

Legal Aid in Hong Kong
(for the International Forum on Legal Aid, Taipei 2009)

Hong Kong's publicly funded legal aid services are provided through the Legal Aid Department of the Hong Kong Government. Supervising the provision of such service is a matter for the Legal Aid Services Council which is a statutory body independent of the Government.

The Legal Aid Department provides legal aid to any person in Hong Kong, resident or non-resident, who satisfies the criteria for legal aid, namely the means test and the merits test. Eligible applicants receive legal aid through the provision of the service of a solicitor and, if necessary, a barrister in court proceedings to ensure that a person who has reasonable grounds for pursuing or defending a legal action is not prevented from doing so because of a lack of means.

The Legal Aid Department is organized into three divisions. They are: the Application and Processing Division, the Litigation Division and the Policy and Administration Division.

The Application and Processing Division determines applications for civil legal aid. When legal aid is granted, the case is assigned to lawyers in private practice or to in-house lawyers if the case is one concerning personal injury including employees' compensation claims or divorce and ancillary matters.

The Litigation Division determines applications for criminal legal aid and deals with the resulting litigation that has been granted legal aid.

The Policy and Administration Division supports the operation of the whole Department in areas such as human resources management, staff training, accounting and information technology management etc.

The majority of legal aid counsel working in the Department are deployed to the Application and Processing Division to screen legal aid applications. Legal representation is mostly provided by lawyers in private practice. There are about 7,300 practicing lawyers in Hong Kong and nearly 40% of them are on the legal aid panel for assignment. Legal aid panel solicitors and barristers are assigned cases having regard to their experience and expertise and complexity of a particular case.

The Legal Aid Department is committed to be a provider of quality legal aid services. For cases tried in courts, applications for legal aid are usually processed within 8 to 10 working days of the application. For criminal appeal cases, applications are processed within 2 to 3 months. In respect of civil legal aid, the standard processing time is within 3 months of the application. Applications for legal aid have to be submitted in person.

Legal Aid Schemes

Legal representation in litigation in criminal law, civil law, administrative law and claims for compensation is available in Hong Kong. Legal aid for civil proceedings is further distributed under two schemes. There is firstly the Ordinary Legal Aid Scheme which is available to persons whose

financial resources do not exceed HK\$175,800 (US\$22,540-).

The other scheme is the Supplementary Legal Aid Scheme which is available to persons whose financial resources are in excess of the amount prescribed for the Ordinary Legal Aid Scheme but do not exceed HK\$488,400 (US\$62,610-). Applicants under this category are generally referred to as the lower middle class in Hong Kong.

There is another form of legal assistance operating in Hong Kong. It is the Free Legal Advice Scheme which provides face-to-face legal advice to members of the public without means testing, in areas such as matrimonial, employment, landlord and tenant, loans, bankruptcy and contract matters etc. However, assistance during interviews at police stations is not available. The Free Legal Advice Scheme is subvented by the Government but independently administered by the legal profession of Hong Kong. Members of the public can make appointments to see volunteer lawyers through referral agencies spread over 150 offices. Referrals by such large number of agencies ensure that this service is brought to the attention of our potential legal aid applicants.

Financial Eligibility Limits

To qualify for legal aid, applicants must pass both the means and merits tests. However, applicants who are on welfare are generally deemed eligible for legal aid unless there are reasonable grounds to suspect otherwise.

The means test determines whether an applicant's financial resources exceed the financial eligibility limit. Legal aid can be refused if the

applicants' financial resources exceed the limit. The merits test evaluates whether the applicant has reasonable grounds for bringing or defending his case and a reasonable prospect of success in the proceedings. .

In Hong Kong, we adopt a "financial capacity" approach, which aggregates a person's financial resources and disposable capital in determining the means of legal aid applicants. Financial resources are taken as an applicant's monthly disposable income multiplied by 12, plus his or her disposable capital. Disposable income is calculated as the net monthly income after allowable deductions have been made. The deductions include, amongst others, rent, rates and statutory personal allowances for living expenses of the applicant and his or her dependents.

Disposal capital consists of all assets of a capital nature, such as cash, bank savings, jewelry, antiques, stocks and shares and property. Some assets are, however, excluded from the calculation, e.g. the property in which the applicant lives, household furniture, clothing and the tools and implements of the applicant's trade.

An applicant charged with murder, treason or piracy with violence can apply to a judge for exemption from the means test and from legal aid contribution.

Means assessment is conducted by staff of the Legal Aid Department who are civil servants recruited openly. An applicant who has been refused legal aid can appeal to the Registrar of the High Court (in respect of civil cases) or a judge (in respect of criminal cases) against such refusal.

Financial eligibility limits are reviewed annually to take into account of changes in the Consumer Price Index, and on a biennial basis to take into account of changes in private litigation costs.

Legal Aid Funding and Expenditure

Legal aid in Hong Kong is fully financed by public funds. Funding for civil and criminal legal aid comes from appropriations in the Government budget. In respect of the Supplementary Legal Aid Scheme which is a self-financing scheme, funding comes from the application fees and contribution paid by the aided person when the case is won.

A unique feature of legal aid in Hong Kong is that it is non-cash limited. In other words, there is no pre-determined funding cap for legal aid. Supplementary funding can be sought in the event expenses exceed the original estimate. Subject to the approval of the Director of Legal Aid on the ground of reasonableness, there is no limit on the expenditure for any particular case which has been granted legal aid.

Contribution by Applicants

There is a generally held but mistaken belief that legal aid is free. The truth of the matter is that an aided person who litigates at public expense is required to contribute towards the costs and expenses incurred by the Legal Aid Department in respect of which legal aid is granted.

An aided person is required to pay a contribution out of his financial resources upon acceptance of an offer of legal aid, except when his

financial resources are less than HK\$20,000 (US\$2,564-). The amount of contribution varies from 5% to 25% of the applicant's financial resources. The final sum required to be paid however is determined by reference to the costs of the proceedings for which legal aid is offered but will not exceed the full amount of the contribution.

At the close of the case, if the contribution paid and the costs recovered from the opponent are less than the costs and expenses incurred by the Legal Aid Department, the aided person will be asked to pay the balance up to the full amount of the contribution. If, however, the contribution paid has already exceeded the actual legal costs, the balance will be refunded to the aided person. In other words, the costs to be borne by an aided person will not exceed the contribution payable even though the actual legal costs are higher if the case is lost.

If an aided person is successful in recovering or preserving any money or property in the legally aided proceedings (e.g. the matrimonial home in a divorce case, employees' compensation and damages in personal injury cases), he will be required to repay to the Director of Legal Aid the costs and expenses incurred in the proceedings out of the money or property recovered or preserved. The sum required to be paid will be reduced by the contribution that he has already paid and any costs which may be recovered from the opposite party.

Filing Fee and Security for Costs

As for other administrative expenses, it is the practice of Hong Kong courts that if the case is legally aided, the courts will not require the

payment of court fee, filing fee or taxing fee when filing the court papers. However, these fees are regarded as disbursements in the proceedings which can be recovered from the opposite party and pay back to the court if costs are rewarded to the aided person.

On security for costs, if the aided person in the proceedings is obliged to furnish security for costs, the Legal Aid Department may provide such security on behalf of the aided person. But in reality, it is very rare for the opposite party in the proceedings to apply for security for costs against a legally aided person in the courts of Hong Kong.

Assignment and Legal Aid Fees

Proceedings for which legal aid is granted will be handled either by the Legal Aid Department's in-house litigation lawyers or by assigned solicitors and barristers in private practice. Legal aid fees paid to assigned lawyers in private practice are generally at market rate which guarantees the quality of service to be on a par with privately funded litigations.

The Director of Legal Aid maintains panels of barristers and solicitors who are willing to undertake legal aid work. Except where the case is assigned in-house, the aided person can nominate a lawyer on the legal aid panel to represent him or her. If the Director considers the selected lawyer to be unsuitable, he or she will discuss the matter with the aided person. In any event, the aided person's right to choose lawyer is always respected.

Quality Assurance

Cases which are assigned to private lawyers are monitored by the

Legal Aid Department to ensure that the aided persons' interests are best served and that public funds are employed in a cost effective manner.

The Legal Aid Department adopts a number of measures that contribute to quality assurance, e.g. the application of experience and expertise criteria in the assignment of cases. There is also the system to evaluate the assigned lawyers' performance. Questionnaires on customer feedback are issued to the aided persons at various stages of the proceeding to facilitate effective monitoring by the Department's management staff. Complaints on legal aid lawyers will be investigated. If situation warrants, the lawyer will be invited to improve service or be suspended from further assignment. Through such a "report back" system quality of service is maintained and improved.

Lawyers on the legal aid panel are all provided with a Manual for Legal Aid Practitioners which contains guidelines for the handling of both civil and criminal cases. The letter of assignment also draws the assigned lawyer's attention to those guidelines. The Legal Aid Department's approach in monitoring case progress also enables an effective check on the performance of assigned lawyers. The system of "bringing up" cases at stages when certain events are expected to have taken place helps reveal whether the assigned lawyer is managing the case in a timely and efficient manner.

Supervising Legal Aid Services

The Legal Aid Services Council in Hong Kong is an independent statutory body set up to supervise the provision of legal aid services provided by the Legal Aid Department.

A cornerstone of the rule of law is legal aid. It safeguards the value of everyone being equal before the law and facilitates those of limited means in their pursuit of justice. The Legal Aid Services Council's first and foremost objective is to ensure the independent and impartial delivery of legal aid services, that legitimate interest of legal aid applicants are recognized and respected. In discharging this responsibility, the Council may:

- review the work of the Legal Aid Department and make such arrangements as are expedient and proper to ensure the effective discharge of the Department's functions and responsibilities;
- formulate policies governing the provision of legal aid services; and
- advise on policy of the government concerning publicly-funded legal aid.

The Legal Aid Services Council is a body corporate that acts through its meetings. The Council consists of the following members:

- (a) a Chairman who is not a public officer and who is not a barrister or solicitor and who is not connected in any other way directly with the practice of law;
- (b) 2 barristers and 2 solicitors, each holding a practicing certificate;
- (c) 4 persons who, in the opinion of the Administration are not connected in any way with the practice of law; and
- (d) the Director of Legal Aid, being an ex-officio member.

The Council's operations are separated from the Government, although it is funded by the Government. Members of the Council come from

different professions. It is through their expertise in the different fields that they contribute their views on legal aid policy that best suit the needs of the community. As Council members are not government employees (except for the Director of Legal Aid), they are in the best position to ensure that legal aid is provided free from government interference.

The Council holds regular meetings to address specific legal aid topics in depth. Since its establishment in 1996, the Council has reviewed departmental policies and procedures, and studied issues relating to legal aid. This includes the Legal Aid Department's recent initiative in extending legal aid to cover mediation in legally-aided matrimonial cases. And with the implementation of the Civil Justice Reform in April this year, legally aided persons involving in civil proceedings will now be given funding support for mediation as an alternative means of resolving the disputes. The Government is still exploring ways for the wider use of alternative dispute resolution as a means to reducing legal disputes.

It is through these supervisory and advisory functions that the Legal Aid Services Council ensures the provision of high quality, efficient and effective legal aid services in Hong Kong.