

UN RECOMMENDATIONS ON THE DRAFT LAW ON LEGAL AID OF VIET NAM

29th May 2017

(based on the draft law submitted to the National Assembly for discussion at the third session of the 14th National Assembly held between May 22 and June 21, 2017)



As the 14th National Assembly prepares to review the draft amendments to the Law on Legal Aid, the United Nations takes this opportunity to share recommendations on how it believes the draft law can be strengthened to safeguard the rights to legal aid for those that require it most, thereby also improving access to, and quality of, legal aid services.

In 2016, the UN in Viet Nam provided technical assistance to support better alignment of the draft law with international standards on legal aid and to ensure greater adherence with international human rights laws and conventions that Viet Nam has ratified. The most recent joint UN comments on the draft Law on Legal aid were submitted to the Chairman of the Law Committee of the National Assembly on 27 December 2016.

The following recommendations on the updated draft of the law are made with a view to assisting Viet Nam in meeting its commitment to ensuring equal access to justice for all in accordance with Sustainable Development Goal target 16.3, and consistent with international standards including the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems¹ as adopted by the UN General Assembly through Resolution 67/187² (referred to as “UN Principles and Guidelines” below), as well as international legal standards regarding the right of access to legal aid in non-criminal cases.

1. Expansion of eligible beneficiaries

Although Article 7 of the draft Law has defined an extended list of persons who should be eligible for legal aid in comparison with the current Law on Legal Aid, the beneficiary list should be more inclusive to ensure the right to legal aid for people who are poor, marginalized, or otherwise in need of special legal protection to enable them to exercise their rights, in line with the obligation under the UN Principles and Guidelines for states to “ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible”.³

¹ “UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

² http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/187.

³ UN Principles and Guidelines, Principle 2. Also see principle 10 (Equity in access to legal aid); “Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons.”

The UN recommends that:

- Persons over the age of 16 years and under 18 years who are witnesses or victims in criminal proceedings and who are subject to placement in compulsory education centers should be included in Article 7 (5); "persons between the age of 16 years and under 18 years who are victims in criminal proceedings" must be eligible for legal aid services and not be required to prove eligibility that they are "in difficult financial situations" as mentioned in Article 7 (6) item đ)⁴.
- All victims of gender-based violence and human trafficking, people living with HIV/AIDS, persons with disabilities, regardless of their social status and/or financial situation should be eligible for legal aid⁵.
- People who are deprived of liberty or are facing deprivation of liberty should be defined in the list of eligible beneficiaries, including those who are prisoners, and people at all stages of the proceedings for which punishment includes the deprivation or restriction of liberty. This includes drug users, those charged with administrative offences with respect to the laws on social security, order and safety, who are subject to a court decision on application of an administrative sanction, i.e. "compulsory drug rehabilitation centre" or "compulsory education centre"⁶.
- Legal aid should be made accessible to vulnerable and marginalized people such as migrant workers and internally displaced persons, who should not be required to prove eligibility under the "in difficult financial situation" clause⁷.

2. Simplification of the legal aid procedure and ensuring equity in access to legal aid

For a person in need of legal aid services, the criteria to prove one's eligibility should be stipulated in the draft Law to make sure that these criteria do not create an unnecessary burden on an applicant or act as a barrier to accessing legal aid.

The UN recommends that:

- The Law should establish provisions to uphold the following principles which have not been fully and explicitly stipulated in the draft Law: (i) equity in access to legal aid⁸, (ii) simplification of the legal aid procedure, and (iii) the right to complain about access and quality of legal aid⁹.

⁴ In relation to children detained in education centres, UN Convention on the Rights of the Child Art. 37(d) provides that "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance" which is an unconditional obligation regardless of personal circumstances. In relation to child victims and witnesses, see - in addition to UN Principles and Guidelines (especially Guideline 10) - Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ES/CN.4/2005/20).

⁵ See definition of "vulnerable" under footnote 1 above.

⁶ UN Principles and Guidelines, Principle 3 provides: "States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process".

⁷ See definition of "vulnerable" under footnote 1 above.

⁸ UN Principles and Guidelines, Principle 10.

⁹ UN Principles and Guidelines, Principle 9 and 13, and Guideline 15.

- The Law should explicitly mention which entity—meaning an agency, organization and/or a professional – is authorized to develop such criteria; which entity is authorized to certify or assess eligibility based on pre-defined criteria; and in cases of complaint who is responsible for addressing the complaint.
- The Law should stipulate provisions on special measures to ensure meaningful access to legal aid for women, children and groups in need of specialized services and other support services¹⁰. In addition, the Law should identify special strategies and measures to support specialized legal aid services for vulnerable groups such as women, minors, persons with disabilities, people living with HIV/AIDS and other groups with special needs¹¹. It is recommended that Article 4 of the law should mention the state's obligation to ensure juvenile-friendly legal aid. Other measures can include, but should not be limited to, ensuring services which provide access for persons with disabilities, and those that provide other support services such as medical psychological support for victims of gender-based violence. Specialized legal aid services require that specialized training be provided to legal aid service providers.

3. Enhancement of the legal aid model and quality of legal aid services

In order to ensure that all national legal capacities are best engaged in providing the maximum access to legal aid services, the UN Principles and Guidelines¹² recommend mixed model partnerships or hybrid systems of legal aid which effectively combine services delivered by State and non-state legal aid providers, such as bar associations, legal professional organizations, non-governmental organizations and university law clinics. Based on findings of the global surveys on legal aid,¹³ and comparative analysis of international experiences, the UN recommends that:

- The Law should promote the "mixed model" of legal aid delivery, allowing more diverse legal aid providers and recognizing the role of non-governmental organizations and other actors¹⁴. In addition, the Law should promote equitable access to the State budget and other public resources to finance legal aid delivery among State and non-state legal aid providers¹⁵.
- The Law should expand the scope of the services, diversify the range of legal aid service providers, and create favorable conditions for those who are not certified lawyers but possess relevant expertise, skills and/or experience, such as paralegals¹⁶, so as to enable

¹⁰ UN PG stipulate specific measures required to ensure women's and children's access to legal aid. See in particular the concrete measures set out in Guideline 9 (Implementation of the Right of Women to Legal Aid) and Guideline 10 (Special Measures for Children). See also Guideline 11 paras 57 and 58

¹¹ UN Principles and Guidelines, Guideline 11 paras 57-58

¹² UN Principles and Guidelines, Principle 14 and Guideline 11

¹³ Global Study on Legal Aid: Global Report, UNDP-UNODC, 2016.

¹⁴ UN Principles and Guidelines, Principle 14 para 39, guideline 16

¹⁵ UN Principles and Guidelines, Guideline 12 para 60 and 61. The Indonesian Legal Aid law follows this example

¹⁶ See especially UN Principles and Guidelines, Guideline 14

them to assist the poor and other disadvantaged people through the provision of legal aid services on civil and administrative matters.

- The Law should specifically recognize and support the role of law schools and law students in legal aid delivery¹⁷.
- To ensure sufficient funding to meet the demand, it is essential that the State ensures adequate budget allocation for the administration and delivery of services¹⁸. Innovative approaches and budgeting mechanisms should be explored, including separate budget lines for administration and legal aid services as well as needs assessments to confirm the volume of need and the nature of legal matters for evidence-based fund allocation.¹⁹
- The Law should explicitly define the responsibility of the Ministry of Justice and concerned government agencies to strengthen mechanisms to enhance the quality of legal aid delivery which may include development of professional codes of conduct and quality standards with regard to juvenile-friendly legal aid delivery, gender sensitivity as well as protection of privacy and human rights.²⁰

¹⁷ UN Principles and Guidelines, Guideline 16

¹⁸ UN Principles and Guidelines, Principle 2 para 15: “States should allocate the necessary human and financial resources to the legal aid system.”

¹⁹ See UN Principles and Guidelines, Guideline 12 “Funding the nationwide legal aid system” and Global Study on Legal Aid: Global Report, UNDP - UNODC, 2016.

²⁰ UN Principles and Guidelines, Guideline 11 para 59