

Legal aid systems in selected places

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Executive summary

1. This report studies the legal aid systems in England and Wales of the United Kingdom, the Province of Ontario of Canada (Ontario) and the State of New South Wales of Australia (NSW) with respect to the following aspects: development of the legal aid system; authority responsible for providing legal aid; scope of legal aid services; eligibility for legal aid; legal aid services at the community level; legal aid expenditure per capita; and major recent developments.

England and Wales

2. In England and Wales, legal aid is provided by the Legal Services Commission (LSC), which is a non-departmental public body established under the *Access to Justice Act 1999*. LSC is governed by a board, the members of which are appointed by the Lord Chancellor. LSC's annual budget must be approved by the Lord Chancellor. Besides, the Lord Chancellor may give guidance to LSC about the discharge of its functions, but such guidance cannot touch on individual cases.
3. LSC's legal aid services include not only representation but also legal advice and mediation. Legal aid is normally not provided for some types of civil cases, including personal injury and defamation (libel and slander) or malicious falsehood. Applicants eligible for civil legal aid services other than representation (including initial legal advice and help, advocacy and family mediation) are subject to a unified financial eligibility limit. Regarding criminal legal aid, different levels of services (such as legal advice, advocacy assistance and representation) are subject to different financial eligibility limits.
4. The fixed and graduated fee schemes recently implemented in England and Wales have not been welcomed by legal aid practitioners, who are dissatisfied with the design of the fixed and graduated fees and the levels set, and express their intention to leave the legal aid market. The Constitutional Affairs Committee of the House of Commons is also critical of the fee schemes.
5. In 2007-2008, LSC's legal aid expenditure was over £2 billion (HK\$23.3 billion), which was about £37 (HK\$430) per capita. LSC provides community legal aid services through a network of LSC-funded organizations called the Community Legal Service.

Ontario

6. In Ontario, legal aid is provided by Legal Aid Ontario (LAO), which is a statutory corporation established under the *Legal Aid Services Act 1998*. LAO is governed by a board of directors appointed by the Lieutenant Governor of Ontario acting on and with the advice of the Cabinet of the Ontario government. LAO's annual budget must be approved by the Attorney General and reviewed by the Management Board of the Cabinet of the Ontario government.
7. LAO and the Ministry of the Attorney General are required to enter into a memorandum of understanding under which LAO is accountable to the Attorney General for its expenditure of public funds and provision of legal aid services to low-income individuals.
8. LAO's legal aid services include not only representation but also legal advice and mediation. Legal aid is not available to certain areas of civil law, including proceedings wholly or partly in respect of defamation, relator actions and proceedings relating to election. Applicants for legal aid services are required to fulfill a unified financial eligibility limit, regardless of the level of services they seek.
9. The legal aid services provided by LAO mainly include the legal aid certificate programme, the community legal clinics and the duty counsel programme. The fees of legal aid certificate lawyers are regulated by the Ontario government, with the maximum number of hours and the maximum hourly rates of lawyer fees for different procedures being explicitly specified. For criminal and civil cases, there are three different hourly rates for lawyers, depending on their certified years of experience. Given the increasing complexity of various kinds of legal proceedings covered by legal aid certificates, private lawyers have been dissatisfied with the hourly rates for legal aid services.
10. In 2005-2006, LAO's legal aid expenditure was CAN\$325 million (HK\$2 billion), which was about CAN\$27.5 (HK\$173) per capita. LAO funds non-profit organizations known as community legal clinics to provide free legal services to low-income individuals or disadvantaged communities.

NSW

11. In NSW, legal aid is provided by the Legal Aid Commission (LAC), which is a statutory body established under the *Legal Aid Commission Act*. LAC is governed by a board, the members of which are appointed by the NSW Attorney General.
12. LAC is responsible for preparing its annual budget, which is not statutorily subject to the executive branch's approval. LAC is not bound by any framework document involving the NSW government or guidance from the government, except that LAC may enter into an agreement or arrangement with the federal government for the provision of legal aid in Commonwealth matters in NSW.
13. LAC's legal aid services include not only representation but also legal advice and mediation. Applicants for legal aid services are required to fulfill a unified financial eligibility limit, regardless of the level of services they seek. While there are both means tests and merit tests for most legal aid services, applicants need not pass a means test to obtain legal advice and minor assistance services from LAC, which are free of charge.
14. In NSW, the issue of the legal aid service fee is also a major concern. The National Legal Aid has requested an increase in the fees being paid to private practitioners offering legal aid services, which are considered to be less than the market rate, provided that such move will not decrease the number of grants of legal aid made available by the commissions concerned.
15. In 2006-2007, LAC's legal aid expenditure was AUS\$204 million (HK\$1 billion), equivalent to about AUS\$29.6 (HK\$150) per capita. LAC administers the Community Legal Services Programme and the Women's Domestic Violence Court Assistance Programme to provide legal services to disadvantaged people at the community level.

Legal aid systems in selected places

Chapter 1 – Introduction

1.1 Background

1.1.1 At its meeting on 28 January 2008, the Panel on Administration of Justice and Legal Services requested the Research and Library Services Division (RLSD) to conduct a research on the legal aid systems in overseas jurisdictions. RLSD presented the findings of the interim report on "The legal aid systems in selected places"¹ and the information note entitled "Scope and expenditure of legal aid services in selected places" at the meetings of the Panel on 26 May 2008 and 24 November 2008 respectively. This is the full report on the research subject.

1.1.2 At the aforementioned meetings, Members suggested that RLSD's research on legal aid in overseas places should cover, where practicable, the following concerns:

- (a) the overall regulatory framework for legal aid, including the structure and mode of operation of the authority providing legal aid;
- (b) the eligibility criteria for legal aid applicants, the scope of services provided under civil and criminal legal aid, and the fees for legal aid lawyers;
- (c) whether there is any large scale non-government-run legal aid scheme; and
- (d) any recent major changes in the legal aid system.

¹ Interim report on "The legal aid systems in selected places" (IN18/07-08) and "Scope and expenditure of legal aid services in selected places" (IN03/08-09).

1.2 Scope of research

1.2.1 The legal aid systems in the selected jurisdictions are examined with respect to the following major aspects:

- (a) development of the legal aid system;
- (b) authority responsible for providing legal aid;
- (c) scope of legal aid services;
- (d) eligibility for legal aid;
- (e) legal aid services at the community level; and
- (f) legal aid expenditure per capita.

1.2.2 This research covers the legal aid systems in the following places:

- (a) England and Wales of the United Kingdom;
- (b) the Province of Ontario (Ontario) of Canada; and
- (c) the State of New South Wales (NSW) of Australia.

1.2.3 The legal aid system in England and Wales is selected not only because of the long history of legal aid but also because it has been undergoing major transformation towards a market-based approach to the procurement of legal aid work in recent years. Ontario is selected because its legal aid system is undergoing a comprehensive review by the Ontario government. NSW is selected because its legal aid commission provides by far the largest and broadest civil law programme amongst the regional legal aid commissions in Australia.

1.3 Methodology

1.3.1 This research adopts a desk research method, which involves Internet research, literature review, documentation analysis and correspondence with relevant authorities.

Chapter 2 – England and Wales of the United Kingdom

2.1 Development of the legal aid system

2.1.1 In England and Wales, the concept of the government providing civil and criminal legal assistance for people in need dates back to the early part of the 20th century.² However, it was not until the mid-1940s that the government started to develop a publicly-funded legal aid scheme, which laid the foundation for the present legal aid system.

2.1.2 In May 1944, the Lord Chancellor appointed Lord Rushcliffe to lead the Committee on Legal Aid and Legal Advice in England and Wales (commonly known as the Rushcliffe Committee) to improve the provision of legal aid to people in need. Recognizing the importance of wider access to justice and the right of people in need of legal representation, the Rushcliffe Committee recommended a system under which legal practitioners in private practice would be publicly funded to provide legal aid to people of small or moderate means, and legal aid would be available in all courts. It also recommended the system be administered by the legal profession instead of a government department or local authorities.

2.1.3 Only some of the Ruchcliffe recommendations were accepted and given effect in the *Legal Aid Advice and Assistance Act 1949* under which the first publicly-funded legal aid scheme was established in England and Wales. Initially the scheme was available to 80% of the population on income grounds but limited to divorce cases in the higher courts only.³ It was later extended to other areas of civil cases and, in the early 1960s, to proceedings in county courts and magistrates' courts. From the 1970s to the mid-1980s, it was further expanded to include an advice and assistance scheme, and duty solicitor schemes in magistrates' courts and police station.⁴ Up to the mid-1980s, the scheme had been administered by the Law Society, while the Lord Chancellor had held ultimate political responsibility for it.⁵

² Department for Constitutional Affairs (2005) pp. 6-7.

³ Thorp & Richards (1999) p. 7 and Department for Constitutional Affairs (2005) p. 7.

⁴ Thorp & Richards (1999) p. 7 and Department for Constitutional Affairs (2005) p. 9.

⁵ Thorp & Richards (1999) p. 7.

2.1.4 Between the 1970s and the 1980s, the growing number of litigants using the legal aid scheme resulted in a rapid increase in the cost of running the scheme. For example, in magistrates' courts alone, legal aid expenditure rose in real terms from £6.9 million (HK\$81 million) in 1966-1967 to £117 million (HK\$1.4 billion) in 1982-1983. Meanwhile, there were growing concerns over the quality of legal aid services provided. As a result, in 1987, the Lord Chancellor's Department published a white paper entitled *Legal Aid, England and Wales: a New Framework* proposing a legal aid reform. The proposal was eventually implemented by the *Legal Aid Act 1998*. The Act sought to end the anomalous double roles of the Law Society as both the paymaster and representatives of the legal profession receiving funds.⁶ In essence, the Act established the Legal Aid Board, a non-departmental public body appointed by the Lord Chancellor, to inherit the administrative role of the Law Society in legal aid services, and codified the relationship between the Board and the Lord Chancellor. The Board was also required by the Lord Chancellor to determine whether best use was made of legal aid resources.

2.1.5 Attempts were made by the Legal Aid Board to control legal aid expenditure and quality, such as developing a voluntary scheme of franchising suppliers of legal services whose practice management and case management systems met the Board's quality standards.⁷ However, legal aid expenditure continued to rise. It jumped 135% from £645 million (HK\$7.5 billion) in 1987-1988 to £1.5 billion (HK\$17.5 billion) in 1997-1998.⁸ According to the Department for Constitutional Affairs, a major reason for the surge was that "legal aid was too heavily biased towards expensive, court-based solutions rather than helping to tackle people's problems before they reached courts".⁹ In addition, "expenditure was almost entirely on lawyers' services, who, in practice, determined where and how the money was spent", and "legal aid was often funding cases of insufficient merit".¹⁰

⁶ Department for Constitutional Affairs (2005) p. 9.

⁷ Thorp & Richards (1999) p. 9 and pp. 19-20.

⁸ Department for Constitutional Affairs (2005) p. 11.

⁹ Department for Constitutional Affairs (2005) p. 9.

¹⁰ Department for Constitutional Affairs (2005) p. 9, and Thorp & Richards (1999) p. 26.

2.1.6 In December 1998, the UK government published a white paper entitled *Modernizing Justice* aiming at bringing about a significant increase in access to justice and obtaining the best value for the taxpayers' money spent on legal services and the courts.¹¹ The white paper proposed to set up a new Legal Services Commission (LSC) to replace the Legal Aid Board, and to replace the existing civil and criminal legal aid schemes with the Community Legal Service (CLS) and the Criminal Defence Service (CDS), with a view to providing more integrated, targeted and cost-effective legal aid services for people in need. These proposals were implemented in July 1999 by the *Access to Justice Act 1999*, which has become the legal framework for the current legal aid system in England and Wales.

2.2 Responsible authority

Status

2.2.1 LSC is responsible for establishing, maintaining and developing CLS and CDS. It is a "non-departmental public body", which is not regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown.¹²

Functions and powers

2.2.2 In general, LSC may do what it considers as necessary or appropriate for the discharge of its functions.¹³ In particular, it has powers to:

- (a) enter into any contract;
 - (b) make grants (with or without conditions) and loans, and invest money;
 - (c) promote or assist in the promotion of publicity relating to its functions;
 - (d) undertake any inquiry or investigation which it may consider appropriate in relation to the discharge of any of its functions;
- and

¹¹ Lord Chancellor's Department (1998) p. 7.

¹² Section 1, Schedule 1, *Access to Justice Act 1999*.

¹³ Section 3(1), *Access to Justice Act 1999*.

- (e) give the Lord Chancellor any advice which it may consider appropriate in relation to matters concerning any of its functions.

Membership and appointment

2.2.3 LSC comprises not fewer than seven members and not more than 12 members.¹⁴ To facilitate focused decision-making, LSC is designed to have a smaller membership than its predecessor, the Legal Aid Board, which had 11 to 17 members.¹⁵

2.2.4 All LSC members, including the Chair, are appointed by the Lord Chancellor, who is also responsible for approving their terms and conditions. Each member is appointed for a term of not more than five years and can be reappointed. To reflect the needs of users of legal services, the members so appointed must have experience in or knowledge of:¹⁶

- (a) the provision of services which LSC can fund as part of CLS or CDS;
- (b) the work of the courts;
- (c) consumer affairs;
- (d) social conditions; and
- (e) management.

2.2.5 In addition, the Lord Chancellor may appoint the Chief Executive of LSC as a LSC member on an ex-officio basis, on such terms and conditions he or she considers appropriate.

¹⁴ Sections 1(2) and (3), *Access to Justice Act 1999*. The Lord Chancellor may by order substitute for either or both of the numbers for the time being such other number or numbers as he thinks appropriate.

¹⁵ Section 52, *Explanatory Notes to Access to Justice Act 1999*.

¹⁶ Section 1(5), *Access to Justice Act 1999*, and section 52, *Explanatory Notes to Access to Justice Act 1999*. Unlike the Legal Aid Board, LSC is not required to include two solicitors as members and to consult the desirability of including two barristers.

Relationship with the executive branch

Legal Services Commission Framework

2.2.6 The relationship of LSC with its sponsoring government department, the Ministry of Justice (MoJ), is specified in the *Legal Services Commission Framework Document* drawn up by the Department for Constitutional Affairs (the former sponsoring department for LSC) in consultation with LSC.¹⁷

2.2.7 The *Document*, which took effect from April 2004, comprises the Management Statement and the Financial Memorandum. Subject to the *Access to Justice Act 1999*, the Management Statement sets out the framework for the operation of LSC, particularly regarding:

- (a) LSC's overall aims to support MoJ's wider objectives and Public Service Agreement targets;
- (b) rules and guidelines relevant to LSC's functions, duties and powers;
- (c) conditions under which any public funds are paid to LSC;
- (d) how LSC is to be held to account for its performance; and
- (e) the relationship between the responsible Minister, MoJ and LSC.

2.2.8 The Financial Memorandum sets out in greater detail certain aspects of the financial provisions which LSC is required to observe, including a framework for LSC's procurement policies.

¹⁷ According to the *Document*, LSC or the responsible Minister may propose amendments to the *Document* at any time. Any LSC proposals will be considered in the light of evolving departmental policy aims, operational factors and the track record of LSC. The guiding principle is that "the extent of flexibility and freedom given to the Commission will reflect both the quality of its internal controls and its operational needs". The responsible Minister determines in consultation with LSC what changes, if any, are to be incorporated in the *Document*. Significant variations to the *Document* will be cleared with the Treasury or the Cabinet Office as appropriate. Any question relating to the interpretation of the *Document* will be resolved by the sponsoring department after consultation with LSC and, as necessary, with the Treasury and/or the Cabinet Office. Department for Constitutional Affairs & Legal Services Commission (2004) p. 5.

Guidance from the Lord Chancellor

2.2.9 Under the *Access to Justice Act 1999*, the Lord Chancellor may give guidance to LSC about the discharge of its functions. The Lord Chancellor must either publish or require LSC to publish his guidance. LSC "shall take into account any such guidance when considering the manner in which it is to discharge its functions".¹⁸ However, the Lord Chancellor may not give guidance in relation to individual cases.¹⁹

Accountability to the executive branch

2.2.10 LSC is accountable to the Lord Chancellor in the following ways:

- (a) its annual plan, which includes its strategic objectives, must be approved by the Lord Chancellor, who will publish his reasons for rejecting LSC's draft annual plan or any part of it;²⁰
- (b) the Lord Chancellor may require LSC to deal with specified matters in a particular report; and
- (c) it must provide the Lord Chancellor with such information as he may require relating to its property and to the discharge or proposed discharge of its functions. LSC must permit any person authorized by the Lord Chancellor to inspect and make copies of any accounts or documents of LSC, and provide such explanation of them as any such person, or the Lord Chancellor, may require.²¹

Accountability to the legislature through the Lord Chancellor

2.2.11 The Lord Chancellor is accountable to Parliament for the activities and performance of LSC. As an associated body of MoJ, LSC is monitored by the Justice Committee of the House of Commons of Parliament. Besides, in its annual report laid before Parliament, LSC must provide evidence to Parliament that it has successfully met its statutory responsibilities, including maintaining and developing CLS and CDS, funding legal aid services in England and Wales, identifying where there are unmet legal aid needs, and developing providers and innovative services to meet priority needs identified.

¹⁸ Section 23, *Access to Justice Act 1999*.

¹⁹ Ibid.

²⁰ Thorp & Richards (1999) pp. 44-45.

²¹ Sections 13(1) and (2), Schedule 1, *Access to Justice Act 1999*.

2.3 Civil legal aid services

2.3.1 LSC provides civil legal aid services through CLS, which is a network of LSC-funded organizations providing:²²

- (a) general information about the law and legal system and the availability of legal services;
- (b) advice on how the law applies in particular circumstances;
- (c) help in preventing, or settling or otherwise resolving, disputes about legal rights and duties, and in enforcing decisions by which such disputes are resolved; and
- (d) help concerning legal proceedings not relating to disputes.

2.3.2 Under the Five-year CLS Strategy covering 2006 to 2010, LSC has been establishing community legal advice services in areas suffering from the most acute deprivation, where legal issues relating to social welfare require a wide range of expertise. LSC has also signed agreements with county councils to develop a network to facilitate referrals of clients to legal aid service providers with particular expertise that may not be available in the locality.

Scope of services

2.3.3 Legal aid is available for most types of civil legal cases except those civil cases heard in certain tribunals or courts, including the Employment Tribunal, the Immigration Tribunal and the Lands Tribunal. In addition, legal aid is normally not provided for the following types of civil cases:²³

- (a) personal injury;
- (b) negligently caused damage to property;
- (c) conveyancing;
- (d) boundary disputes;

²² Section 4(2), *Access to Justice Act 1999*.

²³ *Community Legal Service (2007)*.

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- (e) making a will;
 - (f) trust law;
 - (g) defamation (libel and slander) or malicious falsehood;
 - (h) company or partnership law;
 - (i) matters arising out of carrying on a business; or
 - (j) attending an interview or an asylum claim.

2.3.4 CLS provides different levels of civil legal aid services based on the assessment of an application:²⁴

- (a) Legal Help, which provides initial advice and help;²⁵
- (b) Help at Court, which provides help and advocacy for a client in relation to a particular hearing, without formally acting as a legal representative in the proceedings, unless authorized by LSC;
- (c) Family Mediation, which provides mediation of a family dispute, including assessing whether mediation is considered suitable to the dispute and the parties;
- (d) Family Help (Lower);²⁶

²⁴ Section 2.1, Part A, The Funding Code: Criteria, Legal Services Commission.

²⁵ "Legal Help" does not include the provision of general information about the law and legal system and the availability of legal services (except where such provision is incidental to the provision of help in a specific case); issuing or conducting court proceedings; advocacy or instructing an advocate in proceedings; and the provision of mediation or arbitration (but this does not prevent legal help being given in relation to mediation or arbitration).

²⁶ "Family Help (Lower)" means "Family Help" excluding issue of proceedings or representation in proceedings other than help in obtaining a consent order following settlement of a family dispute. "Family Help" is a level of services the grant of which authorizes help in relation to a family dispute, including assistance in resolving that dispute through negotiation or other means.

- (e) Legal Representation²⁷ before the Asylum and Immigration Tribunal, and before the High Court in respect of an application under Section 103A of the *Nationality, Immigration and Asylum Act 2002*; and
- (f) Legal Representation in Specified Family Proceedings, i.e. family proceedings before a magistrates' court (other than proceedings under the *Children Act 1989* or Part IV of the *Family Act 1996*).

2.3.5 These services are managed through CLS contracts awarded to solicitors and not-for-profit agencies by LSC. CLS contracts operate under two mechanisms:

- (a) Controlled Work, which includes work under civil contracts that cover Legal Help, Help at Court and Legal Representation in front of the Asylum and Immigration Tribunal; and
- (b) Licensed Work, which is work under civil contracts that cover all Legal Representation except work covered by Controlled Work or Very High Cost Cases, which are managed under separate contracts.

Eligibility for civil legal aid

2.3.6 To be eligible for civil legal aid, an applicant must pass both the means test and the legal merit test.

²⁷ "Legal Representation" provides legal representation for a party to proceedings or for a person who is contemplating taking proceedings. This includes litigation services and advocacy services, but does not include mediation or arbitration.

Means test

2.3.7 Generally, for all levels of civil legal aid services except Legal Representation in immigration matters (which is a type of Controlled Work) and Legal Representation in Specified Family Proceedings, an eligible applicant must pass the means test which comprises the following three conditions:

- (a) gross income²⁸ not exceeding £2,530 (HK\$29,300) per month;
- (b) disposable income²⁹ not exceeding £698 (HK\$8,100) per month; and
- (c) disposable capital³⁰ not exceeding £8,000 (HK\$93,000).

2.3.8 While both the gross income cap and disposable income cap for Legal Representation in immigration matters are the same as those for other civil legal aid services, an applicant is subject to a lower disposable capital cap of £3,000 (HK\$35,000). On the other hand, to be eligible for Legal Representation in Specified Family Proceedings, an applicant must not only pass the means test, but also pay a contribution to LSC from the applicant's income or capital or both.

2.3.9 An applicant in receipt of Income Support, Income-Based Jobseeker's Allowance, Income-Based Employment and Support Allowance or Guarantee Credit automatically satisfies the means test for all levels of services.³¹

Legal merits test

2.3.10 The legal merit test involves the evaluation of whether an applicant's case is likely to be successful and whether the case is likely to win more than the amount of resources spent on it.

²⁸ Gross income means the total income from all sources before the deduction of tax, National Insurance and any other allowances or disregards. Applicants with more than four dependent children are subject to a higher monthly gross income cap.

²⁹ Disposable income means the amount of income, such as earnings and benefits.

³⁰ Disposable capital means the amount of assets, such as savings and property.

³¹ An applicant may receive legal aid for some types of help regardless of how much money the applicant has. An example is representation at the Mental Health Review Tribunal.

Contribution to legal aid cost

2.3.11 Legal Representation in Specified Family Proceedings is the only level of civil legal aid service for which contribution to LSC can be sought. A recipient of such service, who has disposable income in excess of £300 (HK\$3,500) and up to £698 (HK\$8,100) per month, is liable to pay a monthly contribution of a proportion of the excess income over £296 (HK\$3,400), which is calculated in accordance with a prescribed scale. A recipient of such service, who has a disposable income of £300 (HK\$3,500) or below per month, does not need to pay any contribution from his or her income, but may still have to pay a contribution from his or her capital. A service recipient whose disposable capital exceeds £3,000 (HK\$35,000) is required to pay a contribution of either the capital exceeding that sum or the likely maximum cost of the funded service, whichever is the lesser.

2.4 Criminal legal aid services

2.4.1 LSC provides criminal legal aid services through CDS, which is a criminal legal aid scheme aimed at ensuring that people suspected or accused of a crime have access to advice, assistance and representation, as the interests of justice require. CDS administers three levels of services:

- (a) Advice and Assistance, which covers help from a solicitor, including giving advice, writing letters, negotiating, getting a barrister's opinion and preparing a written case;³²
- (b) Advocacy Assistance, which covers the cost of a solicitor to prepare a client's case and representation in certain proceedings in both magistrates' courts and the Crown Court, and representation for prisoners facing disciplinary charges before the prison governor/controller or adjudicator, discretionary and automatic lifers and those detained at the Queen's Pleasure whose cases are referred to the Parole Board; and

³² Advice and Assistance may be available in relation to appeals or prison law but is not available during criminal proceedings after charge or summons. Nor does it cover representation in court.

- (c) Representation for criminal offences, which covers the cost of a solicitor to prepare a client's defence before the client goes to court and to represent the client there, including dealing with issues such as bail, and advice on appeal against a verdict or sentence of magistrates' courts or the Crown Court (or a decision of the Court of Appeal) and preparing the notice of appeal itself.³³

Eligibility for criminal legal aid services

2.4.2 Except for certain groups of applicants,³⁴ an applicant eligible for criminal legal aid services for cases in magistrates' courts must pass a means test, which establishes whether the applicant is financially eligible for legal aid. The means test considers income and expenses but not capital.³⁵ On the other hand, there is no means test for cases heard in the Crown Court and higher courts, and legal aid can be granted to defendants in those cases. The court may issue an order to recover legal aid costs if it believes that a defendant could have paid for his or her own defence.

2.4.3 The three levels of services provided by CDS are subject to different eligibility requirements:

³³ Representation is not available to bringing a criminal a private prosecution (i.e. bringing a criminal case against another person).

³⁴ Applicants automatically pass the means test if they are under the age of 16, aged 16 or 17 with no income and living with their parents or guardians, under the age of 18 and in full-time education, or on unemployment benefits.

³⁵ Unlike that for civil legal aid, the means test for criminal legal aid in magistrates' courts only considers income and expenses but not capital.

Advice and Assistance

2.4.4 An applicant is eligible for Advice and Assistance if the applicant has a disposable capital³⁶ of £1,000 (HK\$11,600) or less, and a disposable income of £95 (HK\$1,100) per week or less.³⁷

Advocacy Assistance

2.4.5 There is no means test for Advocacy Assistance, except where Advocacy Assistance is provided in prison law. For this class of work, the capital limit is £3,000 (HK\$35,000) with allowances of £335 (HK\$3,900) for one dependant, £535 (HK\$6,200) for two dependants plus £100 (HK\$1,200) for each additional dependant. The income limit is £194 (HK\$2,300) per week. The assessment of the capital and income caps is conducted in the same way as that in Advice and Assistance except when the applicant receives Income Support, Income-Based Job Seeker's Allowance or Guarantee State Pension Credit, the applicant will automatically qualify.

Representation for criminal offences

2.4.6 Decisions to grant Representation in individual cases are made by magistrates' courts. Whether the court will grant an applicant Representation depends on the outcome of the following means test and Interests of Justice test. An applicant must pass both tests to be eligible for Representation.

³⁶ An applicant's disposable capital includes the value of his or her savings (whether in cash, investments, or money in a bank or the National Savings Bank) and anything of substantial value owned by the applicant. Disposable capital does not include: (a) the value of the house in which the applicant lives (although any value of the house in excess of £100,000 (HK\$1.2 million), after allowing a maximum of £100,000 (HK\$1.2 million) for any mortgage, must be included); (b) the applicant's household furniture and effects, clothing and any tools of the applicant's trade; and (c) the Back to Work Bonus under Section 26 of the *Job Seekers Act 1995*. The calculation of disposable capital also deducts the following allowances for dependants of the applicant (i.e. partners, children and relatives): (a) £335 (HK\$3,900) if the applicant has one dependant; (b) £535 (HK\$6,200) if the applicant has two dependants; and (c) £100 (HK\$1,200) for each extra dependant.

³⁷ If the applicant is married or living with someone as a couple, the disposable capital and disposable income of the applicant's partner will be included unless they live apart or there is a conflict of interest between them.

Means test

2.4.7 An applicant automatically qualifies for Representation if the applicant is receiving Income Support, Income-Based Jobseeker's Allowance or a Guarantee State Pension Credit; under the age of 16; or under the age of 18 and in full-time education.

2.4.8 For other applicants, the court calculates the "actual annual income"³⁸ of the applicant and his or her partner (if any), and applies the "simple means test". An applicant qualifies for Representation if his or her actual annual income following the calculation is £12,007 (HK\$140,000) or less.

2.4.9 If an applicant's actual annual income is between £12,007 (HK\$140,000) and £21,487 (HK\$250,000), the court will deduct from it the applicant's Income Tax and National Insurance contributions, annual housing costs, annual childcare costs, annual maintenance to his or her former partner and any children, and annual living allowance to determine the "annual disposable income". The applicant will qualify for Representation if his or her "annual disposable income" is £3,270 (HK\$38,000) or less.

Interests of Justice test

2.4.10 The court may decide that it is in the interests of justice to grant an applicant Representation for certain reasons, including:

- (a) the applicant's case is so serious that if the applicant is found guilty, he or she is likely to go to prison or lose his or her job;
- (b) there are substantial questions of law to be argued; and
- (c) the applicant is unable to follow the proceedings and explain his or her case because he or she does not speak English well enough or is mentally ill.

³⁸ Actual annual income includes money received from the applicant's (and his or her partner's, if any) employment, friends, relatives, pension, property, lodgers and student loan, interest from savings, maintenance received from former partners and some benefits.

Contribution to legal aid cost

2.4.11 Recipients of Advice and Assistance or Advocacy Assistance under CDS are not required to pay any contribution. For an applicant qualified for Representation, at the end of the case the applicant might be asked to make a payment if the applicant has been represented in any court other than a magistrates' court. The judge will only ask the recipient to pay a contribution if it is reasonable in consideration of all the circumstances of the case, including the applicant's financial situation.

2.5 Funding

2.5.1 The Lord Chancellor has a statutory duty to pay LSC the sums as he or she may determine as appropriate for LSC to exercise its functions in relation to CLS and CDS as well as to cover the administrative costs of LSC. The budget of LSC is included as part of the departmental budget of MoJ, and LSC is financed by grant-in-aid received from MoJ.

2.5.2 In the UK, legal aid expenditure increased from £1.5 billion (HK\$17.5 billion) in 1996-1997 to over £2 billion (HK\$23.3 billion) in 2007-2008. At present, LSC spends about £37 (HK\$430) per head of population. According to LSC, legal aid has been one of the fastest growing areas of the public sector over the past 25 years. The expenditure on legal aid has increased at almost 6% per year in real terms, compared to the respective growth in health and education of about 4% and 2%.

2.6 Major recent developments

Review by Lord Carter

2.6.1 In England and Wales, the legal aid system has been experiencing significant changes in recent years. In July 2005, the UK government published a document entitled *A Fairer Deal for Legal Aid*, setting out a long-term strategy to address shortcomings and inefficiency in the existing legal aid system. To this end, the government commissioned in July 2005 Lord Carter of Coles to conduct an independent review of the issues relating to legal aid procurement. In July 2006, Lord Carter published a report entitled *Legal aid: A market-based approach to reform* (the Carter report), proposing "radical changes" to the procurement of publicly-funded legal advice and representation, particularly the remuneration schemes for legal aid service providers.

Reform of legal aid fee schemes

2.6.2 Since the mid-1990s, legal aid service providers had been remunerated by a mixture of fixed and graduated fees and hourly rates in different areas of law.³⁹ The Carter report remarked that the fixed and graduated schemes would reward efficiency and provide a fair pricing for cases requiring more expertise and effort, while hourly rates would potentially reward inefficient service providers and could not offer sufficient financial incentives for efficient providers. The Carter report therefore recommended extending the use of fixed and graduated fees to nearly all areas of legal aid. This change was supposed to be an interim step to a market-based "best value tendering system", under which service providers would have to bid against each other for legal aid contracts, based on quality, capacity and price, and the market would set the prices for LSC to pay service providers.

³⁹ A fixed and graduated fee payment means that the fee for all cases of the same type is the same regardless of how much time a legal aid practitioner may spend on one such case (unless the case is exceptional), and the fixed fee may rise depending on the stage the case reaches. A case will be treated as exceptional when the payment calculated at an hourly rate is more than three times the corresponding fixed fee payment. In this situation, exceptional cases are paid at an hourly rate instead of a fixed fee.

2.6.3 The UK government accepted almost all recommendations of the Carter report, which were also supported by LSC.⁴⁰ In a document entitled *Legal Aid Reform: the Way Ahead* jointly issued by the Department for Constitutional Affairs (the then sponsoring department for LSC) and LSC in November 2006, both the government and LSC agreed that a market-based system would offer the best route for the legal aid reform. It "should be more efficient to run than an administratively-based one". It "should encourage greater efficiency amongst providers" and "lead to a focus on paying for effective service provided to the client, rather than the hours worked by the practitioner – a system based on delivery rather than inputs".⁴¹

2.6.4 Based on Lord Carter's recommendations, the UK government proposed to introduce fixed and graduated fee schemes for most areas of legal aid work.⁴² The reform proposals covered, in particular, criminal defence work by solicitors in the police station, magistrates' courts and the Crown Court, civil legal advice, and advice and representation in family law cases (including child care proceedings), asylum and immigration, and mental health cases. Almost all legal aid work would be remunerated per case completed, rather than per hour worked. Some of these proposed fee schemes consisted of a fixed fee, such as the Police Station Fee Scheme, with an escape mechanism for exceptionally long and complex cases which would be remunerated on an hourly basis.⁴³ Other proposed fee schemes were made up of different levels of fees for different procedural steps between the provision of initial advice and full representation at a final court hearing.

⁴⁰ Department for Constitutional Affairs & Legal Services Commission (2006b) pp. 7-8.

⁴¹ Department for Constitutional Affairs & Legal Services Commission (2006b) pp. 57-66.

⁴² The Carter report recommended that legal aid defence work on criminal cases in the Crown Court which were expected to last longer than 40 days (known as Very High Cost Cases) would continue to be remunerated on an hourly rate under individual case contracts. Such work would be restricted to a panel of experienced specialist providers who had to bid for entry to the panel on the basis of quality, capacity and price.

⁴³ The Police Station Scheme pays for police station work (i.e. advice and assistance) undertaken by legal service providers for a client during the criminal investigation of a matter up until the client is charged or summoned for the matter under investigation. Before January 2008, such advice and assistance was paid on an hourly basis. The hourly rate ranged from £52 (HK\$607) to £80 (HK\$933), depending on whether the solicitor was a duty solicitor or "own" solicitor, at what hour they attended the police station and the seriousness of the offence. There were also separate hourly rates for travel and waiting, which ranged from £30 (HK\$350) to £70 (HK\$817). The remuneration system was based largely on inputs and time spent, and therefore did not provide the best incentive to be efficient or encourage providers to develop and deliver services to clients innovatively. Since January 2008, the hourly rates for police station work have been replaced by fixed fees, which cover all of the advice and assistance for clients as well as travel and waiting. The fixed fees will help control the legal aid costs representing clients in police stations.

2.6.5 The UK government initially intended to introduce these proposed fee schemes in April 2007 and move to best value tendering by April 2009. However, these proposed fixed and graduated fee schemes were not welcomed by legal aid practitioners, who were dissatisfied with the design of the fixed and graduated fees and the levels at which they were set, and expressed their intention to leave the legal aid market. In November 2006, the government announced that the implementation of the new fee schemes would be delayed until October 2007.

2.6.6 Given the importance of and controversy over the reform of fee schemes, a departmental select committee of the House of Commons, known as the Constitutional Affairs Committee, conducted an inquiry in this regard in 2006. In the inquiry report published in April 2007, the Committee expressed its support for the general aims of the reform to limit the significant rise in expenditure on legal aid. However, the Committee was also highly critical of the proposed reform, and it was "extremely concerned" about the government's attempt to "engage in such a far-reaching change to the structure of legal aid on the basis of little or no evidence". On one hand, the Committee pointed out that it had no objection in principle to a system of graduated fees provided that the system adequately captured the amount of work a legal aid supplier had to undertake to provide high quality advice and representation. On the other hand, it stated that "for most kinds of legal aid work, such a system will require appropriate graduation".⁴⁴ In its response in June 2007 to the Committee's inquiry report, the government defended that the proposed reform had been worked up in a careful, iterative and well-publicized manner. While disagreeing with the Committee's suggestion that the proposed reform had been rushed, the government insisted that work to implement the reform would continue. Accordingly, most of the proposed fixed and graduated schemes have been implemented from October 2007 onwards.

⁴⁴ Constitutional Affairs Committee (2007) paragraph 70.

Chapter 3 – The Province of Ontario of Canada

3.1 Development of the legal aid system

3.1.1 In Canada, under the federal Constitution, jurisdiction over the administration of justice has been allocated to the provinces and territories⁴⁵. Accordingly, legal aid has been a provincial and territorial responsibility.

3.1.2 In 1951, the Province of Ontario (Ontario) first implemented an organized legal aid plan, which was designed for criminal cases only.⁴⁶ Legal aid was provided by lawyers to low-income Ontarians on a voluntary basis and as a charitable service. By 1963, both the Ontario government and the Law Society of Upper Canada (Law Society) agreed that such a voluntary plan did not adequately meet the demand for legal aid and created excessive demand on the volunteer lawyers.

3.1.3 In 1967, the *Legal Aid Act, 1967* was enacted to create a formal legal aid system, the Ontario Legal Aid Plan (OLAP). Under OLAP, applicants eligible for legal aid were given certificates to retain private lawyers to represent them. OLAP was financed by the provincial government and administered by the Law Society. The governance framework, funding structure and service delivery models established by the *Legal Aid Act, 1967* continued to operate for almost three decades.⁴⁷

3.1.4 In the early 1970s, besides OLAP, the Ontario government established a system of community legal clinics to provide legal information, representation and advice as well as community legal education for low-income and disadvantaged people. Each clinic was run by a board of directors who were volunteers from the community the clinic served.

⁴⁵ Section 92(14), the *Constitution Act, 1867*.

⁴⁶ For a detailed discussion, see Ontario Legal Aid Review (1997) Vol. 1, Part 1.

⁴⁷ Ministry of the Attorney General (2008) p. 5.

3.1.5 Until the 1980s, the major focus of OLAP had been on criminal law. Between 1980 and 1990, OLAP expanded its community legal clinic, family, refugee, mental health and aboriginal services considerably. In the early 1990s, at the height of a recession, OLAP issued more than 200 000 legal aid certificates a year for a broad range of criminal, family, refugee and other civil claims. At the same time, the legal aid system faced a financial constraint owing to the economic difficulty, leading to frozen funding for the legal clinic system in 1992. In 1994, the government further capped funding for OLAP, resulting in a significant drop in the number of legal aid certificates issued to 75 000.

3.1.6 In 1996, the Attorney General of Ontario (Attorney General), who was the responsible minister for OLAP, commissioned the first review on the Ontario legal aid system since the establishment of OLAP. The review, led by a law professor John McCamus, was mandated to undertake a thorough analysis of the various programmes that comprised the legal aid system in Ontario. In particular, the review was directed to study the implications of capped funding on the future design, administration and governance of the legal aid system and to identify the prevailing common needs of low-income Ontarians.⁴⁸ Released in September 1997, the review report entitled *A Blueprint for Publicly-Funded Legal Services* recommended the creation of an independent body to govern the provision of legal aid services in Ontario and experimentation with service delivery models such as the use of staff lawyers, and contracting and wider use of duty counsel, with more focus on serving clients' needs. These recommendations led to the enactment of the *Legal Aid Services Act, 1998 (LASA)*, under which Legal Aid Ontario (LAO) as an independent statutory agency has assumed responsibility for administering the Ontario legal aid system from the Law Society since April 1999.⁴⁹

3.2 Responsible authority

Status

3.2.1 LAO is established as a corporation without share capital.⁵⁰ It is "not an agent of Her Majesty nor a Crown agent".⁵¹ It is "independent from, but accountable to, the Government of Ontario".⁵²

⁴⁸ Ontario Legal Aid Review (1997) Vols. 1-3.

⁴⁹ Ibid.

⁵⁰ Section 3(1), *LASA*.

⁵¹ Section 3(3), *LASA*.

⁵² Section 3(4), *LASA*.

Functions and powers

3.2.2 LAO is given broad authority in the design and administration of the legal aid system in Ontario. It is mandated to:⁵³

- (a) establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals;
- (b) establish policies and priorities for the provision of legal aid services based on its financial resources;
- (c) facilitate the co-ordination among the various methods by which legal aid services are provided;
- (d) monitor and supervise legal aid services provided by community clinics and other entities funded by LAO;
- (e) co-ordinate legal aid services with other aspects of the justice system and with community services; and
- (f) advise the Attorney General on all aspects of legal aid services in Ontario.

Membership and appointment

3.2.3 LAO is governed and managed by a board of directors appointed by the Lieutenant Governor in Council.⁵⁴ The board of directors consists of:⁵⁵

- (a) a Chair selected by the Attorney General from a list of persons recommended by a committee comprising the Attorney General or a person designated by him or her, the Treasurer of the Law Society or a person designated by him or her and a third party agreed upon by the Attorney General and the Treasurer of the Law Society or persons designated by them;

⁵³ Section 4, *LASA*.

⁵⁴ The "Lieutenant Governor in Council" refers to the Lieutenant Governor of Ontario acting on and with the advice of the Cabinet of the Ontario government. The Lieutenant Governor is the vice-regal representative of the Queen of Canada in Ontario. The Lieutenant Governor is appointed by the Governor-General of Canada on the advice of the Prime Minister of Canada and in consultation with the Premier of Ontario.

⁵⁵ Sections (1) and (2), *LASA*.

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- (b) five directors selected by the Attorney General from a list of persons recommended by the Law Society; and
 - (c) five directors recommended by the Attorney General.

3.2.4 In selecting and recommending members to the board of directors, the Attorney General is required to ensure the board as a whole to have knowledge, skills and experience in the areas that the Attorney General considers appropriate, including:⁵⁶

- (a) business, management and financial matters of public or private sector organisations;
- (b) law and the operation of courts and tribunals;
- (c) special legal needs and provision of legal services to low-income individuals and disadvantaged communities;
- (d) operation of community legal clinics; and
- (e) social and economic circumstances associated with the special legal needs of low-income individuals and disadvantaged communities.

3.2.5 The Attorney General is also required to ensure that the persons selected for appointment to the board of directors reflect the geographic diversity of Ontario.⁵⁷ The majority of the board members "shall be persons who are not lawyers" and "no more than three of the appointed members of the board shall be benchers⁵⁸ of the Law Society".⁵⁹

3.2.6 Board members hold office for a term of two or three years, and are eligible for reappointment. To protect the independence of LAO, the appointment of a board member may not be terminated before the end of its term except for cause.⁶⁰

⁵⁶ Section 5(4), *LASA*.

⁵⁷ Section 5(5), *LASA*.

⁵⁸ Benchers are equivalent to the Law Society's board of directors.

⁵⁹ Sections 5(6) and (7), *LASA*.

⁶⁰ Section 6(3), *LASA*.

Relationship with the executive branch

Budget control

3.2.7 LAO must submit its proposed annual budget to the Attorney General for approval. The budget is based on a three-year cycle, setting out LAO's proposed operating budget for the next fiscal year, the funding required by LAO from the Ontario government for the next fiscal year, and LAO's projected operating budgets for the two fiscal years after the next fiscal year. With the Attorney General's approval, LAO may allocate any surplus or deficit in a fiscal year to either or both of the two subsequent fiscal years.⁶¹

3.2.8 The annual budget of LAO approved by the Attorney General must be reviewed by the Management Board of the Cabinet before it is included in the estimates of the Ministry of the Attorney General to be recommended to the legislature for approval.⁶²

Memorandum of understanding

3.2.9 LAO and the Ministry of the Attorney General are required to enter into a memorandum of understanding every five years.⁶³ The memorandum of understanding requires LAO "to be accountable for the expenditure of public funds and for the provision of legal aid services to low-income individuals" by providing the Attorney General with:

- (a) annual business plans;
- (b) plans for significant changes in LAO's operations or activities;
- (c) strategic plans for a certain number of years specified by the Attorney General;
- (d) annual statement of LAO's policies and priorities for providing legal aid services;
- (e) annual statement of LAO's investment policies and goals;
- (f) agenda of meetings of LAO's board of directors before they are held;

⁶¹ Sections 66(1), (2) and (3), *LASA*.

⁶² Section 67(1), *LASA*.

⁶³ Section 71(1), *LASA*.

- (g) performance standards that LAO must meet; and
- (h) any other matter that may be required by the Lieutenant Governor in Council, the Management Board of the Cabinet or the Attorney General.

Taking over the administration of LAO

3.2.10 If the Attorney General considers that LAO's board of directors has failed to discharge its duties, he or she may apply to the Superior Court of Justice for an order appointing an Administrator to administer LAO in the name of and on behalf of LAO.⁶⁴ The Court may make the order if it is satisfied that the appointment is "in the public interest and is needed to ensure the continued and effective provision of legal aid services".⁶⁵

Accountability

3.2.11 LAO is required to submit within four months after the end of its fiscal year an annual report to the Attorney General, who must submit it to the Lieutenant Governor in Council and table it before the Legislative Assembly of Ontario. The annual report must include:⁶⁶

- (a) audited financial statements of LAO and its subsidiary corporations, if any;
- (b) statement of the nature and amount of legal aid services provided during the year;
- (c) statement on how LAO has met its performance standards;

⁶⁴ Section 73(1), *LASA*.

⁶⁵ Sections 72-80, *LASA*. The Administrator has all the powers and protections of the board of directors of LAO, including the power to make by-laws and regulations, hire and dismiss staff, and enter into contracts. The Administrator is given three duties, namely managing the property and conducting the affairs of LAO; ensuring LAO to carry out its duties in accordance with *LASA* and the regulations; and carrying out any other duty that may be set out in the order of appointment. The Administrator may apply to the Superior Court of Justice for directions concerning any issue arising from the LAO administration, and the Court may enable by order the Administrator to carry out the LAO administration effectively and properly. The Attorney General may request the Administrator to provide reports to him or her on any matter relevant to the Administrator's administration of LAO, but cannot request the Administrator to provide reports on specific applicants for legal aid.

⁶⁶ Section 72(2), *LASA*.

- (d) general information on the working of *LASA* and the regulations and advice, if any, on the need for amendments to *LASA* and the regulations in order to improve the provision of legal aid services; and
- (e) any information LAO considers necessary to advise the Attorney General about the provision of legal aid services, including any features of the justice system that affect or may affect the demand for or quality of legal aid services.

3.2.12 In addition, the Attorney General may at any time require LAO or any of its subsidiary corporations to report to the Attorney General on any aspect of its affairs or to provide information on its activities, operations and financial affairs.

3.3 Scope of legal aid services

3.3.1 LAO is required to provide legal aid services in the areas of criminal law, family law, clinic law⁶⁷ and mental health law.⁶⁸ It may also cover other areas of civil law, except in:⁶⁹

- (a) proceedings wholly or partly in respect of a defamation;
- (b) relator actions;
- (c) proceedings for the recovery of a penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings;
- (d) proceedings relating to election; or
- (e) areas of civil law, types of civil cases or types of civil proceedings prescribed by regulation.

⁶⁷ Under Section 2 of *LASA*, clinic law refers to the areas of law which particularly affect low-income individuals or disadvantaged communities, including legal matters relating to housing and shelter, income maintenance, social assistance and other similar government programmes, human rights, health, employment and education.

⁶⁸ Section 13(1), *LASA*.

⁶⁹ Section 13(3), *LASA*.

3.3.2 Under its statutory scope of services, LAO may provide legal aid services by any method it considers appropriate, having regard to the needs of low-income individuals and disadvantaged communities, the need to achieve an effective balance among the various methods of providing legal aid services, the costs of providing such services, and LAO's financial resources.⁷⁰

3.4 Legal aid programmes

3.4.1 The legal aid services provided by LAO mainly include the legal aid certificate programme, the community legal clinics and the duty counsel programme.⁷¹ LAO is required to have regard to the fact that the private bar is the foundation for the provision of legal aid services in the areas of criminal and family law, and the community legal clinics are the foundation for the provision of legal aid services in the area of clinic law.⁷²

Legal aid certificate programme

3.4.2 The legal aid certificate programme provides legal aid through a "judicare" model under which an applicant is assessed for financial eligibility. An eligible applicant will be issued a legal aid certificate that allows him or her to receive legal representation from his or her choice of private lawyers who have registered with LAO to provide legal aid services. The certificate specifies the particular area of practice that it pertains to, and represents a guarantee of payment from LAO to the responsible private lawyers who are paid according to the rates and limitations set out in the legal aid tariff regulations.

⁷⁰ Section 14(1), *LASA*.

⁷¹ *Ibid.*

⁷² Sections 14(2) and (3), *LASA*.

3.4.3 *LASA* requires LAO's board of directors to divide the province into designated areas and to appoint an area director for each area. An area director must be a person licensed under the *Law Society Act* to practice law in Ontario as a barrister or solicitor.⁷³ The area director will issue a legal aid certificate to an applicant if he or she considers that the issuance is justified, based on the prescribed financial eligibility requirements, the report on the applicant's ability to contribute, and the policies and priorities established by LAO.⁷⁴ If the area director considers that it is not appropriate for him or her to approve a particular application, the area director is required to refer the application to a body known as the Area Committee⁷⁵ for making the final decision.⁷⁶ To avoid a conflict of interest, the area director is not allowed to render legal services via his or her own private practice to any legal aid applicant, except when authorized by the LAO's board of directors. Any applicant who has been refused legal aid certificate may appeal to the Area Committee.⁷⁷

3.4.4 Legal aid certificates are available for a variety of cases,⁷⁸ as shown in **Table 1**.

⁷³ Section 22(3), *LASA*.

⁷⁴ Section 25(1), *LASA*.

⁷⁵ An Area Committee is established for each designated area. It comprises volunteers selected mainly from the legal profession, and is responsible for determining the issuance of a certificate in cases referred to it by the area director, hearing appeals from the area director's refusal to grant a certificate, and other functions as assigned by the Board of LAO. However, the Committee does not have the authority to issue legal aid certificates.

⁷⁶ Section 28(3), *LASA*.

⁷⁷ Section 30, *LASA*.

⁷⁸ Legal aid is not available in certain cases, including libel, defamation and slander; wrongful dismissal; change of name; personal bankruptcy; power of attorney; sponsorship of relatives; commercial litigation; and real estate matters.

Table 1 – Major types of cases covered by the legal aid certificate programme

Types of charges	Major cases covered
Criminal	(a) An offence which would likely result in jail time (e.g. assault, impaired driving causing bodily harm, robbery, welfare fraud, break and enter).
Family matters	(a) To get custody of children; (b) to help deal with the Children's Aid Society; (c) to get access to children; (d) to help if denied access by partner to children; (e) to set up child or spousal support payments; (f) to stop partner from selling or destroying property; and (g) to negotiate ownership of things such as registered retirement savings plans or pensions that could generate income.
Immigration and refugee matters	(a) Refugee hearings before the Immigration and Refugee Board; (b) sponsorship and deportation appeals; and (c) detention reviews.
Other civil cases and final appeal	(a) Workplace Safety and Insurance Appeals Tribunal matters; (b) Social Benefits Tribunal matters; (c) Employment Insurance appeals; and (d) mental health hearings and appeals.

Community legal clinics

3.4.5 Community legal clinics are non-profit organizations that provide clinic law services.⁷⁹ Specifically, issues covered by community legal clinics include tenant rights, works and welfare, disability support programmes, government pensions, immigration, employment insurance, workplace safety and insurance, workers' compensation, employment rights, criminal injuries compensation and human rights. The legal aid services provided by such clinics include summary advice and legal information; referrals to community agencies and lawyers in private practice; client representation before courts and administrative tribunals; public legal education; and implementation of law development initiatives. Community legal clinics do not charge legal fees, and instead they may ask clients who can afford to cover some or all of the case expenses, such as court filing fees and the costs of obtaining medical reports.

3.4.6 Each community legal clinic is governed by a Board of Directors, which comprises volunteers of the community served by the clinic. The Board is responsible for determining the needs of the community and providing the services that meet those needs.⁸⁰ *LASA* grants LAO the authority to provide funding to clinics up to three years at a time.⁸¹ In deciding the funding for a clinic, LAO may consider matters such as the legal needs of the individuals or communities served, the cost-effectiveness of providing services through the clinic, the clinic's past performance, the legal needs of other communities, funding applications of other clinics, and LAO's policies, priorities and financial resources.⁸²

⁷⁹ The legal community clinic system of Ontario emerged in response to the needs of low-income people in their communities by offering legal services in the 1960s. The first clinic was launched in 1969. Subsequently, similar clinics were established by low-income people in Ontario. These clinics were governed by community-based boards and funded initially by the federal government. In 1974, following the recommendations of Justice Osler's task force on legal aid, these clinics began to receive permanent funding from the Ontario government. The funding was administered by the Clinic Funding Committee, which was created under the regulation to the *Legal Aid Act* that governed Ontario's Legal Aid Plan. The role of community legal clinics was further recognized in the 1997 legal aid review, which led to the enactment of *LASA* providing a regulatory framework for these clinics.

⁸⁰ Section 39, *LASA*.

⁸¹ Section 34, *LASA*.

⁸² Section 33(2), *LASA*.

3.4.7 LAO is responsible for monitoring the operation of clinics funded by it. Each of these clinics is required to provide LAO with the audited financial statements, a summary of legal aid services provided, a summary of complaints received by the clinic and any other financial and non-financial information relating to the operation of the clinic requested.⁸³ LAO may reduce or suspend its funding of a clinic if it believes that the clinic is not complying with *LASA* or the funding terms and conditions, or is not meeting LAO's operational standards.⁸⁴

3.4.8 There are currently 80 community legal clinics funded by LAO. Most of them are located in specific geographic communities, each of which is served by a clinic. Of the 80 community legal clinics, 17 are "specialty" community legal clinics that either deal with a specific area of law or represent a specific non-geographic community.

Duty counsel programme

3.4.9 Duty counsel lawyers are tasked to assess individuals' legal problems and provide front-line advice, information and representation to those individuals who would otherwise be unrepresented and unassisted in the court room. Duty counsels are either staff lawyers of LAO or private lawyers hired by LAO on a per diem basis.

3.5 Eligibility for legal aid services

Legal aid certificate programme

3.5.1 LAO and the Ontario government have jointly developed the financial eligibility requirements for legal aid certificates. Such requirements cover four aspects:⁸⁵

- (a) applicant's family unit to identify which family members (if any) should be included in the financial assessment;⁸⁶

⁸³ Section 37, *LASA*. A clinic may withhold confidential information about any individual to whom the clinic has provided legal aid services, unless the individual consents to such access or the information pertains to the individual's financial eligibility for legal aid services.

⁸⁴ Section 39(4), *LASA*.

⁸⁵ Ministry of the Attorney General (2008) p. 26.

⁸⁶ This may include the applicant and his or her spouse, common law partner, same-sex partner and dependent children (if any).

- (b) assets available to the applicant's family unit based on equity in real property and liquid assets;⁸⁷
- (c) income of the applicant's family unit;⁸⁸ and
- (d) comparison of income and assets with the necessary budgetary requirements of the family unit.⁸⁹

3.5.2 The thresholds applied in the asset and income tests for legal aid certificate applicants are in principle linked to the social assistance levels under the Ontario Works and Ontario Disability Support Programme. If an applicant is on social assistance, he or she is normally eligible for legal aid, depending on his or her available assets. Other applicants may also be eligible for legal aid without undergoing a detailed financial test if their family size and the corresponding net income⁹⁰ are both below the thresholds shown in **Table 2**.

Table 2 – Income limit in the financial eligibility test for the legal aid certificate programme

Family size (number of family members)	Income limit	
	Monthly	Yearly
1	CAN\$601 (HK\$4,000)	CAN\$7,212 (HK\$47,600)
2	CAN\$1,075 (HK\$7,100)	CAN\$12,900 (HK\$85,000)
3	CAN\$1,137 (HK\$7,500)	CAN\$13,644 (HK\$90,000)
4 or above	CAN\$1,281 (HK\$8,500)	CAN\$15,372 (HK\$101,000)

⁸⁷ LAO will look at all assets such as cash, bank accounts, stocks, bonds and balances of Registered Retirement Savings Plans, house and property. It will also look at anything that can be sold or easily converted into cash. Normally, if an applicant owns a house or property, he or she will be asked to borrow against it or to sign a lien against the property.

⁸⁸ Income includes worker's compensation, employment income, employment insurance, pensions, social assistance and child tax benefits.

⁸⁹ The test determines the total disposable income available to the applicant's family unit. LAO allows a set amount of money for monthly expenses based on family size and type of shelter. Disposable income is determined by deducting the set amounts for rent or mortgage, food, clothing, transportation, telephone, payroll deductions, day care costs, child support payments and personal expenses.

⁹⁰ Net income is determined by deducting any payroll deductions, day care costs and child support payments from the gross income of an applicant's family unit.

3.5.3 If the net income of an applicant's family unit exceeds the given threshold, the applicant is required to complete a more detailed financial eligibility test, which enables LAO to calculate the money available to the applicant for hiring a legal aid certificate lawyer. If an applicant has disposable income and assets equal to the cost of hiring a private lawyer, the application will be refused. Otherwise, depending on the outcome of the test, the applicant may receive free legal aid or may be asked to repay all or some of the legal aid fees.

Community clinics and duty counsel programme

3.5.4 Community clinics provide free summary advice without means testing. Formal representation is only available in particular areas such as tenant issues, immigration, pensions, social assistance, employment insurance, workers compensation and poverty law. Applicants may be asked to contribute towards the cost of such representation. Duty counsel services are provided for free with no financial eligibility requirements.

3.6 Contribution to legal aid cost

Legal aid certificate programme

3.6.1 Under *LASA*, if a legal aid certificate recipient is not eligible for free legal aid services entirely, LAO may require the recipient to sign an agreement contributing towards the cost involved. The agreement, which is prepared after an assessment of the recipient's financial ability, specifies the terms and manner of payment as well as the payment of an interest rate set by the Ontario government on overdue payments.

Community legal clinics and duty counsel programme

3.6.2 There is no requirement for contribution from legal aid recipients to the legal cost of services under the community legal clinic programme and the duty counsel programme because such services are largely provided for free, except formal representation provided by the clinics, as described in **paragraph 3.5.4**.

3.7 Service fees

Legal aid certificate programme

3.7.1 The fees of legal aid certificate lawyers are regulated by the Ontario government, with the maximum number of hours and the maximum hourly rates of lawyer fees for different procedures being explicitly specified. By matching these statutory caps with the services authorized by a legal aid certificate, the maximum level of hourly rates is determined for different categories of cases. For instance, in family law, a lawyer can bill a maximum of 12 hours for all services prior to the first pre-trial, whereas in criminal law, a lawyer can bill up to two hours maximum for a completed bail hearing for each trial.⁹¹ If the time and cost required to perform services exceed the maximum levels in a particular case, the lawyers involved have to apply to LAO in advance for special approval.

3.7.2 For criminal and civil cases, there are three different hourly rates, or tier levels, for lawyers, depending on their certified years of experience. As for junior counsels, articulated students and law clerks, they are paid according to standardized hourly rates. The structure of the maximum allowable legal aid hourly rates is illustrated in **Table 3**.

⁹¹ Legal Aid Ontario (2008).

Table 3 – Structure of the maximum allowable legal aid hourly rates

Tier level	Hourly Rate Post-1 April 2003 certificates	Hourly Rate Post-1 April 2007 certificates	Weighted average of experience
Criminal tier 1	CAN\$73.87 (HK\$490)	CAN\$77.56 (HK\$512)	Less than four years in criminal law
Criminal tier 2	CAN\$83.10 (HK\$550)	CAN\$87.26 (HK\$580)	Four years or more in criminal law
Criminal tier 3	CAN\$92.34 (HK\$610)	CAN\$96.95 (HK\$640)	A total of 10 years or more in civil or criminal law, including a minimum of four years in criminal law
Civil tier 1	CAN\$73.87 (HK\$490)	CAN\$77.56 (HK\$512)	Less than four years in civil litigation
Civil tier 2	CAN\$83.10 (HK\$550)	CAN\$87.26 (HK\$580)	Four years or more in civil litigation
Civil tier 3	CAN\$92.34 (HK\$610)	CAN\$96.95 (HK\$640)	A total of 10 years or more in criminal or civil law, including a minimum of four years in civil litigation
Junior counsel – criminal or civil	CAN\$55.40 (HK\$366)	CAN\$58.17 (HK\$384)	–
Articled students	CAN\$23 (HK\$152)	CAN\$46 (HK\$304)	–
Law clerks	CAN\$23 (HK\$152)	CAN\$23 (HK\$152)	–

3.7.3 To avoid service quality and market competition being undermined by the concentration of legal aid services in a particular group of lawyers and related professions, each lawyer, articled student or law clerk is limited to a maximum of 10 hours per day of professional services rendered to LAO for work on a certificate. The limit is 2 350 hours on an annual basis.

3.7.4 Given the increasing complexity of various kinds of legal proceedings covered by legal aid certificates, private lawyers have been dissatisfied with the prevailing hourly rates for legal aid services, although such rates have been increased in the past several years.⁹² Consequently, the number of private lawyers providing legal aid services dropped from 4 932 in 1999 to 2 109 in 2007. To reverse this trend, the Ontario government has been trying to increase incentives for private lawyers to provide legal aid services, to be discussed in **paragraph 3.9.1**.

Community legal clinics and duty counsel programme

3.7.5 With LAO's subsidy, the services under community legal clinics and the duty counsel programme are largely provided for free.

3.8 Funding

3.8.1 LAO receives the majority of funding from the Ontario government. It also receives contributions from the federal government through cost-sharing arrangements. The federal government has contributed certain amount of money (to be decided through negotiations between the federal and provincial governments) to cover the cost of providing criminal legal aid services in each province,⁹³ and provided funding for civil legal aid as part of the Canada Social Transfer programme⁹⁴ to the provinces.

⁹² Ministry of the Attorney General (2008) pp. 115-117.

⁹³ In recent years, the provinces of Canada have called on the federal government to increase federal funding for legal aid services. While the provinces continue to increase funding for legal aid, the level of federal support has remained virtually unchanged since 2003-2004. The last time when the federal government was a 50/50 partner was 1990-1991. The federal government, in its 2007 budget, indicated that the criminal legal aid funding would be maintained at the existing level for the next five years.

⁹⁴ Canada Social Transfer is a federal programme transferring payment to provinces and territories in support of post-secondary education, social assistance and social services, early childhood development, early learning and childcare.

3.8.2 In addition, LAO receives funding from the Law Foundation of Ontario and client contributions. The Law Foundation of Ontario⁹⁵ administers the interest earned on trust fund balances. LAO receives 75% of these revenues. LAO also has a client contribution programme for applicants who do not meet its financial eligibility guidelines for non-contributory certificate services. These applicants receive the legal assistance they need and enter into an agreement in which they undertake to repay LAO for the cost of the services on their behalf by solicitors who are paid through LAO.

3.8.3 In 2005-2006, LAO had operating expenditure of over CAN\$351.6 million (HK\$2.74 billion), of which CAN\$325 million (HK\$2 billion) was the legal aid expenditure. The legal aid expenditure per capita was CAN\$27.5 (HK\$173).

3.9 Major recent developments

3.9.1 In August 2007, the Attorney General invited a law professor Michael Trebilock to undertake a review of the legal aid system in Ontario, including a consideration of *LASA* and its regulations. The study would focus on exploring tools and capacities to maximize effective administration and good governance of the legal aid system, and examining alternatives to the tariff process, including methods of ensuring regular reviews to set and adjust the hourly rates paid to lawyers providing legal aid work. The review report was published in 2008, with the following major observations and recommendations:

- (a) the existing legal aid system "is not a system in which most middle-class citizens of Ontario feel they have a material stake".⁹⁶ Both LAO and the Ontario government need to "accord a higher priority to rendering the legal aid system more salient to middle-class citizens", but any argument for additional funding must convince the government and taxpayers that the existing funding is being used cost-effectively and productively;

⁹⁵ The Law Foundation of Ontario receives interest on lawyers' mixed trust accounts to fund worthwhile programmes for law-related activities.

⁹⁶ Ministry of the Attorney General (2008) p. iv.

- (b) while in Ontario some forms of summary legal assistance (such as duty counsel services, the Law Society's telephone hotline service and summary advice provided by some community legal clinics) are provided without, or with more relaxed, means testing, they are "ad hoc", "poorly integrated" and "not aggressively promoted to the public, particularly the working poor, lower middle-income and middle-class citizens".⁹⁷ In this connection, LAO should provide a range of legal aid services, in particular summary forms of advice and assistance, to all Ontario citizens on a non-means-tested basis, so that middle-class Ontarians can benefit from the legal aid system. LAO must also be "much more aggressive and enterprising in experimenting with innovative forms of service delivery",⁹⁸ such as comprehensive, sophisticated and accessible electronic information systems and hotline services. LAO and the Law Society should also accord a higher priority to promoting private insurance markets for legal expense coverage, especially on family law and civil matters.⁹⁹ Early intervention in individuals' legal problems should be strengthened as it can help prevent such problems from triggering non-legal problems, such as greater demands on other social welfare and health programmes;¹⁰⁰ and
- (c) responsibility for determining the tariff should be vested in LAO so as to enhance its incentives to manage its budget cost-effectively and encourage it to be more flexible, dynamic and innovative in experimenting with different tariff structures. The tariff levels and structures should be reviewed every three years.¹⁰¹

3.9.2 As of the publication of this report, LAO has not issued its response to the review report's recommendations.

⁹⁷ Ministry of the Attorney General (2008) p. v.

⁹⁸ Ministry of the Attorney General (2008) p. 178.

⁹⁹ Ministry of the Attorney General (2008) p. vi.

¹⁰⁰ Ibid.

¹⁰¹ Ministry of the Attorney General (2008) p. vii.

Chapter 4 – The State of New South Wales of Australia

4.1 Development of the legal aid system

4.1.1 In NSW, before the 1940s, legal aid services were offered by the federal government only.¹⁰² It was not until the mid-1940s that the NSW government started to provide legal aid through the establishment of the Public Solicitor's Office in 1943. While the Office initially provided representation in serious criminal trials solely, it was then the only sizeable publicly-funded legal aid scheme in Australia.¹⁰³ The Office later extended its legal aid services to cover both criminal and civil matters. Subsequently, the legal aid scheme set up in 1970 by the NSW Law Society gradually took up the jurisdiction of the Public Solicitor's Office over legal aid in civil matters.¹⁰⁴

4.1.2 In 1977, with the enactment of the *Commonwealth Legal Aid Commission Act 1977*, the federal government and the state and territory governments made a cooperative arrangement, under which legal aid services would be provided by independent legal aid commissions to be established in individual states and territories under state and territory legislation. In 1979, the Legal Aid Commission (LAC) of NSW was established under the state *Legal Aid Commission Act 1979 (LACA)*. It amalgamated the legal aid schemes run by the Public Solicitors' Office and the NSW Law Society, and was charged with the responsibility for legal aid in state law matters. While LAC was jointly funded by the federal government and the NSW government, it was allowed to set the priorities for how the funding was to be expended in the delivery of legal aid.

¹⁰² The federal government started to offer legal aid as early as 1903. In 1943, it established for the first time a body called the Legal Service Bureaux to provide legal advice and representation, but such services were limited to servicemen, ex-servicemen and their dependants.

¹⁰³ Noone & Tomsen (2006) p. 30.

¹⁰⁴ Ibid.

4.1.3 In 1987, LAC merged with the Australian Legal Aid Office (ALAO), which was established in 1973 as part of the Community Affairs Division of the Attorney General's Department of the federal government. ALAO had previously been responsible for providing legal aid services to people for whom the federal government had special responsibility, such as pensioners, Indigenous Australians and ex-military service people. With the merger, LAC was given jurisdiction over legal aid for both state and Commonwealth matters in NSW and autonomy setting the priorities for funding to be expended in the delivery of legal aid services. Since 1997, the federal government has required that LAC enter into funding arrangements with it. These funding agreements set the priorities and guidelines for legal aid for Commonwealth matters, and impose additional requirements on LAC, including the application of separate guidelines for Commonwealth matters.¹⁰⁵

4.1.4 Meanwhile, in the mid-1970s and throughout the 1980s, NSW witnessed the growth of non-government and non-profit Community Legal Centres (to be discussed in **paragraph 4.7.2**), which have developed vital links with and provided free legal services to disadvantaged communities, particularly in civil law areas.¹⁰⁶

4.2 Responsible authority

Status

4.2.1 In NSW, legal aid is provided by LAC, which is a statutory body representing the Crown¹⁰⁷ established under *LACA*.

Functions and powers

4.2.2 The principal functions and powers of LAC include:¹⁰⁸

- (a) determining the persons or matters or classes of persons or matters in respect of whom legal aid may be granted;
- (b) determining priorities in the provision of legal aid;

¹⁰⁵ Legal Aid Commission of New South Wales (2003) pp. 8-9.

¹⁰⁶ Legal Aid Commission of New South Wales (2003) p. 9.

¹⁰⁷ Section 6(3), *LACA*.

¹⁰⁸ Section 10, *LACA*.

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- (c) specifying principles, including the imposition of means tests, for considering applications for legal aid;
 - (d) specifying the circumstances in which contributions to legal aid cost shall be paid by persons receiving legal aid and the means of calculating any such contribution;
 - (e) liaising and co-operating with persons engaged or interested in the provision of legal aid otherwise than under *LACA*;
 - (f) giving assistance and making grants to persons or bodies for their provision of legal aid;
 - (g) undertaking research on all aspects of legal aid; bringing the services of LAC to the attention of the public, and carrying out educational programmes to promote public understanding of rights, powers, privileges and duties under the laws of NSW; and
 - (h) making reports and recommendations to the responsible Minister in such matters relating to the functions of LAC as the Minister requests or as LAC considers appropriate.

Membership and appointment

4.2.3 LAC is governed by the Board of LAC, which establishes the broad policies and strategic plans of LAC.¹⁰⁹ The Board comprises 10 members appointed by the NSW Attorney General, namely:

- (a) the Chief Executive Officer of LAC, who is appointed by the Attorney General and is not required to be a barrister or solicitor;¹¹⁰ and
- (b) nine part-time members, among whom one is appointed as the Chairman of the Board; one is nominated by the Bar Association of NSW; one is nominated by the Law Society of NSW; one is nominated by Unions NSW (which represents workers in NSW); three possess skills or experience that would benefit the Board; one represents consumer and community welfare interests; and one represents bodies providing community legal services.

¹⁰⁹ Section 15, *LACA*.

¹¹⁰ Section 16(2), *LACA*.

4.2.4 Before appointing the Board member representing consumer and community welfare interests and the other representing bodies which provide community legal services, the Attorney General must publish advertisements inviting applications for such appointments and consider the applications so received.¹¹¹

4.2.5 The Chairman of the Board is appointed for a term not exceeding five years, while the other members are appointed for a term not exceeding three years. All Board members are eligible for reappointment. A member may be removed from office for inability, misbehaviour or failure to comply with the terms and conditions of his or her appointment.¹¹²

Relationship with the executive branch

4.2.6 LAC reports to the NSW Attorney General and Minister for Justice.¹¹³ It is required to submit an annual report on its work and activities to the Minister, who must lay as soon as practicable the report before the NSW Parliament.¹¹⁴ However, the operation of LAC is not subjected to any framework document or memorandum of understanding involving the NSW government. Nevertheless, with the NSW Attorney General's approval, LAC may from time to time enter into an agreement or arrangement with the federal government for or with respect to the provision of legal aid in Commonwealth matters.¹¹⁵ Such an agreement or arrangement may cover matters relating to the money to be made available by the federal government for the provision of legal aid and the priorities to be observed, in relation to the money, in the provision of legal aid.

¹¹¹ Section 14(4), *LACA*.

¹¹² Section 6, Schedule 2, *LACA*.

¹¹³ Section 13(1), *LACA*.

¹¹⁴ Section 13, *LACA*.

¹¹⁵ Section 72A, *LACA*.

Funding

4.2.7 LAC is empowered to establish and administer a Legal Aid Fund to collect incomes and pay expenditures incurred by LAC.¹¹⁶ The sources of funding for LAC are the state and federal governments, the Public Purpose Fund¹¹⁷ and contributions from persons receiving legal aid. In 2006-2007, LAC had a total income of AUS\$190 million (HK\$1 billion), of which AUS\$91 million (HK\$480 million) or 48% came from the NSW government, AUS\$53 million (HK\$280 million) or 28% from the federal government, and AUS\$35 million (HK\$180 million) or 18% from the Public Purpose Fund.¹¹⁸ In the same financial year, the legal aid expenditure per capita was AUS\$29.6 (HK\$150).

4.2.8 LAC is responsible for preparing its annual budget, which is not statutorily subject to the executive branch's approval. Nevertheless, it is presented as a single entry of the departmental budget of the Attorney General's Department to be approved by the NSW Parliament.

4.3 Types of legal aid

4.3.1 LAC provides three main types of legal aid services, namely free legal advice and minor assistance, representation and alternative dispute resolution conferences for family law matters.

4.3.2 Free legal advice and minor assistance aim at helping clients to identify their problems and understand what course of actions can be taken, and informing them of their legal rights and obligations. Such services do not have any eligibility requirement. Legal advice may be delivered over the phone or through video conferencing or short meetings of about 20 minutes between LAC lawyers and clients. Minor assistance is an extension of legal advice, which may involve longer or additional face-to-face meetings or supplementary telephone contacts. Unlike legal advice, minor assistance usually involves the provision of minor legal paper works such as drafting affidavits, consent orders or other documents for clients and making phone calls on their behalf to help resolve their problems.

¹¹⁶ Sections 62-64, *LACA*.

¹¹⁷ The Public Purpose Fund comprises interest earned from lawyers' trust accounts and is controlled by the *Legal Profession Act 2004*.

¹¹⁸ Legal Aid Commission of New South Wales (2007) pp. 59-60.

4.3.3 Representation of clients for criminal, family and civil matters before courts, tribunals and mediation is generally available if applicants pass eligibility tests to obtain a grant of legal aid. Meanwhile, in alternative dispute resolution conferences, the parties at dispute are brought before a mediator. A solicitor is usually present for each party, with any agreed solution being presented to court for ratification. At least one of the parties must have a grant of legal aid before such a conference is organized. Both representation and alternative dispute resolution are not free of charge. Most people being granted these services are required to pay a contribution towards the costs involved.

4.4 Scope of legal aid

4.4.1 Legal aid is available in the areas of family law, civil law, criminal law, children's matters, mental health matters, prisoners' matters and veterans' pension matters, as shown in **Appendix I**.

4.5 Eligibility for legal aid

4.5.1 Generally, applicants for a grant of legal aid other than the free legal aid services are required to pass both a mean test and a merit test.¹¹⁹

¹¹⁹ An applicant whose application for legal aid is rejected can appeal to the statutory Legal Aid Review Committee. The Committee comprises three members appointed by the Board of LAC, with one being nominated by the Attorney General, one being nominated jointly by the Bar Association and the Law Society; and a non-legal practitioner. The Committee's decisions are final and binding. During 2005-2006, out of the 8 288 refusals of legal aid applications, 864 (10.4%) were appealed. Among these appeals, 137 (16%) were accepted and legal aid was subsequently granted.

Means test

4.5.2 The means test assesses an applicant's net assessable income (after allowable deductions)¹²⁰ and the net assessable assets of the applicant and his or her financially-associated persons (if any).¹²¹

4.5.3 An applicant's net assessable income limit is AUS\$318 (HK\$1,600) or less a week. An applicant whose net assessable income is more than AUS\$318 (HK\$1,600) will only be granted legal aid in exceptional circumstances.¹²²

4.5.4 For an applicant with no dependant or financially-associated person, the value of his or her net assessable assets, which include land, cash, bank account, shares, debentures and other investments, cannot be more than AUS\$1,310 (HK\$6,400) to be eligible for legal aid. For an applicant with one or more dependants or one or more financially-associated persons, the value of his or her net assessable assets cannot be more than AUS\$2,638 (HK\$13,000).

4.5.5 Applications for legal aid in the following areas of law are exempt from the means test:¹²³

- (a) family law duty matters where the applicant is in custody;
- (b) children in the Children's Court and appeals to the District Court in care matters;

¹²⁰ Assessable income includes income from paid work, government pensions, benefits and allowances, periodic receipts of a capital nature including income from investments, interest and payment of debts owed to the applicant, rent, workers' compensation or other insurance payments, and superannuation. Certain items can be deducted from an applicant's total income before the net assessable income is calculated. They include income tax; housing costs up to AUS\$320 (HK\$1,688) a week for applicants living in Sydney and up to AUS\$220 (HK\$1,160) a week for applicants living in areas other than Sydney; child care costs (where these are necessary to enable the applicant and an associated person to work or study) up to AUS\$169 (HK\$891) a week; a dependant allowance of AUS\$100 (HK\$527) a week for each financially-associated person whose income is calculated as part of the applicant's total income; maintenance payment made for children who do not reside with the applicant up to AUS\$100 (HK\$527) for each person for whom maintenance is actually paid; and business overheads and expenses.

¹²¹ Financially-associated persons include an applicant's spouse or de facto partner and any person who is financially responsible for, or provides financial support to, the applicant.

¹²² "Exceptional circumstances" are determined by the following criteria: (a) the likely cost of legal proceedings; (b) the type of legal proceedings; (c) an applicant's overall financial position; (d) situations where an applicant would suffer exceptional hardship if legal aid is refused; (e) insufficient time for an applicant to raise the funds necessary to pay for legal assistance; or (f) an applicant could not reasonably be expected to borrow against assets.

¹²³ Legal Aid Commission of New South Wales (2007) pp. 4-5.

- (c) children in the Community Services Division of the Administrative Decisions Tribunal and appeals to the Supreme Court from the Tribunal;
- (d) children where an order for separate representation is made by the Family Court;
- (e) bail applications at the first appearance in the Local Court;
- (f) some matters relating to the Mental Health Advocacy Service;
- (g) the *Veterans' Entitlements Act 1986* matters relating to ex-service personnel and their dependants (except for war service pension claims);
- (h) disabled persons before the Guardianship Tribunal and in the Supreme Court appeals; and
- (i) the Drug Court matters.

Merit test

4.5.6 The merit test considers whether an applicant has reasonable prospects of success in his or her case, and whether there is any benefit to the applicant if legal aid is granted or any detriment to the applicant if such aid is refused.¹²⁴ The merit test applies to applications relating to the following matters:

- (a) most non-criminal matters (civil, family and veterans' matters);
- (b) appeals in criminal matters;
- (c) bail matters at the Supreme Court;
- (d) some matters associated with the Children's Court proceedings (e.g. appeals from the Children's Court to the District Court); and
- (e) matters where a person applies for an order under the *Guardianship Act*.

¹²⁴ Legal Aid Commission of New South Wales (2007) p. 4.

4.5.7 Applications relating to the following matters are exempt from the merit test:

- (a) criminal law matters, except appeals and bail applications at the Supreme Court;
- (b) children in the Children's Court;
- (c) disabled persons for matters before the Guardianship Tribunal;
- (d) separate representation of children in the Family Court proceedings; and
- (e) most matters under the *Mental Health Act 2007*.

4.6 Contribution to legal aid cost

4.6.1 In granting an application for legal aid, LAC may determine and impose a condition requiring the legal aid receiver to pay a contribution to the costs and expenses of the legal services sought by the receiver. The amount of the contribution is determined by LAC after having regard to the receiver's financial situation and the area of law.¹²⁵

4.7 Community legal programmes

4.7.1 Apart from providing legal aid, LAC administers two community programmes in NSW, namely the Community Legal Services Programme (CLSP),¹²⁶ and the Women's Domestic Violence Court Assistance Programme (WDVCAP).¹²⁷

¹²⁵ Section 36(1)(a), *LACA*.

¹²⁶ Legal Aid Commission of New South Wales (2006a, 2006b & 2006c).

¹²⁷ Legal Aid Commission of New South Wales (2008).

Community Legal Services Programme

4.7.2 CLSP is jointly funded by the NSW government and the federal government.¹²⁸ It, in turn, funds 32 Community Legal Centres (CLCs), which vary in their target client groups, modes of operation, management structure and funding sources. Generally, CLCs are non-government and non-profit organizations managed by an independent board of volunteer directors. Besides CLSP, CLCs may receive funding and in-kind support from other sources, such as NSW government agencies, donation, foundations and private corporations. CLCs provide free legal services to disadvantaged people and community groups which advocate for them. Such services include information and referral, legal advice, legal casework assistance, community legal education, and training and support to legal workers at community and policy advocacy groups. CLCs can be either generalist or specialist. A generalist CLC serves a particular geographic community, while a specialist CLC provides legal services relevant to a particular client group (e.g. children, tenants or disabled people) or in a particular area of law (e.g. welfare rights or disability discrimination).

Women's Domestic Violence Court Assistance Programme

4.7.3 WDVCAP is funded by the NSW government. It, in turn, funds 33 Women's Domestic Violence Court Assistance Schemes servicing local courts throughout NSW. WDVCAP assists victims of domestic violence (mostly women and children) in obtaining legal protection through Apprehended Domestic Violence Orders and accessing other support services, such as legal aid, financial assistance and advice, housing and counseling. WDVCAP works closely with many other government and non-government agencies, such as the Department for Women, the Attorney General's Department, NSW Police, local community organizations and CLCs.

¹²⁸ CLCs in NSW first received funding from the NSW government in 1977, being joined by the federal government in 1978. CLSP has been administered by LAC on behalf of the two governments since 1980.

4.8 Major recent developments

Review of community legal services

4.8.1 In September 2004, the federal and NSW governments jointly set up a steering committee¹²⁹ to conduct for the first time a review of CLCs in NSW. The review aimed at developing strategies to consolidate and strengthen CLSP and establishing a more integrated framework for planning and delivering legal services to disadvantaged members of the NSW community. The Review Report, which was issued in June 2006, found that CLSP was essentially sound, well conceived and well administered, and the funded CLCs had the flexibility to design and develop their services delivery strategically on the basis of their knowledge and experience of target communities and their relationship with other legal, welfare and community service providers.¹³⁰ On the other hand, the Review Report also found that almost all CLCs were overwhelmed by demand for their services and could not sustain their prevailing levels of service.¹³¹ Overall, the Review Report made certain recommendations to strengthen the operation of CLSP, including the establishment of a NSW Legal Assistance Forum to explore greater collaboration between CLCs and other legal service agencies in NSW with regard to the planning and delivery of legal services; the adoption of a Strategic Service Delivery Model for CLSP to help identify unmet legal needs; the adoption of a common funding baselines for CLCs to allow for a basic level of services to be delivered in accordance with the Strategic Service Delivery Model.¹³² All these recommendations have been implemented.

Performance audit on the Legal Aid Commission

4.8.2 In December 2006, the NSW Audit-General published a performance audit report on LAC. The audit primarily aimed at assessing whether legal aid had been properly distributed to people who were entitled to it. The audit found LAC to be performing well in delivering legal aid services, and LAC had maintained and expanded services despite funding pressures and increasing demand. The audit also made a number of recommendations to LAC, such as making information clearer to the public about legal aid, better understanding target groups and demand for legal aid and being more accountable for the use of legal aid resources.¹³³

¹²⁹ The steering committee comprised representatives of the federal Attorney General's Department, LAC and CLCs, and nominees of the Law Society of NSW and the NSW Council of Social Services.

¹³⁰ Legal Aid Commission of New South Wales (2006) p. 4.

¹³¹ Legal Aid Commission of New South Wales (2006) p. 5.

¹³² Legal Aid Commission of New South Wales (2006) pp. 6-17.

¹³³ Auditor-General of New South Wales (2006) p. 3.

Policy and position statement on the operation of legal aid commissions in Australia

4.8.3 In July 2008, the National Legal Aid, which represents the directors of the eight state and territory legal aid commissions in Australia, adopted a policy and position statement emphasizing below a number of aspects crucial to the success of legal aid commissions:¹³⁴

- (a) ensuring legal aid commissions to remain independent of the government and have the ability to provide legal aid whenever the interests of justice require it;
- (b) providing adequate funding for such commissions to meet identified legal needs in a manner consistent with commission policy objectives, and the cost of justice should be reduced generally to increase the value of legal aid funding;
- (c) providing adequate research funding to such commissions to acquire proper data and a comprehensive knowledge base for determining priorities for legal aid delivery and improving the administration of legal aid to disadvantaged people;
- (d) preventing the occurrence of people being imprisoned without the benefit of legal advice or representation;
- (e) supporting the current system of a mixed service delivery model of legal aid and acknowledging the important role of the private profession in the delivery of legal aid; and
- (f) increasing the fees being paid to private practitioners, provided that such move will not decrease the number of grants of legal aid made available by such commissions.¹³⁵

¹³⁴ National Legal Aid (2008).

¹³⁵ Information on legal aid fees in NSW is not available as of the publication of this report.

Chapter 5 – Analysis

5.1 Introduction

5.1.1 Based on the findings in this study, the following issues are highlighted to facilitate Members' deliberation on the legal aid system in Hong Kong:

- (a) authority responsible for providing legal aid;
- (b) scope of legal aid services;
- (c) financial eligibility limits for legal aid;
- (d) legal aid service fees;
- (e) legal aid expenditure per capita; and
- (f) legal aid services at the community level.

5.1.2 To facilitate Members' discussion, a comparison table of various features of the legal aid systems in the three selected places and Hong Kong is presented in **Appendix II**.

5.2 Authority responsible for providing legal aid

Status

5.2.1 In all the selected places, the authorities responsible for providing legal aid are statutory bodies instead of government departments. In England and Wales, the Legal Services Commission (LSC) is a non-departmental public body established under the *Access to Justice Act 1999*. In the Province of Ontario of Canada (Ontario), Legal Aid Ontario (LAO) is a statutory corporation established under the *Legal Aid Services Act 1998 (LASA)*, which explicitly states that LAO is independent from, but accountable to, the Ontario government. In the State of New South Wales of Australia (NSW), legal aid is provided by the Legal Aid Commission (LAC), which is a statutory body established under the *Legal Aid Commission Act (LACA)*.

5.2.2 In Hong Kong, legal aid is provided by the Government's Legal Aid Department (LAD) under the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS). The administration of LAD's legal aid services is overseen by an advisory body known as the Legal Aid Services Council (LASC) established under the Legal Aid Services Council Ordinance (Cap. 489).¹³⁶

Appointment of members to the governing board of legal aid authorities

5.2.3 In all the three selected places, members of the governing boards of the legal aid authorities are appointed by the executive branch. In England and Wales, all LSC members are appointed by the Lord Chancellor. In Ontario, all directors of the board of LAO are appointed by the Lieutenant Governor in Council (the Lieutenant Governor of Ontario acting on and with the advice of the Cabinet of the Ontario government) on the Attorney General's recommendation. In NSW, the board members of LAC are appointed by the NSW Attorney General.

¹³⁶ Under section 4(5)(b) of LASC, LASC is the advisory body of the Chief Executive of the Hong Kong Special Administrative Region on the Government's policy of publicly-funded legal aid services provided by LAD and is responsible for advising on, among others, the feasibility and desirability of the establishment of an independent legal aid authority. LASC comprises a Chairman who is not a public officer and who is not a barrister or solicitor or, in the opinion of the Chief Executive, who is not connected in any other way directly with the practice of law; two barristers and two solicitors, each holding a practising certificate issued under the Legal Practitioners Ordinance (Cap. 159); four persons who, in the opinion of the Chief Executive, are not connected in any way with the practice of law; and the Director of Legal Aid.

Requirements for membership on the governing board of legal aid authorities

5.2.4 In all the selected places, members of the governing board of the legal aid authorities are not appointed from the legal profession solely. They are instead required to come from various backgrounds conducive to the provision of legal aid services. In England and Wales, to reflect the needs of users of legal aid services, LSC members must have experience in or knowledge of the provision of legal aid services, the work of the courts, consumer affairs, social conditions or management. In Ontario, the Attorney General must ensure LAO's board of directors as a whole to have knowledge, skills and experience in the areas that the Attorney General considers appropriate, including business, management and financial matters of public or private sector organizations; law and the operation of courts and tribunals; special legal needs and provision of legal services to low-income individuals and disadvantaged communities; operation of community legal clinics; and social and economic circumstances associated with the special legal needs of low-income individuals and disadvantaged communities. In NSW, members of the LAC board include not only lawyers representing the law associations but also representatives of workers, consumer and community welfare interests, and community legal services.

5.2.5 In Ontario and NSW, the majority of members of the governing board of the legal aid authorities must not be lawyers, while there is no such a restriction in England and Wales.

Relationship with the executive branch

Budget control

5.2.6 In all the three selected places, legal aid authorities' annual budgets are subject to the control of the executive branch before being approved by the legislature. In England and Wales, LSC's annual budget must be approved by the Lord Chancellor, who has a statutory duty to pay LSC the sums as he or she determines as appropriate for LSC to exercise its legal aid functions. LSC's budget is included as part of the departmental budget of the Ministry of Justice (MoJ), and LSC is financed by grant-in-aid from MoJ. In Ontario, LAO must submit its proposed annual budget to the Attorney General for approval. The budget, if approved, must also be reviewed by the Management Board of the Cabinet of the Ontario government before it is included in the estimates of the Ministry of the Attorney General to be recommended to the Ontario Parliament for final approval. In NSW, LAC is responsible for preparing its annual budget, which is presented as a single entry of the departmental budget of the Attorney General's Department to be approved by the NSW Parliament.

Framework for operation

5.2.7 Among the three selected places, both England and Wales and Ontario require their legal aid authorities to operate under a framework involving the executive branch. In England and Wales, the relationship of LSC with MoJ is specified in the *Legal Services Commission Framework Document* drawn up by the executive branch in consultation with LSC. The Framework Document sets out a framework for LSC to operate and use its financial resources. Besides, the Lord Chancellor may give guidance to LSC about the discharge of its functions. LSC must take into account any such guidance. However, such guidance cannot touch on individual cases. In Ontario, LAO and the Ministry of the Attorney General are required to enter into a memorandum of understanding under which LAO must be accountable to the Attorney General for its expenditure of public funds and provision of legal aid services to low-income individuals. Unlike LSC in England and Wales and LAO in Ontario, LAC is not bound by any framework document involving the NSW government or guidance from the government, except that LAC may enter into an agreement or arrangement with the federal government for the provision of legal aid relating to Commonwealth matters in NSW.

5.2.8 Ontario is the only selected place where the Attorney General may apply to the court for an order appointing an Administrator to administer LAO if the Attorney General considers that LAO's board of directors has failed to discharge its duties.

Accountability to the executive branch

5.2.9 In all the three selected places, the legal aid authorities are directly accountable to the executive branch rather than the legislature. In England and Wales, it is the Lord Chancellor who is accountable to Parliament for the activities and performance of LSC. In Ontario, LAO is required to submit an annual report on its performance to the Attorney General, who must submit it to the Lieutenant Governor in Council and table it before the Legislative Assembly of Ontario. In NSW, LAC reports, and submits an annual report on its work and activities, to the NSW Attorney General, who must lay the report before the NSW Parliament.

5.3 Scope of legal aid services

Legal advice and mediation

5.3.1 In all the three selected places, the publicly-funded legal aid services encompass not only representation but also legal advice and mediation. In Hong Kong, the current scope of legal aid does not cover legal advice and mediation.

Types of cases

5.3.2 In the selected places, certain types of cases are not covered by legal aid. In England and Wales, legal aid is normally not provided for some types of civil cases, including personal injury and defamation (libel and slander) or malicious falsehood. In Ontario, legal aid is not available to certain areas of civil law, including proceedings wholly or partly in respect of defamation, relator actions and proceedings relating to election. In NSW, legal aid is available only in specified areas of family law, civil law, criminal law, children's matters, mental health matters, prisoners' matters and veterans' pension matters. In Hong Kong, legal aid does not cover certain types of civil cases, such as building management cases and defamation.¹³⁷

5.4 Financial eligibility limits for legal aid

5.4.1 In England and Wales, there are certain variations in the financial eligibility limits for different civil and criminal legal aid services. Compared to those in England and Wales, the financial eligibility limits on legal aid services in Ontario and NSW are rather unified, regardless of the levels or types of services to be sought by applicants.

¹³⁷ In Hong Kong, under OLAS, legal aid is available for most types of civil proceedings in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. It is also available for cases before the Mental Health Review Tribunal and in the Coroner's Court where the Director of Legal Aid considers that the granting of legal aid is in the public interest. Under SLAS, legal aid is available to claims involving personal injury and death, and medical, dental and legal professional negligence, where the claim for damages exceeds or is likely to exceed HK\$60,000. It also covers claims under the Employee's Compensation Ordinance irrespective of the amount claimed. For criminal proceedings, legal aid is available for all types of criminal cases in the District Court, the Court of First Instance, the Court of Appeal and for appeals against decisions of magistrates. It is also available for appeals to the Court of Final Appeal, and committal proceedings prior to trial in the Court of First Instance.

5.4.2 In England and Wales, applicants eligible for most types of civil legal aid services (including initial legal advice and help, advocacy and family mediation) must meet the following requirements: gross income not exceeding £2,530 (HK\$29,300) per month, disposable income not exceeding £698 (HK\$8,100) per month and disposable capital not exceeding £8,000 (HK\$93,000). Applicants eligible for representation in immigration matters are subject to a lower disposable capital cap of £3,000 (HK\$35,000). Applicants seeking legal representation in family proceedings must not only pass the means test but also pay a contribution to cover the legal aid cost. Regarding criminal legal aid, different levels of services are subject to different financial eligibility limits. Applicants eligible for legal advice must meet the following requirements: disposable capital of £1,000 (HK\$11,600) or less and disposable income of £95 (HK\$1,100) per week or less. However, there is no means test for advocacy assistance, except where such assistance is provided in prison law. To be eligible for representation for criminal offences, applicants normally must not have actual annual income exceeding £12,007 (HK\$140,000).

5.4.3 In Ontario and NSW, applicants are eligible for various levels or types of civil or criminal legal aid if they fulfill a specified financial eligibility limit. For instance, in Ontario, an applicant is eligible for legal aid (including legal advice and representation) if his or her family unit has one member only (i.e. the applicant) and its net monthly income does not exceed CAN\$601 (HK\$4,000). In NSW, an applicant is eligible for legal aid (i.e. representation for criminal, family and civil matters) if his or her net assessable income is AUS\$318 (HK\$1,600) or less a week. NSW is the only selected place where applicants need not pass a means test to obtain free legal advice and minor assistance.

5.4.4 In Hong Kong, to qualify for legal aid in civil or criminal cases, an applicant's financial resources¹³⁸ must not exceed HK\$165,700. The Director of Legal Aid has discretion to waive the upper financial eligibility limit in meritorious Bill of Rights cases.¹³⁹ SLAS is available to those applicants whose financial resources exceed HK\$165,700 but do not exceed HK\$460,300.

5.5 Legal aid service fees

5.5.1 Among the three selected places, there is a rather hot debate over legal aid service fees in both England and Wales and Ontario. In England and Wales, the fixed and graduated fee schemes recently implemented have not been welcomed by legal aid practitioners, who are dissatisfied with the design of the fixed and graduated fees and the levels set, and express their intention to leave the legal aid market. The Constitutional Affairs Committee of the House of Commons is also critical of the fee schemes. In Ontario, given the increasing complexity of various kinds of legal proceedings covered by legal aid certificates, private lawyers have been dissatisfied with the hourly rates for their legal aid services. In NSW, the issue of the legal aid service fee is also a major concern. The National Legal Aid¹⁴⁰ has requested an increase in the fees being paid to private practitioners offering legal aid services, which are considered to be less than the market rate, provided that such move will not decrease the number of grants of legal aid made available by the commissions concerned.

¹³⁸ Financial resources of an applicant are his or her monthly disposable income multiplied by 12 plus his or her disposable capital. Monthly disposable income refers to the net monthly income after allowable deductions have been made from gross income. The deductions include rent, rate and the statutory allowances for the living expenses of the applicant and his or her dependants. Disposable capital comprises all the assets of a capital nature. However, some assets are excluded from the calculation of an applicant's capital, such as the applicant's owner-occupied property, household furniture and effects, personal clothing, etc.

¹³⁹ For an application for legal aid in civil cases, the Director of Legal Aid may waive the limit of an applicant's financial resources in meritorious cases involving a possible breach of the Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights. For an application for legal aid in criminal cases, the Director of Legal Aid may also waive the limit if he or she is satisfied that it is desirable in the interests of justice to do so subject to payment of a contribution to the legal aid cost involved. In addition, an applicant charged with murder, treason or piracy with violence may apply to a judge for exemption of the means test.

¹⁴⁰ It represents the directors of all state and territory legal aid commissions, including the Legal Aid Commission of NSW.

5.5.2 In Hong Kong, the legal professional bodies have raised concerns about the existing relatively low fee rates for criminal legal aid services, which discourage experienced lawyers from participating in such services.¹⁴¹

5.6 Legal aid expenditure per capita

5.6.1 In England and Wales, the legal aid expenditure increased from £1.5 billion (HK\$17.5 billion) in 1996-1997 to over £2 billion (HK\$23.3 billion) in 2007-2008. At present, LSC spends about £37 (HK\$430) per capita. In Ontario, LAO's legal aid expenditure in 2005-2006 was CAN\$325 million (HK\$2 billion), which was about CAN\$27.5 (HK\$173) per capita. In NSW, LAC's legal aid expenditure in 2006-2007 was AUS\$204 million (HK\$1 billion), which was about AUS\$29.6 (HK\$150) per capita. In Hong Kong, the approved estimates for LAD in 2008-2009 are HK\$758.9 million, out of which legal aid costs account for HK\$528 million, which is about HK\$75 per capita.

5.7 Legal aid services at the community level

5.7.1 All the three selected places have made available publicly-funded legal aid services at the community level. In England and Wales, the Community Legal Service is a network of LSC-funded organizations, which funds and provides civil legal advice and representation. In Ontario, LAO funds non-profit organizations known as community legal clinics to provide free clinic law services to low-income individuals and disadvantaged communities, including legal matters relating to housing, social assistance, human rights, health, employment and education. In NSW, LAC administers two community programmes, namely the Community Legal Services Programme (CLSP), and the Women's Domestic Violence Court Assistance Programme (WDVCAP). CLSP funds Community Legal Centres (CLCs), which are non-government and non-profit organizations providing free legal services to disadvantaged people. WDVCAP funds and assists victims of domestic violence in obtaining legal protection and accessing other support services, such as legal aid, financial assistance, housing and counseling. In Hong Kong, LAD does not fund non-profit organizations to provide legal aid services at the community level.

¹⁴¹ Legislative Council Secretariat (2008c).

Appendix I

Scope of legal aid services provided in the State of New South Wales of Australia

Area of Law	State	Commonwealth
Family law	<ul style="list-style-type: none"> • Proceedings under the <i>Property (Relationships) Act 1984</i>; • Adoption proceedings; and • Domestic violence proceedings as set out in the criminal law policies. 	<p>Matters arising under the <i>Family Law Act 1975</i>, the <i>Child Support (Assessment) Act 1989</i> and the <i>Child Support (Registration and Collection) Act 1988</i>, limited to:</p> <ul style="list-style-type: none"> • Separate representation of children; • Other orders relating to children, including parenting orders, location orders and recovery orders; • Parenting plans; • Injunctions relating to family violence; • Child support and child maintenance; • Spousal maintenance; • Dissolution and nullity of marriage; • Property proceedings; • Enforcement proceedings; or • Contempt and breach of court orders proceedings.

Appendix I (cont'd)

Scope of legal aid services provided in the State of New South Wales of Australia

Area of Law	State	Commonwealth
Civil law	<ul style="list-style-type: none"> • Matters where there is a likelihood of loss of the applicant's dwelling; • Matters involving loss of civil liberties, e.g. false imprisonment and malicious prosecution; • <i>Protected Estates Act 1983</i> matters; • Matters under Part 3 Division 6 or Section 41 of the <i>Public Health Act 1991</i>; • Matters under the <i>Crimes (Serious Sex Offenders) Act 2006</i>; • Matters before the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT); • Inquests in limited circumstances; • Consumer protection matters; • Public interest environment matters; and • Proceedings before ADT or the Industrial Relations Commission to obtain an exemption under the <i>Child Protection (Prohibited Employment) Act 1998</i>. <p>Legal aid is also available in state civil law matters and other matters where the applicant is at "special disadvantage" in that proceedings are taken by or for the benefit of a child or a person having substantial difficulty in dealing with the legal system by reason of a substantial psychiatric condition, developmental difficulty, intellectual impairment or physical disability.</p>	<p>Matters arising under a Commonwealth Act, limited to:</p> <ul style="list-style-type: none"> • A decision affecting the receipt or amount of a Commonwealth employee's compensation or a pension, benefit or allowance; • A decision or action by the Commonwealth in relation to a person that has a real prospect of affecting the person's capacity to continue in his or her usual occupation; • Discrimination; • Migration matters in limited circumstances (legal aid is also available under the Immigration Advice & Application Assistance Scheme contract between the Legal Aid Commission of New South Wales and the Commonwealth government); • Consumer protection; • Proceedings under the <i>Proceeds of Crime Act 2002</i>; • Extradition proceedings in limited circumstances; and • National security matters in limited circumstances.
Veterans' pension matters		<ul style="list-style-type: none"> • Appeals from decisions of the Veterans' Review Board about war-caused disability pension entitlement or assessment claims under part II of the <i>Veterans' Entitlements Act 1988</i>; and • Appeals from decisions of the Veterans' Review Board about claims under the <i>Military Rehabilitation and Compensation Act 2004</i>.

Appendix I (cont'd)

Scope of legal aid services provided in the State of New South Wales of Australia

Area of Law	State	Commonwealth
Human rights matters	Legal aid is available for public interest human rights matters (State and Commonwealth) where a case has significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues.	
Mental health matters	<ul style="list-style-type: none"> • Magistrates' inquiries under the <i>Mental Health Act 2007</i>; • Proceedings before the Mental Health Review Tribunal; • Representation of forensic patients; • <i>Guardianship Act 1987</i> matters and appeals to either the Administrative Decisions Tribunal or the Supreme Court from decisions of the Guardianship Tribunal; • Appeals from decisions of the Public Guardian or the Protective Commissioner; and • <i>Protected Estates Act 1983</i> matters. 	
Criminal law	<p>Local court:</p> <ul style="list-style-type: none"> • Most criminal matters commenced by a court attendance notice issued by the Police, except for drink driving and related offences unless there is a real possibility of gaol or exceptional circumstances exist; • Committal proceedings; • Domestic violence proceedings; • Annulment applications under Part 2 of the <i>Crimes (Local Courts Appeal and Review) Act 2001</i>; • Drug Court matters; and • Contesting a forensic procedure application made under the <i>Crimes (Forensic Procedures) Act 2000</i> (NSW) in the Local Court. <p>District Court, Supreme Court and High Court:</p> <ul style="list-style-type: none"> • Indictable matters; • Appeals; • Proceedings under Part 13A of the <i>Crimes Act 1900</i>; and • Defendants in prosecutions in the Land and Environment Court under environmental protection legislation in limited circumstances. 	

Appendix I (cont'd)

Scope of legal aid services provided in the State of New South Wales of Australia

Area of Law	State	Commonwealth
Child support matters		<ul style="list-style-type: none"> • Advice and assistance on child maintenance/support matters; • Representation and assistance in child maintenance proceedings under the <i>Family Law Act 1975</i> and <i>Child Support (Registration and Collection) Act 1988</i>; and • Representation and assistance for child maintenance under the <i>Child Support (Assessment) Act 1989</i>.
<p>Prisoners' matters – State and Commonwealth</p> <ul style="list-style-type: none"> • Visiting justice proceedings; • NSW State Parole Authority review hearings; • Life re-sentencing applications; • Reviews of segregation directions; and • Advice and minor assistance in other matters. 		
<p>Children's matters – State and Commonwealth</p> <p>Children's criminal matters:</p> <ul style="list-style-type: none"> • Proceedings in the Children's Court; • Appeals to the District Court; • Committal proceedings; • Sentence matters and trials in the District Court and Supreme Court; and • Court of Criminal Appeal and High Court. <p>Children's care matters: (applicable to children, parents, guardians and others)</p> <ul style="list-style-type: none"> • Proceedings under the <i>Children and Young Persons (Care and Protection) Act 1998</i> in the Children's Court, District Court, Supreme Court and High Court; • Proceedings under the <i>Children and Young Persons (Care and Protection) Act 1998</i> for dispute resolution conferencing and external alternative dispute resolution when there are no current proceedings, in limited circumstances; • Proceedings in the Community Services Division of the Administrative Decisions Tribunal; and • Proceedings in the Guardianship Tribunal for consent to the carrying out of a special medical procedure on a child. 		

Appendix II

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Authority responsible for legal aid	The Legal Aid Department (LAD) of the Government of the Hong Kong Special Administrative Region.	The Legal Services Commission (LSC).	Legal Aid Ontario (LAO).	The Legal Aid Commission of New South Wales (LAC).
Status	LAD is a government department.	LSC is a non-departmental public body established under the <i>Access to Justice Act 1999</i> , which is not a servant or agent of the Crown, and does not enjoy any status, immunity or privilege of the Crown.	LAO is a statutory corporation established under the <i>Legal Aid Services Act 1998</i> , which is not an agent of Her Majesty nor a Crown agent. It is independent from, but accountable to, the Ontario government.	LAC is a statutory body established under the <i>Legal Aid Commission Act 1979</i> .
Appointment of members to the governing board of legal aid authorities	Not applicable.	LSC comprises not fewer than seven members and not more than 12 members appointed by the Lord Chancellor, who is the responsible Minister for LSC.	LAO is governed and managed by a board of directors appointed by the Lieutenant Governor in Council on recommendation from the Attorney General of the Ontario government (the responsible Minister for LAO) or the Law Society.	LAC is governed and managed by a board, the members of which are appointed by the NSW Attorney General, who is the responsible Minister for LAC.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Requirements for membership on the governing board of legal aid authorities	Not applicable. The departmental staff are all civic servants.	LSC's members must have experience in or knowledge of: <ul style="list-style-type: none"> (a) the provision of legal aid services under LSC's Community Legal Service (CLS) and Criminal Defence Service (CDS); (b) the work of the courts; (c) consumer affairs; (d) social conditions; and (e) management. 	The directors of LAO's board must have certain knowledge, skills and experience in the areas that the Attorney General considers appropriate, including: <ul style="list-style-type: none"> (a) business, management and financial matters of public or private sector organizations; (b) law and the operation of courts and tribunals; (c) special legal needs and provision of legal services to low-income individuals and disadvantaged communities; (d) operation of community legal clinics; and (e) social and economic circumstances associated with the special legal needs of low-income individuals and disadvantaged communities. <p>The Attorney General is also required to ensure that the majority of the board members must be persons who are not lawyers and no more than three of the appointed members are members representing the Law Society in Ontario.</p>	LAC's board members must include: <ul style="list-style-type: none"> (a) lawyers representing the law associations in NSW; (b) representatives of community legal services; and (c) representatives of workers, consumers and community welfare interests.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Budget control by the executive	LAD's annual budget is determined by the Government.	LSC's budget is part of the departmental budget of the Ministry of Justice and must be approved by the Lord Chancellor.	LAO's annual budget is part of the budget of the Ministry of the Attorney General and must be approved by the Attorney General. It must also be reviewed by the Management Board of the Cabinet of the Ontario government.	LAC is responsible for preparing its annual budget, and is not statutorily subject to the executive branch's approval.
Framework for operation/guidance from the executive	LAD operates based upon the Government's set policies.	LSC's operation, use of financial resources and relationship with its sponsoring government department (currently the Ministry of Justice) is specified in the Legal Services Commission Framework Document formulated by the government in consultation with LSC. The Lord Chancellor may also give guidance to LSC about the discharge of its functions, and LSC must take into account any such guidance. However, such guidance cannot touch on individual cases.	LAO and the Ministry of the Attorney General must enter into a memorandum of understanding under which LAO is accountable to the Attorney General for its expenditure of public funds and provision of legal aid services. The Attorney General may apply for a court order to appoint an Administrator to administer LAO if LAO's board of directors fails to discharge its duties.	LAC's operation is not bound by any framework document involving the executive or guidance from the executive, except that it may enter into an agreement with the federal government for the provision of legal aid relating to Commonwealth matters in NSW.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Accountability to the executive and the legislature	The Home Affairs Bureau is responsible for setting legal aid policies for LAD to implement, while the provision of legal aid services by LAD is supervised by the Legal Aid Services Council, which is an advisory body established under the Legal Aid Services Council Ordinance. The work of LAD is also monitored by the Legislative Council.	LSC's annual plans must be approved by the Lord Chancellor. LSC must also submit its annual report to the Lord Chancellor, who causes the report to be laid before Parliament and is accountable to Parliament for LSC's activities and performance.	LAO is required to submit an annual report to the Attorney General, who must submit it to the Lieutenant Governor in Council and table it before the Legislative Assembly of Ontario.	LAC reports to the Attorney General and submits an annual report on its work and activities to the Attorney General, who must lay it before the NSW Parliament.
Whether legal aid services include legal advice	Legal aid services do not include legal advice.	LSC's legal aid services include legal advice, which requires a means test.	LAO's legal aid services include legal advice, which requires a means test.	LAC's legal aid services include legal advice, which does not require a means test.
Whether legal aid services include mediation services	Legal aid services do not include mediation services.	LSC's legal aid services include mediation services, which require a means test.	LAO's legal aid services include mediation services, which require a means test.	LAC's legal aid services include mediation services, which require a means test.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Types of cases covered by legal aid	<p>The Ordinary Legal Aid Scheme (OLAS) covers civil proceedings in District Court and above.</p> <p>The Supplementary Legal Aid Scheme (SLAS) is available for cases involving personal injury or death as well as medical, dental or legal professional negligence where the claim for damages is likely to exceed HK\$60,000. It also covers claims under the Employees' Compensation Ordinance.</p> <p>Legal aid is also available for criminal proceedings at District Court and above, as well as in committal proceedings in the Magistrates' Court.</p>	<p>Legal aid is available in the area of criminal law and civil cases but is normally not provided for the following types of civil cases:</p> <ul style="list-style-type: none"> (a) personal injury;¹⁴² (b) negligently caused damage to property; (c) conveyancing; (d) boundary disputes; (e) making a will; (f) trust law; (g) defamation (libel and slander) or malicious falsehood; (h) company or partnership law; (i) matters arising out of carrying on a business; or (j) attending an interview or an asylum claim. <p>Legal aid services are also not available for civil cases heard in certain tribunals or courts, including the Employment Tribunal, the Immigration Tribunal and the Lands Tribunal.</p>	<p>Legal aid is available in criminal matters, family law, clinic law and mental health law. It is also provided in the areas of civil law except in:</p> <ul style="list-style-type: none"> (a) proceedings wholly or partly in respect of a defamation; (b) relator actions; (c) proceedings for the recovery of a penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings; (d) proceedings relating to election; or (e) prescribed areas of civil law, prescribed types of civil cases or prescribed types of civil proceedings. 	<p>Legal aid services are available in the areas of family law, civil law, criminal law, children's matters, mental health matters, prisoners' matters and veterans' pension matters.</p>

¹⁴² Personal injury has generally been outside the scope of legal aid since 2000 when the government decided to focus legal aid on high-priority cases involving human rights, child protection, domestic violence and social welfare. However, a small range of cases (mainly medical negligence claims) have remained within the scope of legal aid under CLS.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Financial eligibility limits	<p>Generally, to qualify for legal aid for civil proceedings under OLAS or criminal cases, an applicant's financial resources must not exceed HK\$165,700.</p> <p>SLAS is available to applicants whose financial resources range from HK\$165,700 to HK\$460,300.</p>	<p>Applicants eligible for most types of civil legal aid services must have gross income not exceeding £2,530 (HK\$29,300) per month, disposable income not exceeding £698 (HK\$8,100) per month and disposable capital not exceeding £8,000 (HK\$93,000).</p> <p>Different levels of criminal legal aid services are subject to different financial eligibility limits. Applicants eligible for criminal legal advice must have disposable capital of £1,000 (HK\$11,600) or less and disposable income of £95 (HK\$1,100) per week or less. Applicants eligible for representation for criminal offences normally must not have actual annual income exceeding £12,007 (HK\$140,000).</p>	<p>An applicant is eligible for civil or criminal legal aid if his or her family size and the corresponding net income are below a specified limit. For instance, an applicant is eligible for legal aid if his or her family unit has one member only (i.e. the applicant) and its net monthly income does not exceed CAN\$601 (HK\$4,000).</p>	<p>An applicant is eligible for civil or criminal legal aid if his or her net assessable income and the net assessable assets of the applicant and his or her financially-associated persons are below a specified limit. For instance, an applicant (without any financially-associated person) is eligible for legal aid if his or her net assessable income is AUS\$318 (HK\$1,600) or less a week and if the value of his or her net assessable assets is below AUS\$1,310 (HK\$6,400).</p>

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three selected places and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Whether legal aid services are available at the community level	LAD does not fund non-profit organizations to provide legal aid services at the community level.	Yes, the Community Legal Service is a network of LSC-funded organizations, which funds and provides civil legal advice and representation.	Yes, LAO funds non-profit community legal clinics to provide free clinic law services to low-income individuals or disadvantaged communities.	Yes, LAC administers the Community Legal Services Programme (CLSP), and the Women's Domestic Violence Court Assistance Programme (WDVCAP). CLSP funds non-government and non-profit Community Legal Centres to provide free legal services to disadvantaged people. WDVCAP assists victims of domestic violence in obtaining legal protection and accessing other support services.

Appendix II (cont'd)

Comparison table of major features of the legal aid systems in the three jurisdictions studied and Hong Kong

	Hong Kong	England and Wales	Ontario of Canada	New South Wales of Australia
Source of funding	LAD is funded through a separate head of expenditure, "Head 94 Legal Aid Department", in the Government's annual Estimates. LCC prepares its draft budget estimate, and forwards it to the Executive for incorporation into the Government's annual Estimates.	The budget of LSC is included as part of the departmental budget of the Ministry of Justice. LSC is financed by grant-in-aid received from the Ministry of Justice of the United Kingdom government.	The budget of LAO is included in the estimates of the Ministry of the Attorney General. The Ontario government provides the majority of funding for LAO. Such funding includes contributions from the federal government through cost-sharing arrangements. LAO also receives funding from the Law Foundation of Ontario and client contributions.	The budget of LAC is presented as a single entry of the departmental budget of the Attorney General's Department. LAC receives its funding from the Commonwealth and NSW governments, client contributions and the Public Purpose Fund (which comprises interest earned from lawyers' trust accounts and is governed by the <i>Legal Profession Act 2004</i>).
Legal aid expenditure	HK\$528 million (2008-2009).	£1.95 billion (HK\$23 billion) (2007-2008).	CAN\$325 million (HK\$2 billion) (2005-2006).	AUS\$204 million (HK\$1 billion) (2007-2008).
Legal aid expenditure per capita	HK\$75 (Population in 2008: 7 million).	£37 (HK\$430) (Population in 2007: 54 million).	CAN\$27.5 (HK\$173) (Population in 2005: 12 million).	AUS\$29.6 (HK\$150) (Population in 2007: 6.9 million).

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