a relatively comprehensive and concise record of the constitutional and legal framework and practice of the provision of legal aid services. Chapter 6 seeks to fulfill this purpose by stating, for the record and in one single document, the law and practice of legal aid in Hong Kong, including the extent to which entitlement to provision of legal aid is protected as a human right under the Basic Law of the Hong Kong Special Administrative Region and the International Covenant on Civil and Political Rights as applied to Hong Kong.

Chapters 7 and 8 seek to realize the part of the terms of reference of the Working Party for examining the changing “need for legal aid within the social and economic structure of the society”. Chapter 7 outlines the different phases of change in the economy of Hong Kong, and explores trends and emerging issues in demography, the economy and public finance that may impact on legal aid services. Chapter 8 considers the social context of legal aid both in terms of factors that affect the course of development of the provision of legal services and also in terms of legal aid itself as a factor of effecting or contributing to social change; and illustrates the effect that intervention of legal aid has had on the course of actual events.

Chapter 9 is thematic in presentation. By drawing together in one chapter the recurring topics of the independence of the administration of legal aid services and the Supplementary Legal Aid Scheme for in-depth discussion, the Working Party wishes to underline the importance of these two components of the institution of legal aid to the successful and sustainable operation of the whole; and to allow readers to capture, within a small compass of pages, the justifications and the essential provisions of these two significant aspects of the institution of legal aid in Hong Kong.

In Chapter 10, the Working Party concludes firstly by identifying some of the principles on the institution of legal aid, together with brief explanations of their terms; and then by looking to the future and the challenges that the economy, the society’s aspirations and the continuing obligations of Hong Kong all have on the provision of legal aid services. As readers will notice in the course of this Document, there are topics that recur from chapter to chapter, such as the demand for expansion of the scope and coverage of legal aid services, the call for the provision of non-litigation focused legal aid services at the community level, and the implications of legal aid to public finance, particularly in respect of sustainability of appropriations. While this Document is more in

the nature of a record than a piece of advocacy, the Working Party considers it right that observations drawn from the discussions can and should be made for the benefit of legal aid stakeholders now and in the future, and this chapter is the place to make them.

The Working Party is grateful for the written observations and specific comments on drafts of this Document made by the Director of Administration. Where appropriate, these observations and comments have been incorporated into this Document.

It remains for me, as Chairman, to thank the other members of the Working Party on the Institution of Legal Aid, the Secretary of the Council, and the consultant for their sterling efforts in research, drafting and revision of this Document, for assistance of various kinds, and for their unfailing support of this project, over the two and a half years of the deliberations. I should also like to thank other members of the Council for their support and work in finalizing this Document.

Ruy Barretto S.C.

31 March 2006