

International Legal Aid Group Conference

HONG KONG NATIONAL REPORT

Legal Aid in Hong Kong

By

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INTRODUCTION

History of Hong Kong

Under the Ching Dynasty in China, Hong Kong Island was ceded to Britain in 1841, followed by the cession of Kowloon Peninsula in 1860. By a convention signed in 1898, the New Territories was leased to Britain for 99 years. Since then Hong Kong was under British rule, adopting the common law system.

2. In 1984, the Chinese and British governments signed the Joint Declaration that China would resume sovereignty over Hong Kong with effect from 1 July 1997, but that Hong Kong institutions including its legal system and the rule of law would remain unchanged for 50 years. In 1990, The National People's Congress of China adopted the Basic Law which took effect on 1 July 1997. Article 8 of the Basic Law provides that "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law should be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

History of publicly funded legal aid

3. Before 1960s there was no legislation for legal aid in Hong Kong. The only legal remedy for poor people lay in "pauper's petitions", whereby a judge would appoint a lawyer for a poor defendant. However, this recourse was available only for those charged with capital offences in criminal cases (extended to all Supreme Court trials in 1962) or for those with property worth less than US\$64 in civil cases. Moreover, the uncertainty of receiving any fee left lawyers unmotivated, making it an unsatisfactory system.

4. In 1966 the Legal Aid Ordinance for civil proceedings was passed, and came into effect in January 1967, when a sub-department was created within the Judiciary. In 1970, the Legal Aid Department (LAD) was established within the Administration, which provided legal aid

services according to the provisions of the Legal Aid Ordinance in civil cases and the Legal Aid in Criminal Cases Rules in criminal cases.

5. The Duty Lawyer Service was first established in 1978 when the legal profession proposed to implement a pilot scheme in three Magistrates' Courts providing legal assistance to defendants charged with any one of six offences where there was no victim. This was subsequently extended to cover nine scheduled offences in 1981, and to all adult and juvenile Magistrates' Courts in 1983. With the enactment of the Bill of Rights Ordinance in 1991, the scheme expanded to offer representation to defendants in the Magistrates' Courts where the interest of justice required.

7. In response to demand for independence in legal aid, the Legal Aid Services Council (LASC) was established in 1996 under the Legal Aid Services Council Ordinance to supervise the provision of legal aid services by LAD and to advise the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) on legal aid policy.

8. There are in addition other statutory bodies or administrative arrangements providing legal assistance in various ways. They are the Consumer Council, the Equal Opportunities Commission and Building Management Resource Centres of the Home Affairs Department.

Pro-bono services by the legal profession

9. The legal profession in Hong Kong consists of barristers and solicitors, and they provide pro-bono services to members of the public.

10. The Hong Kong Bar Association established the Free Legal Service Scheme in June 2000 to provide free legal aid service to needy litigants who could not afford the cost of litigation but for one

reason or another would not qualify for legal aid. It is managed by a Management Committee chaired ex-officio by the Chairman of the Bar Association. The Advisory Board oversees generally the operation of the scheme to review and formulate policy issues and advises the Management Committee. Barristers who volunteer to help are placed on a panel which comprises barristers with a range of experiences and specializations, offering their services for 3 days or 20 hours each year (website of the Hong Kong Bar Association : <http://www.hkba.org/>).

11. The Law Society of Hong Kong organizes the Law Week each year. During that period, arrangement is made for members of the public to consult attending solicitors without payment on any issue they choose to ask. In addition, the Law Society provides legal advice through its Community Relations Committee which arranges speakers to schools, institutions, specific social groups and the general public on an ad-hoc basis (website of the Law Society of Hong Kong : <http://www.hklawsoc.org.hk/>).

PUBLICLY-FUNDED SERVICES

Government policy

12. The policy objective of the government is to ensure that no one with reasonable grounds is prevented from access to justice for lack of means.

13. Policy on legal aid is the responsibility of the Chief Secretary for Administration who is assisted by the Director of Administration. The Director formulates and reviews policy and work closely with the Legal Aid Department, the Legal Aid Services Council and the Legislative Council (LegCo).

14. LegCo has an active role to play in legal aid policy because changes in policy involve amendment to legislation and appropriation of public funds. In addition, the powers and functions of LegCo are to raise questions on the work of the government and to debate any issues concerning public interest, including legal aid.

It sets up a Standing Panel on Administration of Justice and Legal Services which is responsible for monitoring and examining policy matters and draft legislative proposals relating to the administration of justice and legal services, including the effectiveness of their implementation by relevant officials and departments, consistent with maintaining the independence of the Judiciary and the rule of law.

Consumer Council

(website: http://www.consumer.org.hk/website/ws_en/)

15. The Consumer Council is a statutory body for protecting and promoting the interests of consumers of goods and services and purchasers of immovable property. In 1994, the Consumer Legal Action Fund with a government grant of US\$1.3 million was established to give greater consumer access to legal remedies and to provide legal assistance to consumers with meritorious cases. "Class action" is not catered for in Hong Kong's legal system, and the Fund provides assistance in the following circumstances

- (a) to assist consumers to bring or defend representative action. This type of action enables one consumer to act on behalf of a group of consumers with the same interest in the matter;
- (b) to assist consumers to pursue joint claims out of the same or same series of transaction with a common question of law or fact;
- (c) to group consumers with similar causes of action and claims together administratively and arrange for them to be heard at the same time or consecutively;
- (d) to bring action in the interest of the public; and
- (e) to handle cases of significant consumer interest.

The Fund, with the Consumer Council as its trustee, is administered by a board of administrators underpinned by a management committee with members appointed by the government. The Consumer Council may, if it considers appropriate or if the complainant so requests, refer the case to the Fund for consideration. Consumers may also apply to the Fund direct. Generally speaking, in examining an application for assistance, the Fund will consider whether all other means of resolution have been exhausted and assess the case against established eligibility criteria. Such criteria include whether the case involves significant consumer interest; whether a large group of consumers have been or will potentially be adversely affected; whether the case has a good chance of success; whether the matter concerned can promote the consumer cause and has deterrent effect on unscrupulous business practices; and whether it is practicable for the Fund to offer timely assistance. Funding of the Council in 2004-05 totals US\$8.3 million, excluding the Consumer Legal Action Fund.

Equal Opportunities Commission

(website:

http://www.eoc.org.hk/CE/home_ce.htm)

16. The Equal Opportunities Commission (EOC) is an independent statutory body established in 1996 to oversee the implementation of the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. Its functions include handling complaints, encouraging conciliation, providing assistance to aggrieved persons, and undertaking public education, research and training programmes to promote equal opportunities in the community. EOC aims to resolve disputes between parties through voluntary conciliation. If conciliation is not successful, a complainant may apply to EOC for legal assistance to file civil suit in the District Court. Legal assistance may be granted if the case

- (a) raises a question of principle; or
- (b) it is unreasonable,

because of the complexity of the case or the applicant's position in relation to the respondent, to expect the applicant to deal with the case unaided.

Funding for the Commission in 2004-05 totals US\$9.9 million.

Building Management Resource Centres

17. In 1998 the Home Affairs Department established Building Management Resource Centres to enhance the quality of building management. The Centres provide information, services and advice to building owners, residents, Owners' Corporations, Mutual Aid Committees and management bodies to assist them in improving the standard of management, safety and maintenance of their buildings. Members of the Law Society actively participate in the initiative by providing legal advice to members of the public.

Duty Lawyer Service (website: <http://www.dutylawyer.org.hk/>)

18. The Duty Lawyer Service is subvented by the government but independently administered by the legal profession. The Hong Kong Bar Association and the Law Society of Hong Kong each nominate four members to sit on the council of the Service, which manages and administers its operation, in addition to three invited lay members. The Service operates the Duty Lawyer Scheme which provides legal representation to criminal cases tried in the magistracies, and free legal advice to members of the public, both by volunteer lawyers at advice centres located in nine out of eighteen government District Offices, and through taped legal information accessible via telephone. Funding of the Service for 2004-05 is US\$12.4 million.

19. Legal representation will be provided under the Duty Lawyer Scheme to all applicants in respect of the first appearance in court (for example to take

plea). To be eligible for legal representation subsequently, an applicant has to pass a means test, viz if his gross annual income does not exceed US\$16,300. However, the Administrator of the Duty Lawyer Service has discretion to grant legal representation to a defendant whose gross annual income exceeds this limit, if she considers that it is in the interest of justice to do so. Applicants are also subject to a merits test, the prime consideration being whether the defendant is in jeopardy of losing his liberty or whether a substantial question of law is involved.

Legal Aid Department (LAD)

(website: <http://www.info.gov.hk/lad/>)

20. LAD provides legal representation in both civil and criminal cases heard in the District Court and above. In 2004-05 departmental funding totals US\$97.9 million. It operates the following two schemes

- (a) Ordinary Legal Aid Scheme (OLAS), applicable to both civil cases and criminal cases, and
- (b) Supplementary Legal Aid Scheme (SLAS), only applicable to certain types of civil cases.

21. LAD's funding for both the civil and criminal legal aid schemes for the financial year 2003-04 is about US\$85 million out of which US\$29.9 million is departmental expenses, and US\$55.1 million is for legal aid costs including solicitors costs, counsel fees, doctors fees and experts fees etc. (US\$43.4 million for civil cases and US\$11.7 million for criminal cases).

Ordinary Legal Aid Scheme (OLAS)

22. OLAS makes provision for granting legal aid in civil or criminal actions to persons of limited means. The current financial eligibility limit for the means test is about US\$20,000. However, for cases involving the Hong Kong Bill of Rights Ordinance, the Director of Legal Aid (DLA) has discretion to waive it.

23. OLAS covers virtually all

types of civil proceedings in the District Court, Court of First Instance, Court of Appeal and the Court of Final Appeal. The exceptions are prescribed in Schedule 2 Part II of the Legal Aid Ordinance, such as defamation, election petitions not relating to a breach of the Hong Kong Bill of Rights Ordinance, Small Claims Tribunal cases, proceedings under the Labour Tribunal Ordinance in the Labour Tribunal, money claims in derivatives of securities and currency futures, disputes between limited companies or their shareholders regarding respective rights of the company and the shareholders and disputes over partnership.

24. In a successful case where money or property is recovered or preserved on behalf of the aided person, he is required to reimburse DLA the portion of the legal costs that are not recouped from the opposite party under the proceedings. In other words, he is liable to reimburse DLA his out-of-pocket expenses to the extent of the amount of damages or value of property recovered or preserved plus the amount of contribution paid or payable by the aided person.

25. In an unsuccessful case the aided person's cost liability is limited to the contribution paid or payable as determined by the means test irrespective of the costs of the proceedings.

Supplementary Legal Aid Scheme (SLAS)

26. With a loan of US\$128,200 from the Lotteries Fund, SLAS was first introduced in 1984. It is available for personal injury, professional and medical negligence cases, and is provided for persons whose financial resources exceed the financial eligibility limit under OLAS but within the substantially higher financial eligibility limit of US\$55,500. Applicants are also subject to the means and merits tests.

27. In a successful case, the legally aided person is required to reimburse DLA the portion of the legal costs that are not covered by the opposite party plus a contribution from the damages awarded towards the SLAS Fund. The percentage deduction is either 6% or 12% of the

damages awarded depending upon whether the case was settled prior to delivery of a brief to counsel to attend trial. Such deduction or contribution is then ploughed back into the scheme to assist future litigants.

28. In an unsuccessful case the legally aided person's costs liability is limited to an application fee of US\$128 plus an interim contribution of US\$4,940 irrespective of the costs of the proceedings.

29. By the early 1990s, SLAS became self-financing. As of December 2004, the SLAS Fund had a healthy balance of about US\$12 million. Its sustainability relies heavily on two factors

(a) astute assessment of the

(b) merit of a case, and recoverability of awards from the opposite party,

as otherwise the Fund might run the risk of being depleted. The former factor demands a greater probability of winning the case, and the latter would tend to attract cases where additional safeguards against non-recovery of damages are in place, e.g. Motor Insurances Bureau and Employees Compensation Assistance Fund. Further, the bulk of the cases funded by the scheme are personal injury cases which used to have a very high success rate with high compensation. The Legal Aid Services Council (LASC) has been exploring the possibility of broadening the scope of SLAS. 30. Its performance in 2003 and 2004 are as follows —

	<u>2003</u>	<u>2004</u>
(a) number of successful litigations	156	123
(b) total number of litigations	174	133
(c) (a) / (b)	89.7%	92.5%
(d) total registration fee, contribution and legal costs recovered by SLAS Fund	US\$4.00 million	US\$2.72 million
(e) total legal costs incurred by SLAS Fund	US\$3.03 million	US\$2.03 million
(f) (d) / (e)	132%	134%

31. With changing social and economic conditions, the financial eligibility limits for the two schemes have been adjusted in the past years in line with price movements, and to encompass a broader section of the population.

Judiciary

(website:
<http://www.judiciary.gov.hk/en/index/index.htm>)

32. The Basic Law provides for the setting up of the Court of Final Appeal in Hong Kong, in contrast to the previous situation where the Privy Council in Britain would be the seat of final appeal. In order to draw on the expertise and experience of other common law jurisdictions, the Hong Kong Court of Final Appeal Ordinance provides that an appeal to the Court of Final

Appeal shall be heard and determined by five judges, of which one may be from another common law jurisdiction.

33. The Judiciary has a role to play in hearing appeals against DLA's decision to refuse, discharge or revoke legal aid, and in granting legal aid.

34. In civil cases adjudicated in the District Court, Court of First Instance or the Court of Appeal, an applicant who has been refused legal aid or an aided person whose legal aid has been discharged or revoked and is aggrieved by DLA's decision can appeal to the Registrar of the High Court. The decision of the Registrar is final.

35. For criminal cases which are tried in the District Court, High Court or the Court of Appeal, appeal is not available

in respect of DLA's refusal to grant legal aid on means or merits. In the interest of justice, legal representation will be provided by LAD to an accused for committal proceedings and for trials at the District Court and the Court of First Instance provided he passes the means test. This is irrespective of whether he pleads guilty or not guilty to the charge(s) or the nature of his defence. A convicted person may apply to DLA for legal aid to appeal against conviction and/or sentence, and the merits test is applicable. However, there is a statutory requirement to grant legal aid in cases involving a charge of murder, treason or piracy with violence regardless of the merits of the criminal appeal. If legal aid is refused on means in such cases, a judge may grant legal aid, and/or exemption from the means test and from payment of contribution, with or without an application from the accused. For refusal on merits in other criminal cases, a judge may grant legal aid to the accused provided he passes the means test with or without an application from the accused.

36. For refusal of legal aid in respect of an appeal to the Court of Final Appeal, the appellant can apply to a Committee of Review chaired by the Registrar of the High Court and comprising a barrister and a solicitor appointed by their respective professional bodies for review. This is available to all civil cases irrespective of whether legal aid is refused on means or merits, but is available to criminal cases if legal aid is refused on merits only (see paragraphs 46 to 49).

37. The Resource Centre for Unrepresented Litigants provides assistance on procedural matters to unrepresented litigants who are parties to or about to commence civil proceedings in the High Court or the District Court except those relating to matrimonial, lands, employees' compensation and probate matters. It has its own website and provides facilities such as information on court procedures, taking of oaths and statutory declarations.

Legal Aid Services Council (LASC)
(website: <http://www.info.gov.hk/lasc/>)

38. In 1996 the Legal Aid Services Council (LASC) was established

under the Legal Aid Services Council Ordinance to oversee the administration of legal aid services provided by LAD and to advise the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) on legal aid policy. It seeks to enhance the independence of legal aid, and invites public participation.

39. The Council is chaired by a non-official and comprises eight non-official members with two barristers nominated by the Hong Kong Bar Association and two solicitors nominated by the Law Society of Hong Kong, and the remaining four being non-lawyer members. DLA is the ex-officio member, and all members are appointed by the Chief Executive, HKSAR.

40. According to the Ordinance, LASC may

- (a) formulate policies governing the provision of services by the Legal Aid Department and give advice on the policy direction of the Department;
- (b) review the work of the Department from time to time and make such arrangements as are expedient and proper to ensure the efficient and economical discharge of the functions and provision of legal aid services by the Department;
- (c) keep under review the services provided by the Department and the plans for development of the Department; and
- (d) consider and advise on the estimates of expenditure of the Department.

However, the Council shall not have the power to direct the Department on staff matters and the handling of individual cases.

41. Since its establishment in 1996, the Council has systematically reviewed departmental policies and procedures, and studied issues relating to legal aid. These include the Legal Aid

Policy Reviews 1997 and 2003, the operational policies and procedures of LAD such as case assignment to private lawyers, procedures on appeals against LAD's refusal to grant legal aid and the pilot scheme to extend legal aid to cover mediation. LASC has reviewed overseas practices and studied the feasibility and desirability of the establishment of an independent legal aid authority.

42. To enhance independence of LAD's legal aid service, LASC decided that certain types of cases had to be assigned to lawyers in private practice. These are judicial review cases, cases involving the government or a public agency as a defendant party, or where an apparent challenge on human rights arises, or where an issue is raised about the Basic Law.

43. To enhance public participation, LASC set up three interest groups covering respectively three areas of work, namely scope of legal aid, processing of legal aid applications, and the assignment system and monitoring of assigned-out cases. Membership is open to legal aid panel lawyers, stakeholders and members of the public. The interest groups formulate proposals on different aspects of legal aid for consideration by LASC. For example, the Interest Group on the Scope of Legal Aid is currently studying the possibility of providing legal aid to

- (a) flat owners to enforce the Building Management Ordinance and deed of mutual covenant on maintenance and repair of buildings;
- (b) the parole scheme;
- (c) Guardianship Board;
- (d) appeal to Housing Appeal Panel;
- (e) additional types of cases under SLAS according to the principle of recoverability; and
- (f) unrepresented litigants where masters or judges refer the case to DLA to waive the financial eligibility limits.

The Council has also established a Working Party on the Institution of Legal Aid to document the principles and rationale of legal aid from the social, economic and legal perspectives. A report is expected to be ready by 2006.

44. LASC's advice to the Administration in the Legal Aid Policy Reviews has resulted in the adoption of the 35-percentile household expenditure in 2000 as the allowance deductible for legal aid applicants. Prior to that, Comprehensive Social Security Assistance rates were adopted as the allowance deductible. As a result of the revision, there has been significant increases in the absolute level of the deductible allowance ranging from some 60% to 140%, depending on the size of the household to which a particular applicant belongs. This is a substantial enhancement to Hong Kong's legal aid system in that a greater proportion of the population meets the financial eligibility for legal aid.

45. During the 1997 Legal Aid Policy Review, the government accepted LASC's recommendation to revamp the biennial financial limits review cycle, so that general price movements were reviewed annually and other cost factors once every two years. This proposal was implemented in 2000 and has the effect of better maintaining the monetary value of the financial limits.

46. One of Council's deliberations resulted in the introduction of a scheme in early 2002, by which financial assistance is provided to a legal aid applicant who passes the means test of LAD to obtain a certificate by counsel to seek a review of the refusal of legal aid for his appeal to the Court of Final Appeal. A legal aid appellant can appeal to a Committee of Review against DLA's decision to refuse legal aid in respect of an appeal to the Court of Final Appeal. Section 26A of the Legal Aid Ordinance (LAO) provides that the review shall be initiated by notice to the Registrar of the High Court accompanied by a certificate by counsel stating that the person aggrieved has a reasonable prospect of success in the CFA appeal and the grounds for that opinion. The Registrar of the

High Court would convene a Review Committee to hear the appeal by the legal aid applicant (referred to as "the appellant").

47. There was a need to provide assistance to the appellant as the certificate requirement might deny an impecunious appellant's access to the Review Committee. The Council is responsible for running the assistance scheme to provide the means to obtain the

counsel's certificate. If the counsel certificate states that the appellant has a reasonable chance of success, LAD will review its decision not to grant legal aid before the appeal is put to the Review Committee.

48. The cases handled by the scheme during the past two years are tabulated below —

	<u>2003/04</u>	<u>2004/05</u>	<u>Total</u>
No. of applications	95	85	180
No. of applications approved	86	77	163
No. of certificates by counsel stating that there is reasonable prospect of success	10	14	24
No. of cases where legal aid was granted upon review by DLA	7	6	13
No. of cases where legal aid was granted upon Review Committee's directive	0	2	2

49. Expenditure in respect of the applications for 2004-05 is US\$0.26 million, and this is not charged to the budget of LASC. Funding for LASC in 2004-05 totals US\$0.63 million.

2004. It recommended extensive changes to civil justice practices with impact on civil legal aid.

Statistics

50. Statistics showing the number of applications and approvals granted for 2003 and 2004 in respect of LAD and Duty Lawyer Scheme is at **Appendix**.

52. For example, the Working Party recommends that a system for multi-party litigation should in principle be introduced. Meanwhile, schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong.

RECENT DEVELOPMENTS

Civil Justice Reform

51. In February 2000, the Chief Justice appointed a Working Party on Civil Justice Reform to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed. Having consulted the community through the publication of the Interim Report and Consultation Paper in November 2001, the Working Party published its Final Report in March

53. It also recommends that LAD should have power in suitable cases, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of a pilot scheme on mediation, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed.

Mediation

54. With a view to enhancing legal aid coverage and to assess the

cost-effectiveness and implication of providing legal aid to mediation, a pilot scheme on legal aid for mediation in matrimonial cases was launched by LAD in March 2005. Legally aided persons in matrimonial cases will be advised by solicitors assigned by LAD of the availability of mediation, which can be initiated before or after the commencement of proceedings. If an aided person is willing to attempt mediation to resolve any issue in dispute with the other party, he will be referred to the Mediation Co-ordinator's Office of the Judiciary which will assess whether the case is suitable for mediation. If a case is found suitable for mediation, a mediator will be selected from a list of accredited mediators to assist the parties concerned and LAD will pay for the mediator's fees for both the legally aided person and the other party. The pilot scheme will last for one year, and is estimated to cover about 120 cases. An evaluation of the effectiveness of this pilot scheme will be conducted in 2007-08.

Amendments to the Legal Aid Services Council Ordinance (LASCO)

55. LASC has proposed to the Director of Administration to consider amending the Legal Aid Services Council Ordinance (LASCO) firstly to enable Council to function fully as a body corporate within the meaning of the Companies Ordinance, secondly to enhance Council's role in overseeing the administration of legal aid services provided by LAD, and thirdly to strengthen the independent operation of Council. Subsequently the following amendments are put before the LegCo for enactment :

- (a) power for Council to enter into contracts on its own, including leases,
- (b) power for Council to appoint its own staff, and
- (c) power for the Chief Executive of HKSAR to extend time for the submission of Council's annual report.

It is expected the legislative process will complete later this year.

LASC Consultancy Study to study legal aid practice on cost control and monitoring of case progress in other common law jurisdictions

56. Since its establishment in 1996, LASC has been conscious of the need to keep legal aid services cost effective and to identify possible improvements in monitoring progress of legal aid cases. To this end, LASC commissioned a study on practices in certain common law jurisdictions in early 2005.

57. The study is in the nature of a literature review, with particular reference to

- (a) the application of information technology to cost control and monitoring of case progress;
- (b) the prevalence of using prescribed hourly rates for services rendered by assigned lawyers;
- (c) the use of benchmarks on case load in assignment and monitoring in any type of legal aid work;
- (d) the legal or administrative sanction providing for legal aid panel listing;
- (e) the extent legal aid work is contracted, and the cost effectiveness, as well as the quality of service of the contracting system in contrast with the existing assignment system; and
- (f) methods to ensure that the quality of legal aid services is maintained at a level or standard such that legal aid applicants receive a service appropriate to their cases and is of high quality, timely, professional, independent and ethical.

The Council is considering the consultancy report.

Common Law versus Chinese Law

58. The Basic Law serves as

the constitution for the HKSAR, but Hong Kong's common law system is preserved through Article 8 of the Basic Law.

59. Article 158 of the Basic Law provides that the power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People's Congress (NPCSC). The NPCSC shall consult its Basic Law Committee of the HKSAR before giving an interpretation of the Basic Law. The HKSAR courts are, in turn, authorized to interpret all provisions in the Basic Law in adjudicating cases. However, the Court of Final Appeal must submit a judicial reference to the NPCSC for interpretation of the relevant Basic Law provisions if the three criteria prescribed by Article 158(3) are satisfied, and the courts shall follow such interpretation when applying the relevant provisions. The three criteria are

- (a) the provision concerns affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the HKSAR ("an excluded provision");
- (b) the court needs to interpret the provision and such interpretation will affect the judgment in the case; and
- (c) the court's final judgment is not appealable.

60. In 1999 the Court of Final Appeal made a judgment on the right of abode of certain Chinese nationals born in China Mainland with parental link in Hong Kong. The Administration sought an interpretation of certain provisions of the Basic Law from the NPCSC, which consequently overturned the Court's decision. In 2004 in the face of demand for universal suffrage in the election of the Chief Executive, HKSAR in 2007, and the Legislative Council (LegCo) in 2008 as stated in the Basic Law, the NPCSC declared that the Basic Law should be interpreted such that there should be no drastic change to the electoral arrangements. In 2005 on the term of office of the Chief Executive succeeding Mr Tung Chee Hwa

who resigned from the post before finishing his term until 2007, the Administration again sought an interpretation of the Basic Law from the NPCSC which interpreted the relevant provisions on 27 April 2005.

61. In a LegCo debate in May this year, the Secretary for Justice said that the NPCSC's power of interpretation extended to every provision in the Basic Law, and was not dependent on there being any request for interpretation made by courts.

62. The foregoing suggests the possible exercise of NPCSC's overriding power, and even in situations where the Court of Final Appeal does not refer the matter to the NPCSC for interpretation. It is anticipated that Hong Kong's common law system and China's law system will continue to interact in diverse fashions through the interpretation of the Basic Law.

FUTURE DEVELOPMENTS

Study by the Department of Justice on the Demand for and Supply of Legal and Related Services in Hong Kong

63. The Department has undertaken research to provide accurate information on the existing legal needs in the community, and how the established legal services including court services, are meeting those needs. This would greatly assist the government and other stakeholders to make informed future policy decisions on the provision of legal and related services.

64. A consultative committee comprising representatives from the legal services sector and other professional, academic and community bodies interested in the issue of access to justice was established under the chairmanship of the Solicitor General to assist the government in overseeing the research.

65. The government has engaged a consultant to conduct a research study in order to

- (a) review any pre-existing

- socio-legal research which has been carried out in Hong Kong in relation to the supply of and demand for legal and related services;
- (b) identify the extent of the demand for legal services in Hong Kong; to also identify any gaps in the current provision of legal services, including, but not limited to, both the kinds of substantive issues for which, as well as the geographical locations in which, legal services are unavailable or inadequate; and to also identify the causative factors and circumstances surrounding unrepresented litigants;
- (c) provide useful information to facilitate more focused investment of resources in this area, including the provision of court services, legal aid, private practitioner services and pro-bono services, to better meet the real legal service needs of the community;
- (d) provide useful information on the demand for and supply of law related services, such as those provided by, for example, the police and social workers;
- (e) provide useful information on what means are currently available to citizens (including the types of general legal information and advice) to assist them to resolve their disputes without resorting to the courts or otherwise taking legal action;
- (f) provide useful information on citizens' level of awareness and knowledge of their legal

- rights, as this will facilitate planning and development of public education campaigns and programmes for community legal service centres; and
- (g) provide useful information to assist with the promotion of the rule of law in Hong Kong.

The study commenced in July 2004 and is expected to complete by June 2006.

Law Reform Commission's study of conditional fee

66. Currently the legal profession is remunerated according to work actually undertaken. In some jurisdictions, lawyers undertaking civil litigation are allowed to charge a fee in addition to their standard fee if the outcome of the case is successful, and a reduced fee (or no fee at all) if the case is lost. This, known as "conditional fee", is not currently permitted by statute and within the common law framework in Hong Kong.

67. LASC first discussed conditional fees in 1999 and considered that conditional fee should not be introduced at that time and that the Council be consulted on any initiative relating to conditional fee arrangement.

68. The Law Society of Hong Kong is currently studying the issue of conditional fees.

69. The Law Reform Commission, an official body, is considering whether conditional fee arrangements would be feasible and should be permitted in Hong Kong for civil cases and, if so, to what extent (including for what types of cases and the features and limitations of any such arrangements). A sub-committee was formed in July 2003 to consider this subject.

Future of an independent legal aid authority

70. According to the Legal Aid Services Council Ordinance, LASC is

required to advise the Chief Executive, HKSAR on the feasibility and desirability of the establishment of an independent legal aid authority. LASC commissioned a consultancy study in October 1997 and submitted its recommendations to the Chief Executive of HKSAR in September 1998. In gist LASC recommended that

- (a) in the long term, legal aid services should be as independent as possible;
- (b) ultimately all forms of legal aid services should be delivered by one single institution; and
- (c) to achieve these objectives, a phased approach is desirable.

Specifically, LASC recommended that -

- (a) An independent statutory Legal Aid Authority (LAA) should be established to advise the government on legal aid policies and be accountable for the delivery of legal aid services currently under LAD.
- (b) The operation of LAA should be financed from public revenue and current funding arrangements, with no ceiling on LAD's expenditure on legal services should continue.

71. In 1999, the Administration indicated that it was unable to accept LASC's recommendation for the following reasons

- (a) **Funding Accountability**
To meet policy objective, funding for legal aid was non-cash limited, i.e. supplementary provision might be sought if the approved provision in the Estimates was inadequate to cover the legal aid costs arising from eligible legal aid applications. The Administration could not undertake to provide

unlimited funding support for an entity fully separate from and independent of the government.

(b) **Need for An Independent Authority**

LASC suggested that it was impossible to remove the perception that LAD, being a government department, might be susceptible to pressure from the government in performing its functions. The Administration noted that such perception was neither widely nor deeply held. Concern about the LAD's independence was confined essentially to certain types of cases that presented a particular challenge to the government. There were safeguards in the system to protect the independence of legal aid administration. Moreover, funding by the LAD of numerous cases against the government both before and after the reunification, bore ample testimony to the Administration's continued commitment to the independent administration of legal aid, free from political interference.

(c) **Staff Morale and Service Delivery**

LASC's recommendations involved the disestablishment of the LAD, which was a difficult exercise at the best of times since it affected staff morale and the smooth operation of the department. It would be even more difficult in the prevailing climate with high unemployment and a civil service that was undergoing fairly fundamental reforms.

72. LASC will continue to review the need for an independent legal aid authority and re-activate the issue at an

opportune time.

**Applications and approvals granted for 2003 and 2004
in respect of the Legal Aid Department (LAD) and
the Duty Lawyer Scheme**

			2003	2004
LAD	Civil cases under the Ordinary Legal Aid Scheme	no. of application	21,749	17,729
		no. of certificate	10,773	9,012
	Criminal cases under the Ordinary Legal Aid Scheme	no. of application	4,411	4,477
		no. of certificate	2,803	3,033
	Civil cases under the Supplementary Legal Aid Scheme	no. of application	106	120
		no. of certificate	79	85
Duty Lawyer Scheme (criminal cases in magistrate's courts)		persons who received legal advice and representation*	50,172	51,057

***Note** : including assistance provided to applicants in respect of the first appearance in court.