

CHAPTER 2

History: Development of Legal Aid in Hong Kong

THE EARLIEST FORM OF LEGAL AID: PAUPER'S PETITIONS

Courts were established upon the founding of the British colony of Hong Kong.¹ With the courts came lawyers.² Litigants who were unable to afford lawyers had two options: act in person or abandon the idea of litigation. Those who were indigent had a third option which was to present a pauper's petition (*forma pauperis*) to the Supreme Court.³

The Supreme Court Ordinance 1844 provided for the right of a person, not possessing property to the amount of HK\$50 in value, to apply to the court for leave to sue or defend as a pauper.⁴ The court could grant leave after considering affidavits on the possessions of the applicant, a certificate of a barrister on the merits, and hearing the opposite party.⁵ A person granted leave could also ask the court to appoint a barrister or attorney to represent him, and the barrister or attorney so appointed with his consent could not take any fee from the person.⁶ However, if the person won in his cause and costs were awarded to be paid by his opponent, the barrister or attorney appointed would be entitled to receive all such fees allowed after taxation.⁷

1 Norton-Kyshe reported that the first Chief Magistrate of Hong Kong was appointed on 13 April 1841 and his appointment included responsibilities as head of the police and prisons, as well as judicial duties: Norton-Kyshe, James W, *The History of the Laws and Courts of Hong Kong from the Earliest Period to 1898* (Vetch & Lee, 1971), Vol 1, pp 6, 40. The Criminal Court was opened on 4 March 1844, with the then Governor Sir Henry Pottinger presiding: Ibid, Vol 1, p 37. The Supreme Court of Hong Kong was formally opened on 1 October 1844: Ibid, Vol 1 p 64.

2 The first hearing of the newly opened Supreme Court of Hong Kong was the admission of one attorney and two barristers to practise in Hong Kong: Ibid, Vol 1, p 65.

3 The pauper's petition was first provided in England in 1495 under a statute of Henry VII. Norton-Kyshe made first mention of petition *forma pauperis* when it reported the publication on 1 April 1847 of rules of court regarding proceedings in *forma pauperis*: Ibid, Vol 1, p 130. Notwithstanding the rules of court, the English statute and practice were presumably received into the laws of Hong Kong upon the founding of the colony of Hong Kong; see Wesley-Smith, Peter, *Sources of Hong Kong Law* (Hong Kong University Press, 1994) pp 90-91, 95.

4 Supreme Court Ordinance 1844 (No 15 of 1844) section 133.

5 Ibid, section 133. Leave can be withdrawn if the person became of ability during the progress of the cause, or misbehaved himself by vexatious or improper conduct or proceeding or wilfully delaying the cause: Ibid, section 136.

6 Ibid, sections 134, 135.

7 Ibid, section 135.

In 1873, Hong Kong obtained its first Code of Civil Procedure which provided for similar provisions in chapter XVII therein.⁸ In 1901, a new Code of Civil Procedure and Rules of Court were enacted and provisions on “action by or against pauper” were placed in Order XX.⁹ As the provisions developed in the following half century, the Registrar of the Supreme Court was empowered to admit a person to be a pauper for the purposes of the Order after considering his means and examining through a nominated solicitor, his cause of action or defence. The mechanism of assigning lawyers for pauper’s petition was also extended later on to the summary civil jurisdiction of the Supreme Court to try cases involving a claim below HK\$500. However, the definition of a pauper remained unchanged until 1954 when the amount of possessions in value was raised from HK\$50 to HK\$500.¹⁰

As it was the case previously, if the court granted the petition, counsel and solicitor would be assigned to the pauper free of charge and he was not liable to court fees. Counsel and solicitors on the roll were expected to be selected in turn and could not refuse assistance if selected unless the lawyer selected satisfied the court that he had a good reason for refusing. The rules of court likewise provided for a form of conditional recovery of taxed costs in the case of adjudgment of costs to be paid by the pauper’s opponent or from the property made available to the pauper as a result of proceedings.

In reality, however, counsel and solicitors often ended up conducting pauper’s work without any remuneration as the opponent was without much in means. Lawyers became unmotivated to do pauper’s cases because of lack of public funding and uncertainty about getting paid.¹¹

In criminal matters, free legal representation was extended to accused persons standing trial for capital cases in the Supreme Court and at the judge’s discretion to appellants and accused persons whose cases were subject of reservation on a point of law.¹²

FEASIBILITY OF LEGAL AID SCHEME FIRST EXAMINED

In 1958, Sir Robert Black, Governor of Hong Kong, appointed a committee with terms of reference “to examine and report on the feasibility of introducing a scheme of legal aid and advice for poor persons in both civil and criminal case, having particular regard to

8 Code of Civil Procedure (No 13 of 1873).

9 Code of Civil Procedure and Rules of Court (No 3 of 1901), Order XX. The Order was renumbered as Order XXI in the Code of Civil Procedure (Cap. 4 sub. leg. 1950 Ed.).

10 Pursuant to the Code of Civil Procedure (Amendment) Rules 1954 (GNA 80/1954).

11 A similar situation in England was recalled by Lord Bingham, then Lord Chief Justice, in his Barnett Lecture at Toynbee Hall on 11 June 1998 where he stated that the procedural requirements of obtaining certificate of counsel first exposed solicitors and counsel to the risk of being chosen by the court to conduct the case free of charge and thus by the end of the 19th century, they proved to be effective in preventing both undeserving and deserving cases reaching the court.

12 Criminal Appeal Rules (Cap. 221 sub. leg., 1950 Ed.) rules 32-34.

the financial implications”.¹³ The committee was headed by a Queen’s Counsel, John McNeill QC.¹⁴

Having prioritized its consideration of the provision of legal aid in different types of cases, the McNeill Committee submitted an interim report in April 1959, making recommendations on how criminal legal aid in the Supreme Court was to be extended. It recommended that legal aid be extended on a pilot scheme basis to all accused committed to trial in the Supreme Court upon application and qualification under a means test. Legal aid was recommended to be extended to all prisoners without consideration of merit or likely plea in the light that the depositions shed little light on the strength of cases; that defendants often reserved their defences till trial; that the setting up of a committee to examine a defendant’s case would be costly and cumbersome and contribute to delay. The committee considered this manner of provision to be the most practical, expeditious and economical, and had obtained the support of both branches of the legal profession to enable it to work satisfactorily, at a cost to the public purse of HK\$120,000 annually. The recommendations were accepted with modifications and implementing rules were enacted in 1962.¹⁵

The McNeill Committee also felt constrained in 1959 by the size of the legal profession that free legal advice would not be feasible.

In 1962, the same committee, now headed by F. D. Hammond, submitted a second interim report which recorded its full consideration of the provision of legal aid in civil cases. It reviewed the criticisms of the then existing civil legal aid provisions under Order XXI of the Code of Civil Procedure.¹⁶ As the Government made no contribution to the operation of the scheme except the part time services of court staff to receive and assign cases, the actual operational and financial burden was borne by the legal profession on a charitable basis. The burden of pauper cases was found to be absorbing much of the time of junior counsel and led to considerable discontent and reluctance. While the burden on solicitors was less, there was not much enthusiasm for it. The committee recommended that the scheme under Order XXI be discontinued.

The Hammond Committee considered the options for the replacement scheme and took into account the following factors in the process:

- (a) the number of legal practitioners in private practice (especially barristers) available to operate the scheme;

13 See *Legal Aid Committee: Appointments and Terms of Reference*, GN 679/1958 (23 May 1958).

14 Other members were F. D. Hammond (representing the Law Society), Richard Winter (representing the junior Bar), and P. R. Springall, the Deputy Registrar of the Supreme Court. Desmond F. O’Reilly Mayne served as secretary.

15 I.e. the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg.), GNA16/62. It should be borne in mind that by 1962 the less serious types of criminal cases were all heard either in the magistrate’s court or the District Court and an accused whose case was committed for trial before the Supreme Court would probably be on trial for an offence punishable upon conviction by at least seven years’ imprisonment.

16 The definition of “pauper” was criticized as being imprecise and the limit of means too restrictive in the light of contemporary living standards. There was no machinery to check the means of an applicant. The provisions regarding recovery of costs had the effect of “no win, no fee”, contrary to professional practice and criminal law then prevailing in England.

- (b) the probability that the Government would be unlikely to engage a large number of qualified and trained lawyers so as to cater for any notable increase in the number of cases that could be handled; and
- (c) the opinion of the committee that on account of the generally lesser awareness of the public of the existing civil legal aid scheme, the publicity accompanying the new scheme would generate an increase in the number of cases.

The committee, while declining to increase the limit for the means test, did not adopt the term “net disposable income” on the ground that it was too complicated. It recommended that there should be a professional director of legal aid who would operate the scheme still within the Judiciary, yet divesting the task of investigation of means to the Secretariat for Chinese Affairs. The Order XXI regime for costs was recommended for scrapping in favour of reasonable fees provision.¹⁷ Estimation of costs proved to be difficult in the absence of facts and figures and on a rather rough estimate, the committee came to a figure of HK\$100,000, taking account of incidence of party and party costs being recovered from the other side in successful cases. Consideration for provision of free legal aid to defendants in criminal trials before the District Court and the magistrate’s courts was postponed. Consideration of free legal advice to poor persons beyond the existing and recommended schemes was also postponed.

The Government in response established a Working Party on Legal Aid in Civil Cases in 1963. The Working Party assembled members representing the Legal Department, the Government Secretariat and the Judiciary¹⁸ for the purposes of examining the interim report, reporting on the possible scope of the civil legal aid scheme in detail (including matters recommended by the committee and variations therefrom), and determining more exactly the probable financial implications of the scheme with specific reference to the fees to be paid to counsel. In December 1963, the Working Party, in its report, agreed that a professionally qualified and experienced Director of Legal Aid should be appointed to work within the Judiciary.¹⁹ An applicant for legal aid should pass the merits test and the means test. A certificate of legal aid should be issued at each of the three stages:

- (a) negotiation and settlement prior to issue of writ;
- (b) issue of writ and court proceedings; and
- (c) appeal.

17 The Chief Justice had earlier ordered fees to be paid to counsel and solicitors to whom he had assigned criminal cases each year, pursuant to the Criminal Procedure Ordinance (Cap. 221); see the Counsel (Fees) Order 1952 (approved by the Legislative Council on 20 February 1952) (GNA 28/1952) and the Solicitors (Fees) Order 1957 (approved by the Legislative Council on 27 March 1957) (GNA 30/1957).

18 I.e. Mr G. R. Sneath (Legal Department), Mr D. S. Whitelegge (Government Secretariat) and Mr C. P. D’Almada e Castro (Registrar, Supreme Court).

19 The Working Party noted, from experience in Gibraltar, the advantage of having the Registrar or Deputy Registrar of the Supreme Court appointed as the Director of Legal Aid and did not consider that there would arise any conflict of duty with other functions of the office.

Consideration of merits should involve the investigation of, not only the legal strength of the case, but also its equities.²⁰ Having taken into account the legal aid regimes in Singapore and Gibraltar, the Working Party considered that the section of the community entitled to legal aid could be extended without increasing the overall net cost proportionately by requiring contributions be paid by the applicant, so that the limit of the means test could be set at a higher level that might otherwise be unacceptable. The Working Party however rejected the committee's opinion and considered that the expressions "disposable income" and "disposable capital" were meaningful concepts which could be used to indicate the financial circumstances of an individual. It also rejected the committee's recommendation of divesting the investigation of means to the Secretariat for Chinese Affairs and recommended commission of this function into the hands of the Director of Legal Aid. Participation of barristers and solicitors in the scheme should be voluntary with the Director of Legal Aid keeping a roll of barristers and solicitors willing to participate and assigning each case. Recommendations were made on the appropriate fees to counsel and solicitors and that costs awarded against a legally aided person be taken as an item of expenditure in running the scheme. On estimating the costs of running the scheme the Working Party pointed to "the aversion of the Chinese to litigation" and the availability of means of mediation offered by different Government departments to counter balance against the likelihood of increase in cases brought on as a result of publicity of the new scheme.

LEGAL AID BILL 1966

The Government gazetted a Legal Aid Bill in October 1966 which was drafted on the basis of the English Legal Aid and Advice Act 1949 with some modifications based on Singaporean legal aid legislation. Under the Bill, the Governor was empowered to appoint a Director of Legal Aid, a qualified lawyer who was to have right of audience.²¹ The Bill sought to make legal aid available in all civil proceedings in the Supreme Court and the District Court, except proceedings specifically excluded by Part II of the Schedule (which included small actions for debt and assault in the District Court). An applicant for legal aid would have to satisfy both a means test and a merits test. The means test was based upon limits set on disposable income and disposable capital, with regulations setting out the allowable deductions. The examination of means was to be carried out by the Social Welfare Department. The Director would decide, on the one hand, whether the applicant had reasonable grounds to take or defend proceedings; and, on the other, whether he passed the means test, and if he did, whether he should receive free or assisted legal aid (ie be required to pay a contribution). A contribution set by the Director would be the limit which an aided person might be called upon to pay out of his own resources. The Director would have the additional power to recover from damages or costs awarded to the aided person any extra costs incurred by him above the amount of

20 Thus a case should be regarded as lacking in merit where the applicant sought to take advantage of some technicality of the law or to rely on a provision in legislation to achieve a purpose clearly not intended by the legislature.

21 It was intended that the Director would not exercise the right of audience as long as his post remained within the administrative structure of the Judiciary and would do so when the post became independent of the Judiciary at some future date.

the aided person's contribution, plus any part of the contribution which was unpaid. Appeals against refusals of legal aid would be heard by the Registrar of the Supreme Court who had the discretion to refer a case to a judge of the Supreme Court. The Director had the power to defray the expenses of legal aid from moneys voted by the Legislative Council, meaning that the usual method of budgetary control by means of annual estimates and votes, and by supplementary provision if necessary, would apply.

The Attorney General commented in the Legislative Council that the Bill was "one of the most important pieces of social legislation of recent years", though he was vigilant as to the question of costs and the keeping of costs within reasonable bounds. The cost of the scheme to the public purse would be kept under "close review" and if at any time it appears to the Government that legal aid was costing more than the general revenue could fairly be expected to bear, then it would be necessary to examine the methods of reducing the cost, such as by extending the list of excepted proceedings or by altering the financial limitations.²² The Bill was considered a piece of "social legislation" probably because it acknowledged and provided to a certain extent redress of the criticism that lack of money sometimes prevented a poor man from protecting or obtaining his legal rights. This was noted by the Hon P. C. Woo in his Legislative Council address in the second reading of the Bill. In his mind, the Bill –

"demonstrates the cardinal principle of justice that every man is equal in the eye of the law and that lack of means alone of a litigant will by no means prevent him from obtaining what is rightfully due to him in a Court of Law".

Mr Woo also made a number of suggestions, including extending free legal aid to all criminal cases, and handing over the administration of legal aid to the Law Society when its membership and personnel became adequate to handle the work.²³ The Bill was passed on 23 November 1966 and came into operation on 12 January 1967.²⁴

PUTTING INTO OPERATION THE LEGAL AID SCHEME

On 12 January 1967, a sub-department of the Judiciary called the Legal Aid Section²⁵ came into operation with a Director of Legal Aid²⁶ and five junior staff occupying two small rooms in the old Supreme Court Building. Two judicial officers were seconded to act as the director. At first applicants were still referred by the courts while others came via the Social Welfare Department or the Labour Department.

22 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1966)* pp 401-405 (26 October 1966).

23 *Ibid*, pp 422-423 (23 November 1966).

24 I.e. the Legal Aid Ordinance (No 36 of 1966) (now assigned Cap. 91), coming into operation by virtue of a commencement notice, LN 1/1967, on 12 January 1967.

25 The Legal Aid Section was subsequently renamed the Directorate of Legal Aid; see Director of Legal Aid, *Annual Departmental Report for the Financial Year 1972-1973*, p 5.

26 The Director of Legal Aid was at first designated the rank of Deputy Registrar (Legal Aid), Supreme Court.

LEGAL AID IN CRIMINAL CASES RULES 1969

On 27 August 1969, the Legislative Council approved the Legal Aid in Criminal Cases Rules 1969 which came into force on 1 January 1970, to replace the 1962 rules under the Criminal Procedure Ordinance (Cap 221).²⁷ These new rules did not expand the scope of criminal legal aid, which remained confined to trials before the Supreme Court, criminal appeals from the Supreme Court and the District Court, and magistracy appeals (except where the accused had pleaded guilty). The granting authority became however the Director of Legal Aid who also had the authority to assign solicitor and counsel from panels he prepared and maintained.²⁸ The Director was to grant legal aid where he was satisfied that legal aid was desirable in the interest of justice. There was a considerable increase in fees.²⁹ As in civil cases, the new rules incorporated a means test coupled with a power to require contribution as the Director considered appropriate. The court maintained a discretion to grant legal aid where it had been refused by the Director. In capital cases, the Director could grant legal aid notwithstanding that the means test limits were exceeded. The court could exercise a similar discretion to grant legal aid in capital cases and/or to exempt a defendant in such cases from the requirement to pay a contribution. On 1 January 1970, the Director of Legal Aid took over the administration of legal aid in criminal cases.

1970s: ESTABLISHMENT OF THE LEGAL AID DEPARTMENT AND OTHER DEVELOPMENTS

The Legal Aid Department was established on 1 July 1970 as a department of the Administration and was no longer part of the Judiciary.³⁰ It took on the work under the Legal Aid Ordinance and the Legal Aid in Criminal Cases Rules from the Judiciary. At the time of its establishment, the Department had four lawyers and seven supporting staff handling about 3,000 applications a year. The first departmental head or Director of Legal Aid was Desmond O'Reilly Mayne QC who served in the post till 1981.³¹

27 I.e. the Legal Aid in Criminal Cases Rules 1969 (LN 130/1969).

28 Counsel and solicitors were entitled to have their names included in the relevant panel unless the Director of Legal Aid had a good reason to exclude a particular person.

29 The rationale was to align with practice in England where the fees were meant to represent a fair return for work done and not intended to include an element of charitable work on the part of the practitioners: *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1969)* p 525.

30 Mr Desmond O'Reilly Mayne QC did not record the reasons for separating the Directorate of Legal Aid from the Judiciary into a separate department answerable to the Colonial Secretary. However, he did note that the move enabled the department to have *immediate access* to the Government Secretariat and its various branches, including the Finance and Establishment branches, and it turned out that the Government Secretariat had been able and willing to help the burgeoning department: Director of Legal Aid, *Annual Departmental Report for the Financial Year 1972-1973*, p 5.

31 Mr Desmond O'Reilly Mayne QC was first substantively appointed Deputy Registrar (Legal Aid), Supreme Court with effect from 20 December 1968 (GN 2558/1968).

A Standing Committee on Legal Aid was established in February 1970 consisting of the Registrar of the Supreme Court, the Director of Legal Aid, and three representatives from either branch of the legal profession. The Standing Committee was to report to the Chief Justice on the practical working of the legal aid scheme in civil and criminal cases and to make recommendations on necessary changes to the law.³²

The Legal Aid in Criminal Cases Rules were amended in 1972 to extend legal aid to respondents in applications for review of sentence.³³ The Legal Aid Ordinance was amended also in that year by resolution of the Legislative Council to raise the amounts of disposable income and disposable capital, having taken into account rises in industrial workers' wages.³⁴

Criminal legal aid was extended in 1973 to District Court trials where the charge carried a possible sentence of 14 years' imprisonment, which at the time meant about 75% of the cases, but that also meant legal aid could be granted in robbery cases but not theft.³⁵

The Legal Aid Department established in 1973 a Litigation Unit which would handle all the solicitors' side of the work in the majority of cases where legal aid was granted in criminal cases.³⁶ With rights of audience provided for under the Legal Aid Ordinance, the Litigation Unit was soon staffed with legal aid officers recruited from the United Kingdom, Australia and New Zealand. Its scope of work was expanded in 1974 to include civil legal aid and the practice soon developed into one where members of the unit conducted every aspect of certain types of proceedings, such as divorces, winding up and bankruptcy matters, workmen's compensation cases, wage claims and different types of proceedings in the District Court.

By the end of 1973, Desmond O'Reilly Mayne QC, Director of Legal Aid, reported on the progress being made in the following terms:

"In the early days of legal aid, most applicants were referred to us by other departments. They came expecting nothing, and very often they got too little and too late. Now for the most part they come here direct, expecting to receive constructive aid in relation to litigation matters – and generally speaking, their expectations are being better met, and with greater expedition."³⁷

32 See GN 369/1970. The Standing Committee on Legal Aid was developed from the Standing Committee on Legal Aid in Civil Cases, which was established in May 1967 and had a similar composition but considered matters pertaining only to the practical workings of the civil legal aid scheme (GN 999/1967).

33 I.e. the Legal Aid in Criminal Cases (Amendment) Rules 1972 (LN 167/1972), approved by resolution of the Legislative Council on 30 August 1972 (LN 166/1972).

34 I.e. resolution of the Legislative Council on 30 August 1972 (LN 168/1972). See also Director of Legal Aid, *Annual Departmental Report for the Financial Year 1972-1973*, p 5.

35 I.e. the Legal Aid in Criminal Cases (Amendment) Rules 1973 (LN 70/1973), approved by resolution of the Legislative Council on 28 March 1973 (LN 69/1973) and coming into operation on 1 April 1973.

36 The reason for setting up the Litigation Unit was said to be that there was at the time a shortage of lawyers in private practice to be assigned with cases and that many solicitors were said to be "reluctant to take on legal aid cases when the booming property market offered far more lucrative and less troublesome work", thus contributing to delays in processing legally aided cases. See *Access to Justice: The Legal Aid Department Serving the Community for 30 Years* (Legal Aid Department, 2000) p 14.

37 Director of Legal Aid, *Annual Departmental Report for the Financial Year 1973-1974*, p 1.

The Government expressed its intention in 1975 that legal aid “should be extended to embrace a larger sector of the community (notably in the middle income group)”.³⁸

The Legal Aid Ordinance was amended in 1977 to raise the limits of disposable income and disposable capital for the means test, having taken into account the increase of average daily wages between 1972 and 1976.³⁹ The Chief Secretary, the Hon Denys Roberts, noted in the Legislative Council on 18 May 1977 that “legal aid in civil cases is an important social service”.⁴⁰ The amendment took effect on 1 June 1977.

Although the Executive Council approved in principle in August 1974, after considering the Report of the Working Party on Legal Aid, that legal aid be extended to cover all criminal cases in the District Court, it was not until March 1978 that public resources were made available. The Legal Aid in Criminal Cases Rules were amended accordingly on 15 March 1978 to take effect on 1 April 1978.⁴¹

The Legal Aid Department established in 1978 a branch office in Mongkok, Kowloon as a convenient alternative for receiving and handling civil legal aid applications.

THE BEGINNINGS OF THE DUTY LAWYER SERVICE

In 1978, the Law Society and the Hong Kong Bar Association accepted responsibility for administration of two schemes providing free legal services, namely the Free Legal Advice Scheme and the Limited Legal Representation in Magistracies Scheme, with a subvention from the Government.⁴² The Free Legal Advice Scheme which provided face-to-face advice by appointment at government District Offices, was subsequently complemented with a scheme offering pre-recorded advice on selected legal subjects accessible by dialling a telephone number.⁴³ Publicly subvented legal representation in the magistracies gradually expanded to cover all magistracies and juvenile courts and this scheme became known as the Duty Lawyer Scheme. These two schemes were eventually placed under the administration of the Duty Lawyer Service which was incorporated as a company limited by guarantee in 1993, and administered jointly by the Law Society and the Bar Association through its council.⁴⁴

38 *Hong Kong 1975: Report of the Year 1974* (Hong Kong Government Press, 1975) p 208. The annual report also mentioned that to achieve this intention, “an examination was carried out in 1974 to consider the financial and other implications of raising the limits of eligibility under the means test”: *Ibid.*

39 I.e. resolution of the Legislative Council dated 18 May 1977 (LN 108/1977).

40 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1976/77)* pp 904-905.

41 I.e. the Legal Aid in Criminal Cases (Amendment) Rules 1978 (LN 64/1978), approved by the Legislative Council by resolution on 15 March 1978 (LN 57/1978).

42 See Law Society Legal Advice and Assistance Scheme, *Report of the Management and Administration Committee* (17 December 1979) pp 1-2.

43 I.e. the Tel-Law Scheme introduced by the Law Society in 1984.

44 Duty Lawyer Service, *Annual Report 2004* (Duty Lawyer Service, 2004) paragraphs 2.1 to 2.3.

1980s: DEVELOPMENTS

On 22 December 1982, the Legislative Council resolved to amend the Legal Aid Ordinance to raise the limits of disposable income and disposable capital for the means test with effect from 3 January 1983.⁴⁵ It also approved amendments to the Legal Aid in Criminal Cases Rules to increase the limits of the means test for criminal legal aid to the same levels⁴⁶ for the reason that it was desirable that there should be uniform financial criteria for eligibility under the two legal aid schemes. The Legal Aid (Assessment of Contributions) Regulations were amended in this connection by the Executive Council to provide for a higher threshold at which contributions became payable and extend the scales of contributions.⁴⁷

Legal aid was extended to appeals to the Privy Council in 1982.⁴⁸ Amendments were subsequently made in the light of resumption of sovereignty by the People's Republic of China to ensure continuity of legal aid to the Court of Final Appeal of the Hong Kong Special Administrative Region.⁴⁹

THE BEGINNINGS OF THE SUPPLEMENTARY LEGAL AID SCHEME

A Working Party consisting of the Director of Legal Aid (Chairman) and representatives from the two branches of the legal profession, the Judiciary, the Legal Department and the Legal Aid Department was established in June 1981 to formulate a scheme to provide legal representation for people who had good potential claims but did not qualify for legal aid because they were outside the means test limits and who, nonetheless, were unable to afford the high cost of litigation from their own financial resources. The Working Party reported in 1982.⁵⁰ By the time the Hon Maria Tam called for the introduction of a scheme to provide legal aid to those in the so-called "sandwich" class in the Legislative Council in October 1983,⁵¹ discussions were taking place regarding financing a Supplementary Legal Aid Scheme to implement the recommendations of the Working Party.⁵²

45 I.e. resolution of the Legislative Council on 22 December 1982 (LN 425/1982), coming into operation on 3 January 1983.

46 I.e. the Legal Aid in Criminal Cases (Amendment) (No 2) Rules 1982 (LN 427/1982), approved by resolution of the Legislative Council on 22 December 1982 (LN 426/1982).

47 I.e. the Legal Aid (Assessment of Contributions) (Amendment) Regulations 1982 (LN 423/1982), coming into operation on 3 January 1983.

48 I.e. by virtue of the Legal Aid (Amendment) Ordinance 1982 (No 14 of 1982), coming into operation on 23 April 1982.

49 Pursuant to the Hong Kong Court of Final Appeal Ordinance (No 79 of 1995) (now assigned Cap. 484) section 50, coming into operation on 1 July 1997.

50 *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982). For discussion of the Supplementary Legal Aid Scheme, see Chapter 9 below.

51 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1983/84)* pp 135-137.

52 *Ibid*, pp 219-220.

A Bill was introduced in 1984 in the Legislative Council to amend the Legal Aid Ordinance to put in place the Supplementary Legal Aid Scheme. The Attorney General acknowledged in the Legislative Council meeting on 11 July 1984 that the limits set for the means test “must inevitably be arbitrary and there are fears that some applicants who fail the means test may nevertheless be hard pressed to pay for the services of a private lawyer.”⁵³ This scheme was to cater for applicants who would satisfy the Director of Legal Aid that they had reasonable grounds for taking proceedings in the High Court for damages for personal injuries or death (excluding medical negligence). Higher financial limits would apply and those who were successful in litigation would pay a proportion of their damages to the scheme, so as to make the scheme self-financing. The Lotteries Fund was to set aside a sum of \$1 million as a loan facility to be drawn upon for setting up the scheme. The philosophy of the scheme, it was explained, was to have the losses of the unsuccessful litigants made up by the contributions of those who were successful. The Attorney General concluded his speech with a reference that the rule of law was as important as the principle that access to the courts should be available to all.⁵⁴ The Bill was enacted into the Legal Aid (Amendment) Ordinance 1984.⁵⁵ The Legal Aid Regulations were consequentially amended.⁵⁶

On 1 October 1984, the Supplementary Legal Aid Scheme came into operation. It was the first contingency legal aid fund in the world, and became self-financing in the early 1990s.

FURTHER DEVELOPMENTS

Criminal legal aid was extended in 1984 to cover committal proceedings in the magistrate’s court after the appointment of a return day⁵⁷, and such work was conducted in-house with legal aid counsel appearing in the weekly proceedings.

On 15 January 1986, the Legislative Council resolved to raise the limit of disposable income prescribed for the means test under the Legal Aid Ordinance for eligibility for legal aid.⁵⁸ This was intended to be an interim measure reflecting inflation and pending the report of the Legal Aid Working Party.

53 Ibid, pp 1173-1175.

54 Ibid, p 1175. It is to be noted that the Hon Maria Tam, speaking in support of the Bill, referred to the one-third of the population not protected by legal aid: Ibid, pp 1241.

55 I.e. the Legal Aid (Amendment) Ordinance 1984 (No 54 of 1984), coming into operation on 1 October 1984.

56 I.e. the Legal Aid (Amendment) Regulations 1984 (LN 326/1984), coming into operation on 1 October 1984.

57 I.e. by virtue of the Criminal Procedure (Preliminary Proceedings on an Indictable Offence) Ordinance 1983 (No 48 of 1983) section 5, commencing on 1 January 1984.

58 I.e. resolution of the Legislative Council on 15 January 1986 (LN 5 of 1986).

THE SCOTT REPORT

The Legal Aid Working Party⁵⁹ issued its report (the Scott Report) in January 1986. The Scott Report was a landmark in the development of legal aid in Hong Kong because many of the principles underpinning the present institution of legal aid, including the concept of financial capacity for setting financial eligibility limits, and the requirement for realistic levels of contribution, owed their origin to it. It recommended that legal aid should be administered by an independent legal aid commission which enjoyed a status outside the main civil service, like the Department of Audit.

The Joint Profession Working Party on Legal Aid Reform which was chaired by Mr Denis Chang QC, Chairman of the Bar and Mr Brian Tisdall, President of the Law Society, responded to the Scott Report in 1987. It rejected the Scott Report's recommendations for an independent legal aid commission and argued for a statutory legal services authority under the managerial control of the legal profession and being accountable to an independent advisory body.

1990s: DEVELOPMENTS

In March 1991, the Legal Aid (Amendment) Bill 1991 was introduced into the Legislative Council to replace the criteria of disposable income and disposable capital in the means test with a single criterion of "financial capacity" with the aim of achieving a system fairer to persons having only income or capital. The new concept of "financial capacity", which followed from the Scott Report, was defined to be the aggregate of a person's disposable annual income and disposable capital. The amendments were enacted and came into operation on 1 July 1992.⁶⁰

In 1991, the enactment of the Official Solicitor Ordinance, representing a rationalization of previous practices of providing legal assistance to minors and people under mental or physical disability by the Registrar General and the Attorney General, placed the Director of Legal Aid in the role of the Official Solicitor.⁶¹ The Director performed the role of Official Solicitor in a separate office, represented minors in wardship proceedings, and acted in proceedings against the estate of deceased defendants, matrimonial cases, overseas adoption matters, receivership litigation, and the maintenance of trust funds.

59 The Legal Aid Working Party was appointed by the Chief Secretary in June 1985 "to examine the law, practice, administration and finance relating to the provision of legal aid, advice and assistance in Hong Kong, to consider whether any changes are desirable and to report to the Chief Secretary". The Government formed the working party following its decision to conduct a thorough examination of legal aid policy after considering a report of a Mr. Hanratty of the Legal Department dated June 1984 (which had not been made available for the writing of this Document) recommending that detailed studies of policy rather than law concerning the provision of legal aid services in Hong Kong were required in some areas.

60 I.e. the Legal Aid (Amendment) Ordinance 1991 (No 27 of 1991), coming into operation on 1 July 1992.

61 I.e. the Official Solicitor Ordinance 1991 (No 98 of 1991) (now assigned Cap. 416), coming into operation on 1 August 1991.

An interdepartmental working group known as the Working Group on Legal Aid Policy Review was established in March 1992 to conduct a review on law, policy and practice governing the provision of legal aid services in Hong Kong. Having published its preliminary findings in a consultation paper in April 1993, the Working Group reconvened in December 1993 to examine all the comments on the consultation paper and other views expressed on the provision of legal aid. The Reconvened Working Group made recommendations which were accepted by the Executive Council and published a report in July 1994. It recommended the establishment of a Legal Aid Services Council and changes to the scope and operation of the legal aid scheme. The Administration accepted that the status of the Legal Aid Department as a government department might create a “perception problem” but the proposal to establish a non-governmental authority was rejected on grounds of cost, estimated at HK\$80 million, and disruption on account of no guarantee that staff would join the new authority. The Legal Aid Services Council was said to be capable of enhancing the perception of independence by providing “a buffer between the Government and the executive agencies responsible for the day-to-day provision of legal aid services.”

The other recommendations of the Reconvened Working Group were implemented firstly by amendments to the Legal Aid Ordinance,⁶² the Legal Aid Regulations,⁶³ the Legal Aid (Assessment of Resources and Contributions) Regulations⁶⁴ and the Legal Aid in Criminal Cases Rules.⁶⁵ In particular, the Director of Legal Aid was given the power to waive the upper limit of the means test in the case of applicants who satisfied the Director of having reasonable grounds to claim under the Hong Kong Bill of Rights Ordinance⁶⁶ and the International Covenant on Civil and Political Rights as applied to Hong Kong.⁶⁷ The implications of the enactment of the Hong Kong Bill of Rights Ordinance was taken into account in revising the list of proceedings excepted from the scope of the civil legal aid scheme.

DEBATES ON INDEPENDENCE OF LEGAL AID ADMINISTRATION

The Legislative Council debated on the motion of the Hon Wong Wai Yin for review of the provision of legal aid on 1 July 1992. During the debate, the Hon Martin Lee, a Queen’s Counsel himself, questioned why the Government did not allow the Legal Aid Department to become independent and suggested the Government’s preference was that

62 I.e. the Legal Aid (Amendment) Ordinance 1995 (No 43 of 1995), coming into operation on 28 July 1995.

63 I.e. the Legal Aid (Amendment) Regulations 1995 (LN 5/1995).

64 I.e. the Legal Aid (Assessment of Resources and Contributions) Regulations (LN 353/1995), amended by the Legislative Council by resolution dated 2 November 1995 (LN 489/1995).

65 I.e. the Legal Aid in Criminal Cases (Amendment) (No 2) Rules 1995 (LN 360/1995), approved by the Legislative Council by resolution on 26 July 1995 (LN 359/1995).

66 I.e. the Hong Kong Bill of Rights Ordinance (Cap. 383).

67 The Reconvened Working Group on Legal Aid Policy Review recommended for the Director of Legal Aid to have the said discretion upon finding merit in the proposal put forward by Amnesty International in its report on Hong Kong and Human Rights (April 1994): Administration Wing, Chief Secretary’s Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994), paragraph 5.5.

it wanted to continue to influence the way in which legal aid officials assessed the merits of applicants' cases. He referred to the control of the Government over promotion of legal aid officers and the rumour that the Director of Legal Aid at the time would not have his contract renewed because he granted legal aid to Vietnamese boat people to sue the Government.⁶⁸ The Hon Simon Ip, a solicitor by profession, quoted the Final Report of the Royal Commission on Legal Services to affirm his criticism that legal aid being provided by a government department did not allow it to be perceived as independent and free from influence of or interference from the Government. It could not be right for the Government to represent both parties when remedies were sought against it.⁶⁹ However, the Hon Moses Cheng, another solicitor, considered it more appropriate for the Legal Aid Department to remain in the hierarchy of government subject to the same degree of monitoring as any other government department.⁷⁰

In reply, the Secretary for Constitutional Affairs stressed that priority must be given to encouraging more efficient and cost-effective utilization of resources rather than simply allocating more money to the system and stated that an independent legal aid authority had been considered in the past; that the interference was more imagined than real (since the Director of Legal Aid was required to consider applications in accordance with statutory criteria and the Legal Aid Ordinance ensured that the Director operated independently); that there was cost implication in establishing such an authority; and that independence could be secured by civil servants having security of tenure. The Secretary reiterated that the Government attached importance to improving the quality and availability of legal aid services in that though it had often been regarded as a form of welfare service, legal aid was first and foremost an integral part of the justice system, for it was legal aid which translated a theoretical right to justice into a practical reality. "Legal Aid thus lies at the heart of the justice system," he said, but the Government must "strike a balance between providing publicly funded legal aid and related services to meet genuine cases of need and excessive public expenditure which may encourage exorbitant and nugatory litigation".⁷¹

The Legislative Council again debated on 21 July 1993 the motion "That since legal aid is necessary to uphold the right to equality before the law, this council urges the Government to set up an independent statutory authority to be responsible for the administration of legal aid so as to ensure its independence, enhance the perception of fairness and increase its accountability to the public". The Hon Simon Ip, introducing the motion, expressed disappointment that the Consultation Paper on Legal Aid fudged the issue of independence. He contended that the Government's worry over disruption was more imaginary than real on the basis of a survey he did of professional officers of the Legal Aid Department. He concluded that the protection of the rule of law required that legal aid services be independent of the Government and outside the civil service.⁷²

68 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)*, pp 3935-3937.

69 *Ibid.*, pp 3941-3944.

70 *Ibid.*, pp 3940-3941.

71 *Ibid.*, pp 3952-3955.

72 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1992/93)* pp 4921-4926.

The Hon Martin Lee criticized the Government's approach of using administrative considerations to take precedence over upholding the principle of equality before the law, and related to the circumstances of the termination of the service of Mr. Patrick Moss, a former Director of Legal Aid, and suggested that Mr. Moss had on occasion been subject to indication that the Legal Aid Department should take into consideration public opinion in approving legal aid applications, which was interpreted as meaning that the public did not wish to see legal aid granted to the boat people.⁷³ The Hon Anna Wu cautioned that adopting half-hearted measures would only lead to "a false sense of security".⁷⁴ Other members stressed the necessity of independence to secure the rule of law.⁷⁵

The Chief Secretary in reply referred to the previous arguments put forward by the Government, citing the absence of interference by the Administration upon the Legal Aid Department, the significant costs and disruption to service provision of the disestablishment of the Department, the many examples of legally aided persons successfully challenging the Government in court, and the satisfaction of legally aided persons with having legal aid counsel of the Department handling their cases. Having summed up the Government's position that the system in place was efficiently administered and independent in place with no outside interference, the Chief Secretary posed the question as one of whether "we should pay for the price of disestablishing the Legal Aid Department for enhancing, in terms of perception, the independence of legal aid administration as advocated by Mr Simon IP and some other members" and noted that two members of the Legislative Council favoured evolutionary changes to minimize disruption and two other members accepted the setting up of an independent legal aid authority with the Legal Aid Department as its executive arm.⁷⁶ The Hon Simon Ip wound up the debate by criticizing the Government for relying on bureaucratic reasons against making legal aid services truly independent.⁷⁷

FURTHER DEVELOPMENTS

The Finance Committee of the Legislative Council approved in June 1995 a one-off grant of HK\$27 million to the Supplementary Legal Aid Scheme to enable it to extend its scope to cover claims for damages arising from medical and dental negligence and professional negligence of lawyers and to increase the financial eligibility limit from HK\$280,000 to HK\$400,000. The Legal Aid Department indicated in June 1995 that the Scheme had a balance of \$4.9 million after ten years of operation and handling on average 105 applications every year with about 68% of the applications being successful in obtaining assistance under the Scheme.⁷⁸

73 Ibid, pp 4926-4928.

74 Ibid, pp 4940-4942.

75 On the other hand, the Hon Tam Yiu Chung argued that making the Legal Aid Department independent of the Government was a change in the judicial system and must be thoroughly studied and widely consulted and placed on the agenda of the Joint Liaison Group: Ibid, pp 4928-4929.

76 Ibid, pp 4942-4945.

77 Ibid, pp 4945-4946.

78 *Item for Finance Committee* (FCR (95-96) 29) (Legal Aid Department, 23 June 1995).

The exception of assault and battery cases in the District Court from legal aid provision was removed in 1995⁷⁹. On the same occasion, legal aid was extended to applications before the Mental Health Review Tribunal and to applications to the Motor Insurance Bureau for compensation in hit and run accidents.⁸⁰ The financial eligibility limits for the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme, and the rates of contribution of aided persons were also raised.⁸¹

ESTABLISHING THE LEGAL AID SERVICES COUNCIL

A Legal Aid Services Council Bill was made into law by the Legislative Council in 1996.⁸² The Chairman of the Bills Committee, the Hon Miriam Lau, noted that the Bar Association and the Law Society maintained that legal aid services should be made independent and opposed the establishment of the proposed Legal Aid Services Council, thinking that the Council would be a cosmetic gesture creating an additional level of bureaucracy, and diverting accountability for legal aid from the Legal Aid Department to a body which was not in a position to be so accountable because of restraint on its powers. The legal profession also opposed the inclusion of the Duty Lawyer Service within the purview of the Legal Aid Services Council.⁸³ The Hon Margaret Ng pointed out that responsibility was not the same as power; the Director of Legal Aid and every single member of staff of that Department remained directly responsible to the Administration. They were hired and fired, promoted or demoted or transferred by the Administration. The budget was controlled by the Administration. How the Department worked with other government departments was a matter within the Administration.⁸⁴

The Chief Secretary said during the passage of the Bill that the establishment of an independent legal aid authority could take a considerable period of time. The disestablishment of the Legal Aid Department was said to involve protracted consultation with the staff of the Department (who had not indicated clear support for the proposal) and the drawing up of new terms and conditions of service for the new authority. Therefore a two stage approach was adopted: firstly by establishing the Legal Aid Services Council; and secondly by asking the Legal Aid Services Council to examine and advise on the proposal for an independent authority.⁸⁵

The Legal Aid Services Council became legally operational in September 1996. It is charged with the responsibility of overseeing the administration of the legal aid services provided by the Legal Aid Department. The Department is accountable to it for the provision of such services. It is also the Chief Executive's advisory body on government policy concerning publicly funded legal aid services provided by the Department.⁸⁶

79 I.e. the Legal Aid (Amendment) Ordinance 1995 (No 43 of 1995) section 3, coming into operation on 28 July 1995.

80 Ibid.

81 Ibid.

82 I.e. the Legal Aid Services Council Ordinance (No 17 of 1996) (now assigned Cap. 489), coming into operation on 30 August 1996.

83 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1995/96)*, 1 May 1996, pp 84-87.

84 Ibid, pp 89-91.

85 Ibid, pp 97-99.

86 Legal Aid Services Council Ordinance (Cap. 489) section 4(1), (5).

PERIODIC REVIEWS ON LEGAL AID

The Reconvened Working Group on Legal Aid Policy Review's report, as accepted by the Executive Council, introduced periodic revision of the financial eligibility limit for the grant of legal aid. The limit itself would be revised every two years to take account of inflation, change in litigation costs and other relevant factors,⁸⁷ and the overall approach towards assessing the financial eligibility of applicants would be subject to review every five years. The scale of contribution payable by the aided persons would be subject to review every two years.

Upon the completion of a review of the financial eligibility limits and rates of contribution, the Government introduced into the Legislative Council the Legal Aid (Amendment) Bill 1996 to raise the financial eligibility limits for the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme, and the rates of contribution of aided persons to take account of inflation. The amendments were enacted and came into operation on 1 May 1997.⁸⁸

LEGAL AID POLICY REVIEW 1997

In early 1997, a working group was set up under the Administration Wing of the Chief Secretary's Office (which retained the role of the policy branch for major policies and accompanying legislative proposals and resource bids) to conduct a legal aid policy review.⁸⁹ A review paper containing its findings and recommendations was published in December 1997 for public consultation. On the funding of legal aid, the working group was of the view that the current practice of not imposing any ceiling on the legal aid services spending should be maintained. Rather further ways and means to enhance cost control and case progress monitoring should be explored with the Legal Aid Services Council, and another interdepartmental working group was set up to look into this matter.⁹⁰

The Administration Wing finalized in September 1999 the recommendations that followed from the consultation on the review paper. It was recommended that the approach for assessing financial capacity and the financial eligibility limits for legal aid should be maintained but the method for assessing disposable income be changed, replacing the rates of Comprehensive Social Security Assistance with the 35-percentile

87 The Working Group on Legal Aid Policy Review had earlier identified as relevant factors changes in income levels, the percentage of population eligible for legal aid, and financial position of the Government: Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraphs 7, 8. As to how the reviews were carried out, see Chapter 8 below.

88 I.e. the Legal Aid (Amendment) Ordinance 1997 (No 8 of 1997), coming into operation on 1 May 1997.

89 The working group was an interdepartmental group and had representatives from the Administration Wing of the Chief Secretary for Administration's Office, the Legal Aid Department, the Department of Justice and the Finance Bureau. The Legal Aid Services Council, which had been in operation since September 1996, did not participate and was not consulted on the working group's proposals before publication.

90 Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997).

household expenditure as revealed by the five-yearly household expenditure survey as the measure for the deductible allowance. Further, the review cycle of the financial limits of eligibility should be an annual one to take account of inflation, coupled with a biennial review to take account of changes in litigation costs. Persons required to attend coroner's inquests in cases of public concern such as death in official custody, or where attendance was necessary for the conduct of civil claims should be given legal assistance from public funding. The Director of Legal Aid should be given the power not to discharge a legal aid certificate in a case where the aided person's financial resources became greater than the statutory limits of financial eligibility after he had been granted legal aid, if he considered it in the interest of justice to do so. Finally, the contribution scales should be rationalized. The recommendations were implemented by amendments to the Legal Aid Ordinance;⁹¹ the Legal Aid Regulations;⁹² the Legal Aid (Assessment of Resources and Contribution) Regulations;⁹³ and by administrative arrangements.

LEGAL AID SERVICES COUNCIL'S STUDY ON ESTABLISHMENT OF AN INDEPENDENT LEGAL AID AUTHORITY

The Legal Aid Services Council began work in December 1996 to study the feasibility and desirability of establishing an independent legal aid authority, and commissioned consultants to study all publicly funded legal aid services provided by both the Legal Aid Department and the Duty Lawyer Service with reference to those offered in other common law jurisdictions. The consultants submitted their report in March 1998, which found that institutionally, potential existed for decision-making in the Legal Aid Department to lack independence from the Administration; and that non-institutional mechanisms, such as statutory criteria for the granting of legal aid, could not address fully the issues concerning independence. The consultants also found that the views of community groups, clients of the Legal Aid Department and the general public on independence of legal aid administration were mixed, with some more concerned about quality of service. A Working Party of the Council took account of the consultants' report and prepared a set of recommendations which were subsequently adopted by the Council in August 1998. The recommendations, which favoured the setting up of an independent statutory legal aid authority in stages under the current mode of financing (i.e. without any cap on legal aid spending) and the disestablishment of the Legal Aid Department, were submitted to the Chief Executive in September 1998.⁹⁴ The Administration rejected the proposal in October 1999. The Council, though disappointed with the Administration's response, resolved to evaluate its role under the existing institutional framework and to explore proposals, including amendments to the Legal Aid Services Council Ordinance, to enhance its competence in discharging its responsibilities.⁹⁵ On the other hand, by virtue of section 4(5) of the Legal Aid Services

91 I.e. the Legal Aid (Amendment) Ordinance 2000 (No 26 of 2000), coming into operation on 3 July 2000.

92 I.e. the Legal Aid (Amendment) Regulations 2000 (LN 147/2000).

93 I.e. the Legal Aid (Assessment of Resources and Contribution) (Amendment) Regulations 2000 (LN 148/2000).

94 Legal Aid Services Council, *Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority* (September 1998).

95 See Legal Aid Services Council, *Annual Report 2000-2001*, pp 16-17 and the Statute Law (Miscellaneous Provisions) Bill 2005, clauses 27-29.

Council Ordinance, the Council would continue to review the need for an independent legal aid authority and re-activate the issue at an opportune time.

MEANS TESTING AND AUDITING BY LEGAL AID DEPARTMENT

The Legal Aid Department took over in September 1997 from the Social Welfare Department the responsibility of conducting means testing of all legal aid applicants. It also set up an internal audit team in the following financial year not only to continue the same control measure that the Social Welfare Department had over means testing but also to broaden the team's terms of reference to include accounts auditing, and systems auditing (such as performance pledges, assigning-out of cases, monitoring and progress reporting and legal aid payments), and development of new systems.⁹⁶

YEAR 2000 AND BEYOND

The Hong Kong Bar Association set up a Bar Free Legal Service Scheme in June 2000 to provide free legal assistance by barristers in cases where legal aid was not available or where the litigant was unable to afford legal assistance and the case was considered to be one where assistance should be given.

A member of the Legislative Council proposed the introduction of a Bill in 2000 for the amendment of the Legal Aid Ordinance to empower the Director of Legal Aid to grant legal aid to a person involved in litigation (including appeals) pertaining to the provisions of the Employment Ordinance⁹⁷ or cases concerning employment contracts, notwithstanding that the financial capacity of the applicant exceeded the eligibility limits for the ordinary legal aid scheme. On 29 June 2000, the President of the Legislative Council ruled that the member might not introduce the proposed Bill under the Rules and Procedures of the Legislative Council because it related to government expenditure and government policies.⁹⁸

The Hon Audrey Eu moved a motion debate in the Legislative Council on the rule of law on 7 November 2001.⁹⁹ She highlighted the difficulties in obtaining legal services of one-man limited companies in recovering commercial debts and partners in partnership disputes. According to the Judiciary Administrator, the number of cases in the High Court and the District Court that did not have any legal representation in 2000 stood at 18,000 and 15,000 respectively. The Hon Audrey Eu called for a review of legal aid

96 Legal Aid Services Council, *Annual Report 2000-2001*, p 45.

97 I.e. Cap. 57, Laws of Hong Kong.

98 *President's Ruling on Hon CHAN Kwok-keung's proposed Legal Aid (Amendment) Bill 2000* (20 June 2000).

99 The motion was in the following terms: "That, in order to maintain the competitive edge of Hong Kong in the rule of law, this Council urges the Government to: (a) promote and implement reforms in legal education;(b) comprehensively review the demand for legal and related services; (c) expand the scope of legal aid services; (d) set up community legal service centres; (e) promote awareness and knowledge of the law in the community; and (f) promote studies on the legal systems of China and Hong Kong, and organize more international conferences on this subject."

services and the Free Legal Advice Scheme of the Duty Lawyer Service, and a survey on the society's needs for legal and other related services, particularly legal advice services through a community legal service centre¹⁰⁰. The motion was passed by a majority of the Legislative Council.¹⁰¹

In November 2001, the Chief Justice's Working Party on Civil Justice Reform published its Interim Report on Civil Justice Reform which included a proposal to enact legislation to give the Director of Legal Aid the power to make resort to alternative dispute resolution a condition of granting legal aid in appropriate types of cases.¹⁰² The Interim Report illustrated the proposal by pointing to the experience in England where mediation was said to be often a condition of legal aid.¹⁰³ The proposal received a "mixed response".¹⁰⁴

The Panel on Administration of Justice and Legal Services of the Legislative Council appointed in December 2001 a working group to identify issues relating to the provision of legal aid services for the purpose of review by the Government. After receiving views from various parties at a public hearing in April 2002 on the working group's preliminary list of issues, the panel advised the Government in August 2002 that it should conduct a review on a list of issues including the following: (a) the scope of legal aid; (b) the financial eligibility limits for legal aid schemes; (c) the discretion of the Director of Legal Aid to waive the means test; (d) the assessment of financial resources; (e) costs and contributions; (f) legal aid for alternative schemes; and (g) legal aid in criminal proceedings.¹⁰⁵ The Government responded to the matters stated on the list in June and October 2003.¹⁰⁶

100 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 2001/02)* pp 1184-1190. Other members of the Legislative Council also voiced complaints over the operation of the Director of Legal Aid's first charge and the exclusion of defamation actions and immigration appeals from the scope of legal aid under the Legal Aid Ordinance (Cap 91).

101 *Ibid*, pp 1268-1269.

102 Chief Justice's Working Party on Civil Justice Reform, *Interim Report on Civil Justice Reform* (November 2001) paragraphs 652-654 and proposal 66.

103 See Family Law Act 1996 [Eng] section 29.

104 See Chief Justice's Working Party on Civil Justice Reform, *Final Report on Civil Justice Reform* (March 2004) section 29.2 (p 428 et seq). It should be noted that while on the one hand, the Legal Aid Department and both the Hong Kong Bar Association and the Law Society of Hong Kong opposed the proposal, on the other hand, groups in Hong Kong associated with mediation and arbitration supported it (*Ibid*, footnote 635).

105 See Legal Aid Services Council, *Annual Report 2002-2003*, p 26; Legislative Council Secretariat, *LegCo Panel on Administration of Justice and Legal Services: Review of provision of legal aid services* (10 July 2002) (LC Paper No CB(2) 2543/01-02 (02)). See Chapter 5 below.

106 See Legal Aid Services Council, *Annual Report 2003-2004*, p 28; Administration Wing, Chief Secretary for Administration's Office, *LegCo Panel on Administration of Justice and Legal Services: Provision of Legal Aid Services – Administration's Response on the List of Issues for Review* (June 2003) (LC Paper No CB(2) 2581/02-03 (03)) (which dealt with matters not covered by the annual and biennial review on the financial eligibility limits for legal aid and the five-yearly review on the criteria to assess financial eligibility for legal aid); and Director of Administration, *Provision of Legal Aid Services: The Administration's Response to Issues Raised by the AJLS Panel at its Meeting on 23 June and 29 July 2003* (20 October 2003) (LC Paper No CB(2) 159/03-04/(03)). See Chapter 5 below.

AID TO OBTAIN COUNSEL'S CERTIFICATE FOR LEGAL AID REVIEW COMMITTEE

In April 2002, the Legal Aid Services Council began administering a scheme by which legal aid applicants wishing to appeal against refusal of legal aid for a proposed appeal to the Court of Final Appeal might obtain free assistance of lawyers in the preparation of a counsel's certificate on the prospects of success of the proposed appeal for the consideration of the Legal Aid Review Committee, a requirement imposed by section 26A of the Legal Aid Ordinance in respect of such appeals.¹⁰⁷

REVIEW OF FINANCIAL ELIGIBILITY CRITERIA

The Administration Wing of the Chief Secretary for Administration's Office completed a five-yearly review of the criteria used to assess the financial eligibility of legal aid applicants in June 2003.¹⁰⁸ It was of the view that the current approach in the operation of the means test should be maintained subject to some improvements in the manner of calculating the disposable income and the disposable capital of the applicant. Regarding the Supplementary Legal Aid Scheme, it found no justification for an increase of the financial eligibility limit or for extension of its scope, while it was minded to propose reduction of the contribution rate.

ALTERNATIVE DISPUTE RESOLUTION

In March 2004, the Chief Justice's Working Party on Civil Justice Reform published its Final Report on Civil Justice Reform. The Working Party explained in the Final Report that its proposal for empowering the Director of Legal Aid to make alternative dispute resolution a condition for legal aid might have been formulated in "an unfortunate way"; the proposal "is more accurately seen as one for legal aid funding to be made available for mediation both as a likely means of achieving a satisfactory resolution of the parties' dispute and of saving public resources".¹⁰⁹ Having rejected both the general arguments against extending alternative dispute resolution by mandatory means and the specific argument against the said proposal (namely that making participation in alternative dispute resolution a condition of granting legal aid was discriminatory and not consistent with access to justice), the Working Party indicated that the said proposal should be adopted in principle, subject to the Government being satisfied that the proposal "would be likely to present an appropriate and more cost-effective solution in funding legal aid cases and saving public resources".¹¹⁰ It therefore recommended that: "The Legal Aid

107 See Legal Aid Services Council, *Annual Report 2001-2002*, pp 26-28.

108 See Administration Wing of the Chief Secretary for Administration's Office, *Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants* (June 2003) (LC Paper No CB(2) 2581/02-03/(02)). The Administration received and responded to comments of its proposals from the Legal Aid Services Council and the Law Society of Hong Kong in the course of 2003-2004.

109 Chief Justice's Working Party on Civil Justice Reform, *Final Report on Civil Justice Reform* (March 2004) section 29.5(d) (p 445).

110 *Ibid*, section 29.5(d) (pp 445-447).

Department should have power in suitable cases, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of the scheme, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed.”¹¹¹

Subsequently, the Legal Aid Department introduced a pilot scheme on mediation for matrimonial cases in March 2005. Legally aided persons would be invited by the assigned solicitor to make use of mediation on a voluntary basis. Those legally aided persons who indicated their willingness would then be referred to the Judiciary’s Mediation Co-ordinator’s Office which would brief the parties in the proceedings on mediation and assess the suitability of their cases for mediation, having regard to the nature of the disputes. A mediator on a panel of mediators maintained by the Legal Aid Department would be assigned (usually following the choice of the legally aided person and the other party to the proceedings) to conduct mediation at a fixed rate per hour up to a specified number of hours. If the mediation had to be extended beyond the specified number of hours, approval must be obtained from the Department.¹¹² The scheme was to last for one year and the evaluation of the cases it covered would be complete in 2007.

FURTHER DEVELOPMENTS

On the recommendation of the Administration, the Legislative Council resolved on 17 March 2004 to reduce the financial eligibility limits for the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme to take account of the deflationary trend in economic indicators between July 2000 and July 2003.¹¹³

Legal aid was extended in July 2004 to prescribed prisoners under the Criminal Procedure (Amendment) Ordinance 2004 to assist them in proceedings before the Court of First Instance for the determination of the minimum sentence they had to serve for the criminal offences of which they were convicted.¹¹⁴

With the assistance of a consultative committee comprising representatives from the Judiciary, the Legal Aid Department, the legal professional bodies, academics and community bodies, the Department of Justice commissioned in late 2004 a three-year consultancy study on the demand for and supply of legal and related services in Hong

111 Ibid, recommendation 141 (p R37). Nevertheless, the Legal Aid Services Council made it known of its view that mediation should be voluntary in that a legally aided person should be given an option to decide whether or not to proceed with mediation; see Legal Aid Services Council, *Annual Report 2003-2004*, p 22.

112 Administration Wing, Chief Secretary for Administration’s Office, *Pilot Scheme on Mediation of Legally Aided Matrimonial Cases* (December 2004) (LC Paper No CB(2) 507/04-05(01)); *Examination of Estimates of Expenditure 2005-06: Controlling Officer’s Reply to Initial Written Question* (CSO023).

113 I.e. resolution of the Legislative Council on 13 March 2004 (LN 45/2004), coming into operation on 12 July 2004.

114 I.e. the Criminal Procedure (Amendment) Ordinance 2004 (No 22 of 2004), amending the Legal Aid in Criminal Cases Rules (Cap 221 sub leg D), coming into operation on 16 July 2004.

Kong, which was expected to include two separate surveys on the population of Hong Kong, one on the aspect of demand for legal and related services and the other on the aspect of supply for the same.¹¹⁵

In May 2005, the China Information Technology and Law Centre of the University of Hong Kong unveiled the Community Legal Information Centre, a website that it developed with funding from the Department of Justice to provide bilingual legal information to the public, particularly on topics which would have a most direct bearing on their daily lives so that they might have a basic understanding of the relevant law before seeking advice from lawyers, and on how and where to seek free or subsidized legal assistance.¹¹⁶

In May 2005, the Director of Legal Aid commenced an application for judicial review and applied for an interim injunction to restrain the Commissioner of Police from executing a search warrant of the offices of the Legal Aid Department, Criminal Division, purportedly in furtherance of an investigation into a complaint of an offence of attempting to pervert the course of justice, on the grounds that the search warrant lacked precision and that, unless the police were able to demonstrate that there was in the possession of the Legal Aid Department material provided by the alleged offender to the Department in furtherance of his alleged offence, the purported search, if executed, would violate the legal professional privilege that was and is a fundamental right of the litigant.¹¹⁷ The Secretary for Justice acted on behalf of the Commissioner of Police. In July 2005, the Director of Legal Aid agreed, in accordance with independent counsel's advice, to withdraw the application for judicial review upon the Commissioner's undertaking to seek the withdrawal of the search warrant.¹¹⁸

In July 2005, amendments to the Legal Aid Services Council Ordinance were enacted to empower the Legal Aid Services Council to, inter alia, do all things necessary to enable it to carry out its statutory functions and appoint staff.¹¹⁹

The Sub-committee on Conditional Fees of the Law Reform Commission of Hong Kong released in September 2005 a consultation paper recommending that the current prohibition against the use of conditional fee arrangements by legal practitioners should be lifted in respect of certain types of civil litigation.¹²⁰ It also recommended the features

115 See Department of Justice, *Consultancy Study on the Demand for and Supply of Legal and Related Services* (March 2004) (LC Paper No CB(2) 1644/03-04(02)); and Department of Justice, *Update in respect of the Consultancy Study on the Demand for and Supply of Legal and Related Services in Hong Kong* (July 2004) (LC Paper No CB(2) 3139/03-04 (01)).

116 The website is at: <http://www.hkcllc.org/>.

117 I.e. HCAL 42/2005. Leave to apply for judicial review was granted.

118 Press Release, *Director of Legal Aid and Commissioner of Police settle differences* (28 July 2005).

119 Statute Law (Miscellaneous Provisions) Ordinance 2005 (10 of 2005) sections 32-34, commencing on 8 July 2005.

120 The types of litigation include personal injury cases, employees' compensation cases, professional negligence cases, insolvency cases, product liability cases, probate cases involving an estate, commercial cases principally claiming damages, and family cases except where the welfare of children is involved.

of conditional fee arrangements and the accompanying legislative framework suitable for Hong Kong,¹²¹ expressing a belief that “if properly formulated and regulated, conditional fee arrangements can play a pivotal role in widening access to justice”.¹²² The Sub-committee on the other hand observed that the effectiveness of a conditional fee regime in Hong Kong would depend on the availability of after-the-event insurance cover at affordable premium to overcome the indemnity rule on costs, under which if a claimant was unsuccessful in establishing his claim, he would face liability to pay his opponent’s costs. The Government was urged to conduct an in-depth study of the commercial viability of after-the-event insurance in Hong Kong.¹²³ In the light of the uncertain viability of a proposed conditional fee regime in Hong Kong, the Sub-committee also recommended two additional options to promote access to justice, namely gradual expansion of the Supplementary Legal Aid Scheme; and the establishment of a privately and independently administered self-financing litigation fund to run alongside the scheme.¹²⁴ The Legal Aid Services Council, responding to the consultation paper, noted that conditional fee arrangements were contrary to common law and put lawyers in a position of conflict between the interest of his client and his own financial interest. The consultation paper was deficient in not properly addressing the principle against conflict of interest and also the clash between that principle and the real basis for conditional fee arrangements, namely expediency. The Council questioned the necessity of conditional fee arrangements and considered that they were fraught with difficulty, uncertainty and risk and were not in the public interest of Hong Kong. It further observed that legalizing conditional fee arrangements would cause “the easiest and more lucrative cases being creamed off by the private sector thereby leaving the Legal Aid Department and the public purse with the more problematic cases and their costs”. It would upset the balance that the Supplementary Legal Aid Scheme currently relied on not only to enable deployment of costs generated from easier cases to assist other deserving and difficult cases, but also to maintain its continued viability. On the other hand, by widening the scope of the Scheme, the purpose of widening access to justice would be achieved without undermining fundamental principles of the rule of law.

In February 2006, amendments to the Legal Aid (Assessment of Resources and Contributions) Regulations came into effect. These amendments implemented part of the recommendations of the second five-yearly review of the overall approach and criteria for assessing the financial eligibility of legal aid applicants.¹²⁵ In the calculation of

121 The Sub-committee considered that only four types of conditional fee arrangements should be allowed under the proposed conditional fee regime, namely, (i) no win, no fee; if win, success fees; (ii) no win, no fee; if win, normal fees; (iii) no win, reduced fee; if win, normal fee; and (iv) no win, reduced fee; if win, success fees: Law Reform Commission of Hong Kong, Sub-committee on Conditional Fees, *Consultation Paper: Conditional Fees* (September 2005) paragraphs 7.39-7.41, recommendation 10. “Success fee” refer to the agreed flat amount or percentage “uplift” on the usual fee that a lawyer would receive in addition to his usual fee in the event of success: *Ibid*, Preface, paragraph 7.

122 *Ibid*, paragraph 7.54.

123 *Ibid*, paragraphs 7.42-7.43, recommendation 11.

124 See Chapter 9 below.

125 Other recommendations of the second five-yearly review such as the taking into account of the loss or reduction of future income in the calculation of a legal aid applicant’s disposable income, did not require legislative amendment, and were put into practice through administrative measures.

disposable income, account can now be made of the loss or reduction of future income and the categories of deductible item have been expanded to include expenditure in respect of the care of dependents and maintenance payments. Insurance monies received in respect of personal injuries may also be disregarded under specified circumstances. The contribution rate of the Supplementary Legal Aid Scheme is also reduced from 12% to 10% of the award of damages in the case of a claim proceeding to judgment.¹²⁶ In June 2006, the Legal Aid (Charge on Property) (Rate of Interest) Regulation came into effect to provide for a mechanism for the adoption of an interest rate with due regard to market movements for the interest accrued on the Director of Legal Aid's first charge on any property recovered or preserved on behalf of an aided person.¹²⁷

In 2006, the Administration will submit to the Legislative Council a proposed resolution to raise the financial eligibility limits for the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme by 1.6% to take account of the change in inflation between July 2003 and July 2005.¹²⁸

126 The rate of contribution in the case of a claim settled prior to delivery of a brief for attendance at trial to counsel was set at 6%; see the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulations 2005 (LN 224/2005), amending the Legal Aid (Assessment of Resources and Contributions) Regulations, and coming into operation on 20 February 2006.

127 I.e. the Legal Aid (Charge of Property) (Rate of Interest) Regulation (LN 225/2005), coming into operation on 1 June 2006.

128 See Letter of the Director of Administration to the Clerk to the Panel on Administration of Justice and Legal Services dated 17 March 2006 (LC Paper CB(2)1471/05-06 (01)).