

## CHAPTER 4

# The Role of the Government

Publicly funded legal aid services are formulated, legislated and implemented by different parts of the Government in the broad sense in the 1950s and 1960s. The British Colonial Administration introduced the legal aid scheme in Hong Kong as part of its overall policy of social justice in those two decades. Laws and regulations were made by or under delegated authority from the Legislative Council to put in place the scheme. Legal aid services were at first provided under a sub-department of the Judiciary, before the subsequent establishment of the Legal Aid Department. In the 45 years that follow, the legal aid scheme has developed into an institution within the legal system essential to the maintenance of the Rule of Law by ensuring equal access to justice.<sup>1</sup> Nonetheless, the Government now maintains and develops the institution of legal aid in Hong Kong through the performance of the following roles:

- (a) Policy-making
- (b) Service-providing
- (c) Primary-funding

This Chapter attempts to present each of these three roles in a systematic manner and to discuss their inter-relationships, and also the relationship of the Government with other non-governmental providers of legal aid when it discharges each of these three responsibilities.

“Government” is used in the term’s broad sense in this Chapter and refers to all three branches of government: The Executive Authorities, or the Administration;<sup>2</sup> the Legislature; and the Judiciary.

---

1 See Chapter 2.

2 The Government of the HKSAR constitutes the Executive Authorities of the HKSAR and is led by its head, the Chief Executive of the HKSAR: Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990, (1990) 29 ILM 1511) Articles 59, 60.

## POLICY-MAKING

Article 62 of the Basic Law of the HKSAR provides that the Administration exercises, inter alia, the function of formulating policies.<sup>3</sup> The decision on government policies rests with the Chief Executive of the HKSAR, who before making important policy decisions, must consult the Executive Council which assists him in policy-making.<sup>4</sup>

Policies are formulated within a policy bureau of the Administration with, where appropriate, consultation of interested groups.<sup>5</sup> Legal aid policy is the responsibility of the Chief Secretary for Administration, supported by the Administration Wing of the Chief Secretary for Administration's Office, headed by the Director of Administration.<sup>6</sup> The Administration Wing accordingly oversees the Government's policy-making in respect of legal aid services and accompanying legislative proposals and resource bids.<sup>7</sup>

As legal aid services is part of the administration of justice and requires resources allocation, important policy initiatives in this regard have often been committed to multi-party working groups or working parties involving representatives from the Department of Justice, the Legal Aid Department and the Finance Branch/Bureau. Over the years there have been four such working parties, reporting in 1974 (in respect of extending legal aid to all criminal cases in the District Court), in 1982 (in respect of the Supplementary Legal Aid Scheme), in 1986 (in respect of the administration of legal aid), in 1994 (in respect of legal aid policy review, especially governance issues), and in 1997 (in respect of legal aid policy review, especially periodic review of eligibility criteria). The last two reports were finalized after consulting the public and interested parties by the release of a consultation paper.

The participation of the Department of Justice is desirable since its portfolio encompasses both the proper administration of justice and the development of legal services in Hong Kong. Government lawyers are "users" of the legal system and may contribute to the assessment of the implications of proposals to the working of the system of the administration of justice. Apart from the "users" perspective, the department is in a position to notice and assess the implications of proposed changes to the system for the administration of justice and to the regulation of the legal services sector upon the

3 Ibid, Article 62(1).

4 Ibid, Articles 48(4), 54, 56. The Chief Executive of the HKSAR must also consult the Executive Council before Bills are introduced to the Legislative Council or subordinate legislations are made.

5 See Scott, Ian, *Public Administration in Hong Kong* (Singapore: Marshall Cavendish, 2005) pp 201-207.

6 The Administration Wing has a broad portfolio covering co-ordination of Legislative Council business, legal and judicial affairs, legal aid services, liaison with the Office of the Ombudsman, liaison with and overseeing the handling of complaints against the Independent Commission Against Corruption, policy matters regarding flags and emblems, policy matters concerning sustainable development, government regulations, protocol matters, management of the consular corps, honour and awards, and the Government Records Service. The Assistant Director of Administration responsible for the part of the portfolio on legal aid services is also responsible for legal and judicial affairs, mutual legal assistance in civil and commercial matters, and applications for "authorized person" status under the Evidence Ordinance (Cap 8).

7 See Administration Wing, Chief Secretary's Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.16.

demand for legal aid and the supply of legal aid services, and to advise the relevant policy-makers accordingly.<sup>8</sup>

Every policy change could have a cost implication. The Finance Bureau's participation is therefore desirable to enable the funding issues to be properly calculated and evaluated at an early stage.

The Administration Wing conducts reviews and makes policy determinations on a comparatively micro-level pursuant to established frameworks or arrangements, such as the review of financial eligibility criteria for legal aid<sup>9</sup> and the fees payable to lawyers providing criminal legal aid,<sup>10</sup> before proposing to the relevant rule-making body for adoption and implementation.

The Legal Aid Services Council, set up in September 1996, is the Chief Executive's advisory body on the Administration's policy on publicly funded legal aid services.<sup>11</sup> The Administration Wing is obliged to obtain input from the Council on its policy initiatives. Consultation and discussion of legal aid services related policies from time to time is also conducted by the Administration Wing with the Legislative Council, especially its Panel on Administration of Justice and Legal Services, the Judiciary, the Duty Lawyer Service, and the two professional bodies of the legal profession, namely the Hong Kong Bar Association and the Law Society of Hong Kong. Timely and frank consultation and discussion of matters relevant to likely and coming policy formulation enables the Administration to seek and build consensus and co-operation in policies, particularly those that require implementation by the making of legislation or amendment of rules of court by a separate institution.<sup>12</sup> In addition, maintaining good communication with these

---

8 See, for example, Cape, Ed and Moorehead, Richard, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, UK, 2005) (<http://www.lsrc.org.uk/publications.htm>), where the authors examined the system in England and Wales for legally aided criminal defence and came to the conclusion that it was government's changes to the criminal justice system that caused the increase in the cost of criminal legal aid there. The authors noted the abolition of the means test for criminal legal aid under the Access to Justice Act 1999 [Eng] might lead to an increase in legal aid applications and grants. According to Zander, the British Government has now estimated that the abolition of the means test resulted in extra net costs between £24 million and £62 million: Zander, Michael, *Radical reform of legal aid?* (2005) 155 *New Law Journal* 1065.

9 See, for example, Administration Wing, Chief Secretary for Administration's Office, *Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants* (December 2004) (LC Paper No CB(2) 367/04-05 (01)). The results of a review of financial eligibility criteria for legal aid are given effect by the Administration moving a resolution of the Legislative Council under the Legal Aid Ordinance (Cap 91) section 7, if any adjustment to the criteria is to be made.

10 The Administration Wing undertakes, subject to restrictions, the review of criminal legal aid fees under the delegated authority of the Finance Committee of the Legislative Council, which is vested with the substantive authority of approving the financial provision for the criminal legal aid fees. The results of a review are implemented by amendments made by the Criminal Procedure Rules Committee pursuant to the Criminal Procedure Ordinance (Cap 221) section 9A.

11 See the Legal Aid Services Council Ordinance (Cap. 489) section 4(5).

12 See Scott, Ian, *Public Administration in Hong Kong* (Singapore: Marshall Cavendish, 2005) p 217.

stakeholders enables a positive exchange of policy ideas to flow into the policy-making process, a matter of some importance in Hong Kong's disarticulated system.<sup>13</sup>

Initiatives for changes in policy do not necessarily originate from within the Administration. It is often the case that other institutions of Government, having conducted their own studies, propose or counter-propose policies for consideration by the Administration. For example, the Panel on Administration of Justice and Legal Services of the Legislative Council provided the Administration with a list of issues in July 2002 urging it to conduct a comprehensive review on the objective, adequacy and effectiveness of the existing legal aid regime.<sup>14</sup> The Chief Justice's Working Party on Civil Justice Reform proposed in November 2001 that the Director of Legal Aid be empowered to make resort to alternative dispute resolution a condition for granting legal aid.<sup>15</sup> The process involved in this respect is one of interaction.

The Administration's responsibility of policy formulation is, as far as the policy is required to be implemented by way of legislation, subject to the scrutiny of the Legislative Council in the legislative process. Every piece of draft legislation is studied and queried, usually in a bills committee and legislative councillors sometimes counter-propose changes as amendments to the draft. The Legislative Council may confer power to make subsidiary legislations, such as rules and regulations, on a designated person or officer, and legislations made under such delegated authority must be laid before it after publication in the Government Gazette. The Legislative Council may by resolution amend any subsidiary legislation in a manner that is consistent with the power to make it.<sup>16</sup> Individual members of the Legislative Council question and debate on legal aid policy (whether generally or on specific aspects) from time to time as an issue concerning public interest. A committee of the Legislative Council known as the Panel on Administration of Justice and Legal Services shadows the Administration's policy initiatives.

The implementation of policy by way of legislation is also checked by the courts, which have the final word in the interpretation of such legislation, whether primary or subsidiary, by reference to established interpretative principles.

## SERVICE-PROVIDING

Article 62 of the Basic Law of the HKSAR provides that the Administration exercises, *inter alia*, the function of implementing policies and of conducting administrative affairs.<sup>17</sup>

---

13 See Scott, Ian, *Public Administration in Hong Kong* (Singapore: Marshall Cavendish, 2005) p 218. Scott considered that Hong Kong's disarticulated system (which was formally centralized but in reality diffuse) had the effect of compressing issues of values, formulation and implementation into a single event rather than a series of distinct stages: *Ibid*, pp 225-226.

14 See Legislative Council Secretariat, *LegCo Panel on Administration of Justice and Legal Services: Provision of legal aid services: List of issues for review* (26 July 2002) (LC Paper No CB(2) 2646/01-02 (01)).

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

16 Interpretation and General Clauses Ordinance (Cap. 1) section 34.

17 Basic Law of the HKSAR, Article 62(1), (2).

The policy responsibilities of the Administration Wing of the Chief Secretary's Office naturally extend from the making of legal aid services related policies to co-ordinating and even supervising the implementation of those policies. For example, the Administration Wing established a steering committee to oversee a pilot scheme on mediation of legally aided matrimonial cases and to evaluate its cost-effectiveness before deciding on the way forward.<sup>18</sup>

The routine policy implementation and service provision in relation to legal aid is performed by the Legal Aid Department headed by a Director of Legal Aid and staffed by legal aid officers and other civil servants.<sup>19</sup> Broadly speaking, the Legal Aid Department can be compared with a law practice providing legal services to a specified class of clients prosecuting or defending their own civil law suits, and defending criminal cases relating to themselves. It is in the delimitation of the specified class of clients in terms of available financial resources that one ensures that there is as little competition as possible with private legal practitioners over the same class of clients. To a large extent, such competition, if any, is alleviated by the assigning out of legal aid cases to legal practitioners in private practice willing and able to undertake legal aid work. The similarity might diminish when legal aid is sought to challenge or oppose the Government in which the Legal Aid Department forms part and by which the staff of the Department are employed. In this regard, the Department emphasizes the integrity of the decision-making process involving such cases, including the taking of advice from private legal practitioners.

The Legal Aid Services Council is responsible for overseeing the administration of the legal aid services provided by the Legal Aid Department, and in discharging this supervisory role, the Council may formulate policies governing the provision of services by the Department, give advice on its policy direction, review its work from time to time, keep under review its services and development plans, and consider and advise on its estimates of expenditure.<sup>20</sup>

The scheme of the provision of publicly funded legal aid services consists of other components. Decisions made by the Legal Aid Department, except those relating to a proposed appeal to the Court of Final Appeal, may be challenged by way of the statutory avenue of a legal aid appeal to the Registrar or Masters of the High Court, who are statutorily designated with the power of hearing and determining such appeals.<sup>21</sup> Challenges to decisions relating to a proposed appeal to the Court of Final Appeal are heard and determined by a Legal Aid Review Committee chaired by the Registrar of the High Court, with members nominated by the two branches of the legal profession.<sup>22</sup> The Legal Aid Services Council provides a service with public funding to enable legal aid applicants to obtain counsel's certificates without charge to pursue their challenges before the Committee.<sup>23</sup> Judicial officers, in this connection, act as designated persons

---

18 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)).

19 As to the Legal Aid Department, see Chapter 5 below.

20 See the Legal Aid Services Council Ordinance (Cap. 489) section 4(1), (2). The supervisory role of the Legal Aid Services Council under these provisions is separate from and overlaps with its advisory function under section 4(5) of the Ordinance discussed previously.

21 See the Legal Aid Ordinance (Cap. 91) section 26 and Chapter 6 below.

22 See the Legal Aid Ordinance (Cap. 91) section 26A and Chapter 6 below.

23 See Chapter 5 below.

endowed with statutory powers to enable decisions made under the legal aid schemes to be subject to independent, impartial and timely review. The Council provides the counsel's certificate service to facilitate the review process in relation to challenges sought to be before the Committee.

Publicly funded legal aid, assistance and advice services are also provided by other entities, namely the Duty Lawyer Service, the Equal Opportunities Commission, and the Consumer Council, though the latter two do not come under the purview of the Administration Wing.<sup>24</sup> The Judiciary, in addition to the part judges and judicial officers play in the legal aid process, provides a service, by operating a resource centre for unrepresented litigants in respect of civil proceedings, which can be regarded as a form of legal assistance.

#### PRIMARY-FUNDING

Article 62 of the Basic Law of the HKSAR provides that the Administration exercises, inter alia, the function of drawing up and introducing budgets and final accounts.<sup>25</sup> It must obtain the approval of the Legislative Council for public expenditure, including such expenditure for the provision of publicly funded legal aid services.<sup>26</sup> Such approval is signified by the Legislative Council passing Appropriation and Supplementary Appropriation Bills that specify, inter alia, such expenditure. The Finance Committee of the Legislative Council, in addition, scrutinizes and approves proposals to change the estimates of expenditure approved under an Appropriation Bill.<sup>27</sup>

Legal aid services in Hong Kong are primarily funded from public sources. Funding for legal aid services comes from appropriations in the Government budget in the cases of the Ordinary Legal Aid Scheme, criminal legal aid, the Legal Aid Services Council, and the Duty Lawyer Service, and contributions and fees from legally aided persons in the case of the Supplementary Legal Aid Scheme.

A significant feature of the legal aid services provided in Hong Kong is that funding for legal aid costs provided by the Legal Aid Department (excluding the Supplementary Legal Aid Scheme for civil cases, which is self-financing) is not cash-limited; there is no pre-determined funding cap and supplementary appropriation can be sought in case that the expenses of legally aided cases in the year exceeds the amount of appropriation originally projected. On the other hand, funding for the Duty Lawyer Service and the

---

24 The Equal Opportunities Commission is under the purview of the Home Affairs Bureau, whereas the Consumer Council, that of the Economic Development and Labour Bureau.

25 Basic Law of the HKSAR, Article 62(4).

26 Basic Law of the HKSAR, Articles 64, 73(2), (3)

27 The Finance Committee of the Legislative Council has delegated to the Director of Administration the power to approve future adjustments of criminal legal aid fees, provided that the extent of adjustment is not greater than the movement on consumer prices as measured by Consumer Price Index (C) during the reference period. See Chapters 6 and 8 below.

Legal Aid Services Council, both of which are non-departmental public bodies, is in the nature of a year-to-year subvention and is cash-limited.<sup>28</sup>

Another significant feature of the legal aid services provided in Hong Kong is that there is no pre-determined funding cap for each individual case. Subject to monitoring and approval on the ground of reasonableness, a legally aided case may obtain the services of counsel and solicitors of the choice of the legally aided person and be prepared in a way advantageous to the legally aided person's interests, for example through the securing of assistance of expert witnesses. The legally aided person's exposure in this regard is limited to a contribution calculated by reference to his financial resources. The requirement to pay a contribution reflects the Administration's policy underpinning that everyone should be expected to draw on both his income and capital to meet his legal costs to the extent that he can do so without suffering undue hardship.

A further significant feature of the legal aid services in Hong Kong is the self-financing ability of the Supplementary Legal Aid Scheme, the only scheme in the world to have such a capability. The Government's funding role in this regard has been the provision of "seed money" by way of loan or grant to the Supplementary Legal Aid Fund to assist the founding and expansion of the Supplementary Legal Aid Scheme.<sup>29</sup>

These favourable features of the legal aid system in Hong Kong are achieved against the background of a fiscal policy of economic rationality and prudence that has underpinned the budgetary system of the Government.<sup>30</sup> It is also this fiscal policy that underlines the discussion in relation to further development of legal aid services, particularly where any such proposed development invariably implies increased expenditure by opening up new categories of cases demanding the provision of legal aid services. The implication is that while legal aid services remain a commitment of the Government as a service essential to the maintenance of the rule of law and proper administration of justice, their claim to priority for resources for expansion or development will have to be set against competing claims for other services that are likewise substantially recurrent, such as education, housing, health care and social welfare.<sup>31</sup>

---

28 In the case of the Duty Lawyer Service and the Legal Aid Services Council, cash is limited in the sense that while supplementary subvention may be sought for a good reason, this is subject to the availability of funds from the Director of Administration's vote, which operates under an operating envelope mechanism whereby there will be no additional funding from the Centre.

29 The "seed money" of HK\$1 million for the start-up of the Supplementary Legal Aid Scheme, provided in the form of a loan from the Lotteries Fund, has been repaid. The grant of HK\$27 million, provided in 1995, is not repayable.

30 See Scott, Ian, *Public Administration in Hong Kong* (Singapore: Marshall Cavendish, 2005) pp 161-162, 164.

31 See Scott, Ian, *Public Administration in Hong Kong* (Singapore: Marshall Cavendish, 2005) pp 175-181 for a description of the budgetary cycle in Hong Kong.