

CHAPTER 9

Scope, Funding and Independence

This Chapter highlights and discusses in depth two crucial topics in the development of the institution of legal aid in Hong Kong. The first topic is the expansion of legal aid services on a basis of financing other than Government or public funding or subsidy; and includes an examination of the Supplementary Legal Aid Scheme, the only successful legal aid scheme in the world utilizing the funding mechanism of a “contingency fund”, in terms of its historical origin, policy underpinnings, and operation. The discussion is to conclude with an appraisal of possible lines of further expansion or development.

The second topic is the independence of legal aid. The recent history of the evolution of legal aid in Hong Kong has been interspersed with initiatives of disestablishing the Legal Aid Department and the creation of an independent legal aid authority. This part of the Chapter first explains the notion of independence in the context of provision of legal aid services. The application of the different aspects of the notion of independence in the operation of the legal aid service is the next issue for discussion and is to be followed in the final portion with suggestions through which the goal of establishing an independent legal aid authority may become reality.

FINANCING EXPANSION OF LEGAL AID WITH ALTERNATIVE FUNDING

Generally, legal aid services can be financed through 3 types of funding: public funding, non-government funding, and self-generated income.¹ Public funding, in its typical form, involves the Government appropriating from general revenue the financial provision for the expenditure of legal aid services. Chapter 4 indicates that this is an annual exercise in competition for priority in resource allocation with heavily committed public services such as education, social welfare and health care. On the other hand, there are indirect forms of public funding, such as a government subsidy to the insurance industry so that legal expenses insurance may become affordable to the public.

Non-government funding has not been practised in Hong Kong in relation to legal aid.² In overseas jurisdictions, non-government funding of legal aid services comes from

-
- 1 Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 33.
 - 2 Non-government funding has been utilized in Hong Kong to finance initiatives such as compensation funds (for example those under the Travel Agents Ordinance (Cap. 218) and the Securities and Futures Ordinance (Cap. 571)) and employees retraining under the Employees Retraining Ordinance (Cap. 423).

donations from private foundations, private lawyers and law firms, charitable organizations and law foundations; contributions made by the legal profession in the form of interest from solicitors' trust accounts and fidelity funds;³ and levies diverting moneys payable by the public, for example, as court fees, into the pool of resources for legal aid services. Privately sourced and market oriented litigation funding options are akin to non-government funding of legal aid and can be discussed in the present connection. Legal expenses insurance may be subscribed to before or after the event that leads to litigation. The former insures against a general risk and is widely available in jurisdictions in continental Europe such as Germany.⁴ The latter insures against a specific risk and is usually purchased in relation to a conditional fee arrangement to provide cover for the event of the insured being ordered to pay the legal costs of his or her opponent. In Australia and more recently, England, third party funding of litigation has become prevalent, sometimes by way of maintenance (whether in the form of "pure funding" or "professional funding")⁵ and increasingly in association with conditional fee arrangements on the part of the legal representatives. Banks and law firms may make arrangements to enable clients to take loans to meet legal expenses under a "litigation lending scheme". The English Court of Appeal has developed the rules on the liability of a non-party to pay legal costs of a successful party to "cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable".⁶

Self-generated income, in the context of the legal aid schemes in Hong Kong, includes contributions, costs awarded, receipts from first charge enforcement, and administrative fees. Requiring the aided person to pay reasonable contributions commensurate to his financial resources ensures that legal aid is provided to those who cannot afford to engage lawyers on a private basis.⁷ Administrative fees, on the other hand, deter vexatious applications.

3 The Working Group on Legal Aid Policy Review, which studied the 3 types of funding, did not propose that the legal profession in Hong Kong should contribute to legal aid funding, since members of the legal profession has already contributed in kind, through their participation in the Free Legal Advice Scheme and their accepting duty lawyer assignments: Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 42.

4 See Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs: Report & Recommendations* (August 2005) p 50.

5 "Pure funding" has been described as contributing to costs as an act of charity, without the funder having control over how the donation is spent, or playing any part in the management of the trial, or having any interest in its outcome, other than the hope that the donation may be repaid if the claim succeeds, whereas "professional funding" invariably arises out of contract and involves the funder (which is often an insurance company, professional or trade association, or a trade union) exercising control management and supervision of the litigation. The significance of the distinction lies in susceptibility of being ordered to pay costs of the litigation; see *Hamilton v Al Fayed (No 2)* (2001) *The Times*, 25 July (English Queen's Bench Division). See also *Hamilton v Al Fayed (No 2)* [2003] QB 1175 (English Court of Appeal); and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (Privy Council).

6 *Arkin v Borchard Lines Ltd* [2005] 3 All ER 613 (English Court of Appeal).

7 See Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997) paragraph 44.

Hong Kong has the distinction among the jurisdictions of the world in having a legal aid scheme that is financed entirely on self-generated income. This scheme is supplementary to the regular civil legal aid scheme. It has managed to expand legal aid services without attracting additional commitment of public funding.

SUPPLEMENTARY LEGAL AID SCHEME

History

A meeting in 1979 of the leaders of the two branches of the legal profession and the Director of Legal Aid sought to attend to the problem that there might have been over 1 million in the population of Hong Kong of 4.9 million, who were ineligible to receive legal aid but unable to afford the high litigation costs of Hong Kong.⁸ The result of the meeting was a legal aid scheme, additional to the Ordinary Legal Aid Scheme in operation at the time and “intended only for civil cases and if it comes to operation, will only apply to cases of hardship where the plaintiff has a strong case and the defendant has the means to meet whatever judgment may be made against him”. All litigants under the additional scheme would have to pay a pre-determined contribution, which would be repaid if they were successful. A sum of HK\$2 million, repayable in 5 years with moneys representing a percentage of the award of damages to successful litigants under it, was considered to be necessary to “float” the additional scheme.⁹

This idea received attention and subsequently, 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 1982.¹⁰

The Working Party took account of the proposals in England for a contingency legal aid fund and the contingency fee system in the United States and considered that “there is scope for a scheme which incorporates some of the features of the American contingency fee system but which eliminates its more unacceptable and impractical features”. The new scheme would be known as the Supplementary Legal Aid Scheme (“SLAS”). The Working Party observed that SLAS “would be a kind of mutual insurance fund, which would insure each aided litigant against the risk of losing his action and having to pay both his own and his successful opponent’s costs out of his own pocket.”¹¹ In return, the

8 O’Reilly Mayne, Desmond QC, *Two Tier Legal Aid Suggestion* (1979) in *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) Annex A. The meeting reckoned from the basis that the legal aid services provided at the time benefited two-thirds of the population but only about 300,000 to 400,000 persons of the remaining one-third were truly able to afford to pay for private legal representation in civil cases.

9 O’Reilly Mayne, Desmond QC, *Two Tier Legal Aid Suggestion* (1979) in *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) Annex A.

10 *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982).

11 See JUSTICE, *CLAF: Proposals for a Contingency Legal Aid Fund* (London: JUSTICE, 1978) p 1.

aided litigant would pay, as a 'premium', a percentage of his damages if he succeeded. The 'premium' thus collected in successful cases would constitute the fund from which the aided litigant's and his opponent's costs would be paid in unsuccessful cases". On the other hand, since the percentage deduction from the award of damages would go into the fund and not to the lawyers (who would be remunerated in the usual basis), the perceived abuses of the contingency fee system in the United States (presumably stemming from lawyers having a direct financial interest in the outcome of the cases) might be avoided.¹²

While SLAS had the drawback of operating only in cases where the legal aid applicant was a potential plaintiff making a claim for money or property,¹³ the Working Party considered that it was a step in the right direction by assisting at least some of those who were unable to afford private litigation. Some help was better than no help.¹⁴

The Working Party recommended that initially, SLAS should be limited to personal injuries and fatal accident claims so that it might not be over-burdened; would have a reasonable opportunity of building up its fund from deductions in successful cases; and would cater for the most deserving class of cases. Initial financing by way of a loan facility was necessary, though the fund was envisaged to be self-financing in 2 years, assuming that not less than 90% of claims under SLAS would be successful. Gradual extension of SLAS was envisaged not only in the types of cases or litigation capacity of the applicants, but also in the status of the applicants, so that eventually partnerships and companies might also apply.¹⁵

A Bill was introduced in 1984 in the Legislative Council to amend the Legal Aid Ordinance to put SLAS in place. The Attorney General acknowledged in the Legislative Council meeting in 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

12 *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) p 3. See also JUSTICE, *CLAF: Proposals for a Contingency Legal Aid Fund* (London: JUSTICE, 1978) p 5.

13 Both the Law Society of England and Wales and the Senate of the Inns of Court and the Bar of England and Wales had reservations of Justice's proposal for a contingency legal aid fund, such as a possible imbalance between plaintiffs and defendants, and possible difficulties in negotiating settlements in the light of the deduction from the award of damages; see *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) Annexes E, F. Both professional bodies were concerned that the development of a contingency legal aid fund would impede the expansion of legal aid by the British Government.

The Royal Commission on Legal Services rejected the proposal of a contingency legal aid fund. It described the proposal as a palliative which would at best be a half-measure; and objected to the necessary implication of the fund of having successful clients (particularly those who had suffered most, since they would have to be contributing the larger sums to the fund in the light of the greater awards in damages) subsidizing those who were unsuccessful: Royal Commission on Legal Services, *Final Report* (London, Her Majesty's Stationary Office, 1979) (Candy 7648) paragraphs 16.11, 16.12.

14 *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) p 4.

15 *Report of the Working Party on a Proposed Supplementary Legal Aid Scheme* (1982) pp 4-13. See JUSTICE, *CLAF: Proposals for a Contingency Legal Aid Fund* (London: JUSTICE, 1978) p 6 (where the JUSTICE Working Party saw no reason why such a fund should not be made available to business litigation, such as cases of a small trader being let down by a supplier or a small builder's claim for the contract price was resisted by a dubious claim of poor workmanship).

nevertheless be hard pressed to pay for the services of a private lawyer.”¹⁶ SLAS was to cater for applicants who satisfied the merits test for taking proceedings in the High Court for damages for personal injuries or death (excluding medical negligence). Higher financial eligibility limits would apply and those who were successful in litigation would pay a proportion of their award of damages to it, so as to make it self-financing. The philosophy of SLAS, it was said, was to have the losses of the unsuccessful litigants made up by the contributions of those who were successful. The Bill was enacted into the Legal Aid (Amendment) Ordinance 1984,¹⁷ and the Legal Aid Regulations were consequentially amended.¹⁸ The Lotteries Fund set aside a sum of HK\$1 million as a loan facility to be drawn upon for setting up the fund for SLAS.

On 1 October 1984, SLAS came into operation. It became self-financing in the early 1990s without having to draw on the entire loan facility at any one time.

SLAS was expanded in 1991 to include employees’ compensation claims in the District Court¹⁹ and in 1995 to include civil proceedings for medical, dental and legal professional negligence.²⁰ Amendments to the Legal Aid (Assessment of Resources and Contributions) Regulations²¹ in May 2000 and December 2005 reduced the proportion of the award of damages that successful aided persons had to pay to SLAS.²²

APPLICATIONS

SLAS is available to any person to whom legal aid is not available under the Ordinary Legal Aid Scheme because his financial resources are in excess of the amount prescribed for that scheme; and whose financial resources exceed HK\$155,800 but do not exceed HK\$432,900²³ for:

-
- 16 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1983/84)* pp 1173-1175.
 - 17 I.e. the Legal Aid (Amendment) Ordinance 1984 (No 54 of 1984), coming into operation on 1 October 1984.
 - 18 I.e. the Legal Aid (Amendment) Regulations 1984 (LN 326/1984), coming into operation on 1 October 1984.
 - 19 See the Legal Aid (Amendment) Ordinance 1991 (No 27 of 1991), coming into operation on 1 July 1992.
 - 20 See the Legal Aid (Amendment) Ordinance 1995 (No 43 of 1995), coming into operation on 28 July 1995.
 - 21 I.e. the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B).
 - 22 See the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2000 (LN 148/2000), coming into operation on 3 July 2000; and the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005 (LN 224/2005), coming into operation on 20 February 2006.
 - 23 Originally, the upper limit of financial eligibility for SLAS was set in terms of income not exceeding HK\$15,000 a month and disposable capital not exceeding HK\$100,000. In June 1992, the criteria for determination of financial eligibility was replaced with that of financial resources exceeding HK\$120,000 but not exceeding HK\$280,000 (Legal Aid (Amendment) Ordinance 1991 (27 of 1991) section 5), which was revised in July 1995 to financial resources exceeding HK\$144,000 but not exceeding HK\$400,000 (Legal Aid (Amendment) Ordinance 1995 (43 of 1995) section 5); in May 1997 to financial resources exceeding HK\$169,700 but not exceeding HK\$471,600 (Legal Aid (Amendment) Ordinance 1997 (8 of 1997) section 3); and in July 2004 to financial resources exceeding HK\$155,800 but not exceeding HK\$432,900 (LN 45, 99/2004).

- (1) Civil proceedings in the Court of First Instance or the Court of Appeal, brought by the aided person for damages in a claim arising from personal injuries to, or the death of, any person and proceedings incidental to such proceedings including the defence of any counterclaim;
- (2) Civil proceedings in the District Court brought by the aided person for damages in a claim arising from personal injuries to, or the death of, any person where the claim exceeds HK\$60,000 or where, in the opinion of the Director of Legal Aid, the claim is likely to exceed HK\$60,000 and proceedings incidental to such proceedings including the defence to any counterclaim;
- (3) Proceedings in the District Court brought by the aided person under the Employees' Compensation Ordinance;²⁴ and
- (4) Civil proceedings in the Court of First Instance, Court of Appeal or District Court, brought by the aided person for damages for medical, dental or legal professional negligence where, in the opinion of the Director of Legal Aid, the claim is likely to exceed HK\$60,000 including the defence of any counterclaim.²⁵

Every application is subject to a non-refundable application fee of HK\$1,000.²⁶

Processing of applications is similar to that under the Ordinary Legal Aid Scheme. The Legal Aid Ordinance and its subsidiary legislation apply, subject to specific variations for SLAS. In particular, the means of an applicant are calculated in the same way as under the Ordinary Legal Aid Scheme,²⁷ and the merits of an application is evaluated under the same test as that under the Ordinary Legal Aid Scheme.²⁸

TRANSFER TO ORDINARY LEGAL AID SCHEME

An aided person who receives legal aid under SLAS and whose financial resources have declined to a level below the financial eligibility limit for the Ordinary Legal Aid Scheme may ask for the legal aid certificate to be discharged and his legal aid to be maintained under the Ordinary Legal Aid Scheme. The Director of Legal Aid is empowered to vary the contribution payable by a person under SLAS where the financial resources of the person have changed so as to entitle him to seek assistance under the Ordinary Legal Aid Scheme, and he will apportion the contribution payable having regard to the time for which the person was aided under SLAS and the period taken to resolve the claim.²⁹

24 I.e. Cap. 282, Laws of Hong Kong.

25 Legal Aid Ordinance (Cap. 91) section 5A, Schedule 3 (except claims in the Court of First Instance or District Court for damages for assault and battery).

26 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 3(3).

27 See the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) and Chapter 6 above.

28 See the Legal Aid Ordinance (Cap. 91) section 10 and Chapter 6.

29 Ibid, section 32A.

CONDUCT OF PROCEEDINGS

As a matter of practice, and subject to nomination of the aided persons and the caseload of the Legal Aid Department's lawyers, the Director of Legal Aid will act for aided persons granted with a legal aid certificate in the capacity of instructing solicitor and assign counsel where advice and representation is required.

If an aided person who has been granted legal aid fails, whether in whole or in part, in proceedings brought by him with the assistance of such legal aid, the Director of Legal Aid is empowered to appeal against any judgment or order of the court in which the proceedings were brought. Also, if the person succeeds, whether in whole or in part, in such proceedings and fails to defend any appeal brought by any other person, the Director is empowered to oppose such appeal himself.³⁰

CONTRIBUTION AND RECOVERY OF COSTS

SLAS works by requiring applicants who are successful in litigation to contribute the amount of the costs and expenses not recovered from the opposite party, and also a proportion of the damages awarded, which would be ploughed back into the Supplementary Legal Aid Fund to assist future litigants.

An aided person must pay to the Director of Legal Aid a contribution for the benefit of the Supplementary Legal Aid Fund,³¹ and is required to pay an interim contribution to the Director for the benefit of the Fund.³² Any interim contribution and any application fee paid is not liable to be refunded to the aided person if that person is not successful in the proceedings brought by him with the assistance of SLAS.³³

30 Ibid, section 33(1). If the Director exercises this power, he will have all the rights and privileges which the aided person would have had had he brought or opposed the appeal, including the right to settle the proceedings by means of a compromise arrived at with another party to the proceedings: Ibid, section 33(2). In such an appeal, all expenses payable in connection therewith, including any amount payable under an order as to costs, will be paid by the Director out of the Supplementary Legal Aid Fund; but if the Director succeeds on the appeal in whole or in part section 32 of the Legal Aid Ordinance will apply as if the aided person had himself appealed or defended the appeal to require a contribution to be made to the Fund: Ibid, section 33(3).

31 Ibid, sections 18(1)(a), 32. No contribution payable under section 32 may exceed the value of the property recovered or preserved for the aided person in the proceedings: Ibid, section 32(2).

32 The interim contribution is to be an amount equivalent to the maximum contribution payable by an aided person under section 18(1) of the Legal Aid Ordinance (Cap. 91) whose financial resources are equal to the limit prescribed in section 5 of that Ordinance: Legal Aid (Assessment of Resources and Contribution) Regulations, regulation 14(a). The relevant amount, last revised in July 2004, is HK\$38,950.

33 Legal Aid Ordinance, section 32(1A). However, if the sums paid or payable on his account out of the Fund and the costs incurred on his behalf before the legal aid certificate is discharged are less than the amount of interim contribution paid, the Director will refund the balance of the amount remaining to the aided person.

If an aided person is successful, either in whole or in part, in the proceedings brought by him,³⁴ the Director of Legal Aid will require him to pay a final contribution for the benefit of the Supplementary Legal Aid Fund,³⁵ in an amount calculated in a manner, and according to such circumstances as prescribed in the Legal Aid (Assessment of Resources and Contributions) Regulations.³⁶ The rate of contribution is 10% of the value of the property recovered or preserved for the aided person in the proceedings³⁷ where a claim proceeds to judgment, but reduced to 6% of the same if the claim is settled prior to delivery of a brief to counsel³⁸ (less the application fee paid), together with the sums paid or payable on his account out of the Fund and the costs incurred on his behalf.³⁹ In short, the final contribution comprises not only the percentage deduction from the award of damages or sum recovered, but also the Director's out-of-pocket expenses, including the common fund costs and disbursements incurred in the legal proceedings (even where party and party costs may have been recovered from the opposite party).

34 Proceedings are deemed to be successful where property is recovered or preserved for the aided person either under a court order or under a compromise arrived at to avoid or bring to an end the proceedings: *Ibid*, section 32(5).

"Property recovered or preserved for the aided person in the proceedings" include: (a) his rights under any compromise arrived at to avoid or bring to an end the proceedings and any sums recovered under an order or agreement for costs made in his favour with respect to the proceedings; and (b) where the legal aid certificate granted to him in respect of the proceedings is revoked or discharged, any property subsequently recovered or preserved by or for him in the proceedings or by virtue of any compromise arrived at to avoid or bring to an end the proceedings; and (c) any property recovered for the benefit of any person on whose behalf the aided person is acting or for the benefit of any estate or fund out of which that aided person is entitled to be indemnified: *Ibid*, sections 18A(3), 32(6).

35 There will be deducted from the final contribution payable any interim contribution paid and any sums recovered under or by virtue of an order or agreement for costs made in the aided person's favour and such other sums, if any, as may be prescribed: *Ibid*, section 32(1B).

36 *Ibid*, section 32(1). The provisions in section 32 does not prevent the recovery from a formerly aided person, in such manner and amount as may be prescribed, of the costs and expenses of legal aid under SLAS incurred prior to the revocation or discharge of his legal aid certificate upon such revocation or discharge whether or not such person continues the proceedings and whether or not the proceedings are successful: Legal Aid Ordinance, section 32(4).

37 The expression "value of the property recovered or preserved" for the aided person refers in the Legal Aid Ordinance (Cap. 91) section 32 to the actual value without any deduction of the Director's first charge. Therefore, the contribution is to be calculated by reference to the actual value and not on the reduced value after deducting the Director's first charge. Further, post-judgment interest on the award of damages is not subject to the percentage deduction prescribed under section 32.

38 Counsel and solicitors acting for an aided person granted legal aid under SLAS accordingly must bear in mind the impact of the contributions when considering offers of settlement and advising the aided person as to the likely net benefit to them of any particular proposed settlement.

39 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 14 and Schedule 3, Part III.

The Director may by notice in writing to the aided person waive, either in whole or in part, his rights to a contribution where he is satisfied that it would cause serious hardship to any person to rely on such rights and it is in all the circumstances just and equitable to do so.⁴⁰

An aided person is not liable for costs⁴¹ incurred by the Director on his behalf, which is in excess of the prescribed contributions.⁴²

Where proceedings to which a legal aid certificate relates are successful and there is a costs order in favour of the aided person, party and party costs will be recovered from the paying party and paid to the assigned solicitor or the Legal Aid Department for onward payment into the Supplementary Legal Aid Fund.⁴³ On the other hand, common fund costs will be recovered from the damages awarded in the successful cases and paid in a similar manner into the Fund.⁴⁴

If a legal aid certificate is discharged, the Supplementary Legal Aid Fund will bear the costs up to the date of the discharge upon taxation or assessment, as the case may be.⁴⁵ If a legal aid certificate is revoked or discharged and the person to whom the certificate was issued continues to take, defend or be a party to the proceedings to which the certificate relates and is successful in those proceedings in circumstances where, had the certificate not been revoked or discharged, a contribution would have been payable, he will be liable to pay, in addition to any amount of costs payable, a contribution equivalent in amount to the contribution which would have been payable had the proceedings been settled at the time of the revocation or discharge and the value of the property subsequently recovered or preserved for the person to whom the certificate was issued in the proceedings, or by virtue of any compromise arrived at in order to bring the proceedings to an end, had been the value of property recovered or preserved for that person in the settlement. However, if legal aid is discharged because the grounds for taking the proceedings to which the legal aid certificate was formerly related no longer exists and the proceedings continue and results in an award of damages, then no contribution will be payable. On the other hand, if legal aid is discharged because the formerly aided person rejected an offer in settlement and the proceedings to which the legal aid certificate was formerly related continue and damages in an amount more than the rejected offer are recovered, then the contribution will be calculated as though a settlement in the amount of the rejected offer had taken place at the date of the discharge.⁴⁶

40 Legal Aid Ordinance (Cap. 91) section 32(3).

41 Costs in this connection relates only to costs arising in respect of proceedings to which, and during the period to which, a legal aid certificate relates. The liability for costs of an aided person is not otherwise affected: Legal Aid Ordinance, section 16C(2).

42 Ibid, section 16C(1)(a).

43 Ibid, section 19A(1).

44 Ibid, section 19B(1).

45 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 9(3). On the other hand, the Director of Legal Aid will have the right to recover from the formerly aided person the costs that the Director remains liable: Ibid, regulation 9(5).

46 Ibid, regulation 9(10).

SUPPLEMENTARY LEGAL AID FUND

The Supplementary Legal Aid Fund is a fund administered by the Director of Legal Aid,⁴⁷ consisting of the proceeds of any loan or grant made to the Director for the purposes of the Fund,⁴⁸ contributions payable from persons granted legal aid under SLAS, the proceeds of and interest on any investments of the moneys of the Fund,⁴⁹ moneys paid or repaid to the Director under section 19 or 19A of the Legal Aid Ordinance or retained under section 19B of the Ordinance where the aided person is aided under SLAS, and such other moneys as may be prescribed.⁵⁰ The Fund is to be charged with the expenses of SLAS,⁵¹ any security provided under section 18B of the Ordinance and to be provided out of the Fund, the payment of interest and the repayment of moneys borrowed by the Director for the purpose of SLAS as well as all charges and expenses payable in connection with such a borrowing, the payment of fees charged to the Fund in respect of the services afforded by public servants under SLAS,⁵² and such expenses as may be prescribed.⁵³ Since the commencement of operation of SLAS in 1984, the Fund has gradually built up a surplus of about HK\$92 million by 2004.

EVALUATION

Having examined the track record of the Supplementary Legal Aid Fund, the Legal Aid Services Council observed in 2001 that the viability of the Fund was due to the fact that the following measures had been implemented to protect the Fund:

- (a) the setting up of a Monitoring Committee in the Legal Aid Department to closely monitor those cases which were defined as high risk and those for which considerable costs had been incurred and to review the cash flow and management of the Fund, thus enabling early input both as to the grant or otherwise of legal aid and the future conduct of highly complex and sensitive cases; and
- (b) the assignment of the majority of cases in-house thus ensuring close supervision of conduct of the litigation.

The Council also noted that the viability of the Fund was maintained by the high success rate in litigation of cases under SLAS and in the recovery of legal costs spent and

47 The Director of Legal Aid is empowered to invest the moneys of the Supplementary Legal Aid Fund in such manner as the Financial Secretary may approve: *Ibid*, section 29(4). The Director must keep proper accounts and proper records in relation thereto of the affairs of the Fund, which are to be audited by the Director of Audit: *Ibid*, section 31.

48 *Ibid*, section 30 (including temporary borrowing power by way of overdraft or otherwise, and non-temporary borrowing power with the prior approval of the Financial Secretary).

49 Surplus monies in the Supplementary Legal Aid Fund are placed on fixed deposits with authorized institutions to earn interest.

50 *Ibid*, sections 29(1), (2).

51 Such expenses include payments to counsel and a solicitor and any costs payable by the Director of Legal Aid under section 16C of the Legal Aid Ordinance where the aided person receives legal aid under SLAS.

52 *Ibid*, section 29(5).

53 *Ibid*, section 29(3).

damages paid by the opposite parties. Nearly all the claims were covered by insurance policies and hence almost all damages and costs were paid up.⁵⁴ Thus the sustainability of SLAS relies heavily on the two factors of astute assessment of the merits of a case; and the recoverability of awards from the opposite party. The former demands a greater probability of winning the case, and the latter would tend to attract cases where additional safeguards against non-recovery of damages are in place, such as assurance funds like those maintained by the Motor Insurance Bureau and the Employees Compensation Assistance Fund. The bulk of the cases funded by SLAS have been personal injuries cases which have a very high success rate with high compensation.

EXPANDING AVAILABILITY OF LEGAL AID WITH ALTERNATE FUNDING

SLAS has been a marked success. The Civil Justice Council in England was so impressed with SLAS that it found “the idea of a self funding contingency scheme ... attractive as an additional part of the menu of funding options” for the “middle income not eligible for legal aid services” (MINELAS) and recommended that the English Legal Services Commission gave it further consideration.⁵⁵

A substantial opinion has also grown locally for the expansion of SLAS through extending the category of actions covered and increasing the upper end of its financial eligibility limits.⁵⁶ The Legal Aid Services Council made a similar call for its expansion on both aspects in 2003, noting that the increasing number of recovery agents operating on a “no win, no charge” basis suggested the existence of unmet need for legal services.⁵⁷ The Council then asked its Interest Group on the Scope of Legal Aid in 2005 to look into as a first priority the expansion of SLAS based on the principle of recoverability.⁵⁸

The Administration has been cautious to the calls for expansion. The Working Group on Legal Aid Policy Review emphasized in 1993 that, to enable the self-financing capability of SLAS, the scope of cases was deliberately confined, as a matter of principle, to “cases: (a) which deserve priority for public funding in the sense that significant injury or injustice to the individual is involved; and (b) which involve monetary claims and have a reasonably good chance of recovering damages”.⁵⁹ When the Working Group was reconvened, it again emphasized in its report that although costs would not be the overriding argument against expansion, SLAS should remain self-financing. Expansion into new categories of claims must not jeopardize its financial viability.⁶⁰ The Administration added in 2003 that the existing categories of cases under SLAS were cases in the vast majority of which there was insurance cover or a last resort

54 Legal Aid Services Council, *Annual Report 2000-2001*, pp 37-38.

55 Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs: Report & Recommendations* (August 2005) pp 31-32.

56 See, for example, Lintern-Smith, Michael, *President's Speech for the Opening of the Legal Year 2005* (17 February 2005).

57 See Legal Aid Services Council, *Annual Report 2003-2004*, p 20.

58 See Legal Aid Services Council, *Legal Aid* (Issue No 8) (July 2005) p 8.

59 Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 22.

60 Administration Wing, Chief Secretary's Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 6.7.

source of compensation, with good prospects of recovering monetary damages, and accordingly did not, “as a matter of principle ... consider it justified using contributions recovered from the existing SLAS cases to subsidize other types of cases that do not satisfy the aforesaid principle [of case selection], or do not provide certainty in the prospect of recovery to ensure that the overall financial viability of the SLAS will not be jeopardized”.⁶¹ Recently, the Director of Administration emphasized that the healthy Supplementary Legal Aid Fund at present “is the result of a careful design built on the principle of cross-subsidization. Indeed, overseas researches/studies suggest that legal assistance provided by a self-financing scheme like SLAS needs to focus itself on the types of litigation that carry a high chance of success with good damages to costs ratio”.⁶²

Although SLAS has generated operational surpluses, and maintains a very healthy fund balance a fraction short of HK\$100 million, it should be borne in mind that:

- The current balance includes a one-off grant from the general revenue of HK\$27 million in 1995;
- SLAS has achieved the present results by having a steady and substantial income flow and losing only few cases, bearing in mind that if an aided person is unsuccessful in his claim, the Supplementary Legal Aid Fund has to pay the winning party’s legal costs which for a substantial personal injuries or professional negligence action concluded after trial and appeals, can accumulate to HK\$10 million; and
- With the reduction of the rates of contribution by aided persons in successful cases in 2000, the annual operating surplus of the Fund has been steadily declining⁶³ and this decline is expected to continue, if not accelerate.⁶⁴

The success of SLAS may be attributed to its narrow scope, directed at legal assistance towards litigation against opposite parties that are properly provisioned either through insurance or self-owned resources. Careful evaluation of merits has also enabled the selection of viable cases capable of generating income to the Supplementary Legal Aid Fund. Prudent case monitoring has further led to reasonable expenditure of costs and appropriate settlements. With these features, SLAS has so far avoided the pitfalls and problems leveled by the English legal profession and the Royal Commission on Legal Services over Justice’s contingency legal aid fund proposal.⁶⁵ Expansion of SLAS to other types of litigation should, therefore, be considered cautiously, and with

61 Administration Wing, Chief Secretary for Administration’s Office, *Panel on Administration of Justice and Legal Services: Five-yearly Review of the Criteria for Assessing Financial Eligibility of Legal Aid Applicants* (June 2003) paragraphs 63-66.

62 See Letter of the Director of Administration to the Secretary, Legal Aid Services Council dated 1 February 2006.

63 The decline in the annual operating surplus is shown as follows: HK\$10.7 million in 2000/2001, HK\$9.4 million in 2001/2002, HK\$7.7 million in 2002/2003, HK\$4.7 million in 2003/2004, and HK\$1.4 million in 2004/2005. The Director of Administration adds that for 2004/2005, if not because of the interest income, the Supplementary Legal Aid Fund would have incurred a deficit for that year.

64 This is due to the further reduction in the rates of contribution of aided persons in successful cases pursuant to the Legal Aid (Assessment of Resources and Contributions) (Amendment) Regulation 2005 (LN 224/2005), coming into operation on 20 February 2006.

65 See note 13 (supra).

moderation, since it is possible that some of those pitfalls and problems may emerge as a consequence of, for example, making assistance to plaintiffs having a cause of action against defendants who are not under a legal obligation or standing practice of having insurance cover, or having a mutual insurance “safety net” arrangement; or defendants who are not well provisioned or do not have recourse to insurance related litigation support; or causes of action the successful vindication of which would not result in an award of damages; or causes of action which have a relatively lower success or recovery rate.⁶⁶ The sustainability of the Fund must be maintained by careful evaluation of possible gains and losses to it as a consequence of expansion of SLAS. The Fund must not be thought of as a “pot of gold” to be spent to further any service provision based agenda, since its existing funds consists mostly of contributions from successfully resolved cases throughout 20 odd years of existence of SLAS and it has been maintained as an assurance fund in expectation that if successful, the qualifying litigants would have to put back a portion of the award to assist future litigants. While discipline in the scrutiny of the merits of cases will have to be maintained in order to alleviate the criticism that it is the successful who are subsidizing the unsuccessful, expansion into more contestable areas of litigation, such as employment and building management, may lead to the administrators of SLAS being subject to the pressure envisaged by the Royal Commission on Legal Services over the giving of assistance to cases with debatable prospects of success, the negotiation of settlements, and the exercise of discretionary powers in authorizing the provision of legal aid services.

The Consultation Paper of the Sub-committee on Conditional Fees of the Law Reform Commission has rekindled discussion about funding of litigation to broaden access to justice. The Sub-committee raises additional proposals for funding litigation, apart from conditional fee arrangements,⁶⁷ since it recognizes that the viability of a conditional fee regime in Hong Kong will depend on the availability of affordable after the event legal expenses insurance. The Sub-committee recommended two alternatives to promote access to justice. The first is to expand SLAS (which it considered to be a scheme using event-triggered fees on a self-financing basis).⁶⁸ The second involves setting up a privately run independent body administering a self-financing litigation fund contributed by a percentage of compensation it will receive for successful cases. The independent body will screen cases on merits only (i.e. without means testing), instruct private lawyers on a conditional fee basis, and pay the opponent’s legal costs if a case is unsuccessful. The Sub-committee opined that this “hybrid model” of contingency based funding and conditional fee arrangement could co-exist with SLAS, offering increased choice to the public.⁶⁹

66 It should be noted that from the experience of the two legal aid schemes in Hong Kong, the success rate of personal injuries/fatal accident/employees’ compensation claims is high (about 80%), while that in respect of professional negligence cases is relatively lower (about 60%), presumably due to their complexity.

67 See Chapter 2 for the response of the Legal Aid Services Council of Sub-committee’s main proposals.

68 Law Reform Commission of Hong Kong, Sub-committee on Conditional Fees, *Consultation Paper: Conditional Fees* (September 2005) paragraphs 7.44-7.45, recommendation 12.

69 *Ibid.*, paragraphs 7.46-7.52, recommendation 13. There are similarities between this “hybrid model” litigation fund scheme and the “Contingency Legal Aid Fund” proposed at different times in England and Wales by JUSTICE (the British Section of the International Commission of Jurists) and the General Council of the Bar respectively.

The Legal Aid Services Council shares the desire of widening access to justice but believes that this may be explored through studying how to expand SLAS, recognizing however its operational limitations. SLAS began with the support of the Government and it is natural to expect the Government to participate in any plan to enhance SLAS, noting in particular the Government's declared commitment to fund legal aid services. While the Council is open minded to additional avenues to fund SLAS, it has yet to study such alternatives, on the premise that they must not jeopardize the viability of existing legal aid services and that they may not compromise the rule of law and the vindication of justice.⁷⁰

INDEPENDENCE

The 2005 International Forum on Legal Aid adopted a Joint Statement declaring, *inter alia*, that "Legal aid institutions should be independent in structure, operation and delivery of services".⁷¹ Chapter 3 of this Document illustrates that legal aid services are not to be treated merely as a form of social welfare. Rather they are an integral part of administration of justice that translates a theoretical right of access to justice into a practical reality. Decisions made in the administration of publicly funded legal aid services are decisions made to give effect to statutory entitlements to such services. The imperatives of the administrative law duty to act fairly, the accountability of a public service provider of its use of public resources, and the special premium of legal aid, make it triply important for decision-making in the processing of legal aid applications and the delivery of legal aid services to be independent and impartial and manifestly perceived to be so.

Independent and impartial decision-making in publicly funded legal aid services requires the decision-makers not to take sides and not perceived to be taking sides. Investigation into the particulars of a legal aid application for means and merits testing and the management of legally aided cases must be undertaken competently, neutrally and objectively, by reference to statutory, judicial and other established criteria and guidelines. The legitimate interests of the legal aid applicant or aided person must be recognized and respected. Conflicts of interest and arrangements or situations giving rise to a perception of influence by extraneous matters, such as personal gain or advancement, should be removed.

Independence and impartiality in decision-making of publicly funded legal aid services will have to be achieved when legal aid is sought by an ordinary citizen in respect of proposed litigation against the Government or a public body. This is at least because of the fact that the Government funds the legal aid services, making it necessary to remove any impression that "he who pays the piper calls the tune". Having the day-to-day operation of the legal aid service provider independent of and on arm's length terms of the Government serves to achieve this objective to an extent. The difficulty of not encouraging such perception of influence by the Government is increased when the

70 See Chapter 2 above for the Legal Aid Services Council's response to the Consultation Paper of the Sub-committee on Conditional Fees of the Law Reform Commission.

71 Joint Statement of the 2005 International Forum on Legal Aid (15-17 October 2005, Taipei) in Legal Aid Services Council, *Legal Aid* (Issue No 10) (January 2006) pp 14-15.

decision-makers themselves owe to the Government not only the funding for their salaries but also the advancement of their careers. Operational independence of publicly funded legal aid services must for this reason be guaranteed by institutional independence of the provider of legal aid.

The merits of the above propositions are borne out when the evolution of publicly funded legal aid services are considered in the paragraphs to follow.

The publicly funded legal aid services in Hong Kong, with the exception of the provision of free legal advice and legal representation in the magistracies, are administered by the Legal Aid Department with civil service staff, part of the executive authorities of the Hong Kong Special Administrative Region. Questions have been raised whether civil service staff (whose benefits and advancement prospects are dependent on the Civil Service Bureau, a part of the Administration) may continue to act independently and impartially to withstand political influence from other parts of the executive authorities, if not from political figures leading or playing a role in the leading of the executive authorities, particularly in relation to litigation by a person against the executive authorities over the validity of an important or even popular piece of legislation or policy initiative. In this respect, it has repeatedly been said, perception counts. For example, the Hon Moses Cheng stated that the Government's role in legal aid, however effective and well-intentioned

'[is] simply counter to the common principles of independent judicial propriety. In most developed democratic societies the justice systems have evolved sufficiently to separate the role of the Government and remove any lingering doubts over conflicting or self-serving interests The powerful perception of "the fox guarding the hen-house" must be washed away from our justice system'.⁷²

The argument for independence was eloquently stated in the *Final Report of the Royal Commission on Legal Services*:

"The main objection of principle is that legal services are required more and more by private individuals who are in dispute with authority in one of its many forms, and to protect the interests of clients in such cases, the independence of the legal profession is of paramount importance. If all the lawyers to assist an individual at public expense depended on the authorities for position and advancement, there would be a risk that an individual's case might be conducted not in the way which best served his interests or comply with his wishes, but in a way which avoided causing difficulties and gave least offence to those in authority".⁷³

The Working Party on Legal Aid recognized in its 1986 report ("the Scott Report") that giving the Legal Aid Department independent status would enhance its neutral position and recommended that the Department should be re-titled "Legal Aid Commission" with a status outside the civil service, like the Department of Audit.⁷⁴ The Scott Report also considered that the then existing Standing Committee on Legal Aid, which was chaired

72 See the speech of the Hon Moses Cheng before the Legislative Council on 2nd July 1993: *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1993/94)*, pp 4929-4931.

73 Royal Commission on Legal Services, *Final Report* (London: Her Majesty's Stationary Office, 1979) (Cmnd 7648), paragraph 5.7.

74 See *Legal Aid: A Report by the Working Party* (January 1986) ("the Scott Report"), paragraph 5.14. The recommendation was not implemented.

by the Registrar of the Supreme Court and comprising of the Director of Legal Aid and three members from each of the Law Society and the Bar Association, should be replaced with a Legal Aid Advisory Committee to advise the Government on the provision of legal aid services and upon the related policy legislation and procedures. It should be concerned with the broad policy issues and not be involved in the detailed functioning of legal aid.

The International Commission of Jurists, in its March 1992 report of the Mission to Hong Kong, observed that in the context of monitoring and enforcing the Hong Kong Bill of Rights Ordinance:⁷⁵

“it is also essential to ensure the independence of the Legal Aid Department, which at present funds much of the human rights litigation. It is a government department headed by a Director of Legal Aid. Consideration should be given to making the Legal Aid Department an independent board rather than a government department.”⁷⁶

The Working Group on Legal Aid Policy Review, which deliberated between 1993 and 1994, recognized the importance of public perception of independence of legal aid provision⁷⁷ and accepted that the status of the Legal Aid Department as a government department may create a perception problem.⁷⁸ The principal recommendation of the Working Group for enhancing the independence of legal aid administration was to establish a Legal Aid Services Council to provide “a buffer between the Government and the executive agencies responsible for the day-to-day provision of legal aid services”.⁷⁹

The Legal Aid Services Council was established in 1996 to be, inter alia, the Chief Executive’s statutory advisory body on legal aid policy, including the feasibility and desirability of the establishment of an independent legal aid authority. The Council appointed consultants in October 1997 to study all publicly funded legal aid services in Hong Kong with reference to those offered in other common law jurisdiction. The consultants were instructed that their recommendations, though focusing on the issue of independence, should ensure that the quality and scope of legal aid services should be at least on a par with existing services and that the administration of justice should not be compromised. The consultants reported in April 1998.

In a submission entitled *Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority*, the Council indicated that the arrangement of having civil servants administering publicly funded legal aid services was institutionally flawed because of the risk of pressure from the Administration. Such an arrangement encourages the perception of a lack of independence. The Council argued that: “Operational independence can only be guaranteed by institutional independence, in the sense that civil servants may find it difficult to exercise

75 I.e. Cap. 383, Laws of Hong Kong.

76 International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (Geneva: International Commission of Jurists, 1992) p 105.

77 See Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 46; and Administration Wing, Chief Secretary’s Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.4.

78 See Administration Wing, Chief Secretary’s Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.3.

79 Ibid, paragraph 9.5.

discretionary powers against the Government when they are themselves part of the Government. Lawyers directly employed by the Government should not have to make decisions about suing the Government. This anomalous situation of conflict of interest has developed in Hong Kong as a matter of convenience”.⁸⁰ Doubts about independence in the operation of the Legal Aid Department undermines public confidence and often leads to the Government, even with the best of intentions, being suspected of and criticized for influencing the decisions of the Legal Aid Department, whether it has done so or not. Job security of staff of the Legal Aid Department as civil servants could not be the foundation for operational independence. “Independence should be built upon an institutional framework which is independent of both the Government and the legal profession”.⁸¹ Accordingly, the Council recommended to the Chief Executive the setting up of an independent statutory legal aid authority by phases with the Director of Legal Aid, the deputy directors and the assistant directors to be directly under its employment, the phased disestablishment of the Legal Aid Department and the creation of an independent Official Solicitor’s Office with a dedicated Official Solicitor. The Duty Lawyer Service was to remain separate in the meantime. The current mode of funding, particularly the absence of a ceiling of appropriation, should be retained.⁸² An independent legal aid authority, the Council considered, would recognize and give expression to institutional protection for operational independence through clear separation of the powers to make legal aid policies on the one hand and to operate legal aid services on the other. The authority’s framework and arm’s length relationship with the Government would properly foster the culture of independence, thus enhancing service delivery.⁸³

Moreover, the board of the proposed independent legal aid authority should allow for greater public participation. There should be more members of the public nominated by different non-governmental organizations or public bodies of different social background, other than the legal professional bodies.⁸⁴ Although legally, board members will ultimately be appointed by the Chief Executive, their nomination status would provide a greater degree of neutrality from the Government or the legal profession in comparison to those directly selected by the Administration or nominated by the legal professional bodies. It will be a step forward to having a more independent structure.

The Chief Secretary for Administration replied in October 1999 informing the Legal Aid Services Council that the Administration was unable to accept the Council’s recommendation of establishing an independent legal aid authority. She set out the Administration’s reasons for not establishing an independent legal aid authority under the 3 headings of Funding Accountability; the Need for an Independent Authority; and Staff Morale and Service Delivery.⁸⁵

80 Legal Aid Services Council, *Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority* (September, 1998) pp 14-15.

81 Ibid, p 15.

82 Ibid, pp 19-23.

83 Ibid, p 17.

84 Ibid, p 19, Annex 1.

85 Letter of the Chief Secretary for Administration to the Chairman of the Legal Aid Services Council dated 6 October 1999, reproduced in Legal Aid Services Council, *Annual Report 1999-2000* pp 41-43. The detailed arguments the Chief Secretary relied on under each heading will be stated and discussed in the ensuing text.

Further discussion of the issue of the pros and cons of establishing an independent legal aid authority can be advanced by reference to 2 questions, one based on perception and the other on practicality:

- Who should run the independent authority, the Judiciary, the legal profession, or the public?
- How about the staff of the Legal Aid Department? On what terms are they to transfer to an independent authority? At what price can one afford to have an independent authority?

The Legal Aid Department switched from being a section of the Judiciary to being a department of the executive authorities. The reasons for the change were not recorded, though Desmond O'Reilly Mayne QC, the first Director of Legal Aid, did mention in his first annual departmental report that being a department of the executive authorities enabled *immediate access* to the Government Secretariat, especially where the growing department was in need of financial and manpower resources.⁸⁶

It would be idle to speculate whether it had ever been thought at the time that it was undesirable for the Judiciary to undertake the screening of legal aid applications (which included assessment of merits) and assignment of lawyers for legal aid cases and also the adjudication of the cases to which the applications related. The strength of a perception argument would not be immediately recognized by the person going to the Legal Aid Department in respect of an ordinary personal injuries case against another person or corporate/private entity. Civil servants obviously have no working relationship or otherwise with that other person or corporate/private entity, and are bound by the Prevention of Bribery Ordinance.⁸⁷ When the Government rejected the perception argument in 1999 and declined the Legal Aid Services Council's recommendation for the establishment of an independent legal aid authority, it relied on a survey by the Legal Aid Services Council's consultants which concluded that any such perception was neither widely nor deeply held among members of the public.⁸⁸

86 *Hong Kong Annual Departmental Report by the Director of Legal Aid, D F O'Reilly Mayne QC JP for the Financial Year 1972-73* p 5.

87 I.e. Cap. 201, Laws of Hong Kong.

88 The Government made 2 other points: (a) There were safeguards in the current system which protect the independence of legal aid administration; and (b) Funding by the Legal Aid Department of numerous cases against the Government both before and after 1997, was said to bear ample testimony to the Government's continued commitment to the independent administration of legal aid, free from political interference: Legal Aid Services Council, *Annual Report 1999-2000*, pp 41-43 (setting out the Government's reasons for not accepting the Legal Aid Services Council's recommendation of setting up an independent legal aid authority).

The Reconvened Working Group on Legal Aid Policy Review, working between 1993 and 1994, reached a similar view, relying on the on-going survey conducted by the Legal Aid Department, which showed that "there is no lack of confidence in the Department and its competence in pursuing and defending the clients' interest. The survey repeatedly reveals that about 90% of the clients actually preferred the Legal Aid Department's counsel to outside lawyers to take up their cases". It sought to support its view by pointing to "numerous examples" in which the Legal Aid Department granted legal aid to legal aid applicants to pursue or defend legal proceedings against the Government, and even the department itself: Administration Wing, Chief Secretary's Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.2.

On the other hand, the Legal Aid Services Council's consultants did observe that the concern about the independence of the Legal Aid Department was particularly related to certain types of cases that present a particular challenge to the Government.

Concern that making the provision of legal aid independent of the Government was not necessarily the panacea and might result in replacing one "fox" with another to stand guard at the "henhouse" was raised again in 1992, when the Hon Wong Wai Yin indicated that "[action] should be taken to increase the degree of transparency of legal aid and related services and to enhance public participation in the provision of such services. To an appropriate extent, the community's overall interests and the general public's standpoint may be used to *counter-balance* the professional interests and standpoints of the professional bodies. This will increase the public's identification with, and respect and support for, the system" (emphasis supplied).⁸⁹

Administration of legal aid by the legal profession is regarded by some as a way of perpetuating self-interest. The Scott Report expressed doubt over whether there would be sufficient number of private practitioners willing to undertake the task of overseeing the administration of legal aid and opined that decisions on the merits test and assignment of lawyers "should be made by a body independent of those who may have a vested interest in the outcome". It was thought that placing administrative control under one branch of the legal profession may lead to conflicts. The Scott Report suggested that monitoring and control of assigned lawyers could better be achieved by "an organization distanced from the profession and its members".⁹⁰

The skepticism of the Scott Report was met with a counter-proposal from the Hong Kong Bar Association and the Law Society of Hong Kong⁹¹ that legal aid services should be administered by a statutory authority independent in name and substance from the Government but under the managerial control of the legal profession, with overall policy and financial control undertaken by a council with a majority of lay members (including its chairman).⁹² The joint profession saw genuine independence in the administration of legal aid to be vital in the sensitive political climate leading to 1997 and believed that independence and accountability could only be achieved if the administration and management of legal aid was controlled by the legal profession overseen by a body of citizens predominantly representing the public. The Scott Report's proposal of putting the Legal Aid Department on a par in terms of distancing with that accorded to the Audit Department was considered to be rather cosmetic.⁹³

89 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)* pp 3929-3934.

90 The Scott Report, paragraphs 5.3-5.13.

91 I.e. through a Joint Profession Working Party on Legal Aid Reform which was chaired by Denis Chang QC, Chairman of the Bar and Brian Tisdall, President of the Law Society.

92 A much watered down version of a council overseeing the provision of legal aid services and advising the Government on legal aid policy formed the basis of a recommendation of a Reconvened Working Group on Legal Aid Policy Review, which described the proposed council to be "a buffer between the Government and the executive agencies responsible for the day to day provision of legal aid services, and thereby achieving greater independence of legal aid administration": Administration Wing, Chief Secretary's Office, *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.5. The recommendation was adopted and accompanying legislation was enacted in 1996 to constitute the Legal Aid Services Council.

93 Joint Professions Working Party, *Report of the Joint Profession on Legal Aid Reform*.

A way of ensuring continuity, minimizing administrative disruption and solving the problem of lack of administrative manpower is to entice existing staff of the Legal Aid Department to the new independent authority, i.e. leaving the civil service. This move, characterized as the disestablishment of the Legal Aid Department, was said in 1995 to come with a price of HK\$130 million, which the Government was said to be reluctant to shoulder. Making sense of the proportion of this head of expenditure with notable infrastructure projects, the Hon Simon Ip exclaimed: “Is the rule of law worth just one-hundredth of the Tsing Ma Bridge?”⁹⁴

Disestablishment was also described by the Government to be “a difficult exercise at the best of times since it affects staff morale and the smooth operation of the department. It would be even more difficult in a harsh economic climate with high unemployment and a civil service that is undergoing fairly fundamental reforms”. Such a move, considered the Government, was bound to be “deeply unsettling to the staff concerned” and in turn affecting the quality of service provided to clients.⁹⁵

One of the major concerns of disestablishment is the funding needed to make provision for existing staff to switch from civil service terms of employment to contract terms of employment. In this connection, it ought to be noted that the Legal Aid Department does provide revenue to the Government in terms of recovered legal costs, an amount which has consistently been in an order exceeding HK\$200 million per year in the last 7 years. In a phased disestablishment programme, a portion of the annual revenue of the Legal Aid Department can be diverted to a dedicated fund account to finance the conversion packages for existing staff.

One of the reasons put forward against establishing an independent legal aid authority was that the Government’s commitment to imposing no cash-limit towards legal aid would have to be changed because the new entity would be fully separate from and independent of the Government, conflicting with “the well established *practice* of prudent management of public money” (emphasis supplied).⁹⁶ This point was made when there was no suggestion that the independent legal aid authority would be administered any differently from the Legal Aid Department with the consequence of incurring extra financial burden.

94 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1993/94)*, p 4946 (21 July 1993, when the price tag was stated to be HK\$80 million).

95 Legal Aid Services Council, *Annual Report 1999-2000*, pp 41-43 (setting out the Government’s reasons for not accepting the Legal Aid Services Council’s recommendation of setting up an independent legal aid authority). Contrast the two to one ratio among the Legal Aid Department’s professional in favour of independence on a poll taken in 1993 by the Hon Simon Ip, quoted in his speech to the Legislative Council: *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1993/94)*, p 4923 (21 July 1993). On the other hand, the Reconvened Working Group on Legal Aid Policy Review found one year later “no conclusive evidence” that the proposal to separate the Legal Aid Department from the Government would be welcomed by the staff in general: *Report of the Reconvened Working Group on Legal Aid Policy Review* (July 1994) paragraph 9.7(c).

96 Legal Aid Services Council, *Annual Report 1999-2000*, pp 41-43 (setting out the Government’s reasons for not accepting the Legal Aid Services Council’s recommendation of setting up an independent legal aid authority). The Government also relied on the fact that in common law jurisdictions where legal aid services are operated by independent bodies, such as Canada, Australia and New Zealand, the budgets of the bodies were invariably capped.

An independent legal aid authority will be a public body known to the Government as a Non-departmental Public Body (“NDPB”). Another expression also used is “arms-length body”. All NDPBs will conclude with the Government a memorandum of administrative arrangements, which is to set out the general principles and guidelines for the administrative arrangements between the NDPB and the Government, including the funding arrangements. The usual administrative arrangement is that the NDPB will be autonomous in the management and control of its activities. The Government will be responsible for funding the NDPB’s activities in the light of overall government priorities which are affected by commitments enshrined in legislation. A designated Government bureau will stand as the controlling officer of the expenditure head and/or subheads for the NDPB. Funding for a NDPB is by way of a subvention under an expenditure head comprising of 3 components: (a) personal emoluments; (b) other charges, including annual recurrent expenditure; and (c) capital expenditure, including items of non-recurrent expenditure for specific purposes and any stores and equipment exceeding in cost a specified amount. Virement of funds as between each component is restricted.⁹⁷ In relation to the annual limit in financial provision, though the normal practice is that the provision for recurrent subvention will not be increased during the course of the financial year, additional funds may be obtained to meet the cost of (i) any revision of salaries and allowances in accordance with approved rates and scales; (ii) payments for statutory obligations; and (c) new or additional services requested by the Government, required by legislation or unforeseen contingencies beyond the control of the NDPB.⁹⁸

An independent legal aid authority having the status of a NDPB will be vested with the statutory obligations under the Legal Aid Ordinance to provide legal aid services to qualifying members of the public. The fluctuation in demand for legal aid services from qualifying members of the public can and should be met by application of supplementary provisions under a suitably drafted memorandum of administrative arrangement, so that the statutory obligations of the Legal Aid Ordinance may be met.⁹⁹ The present non-cash limit commitment towards legal aid may still be met even if the administration of the statutory services were vested in an independent organization separate from the structure of the executive authorities.

97 No virement between recurrent subvention (i.e. (a) and (b)) and capital subvention (i.e. (c)) is allowed, except with the approval of the Secretary for Financial Services and the Treasury. Virement from (b) to (a) must first be approved by the controlling officer. Virement from (a) to (b) is permissible, provided that the virement does not commit the NDPB to any annual recurrent increase in expenditure under (b). Otherwise, prior approval from the controlling officer after consultation with the Secretary is required.

98 The NDPB in such circumstances may submit requests for supplementary provisions with justification to the controlling officer, who would make the application on behalf of the NDPB.

99 Cf Government of the HKSAR, *Estimates for the year ending 31 March 2006, Vol 1A – General Revenue Account*, p 12, where an exception to cash-limited heads or subheads of expenditure is described as: “(c) extra requirements to meet statutory obligations, additional costs which are unforeseeable and wholly out of the control of the controlling officer ... and bills presented for payment within the approved commitment of a non-recurrent or capital item”. A case therefore can be made to safeguard the access to non-cash limited appropriations should the statutory obligations under the Legal Aid Ordinance and the Legal Aid in Criminal Cases Rules become vested with a non-departmental public body operating independent of the Government.

If the financial concerns of establishing an independent legal aid authority can be overcome, or reduced into a less than significant obstacle, the question becomes one of commitment on the part of the Government to the issue of independent and separate administration of legal aid in Hong Kong. The Legal Aid Services Council remains charged by statute with the advisory role to the Chief Executive on the feasibility and desirability of the establishment of an independent legal aid authority.¹⁰⁰ It may be anticipated that the Council will be obliged to review the issue in the future.

The Scott Report has recognized that “the *neutral* position” of the legal aid authority “should be established beyond doubt”.¹⁰¹ Independence obviously guarantees neutrality. In the absence of *institutional* independence, one seems to have to be content with what Government appointed policy review committees and the Legal Aid Department have insisted over time, namely that the Department has *operational* independence.¹⁰² Thus, whilst the Legal Aid Department remains part of the Government, its independent operation has been and is served, in part, by not having a capped budget.

Perception of neutrality, autonomy and independence, as it has been acknowledged, is better felt than claimed. In the context of legal aid, it is the administration and delivery of legal aid services that must be perceived by those providing and receiving such services to be having these qualities. Commitment to maintain these qualities cannot just come from the administrators who are the front line operators, but more importantly from all those in a position to interfere directly or indirectly with operational decisions, namely the executive authorities, the legislature, the judiciary, and the legal profession in its collective capacity.

100 Legal Aid Services Council Ordinance (Cap. 489) section 4(5).

101 Scott Report, paragraph 5.2.

102 See Working Group on Review of Legal Aid Policy, *Consultative Paper on Legal Aid* (April 1993) paragraph 46. The Working Group, acknowledging the importance of a perception of independence, gave serious considerations to ways of further enhancing the independence of legal aid administration, and the mechanism for monitoring efficiency and cost effectiveness.