

# 香港人權監察

## HONG KONG HUMAN RIGHTS MONITOR

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### **Submission to the LegCo Panel on Administration of Justice and Legal Services on the Research Report “Legal aid systems in selected places”**

25 January 2010

#### **Introduction**

1. According to the Legal Aid Department, legal aid is to provide “legal representation to eligible applicants by a solicitor and, if necessary, a barrister in civil or criminal proceedings. As mentioned by Mr. Donald Tsang, the then Chief Secretary for Administration in January 2002, the objective of legal aid services is:  
“Through the provision of publicly funded legal aid services, the Government seeks to ensure that no one with reasonable grounds taking legal action in Hong Kong is prevented from seeking justice because of a lack of means”.<sup>1</sup>
2. A research on legal aid systems in England and Wales of the United Kingdom, the Province of Ontario of Canada and the State of New South Wales of Australia was conducted by the Research and Library Services Division (RLSD) of the Legislative Council. It examined the legal aid systems in the selected jurisdiction with respect to the following major aspects:
  - 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.
3. The Monitor is of the opinion that the existing legal aid system in Hong Kong can be substantially improved and a comprehensive review on it should be conducted. In the light of the research paper prepared by RLSD, the Monitor has prepared this submission to summarise our views on the ways to improve the existing mechanism of legal aid services.

#### **Legal aid as a fundamental human right**

4. Article 35 of the Basic Law, which prescribes the systems to be practiced in Hong Kong, states that:  
“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.”
5. Article 22 of the Hong Kong Bill of Rights, which incorporate article 26 of the International Covenant on Civil and Political Rights (ICCPR) into local law, states the principle of “Equality before and equal protection of law” as follows:  
“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

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<sup>1</sup> Quoted in p. 239, “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006.

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

6. Article 14(3)(d) of ICCPR and equivalent Article 11(2)(d) in the Hong Kong Bill of Rights Ordinance (HKBORO) also provide the principle of “Rights of persons charged with or convicted of criminal offence” that:  
“everyone [charged with a criminal offence] shall be entitled to the ...minimum guarantee” “...to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.
7. Equality before the law is meaningless without access to the law. True access to the law not only means formal rights, but also quality access through suitably experienced and knowledgeable legal advisors. Therefore, legal representation is therefore central to the rule of law, and to achieve equality before the law, publicly funded legal representation must be provided to financially disadvantaged persons who cannot afford to instruct private lawyers.
8. Under the constitutional order of the Basic Law of Hong Kong, it is a constitutional responsibility for the Government to provide proper legal aid services to ensure that no persons would be deprived of proper legal assistance due to inadequate means.
9. As concluded by the former Chairman of the Legal Aid Services Council, Mr. J. P. Lee, JP, OBE, “it will be the government which has to be responsible for making legal aid available if human rights are accepted as an unalienable element to civilized society.”<sup>2</sup>

#### **Authority responsible for providing legal aid**

10. Unlike all selected places in the research paper which the authorities responsible for providing legal aid are independent statutory bodies, legal aid in Hong Kong is provided by the Legal Aid Department, a department within the Government.
11. There are established procedures to appoint members of the governing board of the legal aid authorities in all selected jurisdictions, while all the staff in Legal Aid Department are civil servants or government employees.
12. The Monitor recommends that there should be an independent statutory legal aid authority consisting of independent persons.
13. Legal aid service in Hong Kong was first provided by a sub-department of the Judiciary in January 1967. The Legal Aid Department was then established in July 1970 to take over the administration of the legal aid services. The Legal Aid Department, at that time, was a department of the Administration. The legal aid portfolio was transferred to the Home Affairs Bureau in 2007.
14. It is an established principle that the administrative operation of legal aid services must be independent and perceived to be so too. The Scott Report issued by the Legal Aid Working Party in January 1986 recommended that “legal aid should be administered by an independent legal aid commission which enjoyed a status outside the main civil service, like the

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<sup>2</sup> Foreword, “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006.

Department of Audit.”<sup>3</sup> The Joint Profession Working Party on Legal Aid Reform further argued in 1987 for “a statutory legal services authority under the managerial control of the legal profession and being accountable to an independent advisory body”.<sup>4</sup>

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

“it is also essential to ensure the independence of the Legal Aid Department, which at present funds much of the human rights litigation. It is a government department headed by a Director of Legal Aid. Consideration should be given to making the Legal Aid Department an independent board rather than a government department.”<sup>5</sup>

16. The Legal Aid Services Council is now conducting a study on the establishment of an independent statutory legal aid authority. Back to its submission entitled “Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority” issued in September 1998, the Legal Aid Services Council indicated that the arrangement of having civil servants administering legal aid services was institutionally flawed because of the risk of pressure from the Government. This arrangement encourages the perception of a lack of independence.<sup>6</sup>

17. In the same report, the Legal Aid Services Council further argued that:

“Operational independence can only be guaranteed by institutional independence, in the sense that civil servants may find it difficult to exercise discretionary powers against the Government when they are themselves part of the Government. Lawyers directly employed by the Government should not have to make decisions about suing the Government. This anomalous situation of conflict of interest has developed in Hong Kong as a matter of convenience”.<sup>7</sup>

18. In summary, there have been concerns on the independence of legal aid administration in Hong Kong since the establishment of Legal Aid Department in 1970. These concerns were intensified in 2007 when the legal aid portfolio was transferred from the Administration Wing of the Chief Secretary for Administration’s Office to the Home Affairs Bureau. The Monitor has actually criticized such transfer as “a downgrade on legal aid services and the rule of law” because of the possible conflict of interests and the role of the Home Affairs Bureau as one of the most important government departments to protect the public image of the Government.<sup>8</sup>

19. For a long time the Government has denied the need to establish an independent legal aid authority. The Legal Aid Services Council has quoted the speech of Chief Secretary for Administration in October 1999 that the Government “was unable to accept the Council’s recommendation of establishing an independent legal aid authority. She set out the Government’s reasons for not establishing an independent legal aid authority under the 3

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<sup>3</sup> Ibid, p. 18.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., p. 232.

<sup>6</sup> Ibid.

<sup>7</sup> Legal Aid Services Council, “Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority”, September 1998, pp. 14-15. Quoted in “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, pp. 232-233.

<sup>8</sup> Submission of Hong Kong Human Rights Monitor’s on Re-organization of the Government Secretariat: Proposed transfer of the legal aid portfolio to the Home Affairs Bureau, at <http://www.legco.gov.hk/yr06-07/chinese/panels/ajls/papers/aj0625cb2-1989-2-c.pdf>. (Chinese only)

headings of Funding Accountability; the Need for an Independent Authority; Staff Morale and Service Delivery”.<sup>9</sup>

20. The Government reiterated its position not to make the Legal Aid Department independent in a LegCo Panel on Administration of Justice and Legal Services meeting in June 2007 discussing the transfer of legal aid portfolio, when former lawmaker and senior counsel Martin Lee asked why the Government had acted contrary to the request of LegCo Members to have an independent Legal Aid Department.<sup>10</sup> Even though the actual operation of the Legal Aid Department is as independent as mentioned by the Government, it fails to satisfy the principle that the administrative operation of legal aid services must be perceived to be independent.
21. Following the recommendation to have an independent legal aid authority, the board of such authority should involve a greater public participation as suggested by the Legal Aid Services Council in 1998. There should be more members of the public nominated by different non-governmental organizations or public bodies of different social background, other than the legal professional bodies.<sup>11</sup> The systems in selected jurisdictions of the LegCo research paper, to a certain extent, incarnate this proposed element. Board members of the legal aid authority in selected jurisdiction must have skills, knowledge or experience in areas other than the legal profession, such as business and management, consumer affairs, social and economic conditions etc.
22. As the Legal Aid Services Council suggested, there must be public participation in the overseeing of the administration of legal aid services, providing input on policy-making and ensuring accountability.<sup>12</sup> While in all the three selected places, the legal aid authorities are directly accountable to the executive branch rather the legislature, the work of Legal Aid Department in Hong Kong is supervised and monitored by the Legal Aid Services Council, an advisory body established under the Legal Aid Services Council Ordinance, and also the Legislative Council. More elements of public supervision should be involved to enhance public participation and accountability.

### **Scope of legal aid services**

23. The Legal Aid Services Council opines the principle that “Legal aid covers both civil and criminal proceedings, and also legal advice and assistance not involving legal proceedings. Legal aid should be extended to tribunals and boards that permit legal representation.”<sup>13</sup> In short, the scope of legal aid services should be as broad as possible.
24. Unlike Hong Kong in which the current scope of legal aid does not cover legal advice and mediation, the legal aid services in all three selected places include legal advice and mediation with the requirement of a mean test (provision of legal advice in New South Wales of Australia does not require a mean test). The Monitor recommends the Government consider expanding the scope of legal aid services to cover mediation.

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<sup>9</sup> “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, p. 233.

<sup>10</sup> <http://www.legco.gov.hk/yr06-07/english/panels/ajls/minutes/aj070528.pdf>.

<sup>11</sup> Legal Aid Services Council, “Report on the Feasibility and Desirability of the Establishment of an Independent Legal Aid Authority”, September 1998, pp. 14-15. Quoted in “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, p. 233.

<sup>12</sup> “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, p. 240.

<sup>13</sup> Ibid.

25. There is currently a Free Legal Advice Scheme under subvention of the Duty Lawyer Scheme by the Home Affairs Bureau.<sup>14</sup> It provides free preliminary legal advices to members of the public who face genuine legal problems and would not normally be able to afford fees for professional legal advice, since it does not require a means test. However, the advice is only one-off and preliminary for the clients to understand the nature of their problems. Also, there are established guidelines where in some situations free legal advice will be refused, including when legal aid has been granted to the clients. The Monitor opines that the Government should either consider expanding the coverage of legal aid services to include legal advice, or enhance the Free Legal Advice Scheme by providing in-depth legal advices in broad situations.
26. According to article 5AA of the Legal Aid Ordinance:  
“The Director may waive the limit of financial resources imposed under section 5(1) where the Director is satisfied that, having regard to the matters set out in section 10(3), a person would be granted a legal aid certificate in proceedings in which a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue.”
27. The above provision was added in 1995, when only the Hong Kong Bill of Rights Ordinance and the International Covenant on Civil and Political Rights were legally applicable to Hong Kong. Afterwards other than the Hong Kong Bill of Rights Ordinance and the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international labour conventions were applied to Hong Kong as stipulated in article 39 of the Basic Law. Moreover, a number of local ordinances which protect certain kinds of human rights, including 4 anti-discrimination ordinances (Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance), and the Personal Data (Privacy) Ordinance have been established and fully implemented. The Monitor opines that article 5AA of the Legal Aid Ordinance should include a waiver of the limit of financial resources when there is a breach of any international human rights conventions applicable to Hong Kong, any anti-discrimination ordinances and the Personal Data (Privacy) Ordinance to enshrine the spirit of this provision.
28. On the other hand, apart from human rights issues, the Monitor opines that article 5AA of the Legal Aid Ordinance should also include a waiver of the limit financial resources when the issue is related to public interest.
29. In April 2009 a letter to Paul Chan Mo Po, MBA, FCPA, MH, JP, chairman of the Legal Aid Services Council was sent by the Monitor, urging the Council to press for a change in the criminal legal aid system to fill the gap which can cause real injustice.<sup>15</sup>
30. Legal aid in criminal cases in the High Court and Court of Final Appeal is governed by the Legal Aid in Criminal Cases Rules (the Rules). The types of cases where legal aid is available are identified in Rule 4, which its Rule 4(1)(h) deals with legal aid for appeals to the Court of Final Appeal (‘CFA’). The types of cases where legal aid is available under that sub-rule are cases where a person has been “convicted” of an offence.

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<sup>14</sup> The Duty Lawyer Services: Free Legal Advice Scheme at <http://www.dutylawyer.org.hk/en/free/free.asp>.

<sup>15</sup> Letter of Hong Kong Human Rights Monitor to Chan Mo Po, chairperson of Legal Aid Services Council, at <http://www.legco.gov.hk/yr08-09/english/panels/ajls/papers/ajcb2-1428-1-e.pdf>

31. The test used for granting leave to appeal in criminal cases is that the matter involves “a point of law of great and general importance” or that “it is shown that substantial and grave injustice has been done”.<sup>16</sup> It is possible that a criminal case can involve a point of law so described or a substantial and grave injustice and so be worthy of consideration by the CFA but not concern a person “convicted”. The Monitor noticed that similar cases going to CFA were rejected with legal aid because of this sub-rule.<sup>17</sup>
32. In response to the Monitor’s letter, the Legal Aid Services Council stated that “...Rule 4 is not entirely satisfactory and that the defect should be rectified”, and the Council has sent a letter to Tsang Tak Shing, Secretary for Home Affairs, claiming that “There is a need to remedy the defect to improve access to justice. The Council asks that Rule 4 be rectified to give that effect.” The Government, on the other hand, responded that “(the Government) will examine it carefully taking into account the views of the LASC in considering the way forward. The matter warrants a thorough examination of implications arising from such proposed amendment of the existing legislation.”<sup>18</sup> The Monitor again urges the Government to initiate a change in the Legal Aid in Criminal Cases Rules to allow for legal aid to be granted in cases going to the CFA not involving a conviction.
33. On the other hand, the Monitor opines that the Government should study the expanding of the legal aid services to Hong Kong people involving cases which happened in mainland China. There are increasingly more Hong Kong residents residing and operating their own business in Mainland China. When they face any litigation cases, legal aid is necessary for them to have lawyers representing them. However, most of the Hong Kong people, even those receiving CSSA, are not likely to be eligible to apply legal aid in mainland China. The Monitor opines that the Government should consider extending the scope of the legal aid services to cover cases in mainland China involving Hong Kong residents in the mainland.
34. The Monitor also urges the Government to extend the legal aid services or the Duty Lawyer Scheme to cover other administrative bodies whose decisions have serious consequences for the persons affected, especially where volunteer services are not available to fill the gaps. The Monitor is in particular concerned that there is no legal aid to assist prisoners to prepare and argue their cases before the Long-term Prison Sentences Review Board.

### **Financial eligibility limits for legal aid**

35. It is another established principle of the Legal Aid Services Council that “Legal aid for litigation is to be made available to the lower middle class and below as well as, to an extent, ‘the sandwich class’. The benchmark for setting the means test limits is public affordability. There should be a periodic review and revision of the means test limits and the methodology of the means test”.<sup>19</sup>
36. To qualify for legal aid in civil or criminal cases in Hong Kong, an applicant’s financial resources must not exceed HK\$165,700. Financial resources of an applicant are his or her monthly disposable income multiplied by 12 plus his or her disposable capital.<sup>20</sup> The Monitor

<sup>16</sup> S. 32(2) Hong Kong Court of Final Appeal Ordinance.

<sup>17</sup> See Qamar Sheraz v. HKSAR FACC 5/2007.

<sup>18</sup> Home Affairs Bureau and Legal Aid Department, “Panel on Administration of Justice and Legal Services: Legal Aid in Criminal Cases Rule”, April 2009 at <http://www.legco.gov.hk/yr08-09/english/panels/ajls/papers/ajcb2-1428-2-e.pdf>

<sup>19</sup> “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, p. 240.

<sup>20</sup> Monthly disposable income refers to the net monthly income after allowable deductions have been from gross income. The deductions include rent, rate and the statutory allowances for the living expenses of the applicant and his or her dependents. Disposable capital comprises all the assets of a capital nature. However, some assets are excluded from the

opines that it is a rather harsh eligibility regime, especially with the cases which the costs are substantially higher than the current eligibility limit, such as cases in employees' compensation, traffic cases and miscellaneous personal injury.

37. On the other hand, the Supplementary Legal Aid Scheme is available to those applicants whose financial resources exceed HK\$165, 700 but do not exceed HK\$460, 300. However, the availability of SLAS is only limited to 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, and the claims under the Employees' Compensation Ordinance.
38. In a LegCo debate on expanding the scope of legal aid services, the Secretary for Home Affairs claimed that "the current exempted items are quite comprehensive and have already taken into account the applicant's need to maintain his basic living" and "during the previous reviews, the Government attempted time and again to ascertain that an adjustment should be made to the limit because of the changes in legal costs within the period of review". However, the Secretary further claimed that "the relevant professional bodies have not compiled figures on the legal costs of individual cases" and "The figures provided by the Legal Aid Department" only show that there has been a considerable increase or reduction in legal costs, which may not necessarily be able to reflect the fees actually charged by private practitioners".<sup>21</sup>
39. In a LegCo Panel on Administration of Justice and Legal Services meeting in late March 2009, Margaret Ng, the chairperson of the panel said that the Government informed the LegCo Secretariat that it was not in a position to report its recommendations to the Panel on the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants. The Government's explanation over the failure was that "it needed more time to consider carefully the way forward and the relevant financial and other implications".<sup>22</sup>
40. The Monitor opines that the existing financial eligibility limits fail to cater to most of Hong Kong people, especially the lower middle class and the retired elderly. "Affordability" should be the key concept underlying legal aid policy, and thus the existing financial eligibility limits should be relaxed. The scope of the Supplementary Legal Aid Scheme should be broadened.
41. The Monitor also opines that to ensure justice in some exceptional cases, the Director of Legal Aid should have the discretion to exclude certain assets or incomes in calculating the aggregated financial resources if it is reasonable to do so. Similar discretion should be given to special class of people who are unable to replenish their financial resources in the future and who actually have limited means. The DLA should be given the discretion to waive or reduce the amount of contribution or eligibility limit of such persons who are elderly, on pension, disabled or seriously ill.

### **Legal aid service fees / Legal aid expenditure per capita**

42. Another principle of the Legal Aid Services Council is that "The level of fees payable to lawyers participating in the legal aid scheme, both in civil and criminal legal aid and in

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calculation of an applicant's capital, such as the applicant's owner-occupied property, household furniture and effects, personal clothing, etc.

<sup>21</sup> Hansard of LegCo meeting on 11 February 2009 at <http://www.legco.gov.hk/yr08-09/english/counmtg/hansard/cm0211-translate-e.pdf>.

<sup>22</sup> Panel on Administration of Justice and Legal Services: Minutes of meeting on 30 September 2009 at <http://www.legco.gov.hk/yr08-09/english/panels/ajls/minutes/aj20090330.pdf>.

advice and assistance services must be commensurate to work done, the level of skill employed and the difficulty of the case, and subject to periodic revision”.<sup>23</sup>

43. As the research report mentioned, in Hong Kong the legal professional bodies have raised concerns about the existing relatively low fee rates for criminal legal aid services, which discourages experienced lawyers from participating in such services. Similar to Hong Kong, the legal aid service fees in all the three selected jurisdictions are criticized as being lower than the rate in private market. The Monitor has raised the similar concerns in a document submitted to the LegCo Panel on Administration of Justice and Legal Services in February 2008.<sup>24</sup>
44. On the other hand, while Hong Kong spent HK\$528 million in 2008-2009 on legal aid services, our legal aid expenditure per capita is much lower than the other 3 selected jurisdictions. The numbers are: HK\$75 in Hong Kong, HK\$430 in England and Wales, HK\$173 in Ontario of Canada and HK\$150 in New South Wales of Australia. Although it is to a certain extent a misleading comparison since it excludes the amount of costs recovered by the Legal Aid Department in legal aid funded litigation and the operating costs, the Monitor opines that the Government should provide more resources for legal aid services.
45. The Monitor in its previous submission suggests that “the inevitable consequence of payment of such low fees will be the inexorable drain of quality and experienced criminal solicitors from the present criminal legal aid scheme”, which would finally harm the right of equality before the law. The Monitor further claims that “With criminal cases increasingly involving the mobilization of expanding investigative and prosecutorial resources as well as ever more complex legislation, the inequality of arms that presently exists between the government and the individual will become more pronounced”.
46. The Government responded that it had written to the Law Society offering a further increase to the rate for Instructing Solicitors in handling criminal legal aid cases at the District Court. Also, the Government would welcome continuous discussion with the Law Society on the remuneration package for Solicitors, and prepared to review the rates in two years’ time upon the implementation of the new rates.
47. The Monitor welcomes the Government’s intention to increase the fee rates for criminal legal aid services. To ensure Hong Kong has a legal aid service that meets present and future requirements fit for a civilized and developed society the Monitor is of the view that the Government must allocate substantially increased funds for the provision of reasonable fees for solicitors participating in the criminal legal aid scheme. The Monitor sees no reason why this cannot be achieved by adopting the fee structure currently used for civil legal aid and regulated by an independent system of Taxation. Funds must also be allocated to enable an increase in the scope of legal aid to include representation from the time of a suspect’s arrest.

### **Legal aid services at the community level**

48. Publicly-funded legal aid services at the community level are available in all the three selected places. In Hong Kong, certain kinds of legal aid services at the community level are provided in a piecemeal manner by solicitors, barristers and legislators. The Legal Aid Department does not fund any non-profit organizations to provide legal aid services at the

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<sup>23</sup> “Legal Aid in Hong Kong”, Legal Aid Services Council, 2006, p. 241.

<sup>24</sup> Submission of the Hong Kong Human Rights Monitor on Criminal legal aid fees system, February 2008 at <http://www.legco.gov.hk/yr07-08/english/panels/ajls/papers/aj0225cb2-1245-1-e.pdf>.

community level. The Government should consider expanding the scope of legal aid services at the community level.