

For discussion on
18 January 2000

**Panel on Administration of Justice and Legal Services
Of the Legislative Council**

**Legal Aid Services Council's Recommendation
To Establish an Independent Legal Aid Authority**

Purpose

This paper provides information on legal aid systems in overseas jurisdictions, and as suggested by Members, with particular reference on the UK legal aid systems and the newly enacted Access to Justice Act 1999.

Legal Aid Systems in Overseas Jurisdictions – An Overview

2. Annexes A to C outline where the legal aid system of Hong Kong stands when compared with those of overseas jurisdictions. Annex A shows that, of the eight jurisdictions studied, Hong Kong's average per capita legal aid cost per annum comes behind England and Wales and Ontario, but is higher than that of the Netherlands, Australia, New Zealand, Japan and Malaysia. In other words, the per capita legal aid expenditure in Hong Kong is among the highest in the region, and it also compares favourably or closely to that of advanced common law jurisdictions. While the figure comes behind that of England and Wales, it is the stated policy of the UK to put a cap on legal aid expenditure in the light of rapid growth in the area. The Access to Justice Act 1999 has just been passed last year to this effect.

3. Annex B shows the scope of legal aid services available in eight jurisdictions, including Hong Kong. It is noted that Hong Kong and the UK (England and Wales) at the moment have the widest scope of legal aid coverage, in that all criminal proceedings are covered, and that legal aid is available

generally to most civil cases without prescribed priorities. The limited scope of legal aid services in overseas jurisdictions may be a result of services cut in the light of a rapid growth in legal aid expenditure. For example, divorce and wrongful dismissal proceedings have been removed from the scope of legal services in Ontario, Canada since late 1995. In Queensland, Australia, legal aid in civil matters is limited to family law, discrimination and consumer protection; while in Victoria, cases for damages in civil cases are covered by contingency fee arrangements.

4. Annex C shows that the proportion of population eligible for applying legal aid in Hong Kong, currently at 48%, is roughly comparable to that of England and Wales. Such figure also compares favourably to that of Canada and Australia (at 32% and 18% respectively). We are also endeavoring to further expand the coverage of our legal aid system. Subject to the passage of the Legal Aid (Amendment) Bill and the relevant Regulations, further improvement to the eligibility rate to 58% is expected. Meanwhile, we understand that there is a falling trend of legal aid coverage in some countries. For example, in England, legal coverage rate has been falling from 73.8% in the 1970's to around 50% in the 1990's, despite the steady growth of legal aid expenditure in the interim years.

5. Further information on individual legal aid systems is available on the official web sites of the legal aid authorities concerned. A list of the relevant web sites is at Annex D.

Legal Aid System in England and Wales – A Closer Look

6. The existing legal aid system of England and Wales is the product of the Legal Aid Act 1988, which sets the framework for the administration of legal aid in the area. Legal aid policy is set by the Lord Chancellor's Department, which also provides funding for the provision of legal aid services. Day-to-day operation of the legal schemes is run by a non-departmental public body, the Legal Aid Board. The Legal Aid Board may make recommendations to the Lord Chancellor with regard to changes in policy, and the Lord Chancellor may also issue directions to the Board. The annual staff and administrative cost for the Legal Aid Board is £50 million (i.e. about HK\$600

million).¹

7. At present, legal aid in England and Wales is available in the following manner:

- (a) Civil legal aid: legal aid covers work up to and including hearing in a civil court, with the exception of tribunal cases
- (b) Criminal legal aid: covers all type of criminal proceedings
- (c) Other forms of assistance:
 - (i) Green Form: provides general advice on clients' legal situation and the options available to them
 - (ii) Assistance by way of legal representation (ABWOR) is also available to civil cases in magistrates' court, appearances before the Mental Health Review Tribunals; prisoners facing disciplinary charges; and certain life prisoners and detainees at prisons
 - (iii) Duty Solicitor Schemes: people being questioned by the police are entitled to free legal advice and assistance, including appearance of solicitors in magistrates' courts.

8. The eligibility criteria for legal aid in England and Wales are as follows:

- (a) Civil Legal Aid: persons with disposable capital of £ 3,000 or less and disposable income £2,563 or less are eligible to apply legal aid without contribution. The upper limits for disposable capital and disposable income are £6,750 and £7,777 respectively. Legal aid recipients whose disposable capital and income fall between the scope of the non-contributory rate and the upper limits are required to pay a contribution.
- (b) Criminal legal aid: there are no eligibility limits and regards would be

¹ The annual staff and administrative cost for the Legal Aid Department is about HK\$220 million. This includes the cost for in-house lawyers who undertake about 30% of the civil legal aid cases.

had to the means of the applicants and the likely cost arising from the case. Contribution is required if the applicant's weekly disposable income exceeds £49 or disposable capital exceeds £3,000.

- (c) Green Form: disposable capital should be £1,000 or less, and weekly disposable income should be £77 or less.
- (d) ABWOR: the service is provided free of charge if weekly disposable income falls between £69 and £166. Disposable capital should be £3,000 or less.
- (e) All applicants must satisfy the Legal Aid Board that they have a reasonable chance of success and a reasonable case.

Annex E is a comparison of the eligibility criteria for assistance under the UK and the Hong Kong legal aid schemes.

The Access to Justice Act 1999

9. The Access to Justice Act 1999, passed on 27 July 1999, replaces the legal aid system in England and Wales with two new schemes (i.e. the Community Legal Service and the Criminal Defence Service), and makes provision for, inter alia, private funding of litigation.

10. The Act establishes a Legal Services Commission which replaces the existing Legal Aid Board to run the two new schemes, and enables the Lord Chancellor to give orders, directions and guidance to the Commission as to how it should exercise its functions. The Act also requires the Commission to establish, maintain and develop the Community Legal Service to handle civil and family cases, and use the funds allocated in a way that reflects the priorities set by the Lord Chancellor in conjunction with the local Community Legal Services. The Commission will also be responsible for the Criminal Defence Services, which will replace the current legal aid scheme in criminal cases.

11. The Act also seeks to facilitate the private funding of litigation. The provisions in the Act are so drafted that they will facilitate and encourage the

use of conditional fee arrangement to fund litigation. The ultimate aim is to extend the scope and improve the operation of conditional fees, in order to allow more people to fund litigation privately.

12. The background to the introduction of the Access to Justice Act is that the UK Government felt that there were few mechanisms or incentives in their existing legal aid system for promoting value for money or assuring the quality of the services provided; and neither the UK Government nor the Legal Aid Board had been able to exert adequate control over expenditure or determine the priorities for that expenditure. The result of such a deficiency is that over the last six years, total net expenditure on legal aid has increased by 48%, while the number of people helped by the legal aid schemes fell by almost 30% in the same period. Since 1994, the UK Government and the Legal Aid Board have been looking into ways to resolving the problem, and the Act is the result of that effort.

13. The change in scope in the legal aid system in England and Wales brought about by the Access to Justice Act and compared to that of Hong Kong is at Annex F. In addition to coverage, the Act also brings about fundamental changes to legal aid funding in England and Wales, viz

- (a) capped budgets will be made by the UK Government to each of the regions in England and Wales;
- (b) each region will then allocate their budgets in a way that reflects the priorities set by the Lord Chancellor and the local authorities;
- (c) more importantly, the UK Government plans to make a single cash-limited block grant to cover both criminal and civil legal aid in England and Wales. But while it is the UK Government's intention that funding for criminal legal aid would remain unlimited and demand-led, civil legal aid would be subject to and therefore capped at the level of the initial allocation; and
- (d) a "funding assessment" mechanism will replace the existing merit test. Under the assessment mechanism, consideration will be given to whether there are better ways of dealing with a particular case, such as

mediation, and whether the applicant could fund the case in a different way, such as conditional fees arrangement.

14. The Access to Justice Act introduces significant changes to the legal aid system in England and Wales. Legal practitioners in the UK have raised concern over certain measures contained in the Act, such as those relating to the withdrawal of legal aid for cases involving personal injury, and the introduction of a single cash-limited block grant to cover both civil and criminal legal aid. The actual effect of the reforms brought about by the Act will yet to be known pending implementation of the relevant measures, but the introduction and passage of the Act does highlight the fact that contrary to common belief, a legal aid system operated by a non-government public body with an unlimited budget may not be best placed to cater to the needs of the prospective legal aid recipients.

Conclusion

15. Information to hand indicates that Hong Kong operates a legal aid system comparable to those in developed overseas jurisdictions. To ensure that our policy objective to serve the needs of our target clients is met, we shall continue to keep in view developments in the legal aid systems in overseas jurisdictions and keep under review our own system to improve the delivery of legal aid services in Hong Kong. We shall also work closely with the Legal Aid Services Council to facilitate it in overseeing the administration of legal aid services by the Legal Aid Department, and in advising the Chief Executive on legal aid policy.

Administration Wing
Chief Secretary for Administration's Office
January 2000

Annex A

The annual per capita legal aid expenditure (on legal cost) in different jurisdictions¹

Ranking	Country or area	Per capita legal aid cost per annum (in \$HK)
1	UK (England and Wales)	24.3 billion (expenditure) ÷ 52 million (population) = 466.8
2.	Ontario	1.16 billion ÷ 9.07 million = 108.65
3.	Hong Kong	572 million ÷ 6.8 million = 84
4.	The Netherlands	1.26 billion ÷ 15.8 million = 80
5.	New Zealand	264 million ÷ 3.65 million = 72
6.	Australia	1.24 billion ÷ 18.6 million = 67
7.	Japan	179 million ÷ 120 million = 1.49
8.	Malaysia	10.8 million ÷ 21.7 million = 0.5

¹ The figures in the table are indicative only, it is difficult to obtain the figures for the same year on different jurisdictions. The figures shown in the table are the latest ones available ranging from 1996 - 97 to 1998 - 99.

Scope of legal aid in different jurisdictions

Country or areas	Scope of legal aid
Australia	<p><i>Civil cases:</i> Covers most of the cases but certain matters are given priority, e.g. decisions relating to commonwealth pension and benefits; discrimination matters and refugee applications. Besides, some proceedings are excluded like straightforward divorce cases.</p> <p><i>Criminal cases:</i> Covers most of the cases but priorities are given to certain cases like the representation on charges arising under the Commonwealth statute and charges which are dealt with on indictment. In most states, ceiling is imposed on the funding of individual case like for murder trial, a ceiling of Aus \$ 50,000 is imposed on the legal cost.</p>
British Columbia (Canada)	<p><i>Civil cases:</i> Covers immigration proceedings which would result in removal from the country; family matters for family which have serious family problems; legal problems with pensions and income assistance; human rights problems</p> <p><i>Criminal cases</i> Covers offence which would result in imprisonment, or loss of livelihood if convicted, or immigration complications that could result in deportation</p>

Country or areas	Scope of legal aid
Hong Kong	<p><i>Civil cases</i></p> <p>1) Standard Legal Aid Scheme: covers all types of civil cases with the exception of some proceedings like defamation, recovery of penalty and tribunal cases</p> <p>2) Supplementary Legal Aid Scheme (SLAS): provides legal representation to applicants whose financial resources exceed the limit of the standard scheme (i.e. \$ 169,700) but within the limit of SLAS (\$471,600). It covers cases of personal injury and death, and medical, dental and legal professional negligence claims.</p> <p><i>Criminal cases</i></p> <p>1) Criminal legal aid: covers all types of criminal cases in District Court or above</p> <p>2) Duty Lawyer Service: provide legal representation to defendants who are charged in magistracies</p> <p><i>Legal Advice</i></p> <p>The Duty Lawyer Service operates the Free Legal Advice Scheme to provide free legal advice to the public.</p>
Japan	<p><i>Civil cases</i></p> <p>All forms of civil suits and administrative suits</p> <p><i>Criminal cases</i></p> <p>State assignment of defence counsel is applied to criminal suits and legal assistance is provided to suspects before prosecution in a criminal case</p>
Malaysia	<i>Civil cases</i>

Country or areas	Scope of legal aid
	<p>Rights and liabilities under some specific Acts, e.g. Workmen's Compensation Act 1952; Small Estates (Distribution) Act 1955 and Moneylender's Act 1951; and other cases pertaining to civil and Islamic family matters with regard to those Act</p> <p><i>Criminal cases</i> Limited to mitigation for accused who pleads guilty</p>
The Netherlands	<p><i>Civil cases</i> Covers most cases with the exception of cases of monetary claim of less than NLG 400 (about HK\$1400)</p> <p><i>Criminal cases</i> Covers most cases with the exception of those that carry relatively inexpensive fines</p>
Ontario (Canada)	<p><i>Civil cases</i></p> <ul style="list-style-type: none"> a) In family matters: to get custody of children or to change custody, etc b) in immigration and refugee matters: refugee hearing before the Immigration and Refugee Board, sponsorship and deportation appeals and detention reviews c) some civil cases and final appeals: worker compensation appeal tribunal cases, social benefits tribunal matters, employment insurance appeals and mental health hearing and appeals <p>Some types of proceedings are excluded from the scope, e.g. divorce and wrongful dismissal proceedings.</p> <p><i>Criminal cases</i> Covers all types of offence that would</p>

Country or areas	Scope of legal aid
	likely result in incarceration or which will cause the defendants to lose the job immediately
UK (England and Wales) ²	<p><i>Civil cases</i> Covers work leading up to and including hearing in a civil court, with the exception of tribunal cases</p> <p><i>Criminal cases</i> Covers all types of criminal proceedings</p>

² The legal aid scope may be altered after the Access to Justice Act 1999 comes into force.

The proportion of population financially eligible for legal aid (in the form of legal representation) in different jurisdictions

Ranking	Country or area	Proportion of population eligible for legal aid
1.	The Netherlands	68%
2.	Hong Kong	48% ³
3.	United Kingdom (England and Wales)	48%
4.	Canada	32%
5.	Australia	18%

³ The figure quoted is the existing proportion. In the proposed Legal Aid (Amendment) Regulation 2000, which will be subject to the vetting by the Legislative Council, the method of calculating the disposable income will be revised and the proportion of households eligible for legal aid will be raised from 48% to 58%.

Websites for legal aid authorities in other jurisdictions

1. Legal Aid Ontario: <http://www.legalaid.on.ca>
2. Legal Aid New South Wales: <http://www.legalaid.nsw.gov.au/>
3. Victoria Legal Aid: <http://www.legalaid.vic.gov.au/>
4. Legal Aid Queensland: <http://www.legalaid.qld.gov.au/>
5. Legal Aid Board of England: <http://www.open.gov.uk/lcd/laid/>

**Comparison between Hong Kong and UK
in respect of eligibility for legal aid (in the form of legal representation)**

	UK (England and Wales)	Hong Kong
Upper financial eligibility limits for civil legal aid	<p>Disposable capital: £6,750 (around HK\$ 85,500)</p> <p>Yearly disposable income: £7,777 (around HK\$ 98,500)</p>	<p>Financial capacity: HK\$ 169,700 (yearly disposable income plus disposable capital)</p> <p>Supplementary Legal Aid Scheme: Financial capacity: HK\$ 471,600</p>
Financial eligibility limits for criminal legal aid	<p>The court looks into the applicant's financial position and the likely cost of the case. Applicants with the lowest means receive free legal aid and those with substantial means will not be granted legal aid if they can afford the likely costs.</p>	<p>Subject to the same financial eligibility limits as for civil legal aid (i.e. HK\$ 169,700)</p> <p>However, the Director of Legal Aid has the discretion to grant legal aid in criminal cases even if the applicant's financial resources exceed the limit if he is satisfied that it is in the interest of justice to do so.</p>

<p>Financial eligibility for other forms of legal assistance</p>	<p>Assistance by way of legal representation:</p> <p>Upper financial eligibility limits: Disposable income: £166 per week (around HK\$100,000 per annum) and disposable capital below £3,000 (around HK\$36,000)</p>	<p>Duty Lawyer Scheme:</p> <p>Upper financial eligibility limits: Gross income: \$ 127,330 per annum.</p>
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Comparison of scope of legal aid in Hong Kong and UK (England and Wales) before and after the implementation of Access to Justice Act 1999

UK (England and Wales)		Hong Kong
Before the implementation of Access to Justice Act 1999	After the implementation of Access to Justice Act 1999	
<p><i>Civil legal aid</i></p> <p>Covers works leading up to and including hearing in civil court, with the exception of tribunal cases</p>	<p><i>Civil legal aid</i></p> <p>The local Community Legal Service will determine the priorities of the legal aid services to different types of cases under a capped budget.</p> <p>New “Funding Assessment” approach will be adopted and regard will be had to whether there will be better ways of funding the legal cost in determining the grant of legal aid.</p> <p>Personal injury cases on negligence will be removed from the legal aid scheme and shall be funded by conditional fees arrangement</p>	<p><i>Civil legal aid</i></p> <p>Standard Legal Aid Scheme: Covers works in all courts at the District Court level or above (with the exception of tribunal cases and a small number of proceedings like defamation and recovery of fines)</p> <p>Supplementary Legal Aid Scheme (SLAS): Provides legal representation to applicants whose financial resources exceed the limits of the standard scheme but are below the limits for the SLAS in cases of personal injury, death and medical, dental and legal professional negligence claims.</p>

UK (England and Wales)		Hong Kong
Before the implementation of Access to Justice Act 1999	After the implementation of Access to Justice Act 1999	
<p><i>Criminal legal aid</i></p> <p>Covers all types of criminal proceedings</p>	<p><i>Criminal legal aid</i></p> <p>The local Criminal Defence Service (CDS) will be responsible for the provision of criminal legal aid. Its remit is to secure that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation.</p> <p>The form of assistance will be determined by the local CDS and there may be different scopes and forms of services across UK.</p>	<p><i>Criminal legal aid</i></p> <p>Criminal legal aid: Covers all types of criminal cases at District Court level or above.</p> <p>Duty Lawyer Service: Provides legal representation to defendants charged in the magistracies and also operates Free Legal Advice Scheme to provide free legal advice to the public</p>