

DRAFT VERSION 1.0

OPTIONS FOR APPROACHES TO LEGAL AID SERVICES DELIVERY IN CAMBODIA

PREPARED FOR THE COUNCIL FOR LEGAL AND JUDICIAL REFORM

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ACRONYMS

ASF	- Advocats Sans Frontieres	NGO	- Non-government organisation
AusAID	- Australian Agency for International Development	RGC	- Royal Government of Cambodia
BAKC	- Bar Association of the Kingdom of Cambodia	UNOHCHR	- United Nations Office of the Commissioner for Human Rights
CHRAC	- Cambodian Human Rights Action Committee	USAID	- United States Agency for International Development
CLEC	- Community Legal Education Centre		
CLJR	- Council for Legal & Judicial Reform		
CNP	- Cambodia National Police		
COM	- Council of Ministers		
CWCC	- Cambodian Women Crisis Centre		
DANIDA	- Danish Agency for International Development		
DIHR	- Danish Institute for Human Rights		
EU	- European Union		
EWMI	- East West Management Institute		
GIZ	- Gesellschaft für Internationale Zusammenarbeit		
GS-CLJR	- General Secretariat of the Council for Legal & Judicial Reform		
IBJ	- International Bridges to Justice		
KID	- Khmer Institute of Democracy		
LAC	- Legal Aid of Cambodia		
LSCW	- Legal Support for Children and Women		
LTC	- Lawyer Training Centre		
MOWA	- Ministry of Women's Affairs		

EXECUTIVE SUMMARY

(i) Introduction

The General Secretariat of the Council for Legal & Judicial Reform (GS-CLJR) requested DANIDA to assist with preparations for a national legal aid dialogue meeting with the development of an options paper for legal aid service delivery in Cambodia. The request was for a team to meet with all key stakeholders during the assignment in order to identify cost effective ways to enhance coordination, quality and geographic reach of legal aid services in Cambodia.

An option paper based on these stakeholder meetings was to be drawn up by the consultants for the GS-CLJR as input for the preparation of the national legal aid dialogue meeting.

(ii) Findings

The current environment of low financing and NGO led legal aid services is resulting in a skewing of legal aid services towards specialist areas favoured by donors. This low financing is mirrored by the government with few funds available for BAKC services. A lack of confidence in the capacity of BAKC to deliver these services has been expressed, particularly in provincial areas.

The limited number of legal aid lawyers is mirrored by the limited number of lawyers in the country, particularly in provincial locations.

Despite this there is a high demand for legal aid services. This is partially due to the requirement under law for persons accused of felony crimes or a minor accused of any crime to have representation. Without representation such cases are unable to be heard under Cambodian Criminal Code of Procedures.

Understanding of the role of lawyers in rural communities appears limited.

Current practices include:

NGOs: specialist NGOs are the primary source of legal aid in Cambodia though financing constraints and attached conditions are restricting their ability to deliver general legal aid or to direct legal aid towards areas (both thematic and geographical) of greatest need.

BAKC: providing legal aid services though are thought to be largely ineffective. Low financing and issues with accessing finance contribute towards this.

Paralegals: are being successfully engaged in rural communities by some NGOs however their official status remains uncertain.

University Legal Clinics: the spread of law campuses is wide, however the quality of the students and education on offer, and hence the potential quality of legal assistants, is unknown.

Judicial Police: are required to offer access to a lawyer after 24 hours however the absence of such a service in rural areas is problematic.

Prisons: do provide access to lawyers and in many cases have separate interview rooms however do not actively promote nor supply information on legal aid.

Courts & Prosecution: request legal aid for hearings involving felonies and minors however this is often done only at the trial stage in order to satisfy procedural requirements.

Constraints in the delivery of legal aid include:

Financial – insufficient finance

Legislative – constraints on increasing the number of lawyers and the types of assistance that can be offered by non-BAKC members is inherent in the Law on the BAKC

Procedural – legal aid is not required to be sourced at the investigative stage of a case

Managerial – RGC agencies do not understand their management responsibilities in relation to facilitating legal representation

Professional – some lawyers do not act with sufficient professionalism when undertaking legal aid work

Fraud & corruption – fake lawyers undermine confidence of people in rural communities and petty corruption drives up the cost of cases and can be an impediment to people who cannot afford legal services.

Cultural & lack of understanding role of lawyers – many people do not understand the difference between lawyers and judges and often believe they are the same. At times this results in the rejection of legal aid services offered in favour of using connections provided by those perceived to be wealthy or powerful individuals.

(iii) Options

Options for intervention in legal aid service delivery in Cambodia include:

No change: No change in the current approach

Increasing the number of lawyers: That the number of lawyers, particularly those based in the provinces, be increased above the current rate set by BAKC.

Fomalising the use of paralegal services: Paralegals are provided with a definition, minimum requirements and the ability to officially interact with the formal justice sector.

Promotion of pro-bono services: Conditions are created to promote the use of pro-bono services in Cambodia

Government funded legal aid service: The RGC finances legal aid lawyers in all provincial locations

Promotion of University Legal Clinics: That University Legal Clinics be allowed to operate paralegal and legal assistant services

Coordination body for legal aid activities: That a coordination body be developed to provide strategic oversight to the national provision of legal aid services

Pooling of funds: Smaller contributions are pooled into a general account to allow for better targeted and administered legal aid

Private Practitioners Legal Aid Scheme: Private sector lawyer engagement mechanism

Engagement of the private sector: Corporate social responsibility programmes are accessed to support legal aid activities.

Telephone hotline and Skype: The existing legal aid hotline is to be better supported and regional hotlines staffed by legal assistants be established

Targeted activities: A series of smaller activities that RGC can undertake to improve the effectiveness of legal aid

(iv) Recommendations

These recommendations represent the view of the authors of the document. They do not reflect the opinions of the RGC nor of DANIDA. These recommendations are also made in the context of the anticipated legal aid environment in Cambodia for the next 5 to 7 years.

Given the uncertainty surrounding RGC financing and the reduction in donor financing that is expected to continue into the medium term, the team would recommend those options that:

- (i) remove obstacles to the participation of lawyers in legal aid
- (ii) remove obstacles that increase the cost of existing legal aid
- (iii) encourage the participation of non-traditional actors in legal aid

These recommendations are also made on the assumption of limited increases in legal aid funding to RGC agencies in the short to medium term.

RECOMMENDATION 1: The rate of Lawyer intake be increased

RECOMMENDATION 2: The role of paralegals or legal assistants be formalised

RECOMMENDATION 3: University Legal Clinics be encouraged to provide legal aid services.

RECOMMENDATION 4: The Legal aid hotline be established

1. INTRODUCTION

1.1 Purpose

The General Secretariat of the Council for Legal & Judicial Reform (GS-CLJR) requested DANIDA to assist with preparations for a national legal aid dialogue meeting with the development of an options paper for legal aid service delivery in Cambodia. This was undertaken through a cooperation agreement signed between GS-CLJR and DANIDA on the 21st of June 2011. The request was for a team to meet with all key stakeholders during the assignment in order to identify cost effective ways to enhance coordination, quality and geographic reach of legal aid services in Cambodia.

An option paper based on these stakeholder meetings was to be drawn up by the consultants for the GS-CLJR as input for the preparation of the national legal aid dialogue meeting.

1.2 Methodology

A team consisting of two DANIDA consultants, Phallack Kong and Ben Schultz, were engaged. The first portion of the assignment involved the research of literature on legal aid in Cambodia and in other jurisdictions. An emphasis was placed upon experiences where service delivery was less dependent upon either government or donor funding.

Following this a series of semi-structured interviews took place in Phnom Penh including NGO legal aid service providers, government service providers and donors.

The team then undertook to visit prisons, the Cambodia National police (CNP), Gendarmerie, Court & Prosecutor and legal aid NGO's in Battambang, Banteay Meanchey, Siem Reap and Kampong Thom.

Upon completion of this visit the team met with the Bar Association (BAKC) to discuss findings and also had some final interview with donors.

With the information gathered the team then compiled a list of options that had a higher probability of viability in the current political and economic climate in Cambodia, taking into account existing and planned initiatives.

2. FINDINGS

2.1 Current Environment

The amount of finance available from external donors for legal aid has been in a steady decline for several years. The result is that the number of legal aid lawyers available for general legal aid has been declining and the funds available for new positions are insufficient to entice the more competent lawyers to provincial locations. A number of advertised positions for legal aid lawyers have remained unfilled due to the low salaries. With the Global Financial Crisis affecting the budgets of all the main donor countries, it is envisaged that this trend of decline will not reverse in the short to medium term.

The Royal Government of Cambodia (RGC) has only a very limited amount of funds allocated for legal aid services. These funds have been allocated to the Bar Association (BAKC) and the Ministry of Women's Affairs (MOWA).

The limited number of legal aid lawyers is mirrored by the limited number of lawyers in the country, particularly in provincial locations. Whilst most members of the BAKC felt there were sufficient lawyers in the country, this sentiment was not echoed by the majority of non-lawyers who were interviewed. The lack of lawyers has created space for 'fake' lawyers to ply their trade and defraud less educated and experienced people of money.

Despite this there is a high demand for legal aid services. This is partially due to the requirement under law for persons accused of a felony or a minor accused of any crime to have representation. Without representation such cases are unable to be heard under Cambodian Criminal Code of Procedures.

Understanding of the role of lawyers in rural communities appears limited. It has been reported in all the provinces visited that the right to legal representation has been waived on occasions because the accused either does not understand what a lawyer is or does not believe that a free service exists. Through interviews, people have shown a tendency towards the usage of those who claim to have connections within the justice system. This practice has furthered the increase of fake lawyers.

2.2 Current Practices

NGO Representation

Most legal aid representation in the country is provided via specialised NGOs. These NGOs rely exclusively upon funding from foreign donors in order to provide legal aid services. The services provided by these NGOs vary however do include representation, education, mediation and paralegal services.

With reduced funding donors have, in large, been requiring legal aid service providers to limit services to pre-identified target groups. This has resulted in a skewing of legal aid services towards areas of interest to donors and away from non-specific legal aid services. This has also the unfortunate side-effect of legal aid lawyers being unable to assist clients who do not meet stipulated criteria, even if the legal aid lawyers are unengaged at the time.

Reduced funding has also impacted on the quality of work that NGOs are able to perform. The amount of finance available for investigation and case preparation has declined and often the only service provided is representation at the hearing. This is exasperated by the tendency of provincial courts to request assistance for accused persons when the case is ready to be heard.

There have been some concerns raised as to the commitment and professionalism of some legal aid lawyers.

Bar Association of the Kingdom of Cambodia Representation

The BAKC has been handicapped by a lack of funds from RGC and a general unwillingness of members to undertake pro-bono work (though incidents of pro-bono work, such as in Kampong Thom, have been recorded).

The BAKC is generally viewed as unresponsive by provincial courts. It is also seen as being an expensive option as appointed lawyers are usually Phnom Penh based and required extra financing for their time and travel. As a result it is not being used as a first choice referral mechanism for legal aid services.

The BAKC has shown an interest in hastening the increase in the number of lawyers in the country, particularly in provincial locations, however such moves are not supported by the Bar Council. The BAKC has also shown interest in promoting the use of paralegals and other non-lawyer alternatives.

It was noted by BAKC that problems in accessing finance through COM contributed to the slow rate of expenditure of funds allocated for legal aid.

Paralegals

The use of paralegals in Cambodia is constrained by the uncertainty surrounding the ability of non-lawyers to provide legal advice, and as to what constitutes legal advice. Paralegals have generally been used to assist clients through the legal process, particularly at the earlier stages. Paralegals have also been used to divert clients away from formal judicial proceedings when minor incidents or civil disputes have occurred and alternative resolution mechanisms exist.

Some NGO's have been promoting the use of paralegals, particularly in rural communities where no lawyers are present however the geographical reach of these services is still limited due to financing constraints. Paralegals have generally been drawn from existing respected and educated members of communities.

There have been concerns raised as to knowledge of paralegals and the need for a consistent approach to their engagement with the formal justice sector.

University Legal Clinics

Whilst the principle of University Legal Clinics and the use of students as legal assistants or paralegals has wide support, there is less certainty as to how this would operate. Primary concerns iterated to the team surround the knowledge base of students and issues surrounding client confidentiality.

The team did find that a number of provincial centres have university campuses with law students though the education level and number of students available at each location was not explored.

Judicial Police

The law requires that after 24 hours of detention that a detained person must be offered legal representation. All Judicial Police interviewed expressed their concern at the inability to access any sanctioned legal services in rural areas after this period, though in general they remained cautious as to whether the presence of a lawyer assisted or detracted from the smooth processing of detainees.

All Judicial Police raised the issue of the lack of understanding of many detainees of the role of a lawyer.

Judicial Police posts are generally devoid of referral information and referrals that do occur are either initiated by the detainee's family or are made to NGO's that the Judicial Police have established relations with.

Provincial Prisons

The role of provincial prisons in facilitating legal aid is one of access and information. The prisons visited had separate interview rooms for lawyers which were viewed favourably by prison management.

The access to inmates by lawyers appeared to vary between prisons and was dependent upon the management style of the prison Commissioner. This was not an issue in any prison for inmates who had approved representation confirmed by the provincial court.

No prison actively promoted legal aid or supplied information to inmates on legal aid service options.

Courts & Prosecution

The requirement for all cases involving a felony or a minor having legal representation places an obligation upon courts to ensure that such representation is present before a hearing can commence. This has resulted in legal aid lawyers being requested at the point of the hearing so that trials may proceed, leaving lawyers with little time to prepare and research into the case. This practice means that in many cases legal aid amounts to little more than a lawyer being present at the hearing with very little actual legal assistance being provided. There appears to be few incidents of the courts contacting legal aid institutions at the investigation stage of a case.

Courts have found that the lack of lawyers in the province, and the thematic constraints of legal aid lawyers, has limited their options for legal aid referrals. Complaints as to the lack of responsiveness and the cost of BAKC representation were also made.

2.3 Common Constraints in the Delivery of Legal Aid

Financial

The most common constraint upon legal aid service delivery cited was financial. It was noted that RGC is willing to finance the prosecution (Court, Prosecution, Judicial Police), but has shown less willingness to finance legally required defence in the form of legal aid. The annual budget for legal aid provided to BAKC was merely 200 million Riel and is channeled through the COM and not via a separate budget

This constraint has extended to donor funded programmes where financial assistance has been in decline over several years. This has also led to finance being only available for specific types of cases leaving much of the demand for legal aid unfunded.

Legislative

The legislative provisions in the Law of the Bar restrict the delivery of legal advice to members of BAKC. What is unclear is what constitutes legal advice and to what level paralegal assistance and university legal clinics can operate. There is no definition provided in relation to paralegals, what type of services they are permitted to perform nor how the RGC agencies in the formal justice sector are to interact with them.

Procedural

Current procedures only require the courts to act at the point of the hearing. Whilst legal representation needs to be offered during detention with the Judicial Police after 24 hours, this does not extend to the period when the Prosecution officially takes charge and the investigating judge commences the investigation.

Managerial

There appears to be a general lack of understanding from the RGC agencies of the obligation of the government to support and facilitate legal representation for people who are unable to afford legal services. Whilst some prison commissioners have taken steps to better facilitate such access this has not been universal and is less evident with the judicial police and courts.

Professional

The professionalism and commitment of some of those involved in legal aid has been questioned by a number of people and agencies that were interviewed. It was felt that the level of professionalism exhibited had a significant impact upon the service provided, and that some providers were content to attend hearings without learning about their clients or the case.

Fraud & Corruption

Fake lawyers were reported in all the provinces visited by the interview team, with possible collusion between officials and fraudsters being suggested. This is proving a problem for the entire sector and is exacerbated by the lack of lawyers in the provinces and a culture of using connections via wealthy

and powerful individuals. This practice serves to undermine confidence in the legal profession in rural areas.

Petty corruption within RGC agencies is reported as remaining a problem and is providing a significant barrier to poorer clients. This can particularly be difficult when legal aid lawyers require access to copies of case files top defend clients.

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3. LEGAL AID INTERVENTION OPTIONS

Option 1: No Change

Outline

That no change in the current approach to legal aid is made

Benefits

There is no need to engage resources in change management

Constraints

The current trend of decreasing financing and increasing demand (through population and economic growth) will further reduce the ability of RGOCC to implement the Criminal Procedures Code. This will also result in greater delays in trials and hence and increasing pretrial population within the prison system.

Suggested RGC intervention to improve effectiveness

None

Cost implications

Cost of housing an increasing prison population

Economic cost of lack of activity from pretrial detainees

Sustainability

With the current trend of declining financing from donors this option is unsustainable without significant increases in financing from RGC.

Option 2: Increase the Number of Lawyers

Outline

That the number of lawyers, particularly those based in the provinces, be increased above the current rate set by BAKC.

Benefits

The increased number of lawyers in provinces improves the chances of sourcing local legal aid service options through pro-bono or legal aid contractual representation from lawyers. Lawyers with local knowledge and who are in the proximity of the court improve both the quality and cost of legal aid service provision.

The increased number of lawyers will also increase the revenue stream for BAKC, improving its ability to partake in legal aid service delivery.

Constraints

Increasing the number of lawyers will make it more difficult for existing lawyers of lower quality to obtain work.

Suggested RGC intervention to improve effectiveness

- (i) Increase the number of lawyers able to join the BAKC through Article 32.
- (ii) If the Bar Council is unwilling to increase the BAKC intake rate, legislate for another mechanism independent of BAKC for public defenders to be able to represent clients in the court.
- (iii) Promote a greater geographical spread of LTC students, with a minimum intake requirement from strategic provincial locations.
- (iv) Privatize lawyer training at law schools by creating legal requirements to obtain law degrees and enter the legal profession. BAKC cooperate with all law schools to set a minimum standard through a transparent accreditation procedure.

Cost implications

There are no increased cost implications for RGC.

NOTES:

- The process for being admitted to the LTC needs to be transparent. If funding is a problem then admission to the LTC could be done on a cost-recovery basis together with a fixed number of places for poor students.
- In order to encourage more lawyers to be admitted to practice, private LTCs could be authorized to take students parallel to the BAKC LTC. These could be based at universities with existing law faculties and could be associated with Legal Clinics. Intern lawyers (post LTC) could serve their internships as interns or even supervisors at these clinics.
- The process for being admitted to the BAKC under Article 32 also needs to be more transparent. There should be more transparent criteria or procedures that prevent the process of admission being corrupted.
- Existing impediments to admissions need to be reformed. Consider amendment of the Bar Law to reduce the size of the Bar Council (currently 27 persons), to deal with the problem of getting quorums (e.g. for termination of mandate if fail to attend two/three consecutive meetings without reasonable excuse).
- BAKC could introduce two-tiered admission structure. Lawyers working exclusively on legal aid cases in the provinces could be permitted associate membership for two years, after which they could get full Bar membership.
- BAKC needs to improve the professional standards of its members. This could be done by introducing a mandatory/compulsory Continuing Legal Education program as is done in other jurisdictions. Before a lawyer's permission to practice is renewed every year (i.e. at the time when they pay their annual fee to the BAKC), all lawyers wanting to continue to

practice must demonstrate that they have fulfilled a set quota of CLE requirements. These requirements would normally entail attending training courses, study or contribution to law journals etc.

- Lawyers need more targeted training on advocacy skills, for example, how to make a motion for pre-trial release, how to make a motion to nullify procedural irregularities. The BAKC should review its training curriculum for the BAKC LTC to provide such training to lawyer students. If the BAKC had a CLE program it could also use the same targeted trainings for CLE for practicing lawyers.
- Lawyers need more incentives to work on legal aid cases, therefore there needs to be better recompense for time spent on legal aid cases and even better salaries in the legal aid sector to attract better lawyers.
- Donors and BAKC Legal Aid Department need to do more/better monitoring and evaluation existing legal aid service providers' performance, including performance of individual lawyers.
- BAKC needs to review the performance of its Legal Aid Department, including a regular financial audit. Need to ensure that when lawyers are appointed to defend cases in the provinces that this is done in a cost-effective manner, e.g. by appointing lawyer from that province or nearby and not from Phnom Penh which incurs more travelling and accommodation expenses. A standardized means test, fee structure and means to monitor and evaluate lawyer's performance should be devised and implemented, with improvements on current practice piloted in the short term and expanded over time.
- BAKC needs to develop and implement a proper legal aid policy of its own.

Option 3: Formalise the use of Paralegal Services

Outline

Paralegals are provided with a definition, minimum requirements and the ability to officially interact with the formal justice sector.

Benefits

Less expensive legal assistance can be made available over a wide geographical area. This could assist in legal aid support when accused are detained by judicial police in rural areas as well as for diversion from the formal justice system when required.

Paralegals may also have a permanent presence in key strategic areas such as provincial provisions and courts where they could play a referral and primary advice function.

Paralegals can also provide mediation services, legal awareness and dissemination outreach services in order to inform community members about the role of lawyers, rights to lawyers, the legal process, their rights and how to defend their rights

A client centred approach requires that legal aid not be monopolized by lawyers, particularly when there is a limited number of lawyers available

Paralegal programs are particularly valuable for legal systems where there is already a tradition of resolving disputes outside of the formal justice system (as in Cambodia)

Paralegal programs have been shown to be effective in countries with problems similar to Cambodia, including prison overcrowding, case backlogs, lack of lawyers

Constraints

- Ensuring quality of service delivery over a large geographical area with different service providers could prove challenging.
- Ensuring that the paralegals (such as existing community members, law students, teachers etc.) are properly selected and trained
- For paralegals to give legal advice, rather than legal assistance, the Law on the Bar would need amendment
- Attention needs to be paid to linking paralegals with the formal justice system, including with lawyers who can perform those tasks that paralegals cannot (e.g. defence in court)
- Resistance from the Bar that non-lawyers will create a two-tiered legal representation system offering sub-standard services and unregulated legal representation
- Resistance from police and judiciary who see legal assistance as meddling in the justice system, rather than complementing it

Suggested RGC intervention to improve effectiveness

- (i) Development of legal instruments formalizing the role of paralegals
- (ii) Development of procedures for paralegals to provide legal services in judicial police detention facilities, prisons and courts
- (iii) Development of minimum standards for paralegals

Cost implications

Training, especially on legal education, dispute resolution, investigations, interviewing techniques, taking instructions, preparing complaints and other court process

Regular spot audit of paralegal quality controls

Sustainability

As this requires minimal costs to implement and sustain it is sustainable from RGC's perspective.

Sustainability questions arise in relation to the financing of paralegal services.

NOTES:

- According to the meeting with UNCOHCHR on September 19, the South African experience is that the cheapest option for legal aid is using lawyers employed by the Legal Aid Board assisted by paralegals
- KID (Khmer Institute for Democracy) has an existing citizen's adviser program (since 2000) that can be studied for a paralegal model. CLEC has a Community Dispute Resolution Program using paralegals (since 2003) that can also be studied for a paralegal model. LSCW

has a paralegal program in Siem Reap and Svay Rieng provinces that can also be investigated further as a model.

- Regarding paralegals in prisons, the RGC or BAKC or donors could set up a specific Prison Legal Service that has at its basic level a paralegal based in each prison or attending each prison regularly (say once or twice a week initially depending on demand and then as required) who can visit prisons, identify who needs assistance, take instructions regarding cases and then refer them to either the BAKC or legal aid NGOs or a national legal aid institution or clearing house. This would be advantageous because it would (1) identify cases quickly, (2) match demand to supply (subject to availability of supply), (3) assist in speeding up case processing by regular case follow up by the paralegals and potentially by assisting courts in planning case dispositions based on availability of lawyers in cases that have already been prepared by the prison paralegals, (4) assist in reduction of pre-trial detention periods.
- The BAKC could set up an office in every province, either attached to the court or outside of it but able to receive referrals from the court or prosecutions office, staffed by a paralegal who could take instructions etc and then source a lawyer from the BAKC.
- Important to ensure that paralegals are properly trained, that minimum criteria are set, that they are regulated in some way and, in particular, that they are bound to respect confidentiality
- For successful paralegal model, see South Africa; Bangladesh (particularly in relation to reducing excessive pre-trial detention); Benin – a civil law country (see film by PRI); and Sierra Leone (TIMAP for Justice funded by Open Society)

Option 4: Promote Pro-bono Services

Outline

That conditions are created to promote the use of pro-bono services in Cambodia

Benefits

The approach relies upon existing practitioners and can be cost efficient with only case costs being covered

An increased awareness amongst legal practitioners of the role of legal aid

Constraints

Resistance from members of the BAKC

Non-compliance from powerful members may prove problematic

The cost of avoidance may exceed the BAKC membership costs

Suggested RGC intervention to improve effectiveness

- (i) BAKC members are legislated to provide a minimum number of hours per year for legal aid service (as in Ethiopia)
- (ii) Members can forgo such services by paying a fee into a legal aid fund (as in Uganda)
- (iii) The fund is used to finance normal legal aid services provided by BAKC
- (iv) BAKC sets up a Pro-Bono Access to Justice Committee (similar to the existing committees on criminal law, civil law and commercial law) to promote pro-bono activities or reform the legal aid department at BAKC

Cost implications

There are no increased operational financial cost considerations for RGC

Costs of law amendment

Sustainability

As the programme relies on minimal financing from RGC it is sustainable

NOTES:

- CLEC suggested that donors could create a Pro-bono Legal Aid Fund that is accessible to poor clients or communities. The fund is administered by a stand-alone agency with set criteria for disbursement of monies for cases. The client or the community applies to the fund which assesses the application, decides whether the grant legal aid or not (normally based on asset/income test; type of case; merit test), and appoints a lawyer from a standing list of lawyers held by the agency. (For an example of an income/merit test, see the Indian Legal Services Authorities Act, 1987, Chapter IV, section 12, 13).
- An annual pro-bono or legal aid lawyers award could be established
- Pro bono services need not be only given on a one-to-one lawyer-client basis. A law firm could be matched to a community based organization to provide pro bono assistance over time in a specific area of law that affects the CBO and that the law firm is interested in or has expertise in

Option 5: Government Funded Legal Aid Service

Outline

The RGC finance legal aid lawyers in all provincial locations

Benefits

Improved capacity to implement the law and provide legislated services

National coverage

An ability to have a dedicated service for those in pretrial detention, regardless of the accusation

Anti-corruption measure – a central legal aid clearing house will prevent collusion between officials and the legal profession in appointment of lawyers in felony cases or for minors

Constraints

Financial (In a survey of 38 developing countries with a Per Capita GDP range of \$400-\$1200, none of the governments of those countries provide substantial or even limited legal aid.)

Suggested RGC intervention to improve effectiveness

- (i) Establishment of a legal aid agency with quality control systems
- (ii) Supply an average of 2 RGC financed legal aid lawyers to each court
- (iii) Provision of a paralegal service for each district
- (iv) Establishment of an RGC legal aid office at each court

Cost implications

Cost of legal aid lawyers

Case fees

Legal Aid offices

Paralegal fees

Administration

Training

Sustainability

Sustainable only if RGC choose to finance the agency

NOTES:

- In Vietnam, the government provides legal aid through the national and provincial legal aid centres, including some centres at the district level. Legal aid officials employed by the provincial centres have the right to represent legal clients in courts and have the same rights in judicial proceedings as private lawyers. These legal aid officers have a law degree plus training in legal aid cases. Legal aid officials are assisted by “legal aid collaborators” who can provide assistance and advice, but not representation. The budget for the national and provincial legal aid centres comes from both the government and from donors. Private lawyers can also provide legal aid services, including by doing paid work through and with the provincial legal aid centers or by registering with the local provincial government to provide pro bono services. “Mass organizations” can also register to provide legal aid for their members. At the national level, the National Legal Aid Agency carries out the state management of legal aid, including drafting instruments on legal aid, guiding the organization and operation of legal aid organizations, providing professional training for legal aid providers, inspecting and monitoring legal aid services, managing a Legal Aid Fund and maintaining statistics on legal aid

- A government funded legal aid service could be funded from the court fees received from the courts for civil cases which currently should be sent by the courts to the treasury.
- In Hong Kong, legal aid is funded from a levy on damages awards in civil cases.

Option 6: Promotion of University Legal Clinics

Outline

That University Legal Clinics be allowed to operate paralegal and legal assistant services

Benefits

An improved geographical reach

Inexpensive options for provincial centres

An ability to support existing legal aid service providers, especially in relation to prisons

Improve the understanding of students of the role of legal aid

Provide real practical experience to potential lawyers

Create an ethic amongst law students of social responsibility (helping others)

Law students participating in the clinics can receive credit towards completion of their program of study.

University clinics can also provide community legal education services, which can both inform people about the role of lawyers, their rights to lawyers, the legal process and how to defend their rights

Constraints

The universities with legal students do not have campuses in every province

Students will only be able to work with minor crimes and small civil cases

A BAKC member will still be required to oversee case preparation and to conduct hearings

Case confidentiality concerns will need to be addressed

Suggested RGOc intervention to improve effectiveness

- (i) Establishment of a formal set of preconditions for university clinics
- (ii) Establishment of procedures for the operation of such clinics
- (iii) Establishment of academic credit recognition
- (iv) Establishment of procedures for RGC agencies to interact with such clinics

Cost implications

Such clinics may operate under existing education budgets, therefore no additional cost to RGC

Costs may be incurred if RGC decides to provide minimal funding for investigations in rural areas

Sustainability

As the universities financing is not dependent upon RGC nor donor justice sector financing the option is sustainable

NOTES:

- Legal assistance provided by university law clinics should be limited to minor cases, including civil disputes for which there is currently little or no legal aid funding. Therefore, this option is not an alternative to mainstream legal aid, but a complement to it.
- PUC has a student street law/community legal education program which can be explored as a model. Previously this was funded by donors but now is funded by the students themselves, therefore more sustainable. This clinic has already become part of the PUC infrastructure and can be explored as a model for other law faculties.
- Private LTCs could be based at universities with existing law faculties and could be associated with Legal Clinics. Intern lawyers (post LTC) could serve their internships as interns or even supervisors at these clinics (see BAKC above).
- When the technology is available, law students or final year law students should be permitted to open clinics in provincial areas or take part in mobile clinics whilst receiving their lectures by internet and submitting their assignments and other student works by email/internet. They could then be based in provinces for at least a semester at a time and provide legal assistance (or advice under tutelage of a Bar member) during that time.
- Suggested that for best practices for legal aid university clinics, see the Philippines (or BABSEA program in Thailand)

Option 7: Coordination Body for Legal Aid Services

Outline

That a coordination body be developed to provide strategic oversight to the national provision of legal aid services

Benefits

An improved ability to highlight the thematic skewing of legal aid services

An improved ability to identify areas of need

Improved employment of scarce resources

Anti-corruption measure – a central legal aid clearing house will prevent collusion between local officials and the legal profession in appointment of lawyers in felony cases or for minors

Could be responsible for national training and legal dissemination campaigns (including training officials on the law and informing the public about the law) [See 2006 Legal Aid Survey para 5.4.2, p.34].

Constraints

Risk of the body restricting the activities of agencies currently engaging in innovative legal aid solutions

Lack of capacity and confidence in BAKC to chair such a mechanism

Suggested RGC intervention to improve effectiveness

- (i) A national body for the coordination of legal aid
- (ii) Provincial bodies for regular coordination of local RGO and NGO resources

Cost implications

Meeting costs and per diems

Costs associated with monitoring and analysis

Administration costs

Sustainability

With scarce resources the body may not be sustainable at the national level unless as annual meeting

Improved sustainability at the provincial level dependent upon the management capacity and interest of the institutions involved.

NOTES:

- See also the Private Practitioners' Legal Aid Scheme below, which could be administered by a Legal Aid Coordinating Body. Legal Aid Coordination Body also provides strategic policy advice and provides forum for better coordination between legal aid stakeholders, including on service delivery and on legal awareness and legal dissemination

Option 8: Pooling of Funds

Outline

Smaller contributions are pooled into a general account to allow for better targeted and administered legal aid

Benefits

Greater flexibility in directing legal aid towards the areas of greatest need

Reduced administration costs for smaller financiers

Allows for non-traditional financiers to participate

Improved ability to engage private lawyers based in provinces on a case by case basis

Constraints

Some service providers may be less willing to participate

Financiers will find it more difficult to direct legal aid towards areas of interest so may be put off

Different financial rules for different donors may result in reporting complexities

General levels of corruption within the country may reduce confidence in such a mechanism

Control of such a mechanism may be contested between RGC and BAKC

Suggested RGC intervention to improve effectiveness

- (i) Establishment of a mechanism and controlling body
- (ii) Establishment of procedures

Cost implications

Minimal, primarily surrounding the maintenance and administration of the mechanism

Sustainability

Technically sustainable however it relies upon the confidence financiers have in the mechanism and the level of RGOC support.

Finance is a requirement so reduced finance to the sector will affect the mechanism

NOTES:

- For pooled funds model see DANIDA program in Uganda

Option 9: Private Practitioners' Legal Aid Scheme

Outline

Legal Aid Panel under Legal Aid Coordinating Body and/or comprising BAKC reps, donor reps, RGC reps, Legal Aid NGO reps, receives and assesses legal aid applications. Panel (at either provincial or national level) keeps lists of law firms and individual lawyers who provide legal aid. Referrals are made to the lawyers on those lists. The Panel monitors performance of the lawyers and adds/removes lawyers from the lists. The Panel pays the lawyers from its funds. The payments follow a standard fee structure based upon the type of case and type of services being provided and are paid at set intervals or milestones during the case (see EWMI-PRAJ Model 2005).

Benefits

Reduced administrative costs because private lawyers already have office infrastructure

Private practitioners would augment their income whilst building up experience in legal aid cases

Exposure of private sector lawyers to public interest work

Constraints

Means and merits testing would need to be rigorous

Monitoring of performance of private lawyers would need to be rigorous

Lawyers would be required to report to coordinating body/panel, including permitting auditing of files (agreeing to waive confidentiality)

Suggested RGC intervention to improve effectiveness

- (i) Development of a Legal Aid Panel
- (ii) Development of the scheme
- (iii) Development of a monitoring mechanism

Cost implications

Financing of the scheme would need to be from a pooled fund mechanism

Monitoring of services

Sustainability

The model has a higher level of sustainability due to the fact the lawyers that would be engaged in the provinces are in many cases already present independent of legal aid services.

Option 10: Engagement of the Private Sector

Outline

Corporate social responsibility programmes are accessed to support legal aid activities.

Benefits

Diversification of financiers for legal aid

Improved community understanding of the role of legal

Improved social behavior from companies

Constraints

Limited number of companies in Cambodia with corporate social responsibility programmes

Competitive market for funds for such programmes

Net impact of the approach may be minimal

Suggested RGC intervention to improve effectiveness

- (i) awareness raising of the option for financing legal aid programmes

Cost implications

Minimal

Sustainability

Technically and financially sustainable

NOTES:

- Legal aid organizations could provide service contracts to big organizations, such as Unions to provide legal services to the organisation's members, which would include legal aid

Option 11: Development of a Legal Aid Hotline

Outline

The existing legal aid hotline is to be better supported and regional hotlines staffed by legal assistants be established

Benefits

Low cost approach

Able to achieve national coverage

Existing programme with BAKC

Constraints

The amount of lawyers available for the provision of such services

Suggested RGC intervention to improve effectiveness

- (i) Support for the existing BAKC initiative
- (ii) Procedures developed for paralegals and legal aids to provide advice
- (iii) Toll-free numbers for provinces arrange for university legal clinics to undertake such activities

Cost implications

There are no increased operational financial cost considerations for RGC if existing agencies are used to provide advice

Cost of development of procedures and arrangement of toll-free numbers

Cost of producing public information materials advertising the hotline (put up at commune offices, police stations, courts, government offices etc.)

Skype services can be installed for free

Sustainability

As this is a low to no cost option for RGO and paralegals/legal assistants may be financed via education budgets in the case of university clinics it is sustainable.

NOTES:

- Hotline can provide two types of services – (1) advice and (2) referral. For referrals there needs to be a transparent system, e.g. clients are given a list of lawyers to refer to and client can independently choose from the list.

4. OTHER RGC TARGETED ACTIVITY OPTIONS

- (i) Regulatory framework review (including Constitution, Law on the Bar, Internal Regulations of the Bar, Code of Criminal Procedure, Penal Code, draft juvenile justice law, UDHR, ICCPR, CRC, UN Basic Principles on the Role of Lawyers, UN Standard Minimum Rules for the Treatment of Prisoners, UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Body of Principles for Protection of All Persons under Detention, CAT etc.
- (ii) Costing of the size of the legal aid market, the delivery costs of legal aid, the cost of meeting the existing and projected future needs and projections based on current RGC and donor expenditures regarding meeting those needs.
- (iii) Focus of legal aid generally is on persons accused of felonies and on minors, RGC needs to change this. Legal aid should be focused more generally on victims of offences as well as suspects and accused persons.
- (iv) Currently, for legal aid cases, applicants for legal aid from the BAKC require proof of poverty from their local authorities. This process is open to abuse, for example, by requiring the indigent applicant to pay for such proof, or by the corrupt giving out of a proof of poverty letter to an applicant who is not poor and should not be entitled to receive legal aid. The mechanism for proving poverty needs to be strengthened so as to avoid these abuses.
- (v) Police at the post, commune, district and municipal-provincial level should all have lists/directory of lawyers to call upon if a suspect or accused requests one and police need to be trained to inform suspects and accused of their rights to a lawyer and on how to get a lawyer should a suspect or accused request one

- (vi) Prison authorities are also asking for money from lawyers (and from family members) to be able to enter the prison and visit their clients. This illegal and corrupt practice must be stopped. Some prisons will only allow lawyers to access detainees or prisoners if they have a letter from the court stating that they are already the lawyer on the record. However, the lawyer needs to meet the client first to get the client's Power of Attorney before they can get the letter from the court
- (vii) The cost of copying of case files from the court needs to be rationalized. There are no set fees and the system is open to abuse.
- (viii) Stakeholder dialogues: some provinces have regular meetings between the police, courts, prisons, prosecutor and other government agencies in order to raise and resolve issues relating to the local administration of justice. These meetings should be expanded to include legal aid service providers (NGOs, BAKC)
- (ix) The existing mechanism for the RGC (through the COM) to provide funds to the BAKC for legal aid cases needs to be streamlined. Currently the BAKC experiences problems in receiving the allocated funds.
- (x) National legal aid policy must protect the status of legal aid NGOs as being able to provide legal services as well as private lawyers (raised as a problem in 2009 by previous BAKC administration)
- (xi) Donors funding projects that are likely to impact on the rights of individuals (such as land titling, public works etc) should be encouraged to set aside a percentage of the funds for the program for funding public interest litigation associated with the projects (this could also be an RGC requirement for private sector in areas such as civil works or economic concessions)
- (xii) Law faculties should be encouraged to provide courses on legal aid, pro-bono work and on the importance of competent legal representation
- (xiii) The RGC could re-institute local courts at the district level [salah lahuc] to hear civil cases and petty offenses. Non-lawyers could be permitted to represent parties at this level of court. Appeal courts should sit not only in Phnom Penh but also in provinces/regions (circuit court) or if appeals are heard in Phnom Penh, then the court could hear appeals from a particular province in the same time period so that prisoners can be brought to attend the hearings together from that province.
- (xiv) Design of RGC justice facilities including prosecution offices, courts and prisons should include lawyer interview rooms to facilitate lawyers, including legal aid lawyers, to meet with clients. National database of laws be established either by public, private or educational sector (RULE did have a program on this, but current status is unknown)

5. RECOMMENDATIONS

These recommendations represent the view of the authors of the document. They do not reflect the opinions of the RGC nor of DANIDA. These recommendations are also made in the context of the anticipated legal aid environment in Cambodia for the next 5 to 7 years.

Given the uncertainty surrounding RGC financing and the reduction in donor financing that is expected to continue into the medium term, the team would recommend those options that:

- (i) remove obstacles to the participation of lawyers in legal aid
- (ii) remove obstacles that increase the cost of existing legal aid
- (iii) encourage the participation of non-traditional actors in legal aid

These recommendations are also made on the assumption of limited increases in legal aid funding to RGC agencies in the short to medium term.

RECOMMENDATION 1: The rate of Lawyer intake be increased

RECOMMENDATION 2: The role of paralegals and legal assistants be formalised

RECOMMENDATION 3: University Legal Clinics are allowed to operate legal aid services

RECOMMENDATION 4: The Legal aid hotline be established

APPENDIX 1: List of Consultations

Legal Aid Service Providers

BAKC
ASF
CLEC
CWCC
IBJ
KID
LAC (Phnom Penh, Battambang, Banteay Meanchey & Siem Reap)
LSCW

RGC Agencies

Phnom Penh

Gendarmerie
MOWA

Battambang

Provincial Prison
CNP
Gendarmerie
Court & Prosecution

Banteay Meanchey

Provincial Prison
CNP
Gendarmerie
Court & Prosecution

Siem Reap

Provincial Prison
CNP
Gendarmerie
Court

Kampong Thom

Provincial Prison
CNP
Gendarmerie
Court & Prosecution

Donors

AusAID
DANIDA
EU
GIZ
USAID

Other

CCJAP
CHRAC
DIHR
EWI-PRAJ
UNOHCHR
Panasastra University of Cambodia

APPENDIX 2: Recommendation Implementation Steps

RECOMMENDATION 1: RATE OF LAWYER INTAKE BE INCREASED

- (i) RGoC, with advice from BAKC, develop a target for lawyer growth (quantity, quality and location)
- (ii) Obstacles to growth and BAKC admission determined and strategies for reducing them developed
- (iii) Options developed and agreed to meet the increased growth target
- (iv) Implementation of agreed options
- (v) Monitoring of the growth, quality and distribution of lawyers
- (vi) Annual review of the progress of the policy

RECOMMENDATION 2: THE ROLE OF PARALEGALS AND LEGAL ASSISTANTS FORMALISED

- (i) Organisation of a working group consisting of RGoC representatives and existing legal aid service providers to determine paralegal service needs and legal requirements
- (ii) National workshop on the formalisation of paralegal services
- (iii) Development of legal instruments to allow for paralegals and legal assistants to operate
- (iv) Development of a monitoring mechanism to monitoring the quality of paralegal and legal assistant services
- (v) Review of the effectiveness of paralegal and legal assistant services after a period of 5 years

RECOMMENDATION 3: UNIVERSITY CLINICS ARE ALLOWED TO OPERATE LEGAL AID SERVICES

- (i) RGoC and key Universities form a working group to determine the criteria and parameters for university clinics
- (ii) Development of legal instruments that allow for the formation and operations of university clinics
- (iii) Development of a monitoring mechanism to monitor the effectiveness and educational worth of such clinics
- (iv) Select universities to develop clinics with assistance from RGoC as required
- (v) Community awareness raising of the services

- (vi) Review of the effectiveness of university clinics after a period of 5 years

RECOMMENDATION 4: THE LEGAL AID HOTLINE BE ESTABLISHED

- (i) RGoC and BAKC to form a working group to review the existing legal aid hotline
- (ii) Working group develops options to expand the service
- (iii) Discussions with university clinics in relation to providing limited legal advice over the phone
- (iv) Development of a monitoring mechanism to measure the quality and effectiveness of such advice
- (v) Financing and implementation of the program
- (vi) Community awareness raising
- (vii) Annual review of the effectiveness of the program

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