

THE STATE OF LEGAL AID IN TIMOR-LESTE



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

Research

Judicial System Monitoring Programme (JSMP)

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LIST OF ABBREVIATIONS

ALFeLa	<i>Asisténsia Legál ba Feto no Labarik</i> (“Legal Assistance for Women and Children”), a legal aid NGO providing services particularly to victims of gender-based violence
ECM	<i>Fundasaun Edukasaun Komunitade Matebian</i> , a legal aid organization NGO based in Baucau District
FFSO	<i>Fundasaun Fatu Sinai Oecusse</i> , a legal aid NGO based in Oecusse
JNJ	A private law firm based in Dili, and providing legal aid services in Covalima District
JSSP	Justice Sector Strategic Plan (of the Timor-Leste Government)
LJTC	Legal and Judicial Training Center
MOJ	Ministry of Justice (of the Timor-Leste Government)
OPD	Office of the Public Defender
OPG	Office of the Prosecutor-General
UNDP	United Nations Development Program

EXECUTIVE SUMMARY

As Timor-Leste builds its justice sector, an important continuing challenge is enabling its poorest citizens to access free legal assistance or “legal aid”. This Access to Justice Report considers the current state of legal aid provision in Timor-Leste, identifies challenges, and makes recommendations for change.

The right to access the courts and the right to legal aid are enshrined in the Constitution. The importance of legal aid is also recognized in the government’s strategic planning documents, which propose to eventually establish a system that involves both public and private sector legal aid services. To date, however, government efforts in this area have focused entirely on public sector legal aid, namely legal aid provided by the Office of the Public Defender (OPD). The OPD is established by statute within the Ministry of Justice (MOJ) and it provides legal aid in both civil and criminal cases. It currently employs 30 full-time public defenders, based in the 4 municipal capitals which house District Courts (Dili, Baucau, Suai and Oecusse).

Legal aid outside the OPD is limited. Around 180 private lawyers are qualified to practise in Timor-Leste, and the majority of these are foreign citizens who trained and qualified in another jurisdiction and who exclusively or predominantly undertake commercial and government work in Dili. A small portion of the approximately 70 locally-trained Timorese lawyers work for organizations which provide legal aid with the support of short-term foreign donor funding. Most provide advice and representation across a broad range of legal issues but within a limited geographical area. One country-wide legal aid non-profit organization exists which specializes in legal assistance for women and children victims of gender-based violence.

To date the government has not funded legal aid provision by private lawyers. Some years ago the MOJ developed a draft law establishing a framework for the provision of state-funded legal aid by private lawyers, but it was never presented to Parliament and there appear to be no current plans to proceed with it. The current view of the MOJ appears to be that efforts should first be focused on the establishment of an independent bar association, something which Timor-Leste remains without. A draft law for the establishment of a Timor-Leste Bar Association has been presented to the Parliament, and if passed it will establish independent regulation of private lawyers for the first time. However with attention focused on the upcoming 2017 election it is unclear when this legislation will be passed.

Overall then, the current legal aid context in Timor-Leste is dominated by the OPD, but with some efforts being made by private lawyers with foreign donor support. An analysis of the activity of the OPD and these private lawyers suggests that there are two main challenges to legal aid provision in Timor-Leste: accessibility and quality.

The most obvious accessibility issue is the limited number of lawyers providing legal aid. In effect the burden of meeting all of Timor-Leste’s legal aid needs is currently being borne by only 30 public defenders and fewer than 20 dedicated private legal aid lawyers. This is obviously of concern in a country where the great majority of the population remain poor and unable to afford legal services. Geographical factors also limit access to legal aid: legal aid services are largely concentrated in the seats of the four District Courts, and particularly in Dili. They are therefore especially inaccessible to the country’s most disenfranchised citizens, who live in extremely remote areas. Although lawyers in both the OPD and non-profit legal aid organisations appear eager to reach those in need of their assistance, a shortage of transport and communication resources restrict their ability to do so. Access to

legal aid is further limited by a lack of knowledge in remote communities of the existence and role of legal aid providers.

Increasing access to legal aid will require various efforts, the most fundamental of which must be to increase the number of legal aid lawyers and their geographical reach. Expansions of the OPD into new areas are planned, but the OPD alone cannot meet all of Timor-Leste's legal aid needs: a strong and accessible private legal aid system is also needed, to facilitate the right to choose a lawyer and to ensure the availability of legal aid where conflicts of interest prevent the involvement of the OPD. Ensuring that such services are made available in a sustainable way over the long term necessarily requires the provision of stable government funding. The government must therefore restart efforts to regulate and fund the provision of legal aid by private lawyers.

A further measure with the potential to significantly increase access to legal aid, and which is yet to be adequately explored, is the use of paralegals, particularly in remote areas. Paralegals with basic legal training could provide initial advice, triage and referrals, and representation in community-based dispute resolution procedures. If paralegals were based within rural communities, this would have the potential to make basic legal services available in even the most remote parts of the country. However as with private lawyers, legal aid work by paralegals would only be sustainable if it were funded publicly over the long term.

In addition to the need to increase the *accessibility* of legal aid in Timor-Leste, there is a need to improve its *quality*. Research conducted for this report indicates that serious quality deficiencies affect legal aid services across the board – both those provided by the OPD and those on offer from private lawyers. As explained above, there are a lack of lawyers and resources within the OPD and private organizations that provide legal aid, and this undermines the quality of legal aid as well as its accessibility.

The quality of legal aid is also undermined by inadequate legal education and training in Timor-Leste. At present vocational training for lawyers (including both private lawyers and public defenders) is provided by the MOJ's Legal and Judicial Training Center (LJTC). It remains unclear whether and if so how this will change once an independent bar association is established. Training currently provided by the LJTC is focused on core areas of substantive law – perhaps in an effort to address deficiencies in the legal education that many aspiring lawyers receive at local universities. Almost no attention is given to developing the practical skills essential to legal practice. In addition, courses are predominantly offered in Portuguese, necessitating the provision of language classes which consume much of the allocated course time. It is therefore unsurprising that graduates from the LJTC's courses are poorly equipped to offer legal representation of sufficient quality. These difficulties are then exacerbated following the completion of formal training by a lack of opportunities for continuing legal education and on-the-job professional development.

There are systemic weaknesses not only in the process by which lawyers are educated, but also in the mechanisms established to provide oversight of their work. Each arm of the legal profession – judges, prosecutors, public defenders and private lawyers – is in theory regulated by a statutory council with oversight and disciplinary functions. However in practice these bodies are minimally functional, and for the most part merely play a basic administrative role. To date no steps have been taken by these bodies to assess the effectiveness of legal representation provided by public defenders and private lawyers. And almost no instances have occurred of disciplinary action being taken in response to ineffective representation, notwithstanding that this appears to be a widespread problem.

These problems are not limited to legal aid providers: they apply across the legal profession. However their impacts are felt most keenly in the area of legal aid, where lawyers tend to be locally trained and there is a greater need for ongoing training and oversight. Accordingly, in order to improve the quality of legal aid, attention must be given to improving the quality of the legal education and training of both aspiring and qualified Timorese lawyers; and also to ensuring that regulatory bodies (both those currently in existence and the future bar association) play a proactive role in ensuring that legal services are provided to a sufficiently high standard.

I. INTRODUCTION

A key tenet of access to justice is the possibility to be advised and represented by a lawyer. In any legal system this requires that legal services be provided free of charge to those with limited financial means. This is particularly the case in a country such as Timor-Leste, where the great majority of the population do not have sufficient income to pay for legal services.

Recognizing, therefore, that an effective legal aid system is a fundamental requirement to achieving access to justice in Timor-Leste, this report considers the current state of legal aid mechanisms, identifies challenges and obstacles which are hindering the provision of quality legal aid, and makes recommendations for change.

For those working in the justice sector in Timor-Leste, where the majority of free legal services are provided by public officials in the Public Defenders' Office, the term "legal aid" may not immediately have resonance. However in this report the term "legal aid" is used simply to describe *free* legal assistance. This includes both representation in formal legal proceedings and legal advice outside the context of formal litigation.¹ It includes services provided by both public defenders and private lawyers, regardless of who funds them (the government or private donors).

Further terms may require clarification in the Timorese context. In Tetum the term "*advogadu/a*" is used principally to describe *private* lawyers, as opposed to judges, prosecutors and public defenders. In English the term "lawyer" may carry a much broader meaning in some contexts, potentially even encompassing legal advisors and others with a legal education who work outside the justice sector. It is closer to the concept of "*jurista*" in Tetum. In this report the term "lawyer" is used to refer to a person who is qualified to practise as a lawyer; it does not include a person who has completed a university law degree, but has not qualified to practise as a lawyer. Lawyers in Timor-Leste fall into four categories, namely judges, prosecutors, public defenders and private lawyers. In this report the term "lawyer" is intended to include all of those four categories, but when possible these categories are referred to specifically.

This report is based predominantly on the following research:

- A review of existing and proposed laws and policies in Timor-Leste and a wealth of reports on the country's formal and informal justice sectors.
- An analysis of data gathered by the Judicial System Monitoring Programme (JSMP) over a tenmonth period, which includes not only core court monitoring reports, but also data specifically collected on the performance of public defenders in 138 criminal cases spread across the country's four district courts.
- Information obtained through a series of meetings and interviews held in September and October 2016 with a broad range of persons working in the justice sector.

¹As is explained below, in a previously proposed draft "Access to Courts Law" which would have established a system for government-funded free legal assistance by private lawyers, the term "legal aid" was defined restrictively as only including representation in formal legal proceedings. A broader meaning is intended in this report.

II. OVERVIEW OF THE JUSTICE SECTOR IN TIMOR-LESTE

Structure of the justice sector

Since it gained independence in 2002, Timor-Leste has developed formal legal institutions that operate alongside longstanding informal Timorese justice mechanisms. The formal justice sector remains nascent, and there is a Justice Sector Strategic Plan (JSSP), developed by the Ministry of Justice (MOJ), that commits to improving and developing the justice sector in numerous ways between 2011 and 2030. These include plans to strengthen the provision of legal aid, as detailed below.

The formal court system currently consists of four district courts of first instance and a Court of Appeal. The four district courts are located in the capital, Dili, in the municipalities of Baucau and Covalima (Suai), and in the Special Administrative Region of Oecusse Ambeno (“Oecusse”). There are no courts in the other nine municipalities in Timor-Leste. “Mobile courts” are used to conduct hearings outside the locations of the district courts,² but their reach remains relatively limited and there are serious concerns about the quality of justice that they deliver, not least because they tend to dispose of a very large number of cases within a small amount of time.³ The Constitution requires the establishment of a Supreme Court, and the JSSP plans to achieve this by 2025. There is an independent Office of the Prosecutor General (OPG), as well as an Office of the Public Defender (OPD), which operates under the oversight of the MOJ. The OPD currently only has offices in the municipalities in which there are district courts, although plans exist for further offices to be opened, beginning with Ermera and Bobonaro.⁴ The OPG also has offices in the four municipalities where the district courts are based, and has recently opened a further three offices in the municipalities of Viqueque, Ermera and Bobonaro. There are currently 32 prosecutors and 30 public defenders practising in the country, and 34 judgessitting in the courts.⁵

The development of the justice sector has been strongly influenced by the legal systems of Portugal and other Lusophone jurisdictions, and lawyers from these jurisdictions have advised on justice sector development, sat as judges, and practised as prosecutors and public defenders in Timor-Leste. The involvement of internationals in line functions in judicial institutions (including as judges and prosecutors) was halted in October 2014 with a Parliamentary resolution dismissing foreigners from these posts;⁶ however it is expected that this practice will resume in early 2017. This has been expressly permitted by a new Parliamentary Law that came into effect in January 2017.⁷ In addition, as discussed in further detail below, a significant number of Lusophone private lawyers continue to practice in Timor-Leste. The official languages of Timor-Leste are Tetum and Portuguese, but as of 2013 Portuguese was spoken by less than 10% of the population, whereas Tetum was spoken by 87% and therefore remains by far the most widely used language in the

² Mobile courts are run only out of the District Courts in Dili, Baucau and Suai.

³ Judicial System Monitoring Programme, *2015 Overview of the Justice Sector*, p15-16 available http://jsmp.tl/wp-content/uploads/2012/05/JSMP_OJS-2015_English_FINAL.pdf

⁴ Interview with Sergio Hornai, Public Defender General, 29 September 2016.

⁵ Judicial System Monitoring Programme, *2015 Overview of the Justice Sector*, p12

⁶ Parliamentary Resolution No. 11/2014, 24 October 2014, and Government Resolution No. 29/2014, 24 October 2014; Judicial System Monitoring Programme, *Dismissal of International Officials and Advisors in the Timor-Leste Judicial Sector*, December 2014, available at http://jsmp.tl/wp-content/uploads/2012/05/Report-dismissal-of-international-judicial-officials-FINAL_ENGLISH1.pdf

⁷ Law No. 1/2017 on the Transitional Regime for the Recruitment of Non-Timorese Magistrates and Public Defenders and Second Amendment to Law No. 9/2011 of 17 August, approving the Organic Law of the Audit Chamber of the High Administrative, Tax and Audit Court.

country.⁸A small proportion of the population do not speak either Tetum or Portuguese, instead only speaking one of the 30 local languages found in the country. However laws are drafted in Portuguese and often not made available in Tetum for some time. Court proceedings have also often involved the use of Portuguese, however within the last two years there appears to have been a political drive toward the nationalisation of the justice sector, including greater use of Tetum.⁹ In January 2017 the Government passed a decree said to be aimed at increasing the use of Tetum in the justice sector,¹⁰ although at the time of writing this report it is yet to be promulgated by the President of the Republic and hence come into effect. It remains to be seen whether this step will achieve any impact in practice.

The reach of the formal justice sector is very limited. As explained above, there are no courts in nine of Timor-Leste's thirteen municipalities, and the geographical reach of the OPD and the OPG is almost as limited. Public knowledge of the formal justice sector is also limited: a 2013 survey by The Asia Foundation revealed that only 53% of people in the country were aware of the existence of lawyers.¹¹ People in Timor-Leste generally seek to resolve disputes through longstanding and ubiquitous informal justice mechanisms rather than through the formal justice sector. These informal mechanisms include a broad range of over-lapping and evolving local, community, customary and traditional practices.¹² Various population surveys have revealed that even where people are aware of the formal justice sector, they tend to prefer informal justice mechanisms because they are much faster, far less costly, and always conducted in a language that participants understand.¹³ They are also perceived to have better rates of compliance and to foster social cohesion.¹⁴

Although there have been significant improvements in the formal justice sector since it began to be developed just fifteen years ago, it remains weak. This is attributable to various factors: the sector has been and remains under-resourced, and legal frameworks are in some respects incoherent and poorly adapted to local conditions. For present purposes a notable additional challenge is that many legal professionals (including judges, prosecutors, public defenders and private lawyers) lack capacity, not only because of the longstanding deficiencies in the education provided by the country's schools and universities, but also because of specific problems with the quality of training that lawyers receive in preparation for and during their careers.¹⁵

⁸ The Asia Foundation, *Timor-Leste Law and Justice Survey 2013*, 2013, p28 available <http://asiafoundation.org/publication/timor-leste-law-and-justice-survey-2013/>; See also Counterpart International, *Ba Distrito, Baseline Survey 2014: Local Governance and Access to Justice in Timor-Leste* available *ih* <http://www.counterpart.org/wp-content/uploads/2016/08/Ba-Distrito-Baseline-Survey.pdf>

⁹ Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015

¹⁰ See: <http://timor-leste.gov.tl/?p=17203&lang=en>

¹¹ The Asia Foundation, *Timor-Leste Law and Justice Survey 2013*, 2013, p16

¹² For a recent comprehensive assessment of informal justice mechanisms in Timor-Leste, see Counterpart International, *Ba Distrito, Access to Justice Brief: Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*, 2016 available <http://www.counterpart.org/wp-content/uploads/2015/10/Community-Dispute-Resolution-in-Timor-Leste-ENG-sml.pdf>

¹³ Counterpart International, *Ba Distrito, Baseline Survey 2014: Local Governance and Access to Justice in Timor-Leste*, September 2014, pp68-69; Social Impact, Inc., *Mid-Term Evaluation: The Ba Distrito Program*, August 2016, Annex VII, pp38-41; The Asia Foundation, *Timor-Leste Law and Justice Survey 2013*, 2013, p8

¹⁴ The Asia Foundation, *Timor-Leste Law and Justice Survey 2013*, 2013, p8

¹⁵ Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015

The legal profession

(1) Training and qualification

The training and qualification of all aspiring lawyers in Timor-Leste are overseen by the Legal and Judicial Training Centre (LJTC), an institution run by the MOJ.¹⁶ In general, to become a lawyer in Timor-Leste, a person must obtain a law degree and then complete a course at the LJTC.¹⁷ The LJTC runs two main vocational training courses. One of these is for future “magistrates” (judges and prosecutors) and public defenders, and is often referred to generally as “the magistrates’ course”. The other course is for future “private lawyers” and is run entirely separately from the magistrates’ course. Those who successfully complete the latter course can register and provide legal services as private lawyers operating outside the major public legal institutions (namely the judiciary, the OPG and the OPD).

The magistrates’ course consists of twelve months of “theoretical” teaching in the LJTC in civil and criminal law and procedure, followed by six months working as a trainee in the role in which the trainee will eventually practice, namely as a judge, prosecutor or public defender.¹⁸ At the end of the theoretical phase of teaching in the LJTC, students express a preference as between the three roles, and they are given priority based on their performance during the theoretical phase.¹⁹ Students generally prefer to train as a judge, or alternatively as a prosecutor or a public defender, in that order of preference.²⁰ This prioritisation appears principally to be the result of the relative levels of social and professional prestige accorded to these roles, notwithstanding that they are remunerated equally by law.²¹ The result is that in most cases the students with the best grades will be assigned to train as judges, and those with the lowest passing grades will be assigned to train as public defenders, albeit with some exceptions where students diverge from the usual preferences. This situation is well known within the justice sector and contributes to a perception that public defenders are less capable than prosecutors, which in turn likely reinforces the difference in prestige accorded to prosecutors and public defenders.²²

The private lawyers’ course consists of a fifteen month theoretical phase of teaching similar to that given in the theoretical phase of the magistrates’ course, followed by nine months of working either in the OPD or a private organization that provides legal services, such as a law firm or a non-governmental organisation (NGO).²³

The teaching provided by the LJTC has been criticised as being deeply inadequate.²⁴ It includes almost no teaching on crucial practical skills such as case preparation, drafting, and

¹⁶ Decree Law No. 18/2016 of 22 June, on the Regime of the Training Activities of the Legal and Judicial Training Center; Ministerial Diploma No.43/2016 of 27 July Approving a new Organic Structure of the the Legal and Judicial Training Center.

¹⁷ Law No. 11/2008 on the Juridical Regime Governing the Private Legal Profession and Lawyers Training, as amended. See Annex to Law No. 4/2015 on the Legal Regime of Private Laws and the Training of Lawyers, 30 December 2015, article 2. The law also effectively recognises Timorese judges, prosecutors and public defenders who were in those roles prior to the introduction of the current arrangements for the regulation of the legal profession.

¹⁸ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016

¹⁹ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016

²⁰ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016

²¹ Law No. 10/2009 on the Remuneration of Judicial Magistrates, Public Prosecution Magistrates and Public Defence Officers, 5 August 2009. A new draft law is before the Parliament, which would update this law, but in its current form would not affect the equality of remuneration.

²² See also Counterpart International, Ba Distrito, *Access to Justice Brief: Legal Assistance in Timor-Leste, Summary of Assessment Findings and Recommendations*, September 2014, p19 available <http://www.counterpart.org/wp-content/uploads/2015/10/ENG-Legal-Aid-Assessment.pdf>

²³ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016

²⁴ Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015

advocacy.²⁵ The quality of the teaching is also hampered by the LJTC's heavy reliance on Portuguese language:²⁶ most of the students are not proficient in Portuguese before beginning their course at the LJTC, but until recently teaching was exclusively through Portuguese. The LJTC therefore provides Portuguese language teaching to the students, but this is provided alongside rather than before the legal teaching. This language teaching takes up 50% of class time, and thus drastically reduces the time available for legal teaching.²⁷

The predominant use of Portuguese as a training language may be in part because of its status and its continued use as the primary language of legislation. However perhaps more crucially this is a consequence of the LJTC's historical dependence on international trainers, mostly from Portugal, who are unable to speak Tetum. While Portuguese language skills remain important for lawyers in Timor-Leste, the growing use of Tetum in legal proceedings demonstrates that lawyers often prefer to work through Tetum, and that it may therefore be beneficial to provide legal training in Tetum. This would also reflect the spirit of section 13(2) of the Constitution, which provides that Tetum and other national languages shall be valued and developed by the state. More recently the LJTC has begun to make use of Timorese trainers in some programmes,²⁸ and this may eventually have an impact on the language used for teaching. However given the capacity limitations within the Timorese legal profession, it is likely to be some time before the LJTC can recruit enough adequately skilled Timorese lawyers to significantly reduce its dependency on international trainers.

Although the law envisages that the LJTC will provide continuing education of lawyers, and even stipulates that there is a "duty" of continuous legal education at least for private lawyers, no detail is provided as to exactly what type or quantity of ongoing legal education should be undertaken.²⁹ The JSSP envisages the provision of "ongoing training sessions" for all practising lawyers,³⁰ and it aims to establish an annual programme of professional seminars and workshops by 2017,³¹ but this has not yet been achieved. The LJTC's constitutive law requires it to plan and deliver continuing legal training,³² but no systems currently exist for regulating the continuing legal education obligations of individual lawyers, and in practice the LJTC does not regularly provide it. The LJTC does not have specific funding intended for the provision of continuing legal education. Lawyers appear to be keen to undertake further training, but there is little opportunity to do so, particularly for private lawyers.³³

²⁵ In 2015, through the support of Ba Distrito, the LJTC introduced a module on case management which is provided as part of the training course for private lawyers. It is believed that this is the only practical skill of this kind currently included in the LJTC's vocational training programs. It was taught in Tetum. The materials are available in Tetum, Portuguese and English.

²⁶ See also article 7 of Decree Law No. 18/2016 of 22 June, on the Regime of the Training Activities of the Legal and Judicial Training Center, which provides that in the area of legal training, the Center favours the use of Portuguese.

²⁷ Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015, p11.

²⁸ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016. For example, a Timorese lawyer has begun delivering the Mai Munisipiu-designed case management training in Tetum.

²⁹ Law No. 11/2008 on the Juridical Regime Governing the Private Legal Profession and Lawyers' Training, 30 July 2008, article 71; Decree Law No. 15/2004 on the Recruitment and Training for the Professional Careers of the Judiciary and the Office of the Public Defender, articles 25-29; Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016.

³⁰ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p68.

³¹ *Ibid*, p72.

³² Decree Law No. 18/2016 on the Regime of Training Activities of the Legal and Judicial Training Centre, articles 52-58.

³³ Interview with Natalino Leto and Aniceto Lopes, Liberta, 26 September 2016; interview with Alexandrina de Soares and Aguida de Fatima, Fundasaun Edukasaun Komunitade Matebian ("ECM"), 27 September 2016; interview with Sergio Lobo, JNJ, 27 September 2016.

Although those who undertake their legal training in Timor-Leste must complete a course at the LJTC to become a lawyer, lawyers from other jurisdictions can register as private lawyers in Timor-Leste without completing a course at the LJTC. The law foresees that this will eventually only be possible for foreign lawyers meeting certain requirements, which include five years of experience practising in a foreign jurisdiction.³⁴ More relaxed requirements applied from 2008 until the end of 2016, under a “transitional period” during which any foreign lawyer was able to register to practise in Timor-Leste. However that transitional period has not been extended past the end of 2016. At the time of writing this report, information obtained by JSMP was that it is likely that the transitional period in Law No. 11/2008 will be extended by National Parliament in order to debate, finalize and approve the draft Bar Association law.

As a result of the inadequacy of the training of Timorese lawyers, as well as other causes, Timorese lawyers are often of limited capacity. And while this is not exclusively the case, there is a perception that Timorese lawyers are of a lower standard than the numerous foreign-trained lawyers now registered in Timor-Leste. This has resulted in the emergence of a two-tier legal profession. Foreign trained lawyers, often working in foreign managed firms based in Dili, secure the great majority of lucrative work (principally for government, government contractors, and other profitable companies). Meanwhile, it is reported that most Timorese-trained private lawyers find it difficult to sustain a practice relying on privately paid work. A number of private lawyers who have attempted to do so have returned to the LJTC in order to re-train as magistrates or public defenders in order to secure a reliable income.³⁵

(2) Regulation

Oversight bodies exist in respect of all branches of the legal profession: judges, prosecutors and public defenders are each overseen by a “Superior Council”, and private lawyers are overseen by the Legal Profession Management and Discipline Council, which operates within the LJTC and under the framework of a parliamentary law (the Private Lawyers’ Law). The regulation of private lawyers in this way was always understood to be a transitional measure pending the establishment of an independent bar association, which would take over the regulation of private lawyers. However the establishment of a bar association has been delayed repeatedly. As is explained later in this report, the Superior Councils and the Legal Profession Management and Discipline Council do not appear to be currently providing real oversight of the quality of the work undertaken by magistrates, public defenders and private lawyers.

A draft Bar Association Law has been developed by the MOJ and put before the Parliament, but has yet to be debated. Civil society has called for the draft law to be included in the Parliamentary agenda for debate before the 2017 parliamentary elections, however this has yet to occur.³⁶ This draft law transfers the regulation of private lawyers from the Legal Profession Management and Discipline Council to a new independent bar association. However the control of the training and qualification of private lawyers will remain with the LJTC (and thus the MOJ), rather than be transferred to the new bar association. If passed, the law would therefore create a situation whereby the training and qualification of private lawyers is governed by the MOJ, but the regulation of those private lawyers following qualification is undertaken by an independent bar association. This aspect of the draft law

³⁴ Law No. 11/2008, as amended by Law No. 1/2013 and Law No. 4/2015, article 2(3).
Law No. 11/2008, as amended by Law No. 1/2013 and Law No. 4/2015, article 68.

³⁵ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016.

³⁶ For more information on the draft law, see the submissions from JSMP and the International Bar Association (soon to be published on jsmp.tl) and Mai Munisipiu’s commentary (available on request from Counterpart International).

has been criticised, and it has been argued that the new bar association should have responsibility for the training of private lawyers as well for their regulation following qualification.³⁷ However it might also be argued that the training of private lawyers should not be completely detached from that of magistrates and public defenders. These arguments will have to be further explored and closely considered as the draft law progresses.

The draft Bar Association Law would not significantly change the current position in relation to regulating continuing education for lawyers. It merely provides that such education is “a duty of all lawyers”, and that the bar association is responsible for organising training services; it does not make continuing professional development a clear regulatory requirement or establish a system for its operation.

³⁷Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015, p27.

III. LEGAL FRAMEWORK FOR LEGAL AID PROVISION

There is no comprehensive and overarching legislative framework or policy for the provision of legal aid in Timor-Leste. The JSSP aimed to approve a Law on Legal Aid by 2017, but this has not yet been achieved.³⁸ There are, however, numerous different laws establishing a right to legal aid for those of limited means, and legislation is in place for the provision of legal aid by the OPD. There is currently no system in place for state funding of legal aid by private lawyers, notwithstanding that the JSSP commits to ensuring that legal aid is provided by *both* public defenders *and* private lawyers (this is discussed later in this report). A draft “Access to Courts Law” which would have established such a framework, was developed some years ago by the MOJ but has never been proposed to the Parliament.

In its 2015 report on Timor-Leste, the Committee on the Elimination of all forms of Discrimination Against Women explicitly raised concerns about “the absence of an effective system of legal aid” and recommended that such a system be created.³⁹ However no notable change has occurred since then.

Laws establishing the right to legal aid

The Constitution includes the following relevant provisions:

- Section 26 provides that “[a]ccess to courts is guaranteed to all for the defence of legally protected rights and interests” and that “[j]ustice shall not be denied for insufficient economic means.” This provision is interpreted as guaranteeing both criminal and civil legal aid.
- Section 34 provides, in relation to criminal proceedings, that “[a]n accused person has the right to select, and be assisted by, a lawyer at all stages of the proceedings and the law shall determine the circumstances for which the presence of a lawyer is mandatory.”
- Section 135 provides that “[l]egal and judicial aid is of social interest, and lawyers and defenders shall be governed by this principle.”

By virtue of section 9 of the Constitution, Timorese law also incorporates international law: in this instance most relevantly article 14 of the International Covenant on Civil and Political Rights. It guarantees equal access to courts as well as additional rights for persons charged with a criminal offence, including the right to “defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”⁴⁰

The UN Human Rights Committee has elaborated that:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal

³⁸ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p60.

³⁹ CEDAW, Concluding observations on the combined second and third periodic reports of Timor-Leste, CEDAW/C/TLS/CO/2-3, 24 November 2015, paras 10-11.

⁴⁰ ICCPR, article 14(3)(d).

*aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.*⁴¹

Several pieces of regular legislation in Timor-Leste detail the current provision of legal aid.

Article 25 of the Law Against Domestic Violence provides that “[i]n all legal proceedings, the victim must be accompanied by a lawyer or a public defender, regardless of whether the victim has the financial capacity to retain a lawyer.”⁴²

The Code of Criminal Procedure reflects the constitutional right to counsel in criminal proceedings. Article 60 provides that a defendant has a right “[t]o be assisted by a defender where the law determines compulsory assistance or where he or she so requires”, and Article 68 provides that “[a]ssistance by a defender is compulsory: (a) [i]n the first questioning of a defendant held under arrest or detention; (b) [f]rom the time the indictment is presented until such time as a decision is rendered final, particularly in lodging an appeal; (c) [i]n filing such claims; [and] (d) [i]n such other cases as stated by law.” Article 66 provides that “[a] defendant has the right to retain counsel or to have a defender appointed, whether on a discretionary basis or at request” and that “[t]he replacement of a defender, on the initiative of the defendant or of the defender himself or herself, by invoking reasonable grounds, is permitted.”

Article 21 of the Organic Statute of the MOJ⁴³ provides that the OPD is the body responsible for providing complete and free of charge legal, judicial and extra-judicial assistance to low-income citizens. Article 1 of the Public Defender’s Office Statute (“the OPD statute”)⁴⁴ confirms that the OPD is “responsible for providing full and free legal, judicial and extra-judicial aid to the neediest citizens.” Article 3 provides that the OPD “may not refuse to provide its services if it is requested to do so” and Article 4 confirms that those services are “free of charge.” As explained above, Section 26 of the Constitution is interpreted as guaranteeing both criminal and civil legal aid, and the OPD routinely provides advice and assistance in relation to both criminal and civil matters.

Article 5 of the OPD statute provides that those who request the OPD’s assistance and declare that they do not have the means to pay for a lawyer have the right to such assistance. However Article 6 provides that “[w]hen it is suspected that the user has the means to bear the expense of a lawyer, the [OPD] invites him/her/it to prove the lack of economic and financial means” and “[w]hen, in view of the proof submitted, the [OPD] still has well-founded suspicions regarding the user’s lack of means and the latter continues to insist, the matter is referred to the judge, who shall decide in a non-appealable decision after requesting other supplementary proof if deemed necessary.” The OPD statute thus essentially establishes a presumption in favour of an applicant who seeks assistance and claims to lack means, and the OPD will only investigate the issue if it suspects that the applicant has such means. This is a sensible approach given that the vast majority of people in Timor-Leste plainly lack such means, such that the investigation of the means of every applicant for assistance would be a poor use of resources.

⁴¹ Human Rights Committee, General Comment No.32: Article 14 Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para.10.

⁴² Decree Law No. 7/2010.

⁴³ Decree Law No. 26/2015.

⁴⁴ Decree Law No. 38/2008.

Previously proposed legislative changes

As set out above, at present no system exists for the government to fund legal aid through private lawyers. Several years ago the MOJ developed a draft Access to Courts Law, which would have established such a system.

However the draft law was ultimately not put before Parliament and there does not appear to be any current plan to legislate on this issue, notwithstanding the aim in the JSSP to approve a Law on Legal Aid by 2017.⁴⁵ Despite this, there is some value in considering the system proposed under the draft Access to Courts Law, since it may provide some indication of how this issue will be approached by the government in the future, as it implements the JSSP.

Under the draft law, the bar association is given an important role in the administration of legal aid provision by private lawyers. However, as explained above, the bar association has not yet been established, and one reason given for why the draft Access to Courts Law has not progressed is that it is necessary first to establish the bar association and a permanent regulatory framework for private lawyers before establishing a system of state funding of legal aid provision by such lawyers.

The draft law distinguishes between “legal aid”, which (unlike in this report) is given the restrictive meaning of representation in formal litigation, and “legal advice”, which refers to advice outside the context of litigation. It is clear that both forms of assistance were intended to include assistance in relation to both criminal and civil matters.

(1) “Legal aid” in litigation

The proposed law contained detailed provisions for a litigant to be represented free of charge, whether by a public defender or a private lawyer of his or her choosing, who could be subsidised by the state. The draft law required a person or his chosen private lawyer to apply to a court for legal aid, and that application would then be decided by a judge on the basis of detailed provisions as to how to determine indigence. According to the proposal, where legal aid was granted, the court would decide what fees and expenses would be paid to the private lawyer as part of its final ruling in the case (but the court would make this decision in accordance with guidance issued jointly by the MOJ and the Ministry of Finance).

(2) “Legal advice”

The proposed law also envisaged that free legal advice (outside of the context of litigation) would be provided by private lawyers, and that this too would be paid for by the state. However this proposed scheme was set out only in very general terms and its scope was somewhat unclear. It envisaged that a free public legal advisory service would be established by agreement between the bar association and the Ministry of Justice, but it did not include any provisions in relation to application processes, means testing or remuneration of private lawyers. Presumably the detail of such a system would have been worked out through that agreement.

⁴⁵ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p60. See also p86.

IV. INSTITUTIONS DELIVERING LEGAL AID

The JSSP clearly commits to ensuring that legal aid is provided by *both* public defenders and private lawyers: it commits to

*[g]uaranteeing assistance and legal aid which is effective and of appropriate quality, particularly to the most disadvantaged, by strengthening the technical skills of public defenders and creating an independent and effective group of private lawyers.*⁴⁶

The JSSP also acknowledges the right of all citizens to legal aid and assistance “*provided by private lawyers and public defenders...*”⁴⁷ and the importance of “[*d*]eveloping an integrated legal assistance approach, involving public defenders, private lawyers, paralegals and other judicial support and witness protection mechanisms ...”⁴⁸ The JSSP plans for legislation not only creating an independent professional body for private lawyers but also including a specific law on legal aid.⁴⁹

Despite these plans, current arrangements for legal aid remain limited. As explained above, the draft Access to Courts Law, providing for state funding of legal aid provision by private lawyers, has not progressed. Presently the only state-funded legal aid is that provided by the OPD. There are also, however, a small number of private lawyers who provide legal aid but who are not funded by the state – they mostly work in non-profit organisations funded by foreign donors.

Office of the Public Defender

Although the Timorese Constitution distinguishes between “lawyers” and “defenders”⁵⁰; it does not itself expressly require the establishment of an OPD, and thus does not elaborate on that institution’s role. The OPD Statute states that the institution “*is a public service, responsible for providing full and free legal, judicial and extra-judicial aid to the neediest citizens.*”⁵¹ The OPD’s mandate is not limited in scope to criminal defence, and it provides free legal assistance in a broad range of civil proceedings as well as providing legal advice outside the context of specific litigation.

As explained above, the OPD has offices in each of the municipalities in which there is a district court, namely Dili, Baucau, Suai and Oecusse. There are currently a total of 30 public defenders. Eighteen of these are based in Dili, six in Baucau, three in Suai and three in Oecusse.⁵² The public defenders are assisted by 45 “justice officials”, who in practice provide support of a largely administrative nature.⁵³ There is a very high retention rate of public defenders,⁵⁴ and the overall impression given by the research carried out for this report is that public defenders are generally committed and hard-working. However that research has also revealed a number of serious problems with the OPD and the legal assistance that it provides.

(1) Workload

⁴⁶ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p11.

⁴⁷ *Ibid.*, p37.

⁴⁸ *Ibid.*, p.20. See also pp33, 86.

⁴⁹ *Ibid.*, pp60, 86.

⁵⁰ Constitution, section 135.

⁵¹ Decree Law No. 38/2008, Public Defender’s Office Statute, article 1(1).

⁵² Interview with Sergio Hornai, Public Defender General, 29 September 2016.

⁵³ Interview with Sergio Hornai, Public Defender General, 29 September 2016; Interview with Cancio Xavier, Public Defender, 22 September 2016; “Justice officials” are regulated by Decree Law 19/2002, Statute of Justice Officials, 25 April 2012. Although possession of a law degree can affect a Justice Official’s promotion to certain categories of possession (article 15(2)), it is not a requirement for the role.

⁵⁴ Interview with Sergio Hornai, Public Defender General, 29 September 2016.

The OPD does not have enough public defenders to meet its workload, which is increasing in volume and complexity (for example as a result of prosecutions concerning various types of organized crime and corruption).⁵⁵ In interview the Public Defender General explained that public defenders do not have enough time to adequately prepare for all of their cases, and that this undermines the quality of their work.⁵⁶ The extent of this problem seems severe – public defenders can be required to cover more than three trials in a day.⁵⁷ There is therefore clearly a need for a substantial increase in the number of public defenders. This is so even if, as recommended by this report, legal aid by private lawyers is made available in such a way as to reduce the burden on the OPD.

As explained above, the stipulation that the OPD exists to assist the “neediest citizens”⁵⁸ is reflected by law in a presumption that those declaring themselves to be without means shall be assisted,⁵⁹ but with the possibility for the OPD to request proof of this lack of means and if necessary refer the matter to a judge for determination.⁶⁰ The socio-economic reality in Timor-Leste is such that the vast majority of potential clients will lack such means. However it seems that the OPD is not in practice requesting proof of a lack of means from potential clients who appear to be able to afford a lawyer, and that it has in certain cases provided assistance to such persons: it has, for example, recently represented private companies in commercial disputes and government ministers in corruption cases.⁶¹ Legal aid systems in other jurisdictions generally do not allow for assistance to be provided in these circumstances, and the OPD’s willingness to do so is surprising given that it does not have the capacity to properly meet the needs of the vast and increasing number of indigent clients it represents.

(2) Resources

In addition to being under-staffed, the OPD is under-resourced. Crucially, the OPD appears to be significantly less well-resourced than the OPG. As explained above, the OPG has recently opened new offices in three further municipalities; the OPD believes that it too needs to open new offices, but it has not yet been able to do so, apparently because of budgetary issues.⁶² The OPD also lacks certain important resources – it does not, for example, have enough vehicles to be able to travel to clients and witnesses as often as is necessary.

Direct budgetary comparisons between the OPD and OPG can be misleading, given the different roles of the two institutions (for example: the different types of proceedings in which they engage and the fact that the prosecutor carries the burden of proof in criminal cases). However these factors by themselves do not justify the significant difference in budget allocations between the two institutions. As shown by the figures in the annex to this report, the OPG has consistently been provided with a budget more than twice that of the OPD. For 2017 the OPG is allocated more than three times the OPD’s budget. If amounts to be used for major capital expenditure (in the case of the OPD, amounts intended for the development

⁵⁵ Interview with Sergio Hornai, Public Defender General, 29 September 2016; Interview with Cancio Xavier, Public Defender, 22 September 2016.

⁵⁶ Interview with Sergio Hornai, Public Defender General, 29 September 2016; this was also confirmed in interview with Cancio Xavier, Public Defender, 22 September 2016.

⁵⁷ Interview with Sergio Hornai, Public Defender General, 29 September 2016.

⁵⁸ Decree Law 38/2008, Public Defender’s Office Statute, article 1(1).

⁵⁹ Decree Law 38/2008, Public Defender’s Office Statute, article 5(1).

⁶⁰ Decree Law 38/2008, Public Defender’s Office Statute, article 6.

⁶¹ Interview with Cancio Xavier, Public Defender, 22 September 2016; Interview with Sahe da Silva, a private lawyer working with the firm Da Silva and Associates, 22 September 2016; Interview with Nuno Marrazes, a private lawyer working with the firm Da Silva and Associates, 29 September 2016.

⁶² Interview with Cancio Xavier, Public Defender, 22 September 2016.

of new district offices) are excluded in order to show regular operating budget, the figures are even starker: \$1,010,000 for the OPD and \$4,118,000 for the OPG. It is also noteworthy that in some important and arguably comparable areas, such as vehicle purchases, the OPG has received significantly more funding over time than the OPD.

The OPD's ability to ensure that it is properly resourced is hampered by the fact that it is under the control of the MOJ and has little financial independence.⁶³ The OPG, by contrast, is independent and has full control of its budget. JSMP has therefore recommended that the OPD be provided with its own budget, separate from the MOJ, so that it can meet its equipment and other needs more efficiently.⁶⁴ The JSSP expressly recognises that the OPD's "*degree of autonomy is inadequate*"⁶⁵ and notes the challenge of "[r]evising, when appropriate, the legal and constitutional status of the Office of the Public Defender with a view to reinforce its independence and autonomy."⁶⁶

(3) Accessibility

It is clearly difficult or impossible for most people in Timor-Leste to access the OPD, given the OPD's presence in just four of the country's thirteen municipalities and the country's poor road and transport infrastructure. The OPD also faces difficulty in travelling to meet clients and witnesses because of its insufficient resources, including an insufficient number of vehicles.⁶⁷ Timor-Leste only has two functioning prisons (in the municipalities of Dili and Ermera⁶⁸), and this makes it particularly difficult for public defenders outside of Dili to meet clients who are in preventive detention or serving custodial sentences.

In addition, there will clearly be many cases where the OPD will not be able to assist a person in need because of a conflict of interest with an existing OPD client, and that person is unlikely to find alternative representation because there is no other state-funded legal aid available in the country. (As explained above and below, there are a small number of private lawyers providing legal aid, but their capacity and reach is very limited, and their work depends on short-term funding by foreign donors). Conflicts will routinely occur, for example, between opposing sides in civil disputes of a kind likely to require legal aid on both sides, such as family and land disputes. They will also occur between defendants and victims in some criminal proceedings. While the Criminal Procedure Code envisages that victims are generally represented by the public prosecutor,⁶⁹ in domestic violence cases victims have a right to be accompanied in the proceedings by a private lawyer or a public defender.⁷⁰ Given that the OPD represents the defendant in most criminal cases, including those involving domestic violence, the potential for a conflict clearly arises if public defenders might be required to accompany victims. At the present time this conflict is largely avoided because of the existence of a non-governmental organisation named Asisténsia Legál ba Feto no Labarik ("ALFeLa"), which provides free legal services to victims of domestic violence (the work of this organisation is discussed further below).⁷¹

(4) Quality

⁶³ Interview with Cancio Xavier, Public Defender, 22 September 2016.

⁶⁴ Judicial System Monitoring Programme, *2015 Overview of the Justice Sector*, p12.

⁶⁵ JSSP, p20.

⁶⁶ *Ibid.* p21.

⁶⁷ Interview with Cancio Xavier, Public Defender, 22 September 2016.

⁶⁸ A third prison, in Covalima, was inaugurated on 26 November 2016, but at the time of writing it is not yet in use.

⁶⁹ Criminal Procedure Code, preamble, para.3.

⁷⁰ Law No. 7/2010 on Domestic Violence, article 25.

⁷¹ As with other private organisations providing free legal services, ALFeLa is entirely dependent on foreign donor funding, calling into question its long term sustainability: this issue is discussed further below.

As explained above, the Public Defender General acknowledges that the quality of the assistance provided by the OPD is undermined because there are not enough public defenders to meet the OPD's large and increasing workload. Recent assessments of the justice sector have concluded that the work of *all* public sector judicial officials (judges, prosecutors and public defenders) is often of poor quality, because of both a lack of resources and inadequate training before and during legal practice.⁷² The research carried out for this report supports such conclusions in relation to the OPD. The court monitoring carried out by JSMP,⁷³ and the information gained from interviews with lawyers working in the justice sector (including a senior judge), strongly suggest that the assistance provided by public defenders is often inadequate in the following important respects:

- Public defenders often appear to be inadequately prepared for their cases. Serious failings in this respect included two cases in which a public defender had not met with a defendant charged with homicide until immediately before the trial. Indeed, it is said that the first meeting between a public defender and his or her client frequently occurs on the first day of the trial. Clearly this raises serious questions as to whether a defence based on the client's instructions has been properly prepared in advance: without having spoken with the client, a defender will not have been able to effectively scrutinise prosecution allegations and evidence, gather defence evidence (including by identifying witnesses), and develop a case strategy.
- Public defenders very often fail to question prosecution witnesses. Public defenders did not question prosecution witnesses in most of the cases that were monitored by JSMP, including a homicide case. Likewise, public defenders very often fail to call defence witnesses - no defence witnesses were called in the vast majority of the cases monitored by JSMP. Drawing conclusions about such omissions by a public defender in a particular case is clearly difficult: there may be cases where a sensible tactical decision has been taken not to question certain prosecution witnesses, and there will certainly be cases where there are no witnesses available for the defence (other than the defendant). However it is extremely unlikely that such explanations could be applicable in such a high proportion of cases, and the frequency with which public defenders are declining to question prosecution witnesses and call defence witnesses therefore strongly suggests systematic problems in the quality of the defence being provided.
- It appears that public defenders often fail to rebut prosecution arguments and to make proper closing submissions in relation to both guilt and sentencing. Observers have also expressed concern as to whether certain defendants have been properly advised on plea. This suspicion appears to be based on the frequency with which guilty pleas are entered, and the extremely limited and vague submissions that are sometimes made by public defenders (one source commented that public defenders sometimes simply ask the court to "do justice" without explaining what would be just in the circumstances). However it is not possible to determine with certainty the existence or extent of this problem without further detailed research.

As explained above, the research carried out for this report suggests that public defenders are generally committed and hard-working, but it is nonetheless unsurprising that their work is often of poor quality given their unreasonably large workloads, the inadequacy of the

⁷²Institute for Policy Analysis and Conflict, *Justice at the Crossroads in Timor-Leste*, 7 September 2015.

⁷³ Some weaknesses in the performance of public defenders as observed by JSMP are also described in the recent JSMP report on *Battered women and self-defence in Timor-Leste* (February 2017): http://jsmp.tl/wp-content/uploads/2012/05/Battered-women_JSMP-report-2017_English.pdf

teaching that they receive at the LJTC, and the lack of any significant ongoing training following qualification.

Private lawyers

In order to be entitled to practise as a private lawyer in Timor-Leste, a person must have successfully completed the course at the LJTC. However, foreign-trained lawyers can also register as private lawyers if they meet the relevant requirements.

There are currently 181 registered private lawyers in Timor-Leste, around 70 of whom have graduated from the LJTC and the rest of whom were trained in another jurisdiction.⁷⁴ The majority of private lawyers in Timor-Leste, and almost all of those who have trained in another jurisdiction, are practising within commercial firms in Dili.⁷⁵ It appears that only a very small number of these firms are offering *pro bono* work, and that those which do so do very little of it and believe that it is not commercially viable to do a substantial amount of it.⁷⁶

The vast majority of private legal aid provision is carried out by private lawyers working within small organisations that have been funded to carry out such work by foreign donors. Most of these organisations are non-profit NGOs. Examples include Liberta, Fundasaun Edukasaun Komunitade Matebian (“ECM”), Fundasaun Fatu Sinai Oecusse (“FSSO”), the Baucau Comissão Justica e Paz, and ALFeLa.⁷⁷ Most of these organisations carry out a broad range of legal work, but focus their work to a specific geographical area or areas. The one key exception to this is ALFeLa, which works throughout the country but in the specific area of assisting women and children, particularly victims of gender-based violence. Historically all of these organisations have been highly or completely dependent on donor funding, but such funding has been declining over time. Although some of these organisations have attempted to develop income from privately paying clients, to date none has managed to generate any significant contribution to organisational budgets in this way.

In addition to those organisations that are dependent for their survival on foreign donor funding, some legal aid is being provided by organisations that mix for-profit and non-profit work. An example of this is JNJ, which was established as a private law firm in Dili, but has opened an office in Suai which is funded by the Mai Munisípiu project (which was previously called Ba Distrito).

The following conclusions as to private legal aid provision can be drawn from the interviews carried out for this report, including interviews with private lawyers working in the above organisations:

(1) Nature and extent of private legal aid provision

It is estimated that there are fewer than 20 private lawyers in Timor-Leste who spend a majority of their time undertaking legal aid work. These private lawyers all work in small, mostly non-profit, organisations, many of which also employ staff who have law degrees but have not undertaken the course at the LJTC. They generally encounter the same range of legal needs in the locations in which they work, which mostly relate to criminal cases and

⁷⁴ Statistics provided by the LJTC; Interview with Paulo Remedios, head of the Timor-Leste Private Lawyers Association, 26 September 2016. It is noted that although 72 private lawyers have qualified to date through the LJTC, they may not all be currently registered as such: it is reported that some have returned to the LJTC to requalify as magistrates or public defenders.⁷⁴ Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016.

⁷⁵ Interview with Paulo Remedios, head of the Timor-Leste Private Lawyers Association, 26 September 2016.

⁷⁶ Interview with Paulo Remedios, head of the Timor-Leste Private Lawyers Association, 26 September 2016.

Interview with Sahe da Silva, a private lawyer working with the firm Da Silva and Associates, 22 September 2016.

⁷⁷ Of these organisations Liberta, FFSO, and the Baucau Comissão Justica e Paz are Mai Munisípiu grantees.

family and land disputes. Many of them provide a holistic range of legal services that goes beyond representing clients in formal litigation and includes advice on whether to have recourse to the formal justice system rather than informal mechanisms, as well as involvement in informal justice processes including negotiation and mediation.⁷⁸

One organisation – ALFeLa – offers a more specialised service: it focuses on legal assistance for women and children and has a particular emphasis on representing victims of gender-based violence, although it also provides services to women and children who are parties in civil cases (particularly family law matters) and defendants in criminal proceedings. Other organisations providing legal aid tend to be less specialised and undertake a variety of work, although in some cases they may develop particular specialised programmes in order to implement a donor grant, as has occurred with those organisations who have been given funding by Oxfam for the specific purpose of assisting with the resolution of land disputes.

(2) Need

There is a huge need for private legal aid provision in Timor-Leste. Many people need legal assistance in relation to criminal proceedings and a broad range of civil disputes, including family and land disputes in particular, and the vast majority of people do not have the means to pay for such assistance. This need cannot be met by the OPD alone – private lawyers often represent clients who cannot access the OPD. This may be for reasons including geographical distance, as discussed above. In other cases it may be due to conflicts of interest. The latter may arise where there is a real conflict: for example where the OPD already represents the opposing party in a civil dispute, or where a victim seeks legal representation in a criminal case where the OPD acts for the defendant. Perceived conflicts also arise: it has been noted that some private litigants in cases involving the state or state interests are reluctant to seek the assistance OPD because of concerns as to its independence.

The resources and the geographical reach of the organisations providing legal aid are very limited – their combined efforts only meet the needs of a small section of the population. There is therefore a clear need for a much greater level of private legal aid provision.

(3) Funding and sustainability

Long term sustainable funding of private legal aid provision is crucial. All of the private sector organisations currently providing legal aid rely heavily on short-term funding by foreign donors. Funding by foreign donors is by its very nature unsustainable. Such donors typically commit funds only for a few years at a time and very often change funding priorities at the end of these cycles. In the past legal aid activities have ended because they ceased to be funded, as occurred for some NGOs who were previously funded by USAID through the Asia Foundation's Access to Justice Program, which ended in 2012. In that instance it was reported that clients were left without assistance before their cases had been concluded. Organisations which had been funded through the program were forced to change their activities and lost employee private lawyers whom they could no longer pay. Private lawyers currently providing legal aid are extremely concerned by the prospect of being unable to continue their work once the donor funding on which they rely is no longer available. These difficulties are only partially addressed where donor funding is provided to an organisation that is not dependent on such funding for its very existence, but only for some of its activities (as in the case of JNJ). In such cases termination of donor funding would result in these

⁷⁸See also T. Kirk, *Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste*, the Justice and Security Research Programme and the Asia Foundation, June 2014

organisations ceasing or drastically reducing their legal aid activities, and likely having to make redundant the private lawyers currently providing those services.

In addition to being unsustainable, donor funding can compel organisations to alter their legal aid activities in accordance with donor priorities. In some cases, areas of donor focus have been identified carefully and do address clear needs (as can be said of funding by Oxfam and The Asia Foundation for legal aid provision specifically in relation to land issues and gender based violence respectively). However in some cases donors provide short-term funding which temporarily shifts the existing focus of a legal aid organisation in a way that does not appear to address community needs or organisational sustainability. For example, the provision of funding by Caritas in Baucau has resulted in ECM adopting a program on victim representation for the first time, notwithstanding that ALFeLa has greater capacity to provide such services and is also providing them in the same geographical area.

However, at the present time, no viable alternatives to foreign donor funding appear to exist for private legal aid providers in Timor-Leste. Those working in the private legal sector report that it is not currently realistic for Timorese firms to subsidise significant amounts of *pro bono* work with other paid work. As explained above, most well-remunerated legal work is sourced from government and commercial interests and this work is overwhelmingly awarded to firms staffed by foreign lawyers in Dili. Very few of these firms appear to have a current interest in providing *pro bono* assistance, and those that do have such an interest believe that it would not be commercially viable to undertake a substantial amount *pro bono* work. Even if a commercial firm has an interest in providing *pro bono* assistance, it may not have the expertise to assist with criminal and family matters and is not in any event likely to be located within reach of many communities in need of legal aid. Firms staffed by locally-trained lawyers appear to be more interested in undertaking *pro bono* work, but they are unable to earn sufficient money from paid work in order to support any significant volume of unpaid work.⁷⁹ One reason for this is that clients who can pay high fees prefer to retain the services of a foreign lawyer. Even if, however, local firms had greater access to highly paid work, they would not be able to devote a majority of their time to legal aid work. Proper legal aid provision requires sufficient numbers of lawyers who spend a substantial portion of their time working on typical legal aid cases and thus gain and maintain the skills that are necessary to do that particular work.

Even in countries with a strong culture of *pro bono* work, such work tends to constitute only a small part of legal aid services overall, with the vast majority of legal aid work being undertaken by lawyers who specialise in that work and who consequently have the skills and expertise to do it efficiently and to a high standard. For the reasons explained above, the current and potential role of *pro bono* work in meeting the legal needs of those without means in Timor-Leste is even smaller. Private legal aid provision in Timor-Leste must therefore be funded by the state, as envisaged by the previously proposed draft Access to Courts Law. In contrast to foreign donors, the state is in a position to regularly budget for legal aid over the long term. Moreover it is better placed than donors to identify areas of legal aid need and ensure appropriate and comprehensive coverage.

(4) Quality

⁷⁹ Private lawyers also reported that conditional fee agreements (“no win, no fee” arrangements) are not a solution in Timor-Leste (even assuming that the current proposal in article 35(c) of the draft Bar Association Law to outlaw such arrangements is not brought into force). This is partly because there is not necessarily an entitlement or expectation of a successful party receiving its costs, but even more fundamentally because legal enforcement mechanisms are so weak that private lawyers report they are rarely paid for work which is invoiced *post facto*, and most demand an up-front fee for their services (interview with Sahe da Silva, a private lawyer working with the firm Da Silva and Associates, 22 September 2016).

Although there has been no comprehensive monitoring or assessment of private lawyers currently providing legal aid, there are serious concerns as to the quality of their work. For example, confidential donor evaluations which were shared for the purpose of producing this report reveal that private lawyers providing legal aid services often do not possess basic skills such as taking a client's instructions and drafting witness statements. File noting and other information management systems have been identified as being fundamentally deficient, as were systems to identify conflicts of interest and meet litigation deadlines and limitation periods.

Resource constraints no doubt play some role in these problems: private lawyers providing legal aid report many of the same difficulties that face public defenders. Several reported that they spend their own funds on transport and phone calls in order to contact their clients because their organisations are unable to cover such costs.

However it seems likely that capacity limitations play a more significant role in reducing the quality of legal aid services. As is the case with public defenders and magistrates, the teaching and training of private lawyers is deeply inadequate, and this almost inevitably undermines the quality of their work in practice. In addition, they tend to work in very small organisations and are often isolated from other more senior lawyers, such that they do not benefit significantly or at all from mentoring, and they have virtually no access to further teaching and training once in practice. This is another basis on which the majority of donor-funded legal aid work in Timor-Leste can be criticised: private lawyers currently funded by international donors to work in small and fairly isolated NGOs might develop better skills if they were able to work together with, or under the supervision of, more experienced lawyers. This could be achieved through the kind of model currently operating at JNJ, whereby one private lawyer is funded by Mai Munisípiu to do legal aid work in Suai, but benefits from the mentoring and support of JNJ's more experienced private lawyers working on a for-profit basis in Dili.

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V. CHALLENGES

It is clear from the above that there are two major challenges to be addressed if the right to legal aid is to be realized in Timor-Leste: legal aid must be much more accessible and it must be of a much higher quality.

Accessibility

The need for increased access to legal aid is clearly recognised in the JSSP: goal 2 aims to “de-concentrate” justice sector services so that “people in all districts can access justice”,⁸⁰ and goal 11 aims to improve the availability of justice services, including by “designing an integrated system of legal aid and judicial support throughout the country”.⁸¹ However legal aid remains inaccessible to many in Timor-Leste.

It is clear that the reach of the OPD is extremely limited, such that its services are inaccessible to a large proportion of the population. This challenge will only be met if the OPD’s staff and resources are dramatically increased so that it can manage its large and increasing workload and so that it can reach and assist more people. This would need to include not only offices in all (or at least most) municipalities, but also the creation of real capacity within the OPD to reach more remote areas within each municipality, including through increased staffing and resourcing for transport and communications.

Although there is an urgent need to dramatically increase the number of public defenders in the OPD, there is a limit to the rate at which numbers can be increased: each year there is only a limited pool of law graduates of a sufficient standard to gain entry to the LJTC, and there is also a limit to the OPD’s capacity to train LJTC graduates who choose to become public defenders. In order to effectively and sustainably increase the number of public defenders, therefore, careful consideration must be given to the rate at which the OPD can train new trainees, and steps should be taken to increase the number of law graduates admitted to the LJTC accordingly. Even if the OPD increases its number of public defenders at the greatest possible rate, bearing in mind these constraints, it is likely to be many years before it has a sufficient number of public defenders to be able to meet its huge workload and the needs of Timor-Leste’s entire population.

The OPD’s ability to reach all those in need of its services has been restricted not only by its limited staff and resources, but also by its limited outreach programs. Community members, particularly those remote from OPD locations, are often unaware of the institution and the services it offers, let alone of how to contact it. Partly in recognition of this challenge the UNDP is piloting a project within the OPD which will include paralegal services and community education to raise awareness of OPD services.⁸² However the project has some significant drawbacks, not least of which is its own very limited geographical reach (OPD offices in Baucau and Suai) which does not greatly extend that of the OPD itself; as well as its limited duration (according to project documents, the project will only run for an initial 10 month period, with the possibility of extension). In addition, the sustainability of the project is called into question by its reliance on contracted civil society organisations rather than individuals who might be in a position to work within the OPD on a longer-term basis.

⁸⁰ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p38.

⁸¹ *Ibid.*, p86

⁸² UNDP, Access to Justice Clinics concept note, undated; UNDP, Project on Access to Justice Clinics (AJCs) - Call for Proposals for Micro-Capital Grants, 2016; Interview with Sora Chung and Johnny Joao Crisostomo, UNDP, 23 September 2016.

However, even with increased resourcing and well-designed community engagement, there will always be a limit on the OPD's ability to comprehensively address Timor-Leste's legal aid needs. This is not least because of the potential for conflicts of interest to arise if the OPD is the only source of publicly funded free legal services. Members of the public may also have valid reasons to exercise their right to a lawyer of their own choosing, for example in order to obtain a lawyer with a particular speciality or expertise, who speaks a particular local language, or who is geographically accessible. It is therefore important to view the expansion of private legal aid services in Timor-Leste as a mechanism to complement rather than replace or compete with the OPD.

Problems of accessibility also affect legal aid services currently provided by private lawyers. This is notwithstanding the clear acknowledgement in the JSSP of the crucial importance of access to private lawyers by those in need of legal assistance but without the means to pay for it. There are only a tiny number of private lawyers providing legal aid, and their work is unsustainable because it depends on short-term funding by foreign donors rather than state funding. In order to address this challenge, and meet the clear commitment in the JSSP in this respect, it is necessary to dramatically increase the number of private lawyers providing legal aid by ensuring that sufficient numbers of private lawyers are admitted to practice and by establishing a system with a legal basis whereby the state remunerates those private lawyers for providing legal aid.

However, as is the case with public defenders, there is a limit to the rate at which the number of private lawyers providing legal aid can be effectively and sustainably increased. Careful thought must therefore be given to the rate at which graduates of the LJTC can be given the training they need to become effective private legal aid lawyers. This must be born in mind as the draft Bar Association law progresses and as a system for state funding of legal aid provision by private lawyers is developed.

Particular consideration might also be given to identifying areas in which private lawyers could address existing gaps in OPD services: for example by funding private lawyers in those regions or areas where OPD services are less accessible, or who have local language skills not currently being provided by the OPD, or in relation to legal specialities in which the OPD is less experienced. This would maximise the extent to which the OPD and private lawyers would complement rather than compete with each other.

Addressing issues of the supply of lawyers and their accessibility can also not be addressed only by increasing the number of legal service providers. Thought must also be given to ensuring that various forms of legal service are available. A notable area of concern in this respect concerns implementation of article 25 of the Law Against Domestic Violence (see above at page 9 above). Despite this provision's guarantee of the right to legal assistance for victims of domestic violence, action by the state to ensure the implementation of this right has been minimal. Legal services for these victims of domestic violence are almost exclusively provided by donor-funded private lawyers, principally by ALFeLa, which receive no public funding. While ALFeLa is a specialist organisation uniquely placed to provide such services, its current resourcing is clearly inadequate to meet the substantial needs in this area. From JSMP's observation it appears that very few victims of domestic violence are represented by the OPD lawyers. This appears to be largely because of a lack of public information and appropriate referral pathways: women and police apparently do not consider the possibility of legal assistance to victims by the OPD and police instead tend to refer victims of domestic violence to NGOs (including ALFeLa). In any event the involvement of the OPD in representing victims of domestic violence also has some drawbacks at the present time. In particular, the OPD is very frequently involved in representing men accused

of domestic violence, and does not have structures or systems in place to avoid conflicts of interest. Nor do its lawyers possess significant experience representing victims of the kind possessed by ALFeLa. In the longer term, one solution to this problem might be a modification of the OPD's structure to create a separate and specialised unit specialising in victims' representation. In the meanwhile the simpler means by which this problem can be addressed is the provision of sustainable government funding to ALFeLa.

The draft Access to Courts Law previously produced by the MOJ provides a strong starting point for developing of a system of legal aid provided through private lawyers to complement the work of the OPD. However in some respects that draft law would need to be improved. One difficulty with the draft law was that it used a different approach for determining a person's indigence (and thus entitlement to legal aid) than that existing under the OPD statute. There is clearly a need to ensure harmonization in this respect if a system of state funded legal aid by private lawyers is established. The draft law also created a strict distinction between legal representation in the context of litigation, on the one hand, and legal advice, on the other. In reality, the two activities are frequently interconnected, and a legal aid system should be sufficiently flexible to enable private lawyers to provide a comprehensive service to clients, which will often include a combination of representation during litigation and legal advice before, during and/or after such litigation. However there is also a clear need to ensure that the need for legal advice entirely outside the context of litigation is met. Ensuring widespread access to legal advice on key issues such as succession and land transactions may in the long term reduce the incidence of litigation and the demands on various other parts of the justice sector.

Given the importance of informal justice mechanisms in Timor-Leste,⁸³ it is important that state funding of private legal aid provision covers not only formal litigation, but also advice and assistance in relation to informal justice processes. Facilitating the navigation of the formal and informal justice sectors in this way will serve to ensure that people only resort to costly formal litigation when necessary and that informal justice mechanisms do not infringe formal legal rights.⁸⁴ The previously proposed draft Access to Courts Law was unclear as to the extent to which such work would be covered by state funded legal aid and as to how such funding would be decided and administered. These issues will need to be addressed when establishing a system for state funding of legal aid provision by private lawyers.

Aside from private lawyers, it is also possible that alternative means could be used by the government to ensure basic legal support to those engaging with informal justice mechanisms. In particular, paralegals may have particular value in this context, which is likely to require a lower level of technical legal expertise. The potential role of paralegals in legal aid provision is envisaged in the JSSP, which notes the importance of “[d]eveloping an integrated legal assistance approach, involving public defenders, private lawyers [and] paralegals ...”⁸⁵ and aims to design an “integrated system of legal aid” which includes paralegals.⁸⁶ Paralegal roles could include, for example, advice on whether to use the formal or informal justice sector in particular cases, and advice on how to access the OPD or a

⁸³ Ba Distrito, Access to Justice Brief: Community Dispute Resolution in Timor-Leste: a Legal and Human Rights Analysis, October 2016.

⁸⁴ Counterpart International, Ba Distrito, Access to Justice Brief: Community Dispute Resolution in Timor-Leste: a Legal and Human Rights Analysis, October 2016; T. Kirk, Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste, the Justice and Security Research Programme and the Asia Foundation, June 2014

⁸⁵ Justice Sector Strategic Plan for Timor-Leste 2011-2030, p.20.

⁸⁶ *Ibid.*, p86.

private lawyer where necessary. It could also include advice on how best to use informal justice mechanisms, and representation in informal justice processes, including in community dispute resolutions. This kind of work does not necessarily require the skills of a lawyer, and much less time and resources are needed to train people to be able to do it. Reliance on paralegals could involve some cost benefits for the government, and might potentially facilitate the provision of legal services in more remote areas, since paralegals could be trained to work in their own *sukas*.

Until now, no comprehensive (large scale, or long-term) or public paralegal program has existed in Timor-Leste. In the past some development organisations and NGOs have implemented limited projects using paralegals in specific areas. For example, over the five years ending in 2009 *Avocats Sans Frontières* (ASF) trained and supported “community legal liaisons” in three districts (Covalima, Baucau and Liquica) with the goal of creating accessible sources of basic legal education in communities.⁸⁷ The Asia Foundation’s Access to Justice program also supported organisations to offer paralegal activities.⁸⁸ Although these organisations reported positive results from paralegal activities in rural areas, these programs were ended with funding cycles and changes in donor priorities. As with legal aid provided by private lawyers, it is clear that sustainable and coherent paralegal programs will require government support. While the MOJ has previously shown some interest in the establishment of paralegal programs,⁸⁹ and the JSSP envisages a role for paralegals in legal aid provision, no action has been taken in this area and it does not appear to currently be a priority.

This therefore remains an area in which significant untapped opportunities exist. This might especially be the case given the relatively large number of young people with law degrees (whether from Timor-Leste or elsewhere, especially Indonesia) who have not qualified through the LJTC. Thought should be given to utilising this resource. While these graduates may not (or not yet) have the skills to become lawyers, they may be competent to be trained in a more limited role such as that of paralegal.

Potential organisational structures could include paralegals simply working within the same organisations as private lawyers or public defenders and under their supervision, or working within independent organisations that have partnerships with private lawyers or the OPD. Consideration would also have to be given to the regulation of these activities, so as to ensure that they are not inadvertently prohibited by the legislation regulating private lawyers,⁹⁰ but equally to ensure that paralegals are appropriately trained and overseen.

Quality

It is clear that although public defenders and private lawyers providing legal aid are generally committed and hard-working, their work is often nonetheless of poor quality. This is clearly a major challenge. If the constitutional right to legal aid is to be made meaningful in practice, lawyers providing legal aid must meet minimum standards of quality, and should not offer

⁸⁷ ASF, ASF’s Actions in Timor Leste 2002-2009, http://www.asf.be/wp-content/publications/ASF_Actions2002-2009_Timor.pdf, p6.

⁸⁸ The Asia Foundation, *Timor-Leste Law & Justice Survey 2013* p14, <https://asiafoundation.org/resources/pdfs/TimorLesteLJSurvey2013.pdf>.

⁸⁹ See for example Paralegal: Hakbesik Justisa ba Sidadaun Timor-Leste, <http://mj.gov.tl/?q=node/407>; The Asia Foundation, *Timor-Leste Law & Justice Survey 2013*, <https://asiafoundation.org/resources/pdfs/TimorLesteLJSurvey2013.pdf>, p14.

⁹⁰ A question may arise as to whether this is the impact of article 22 of the current Private Lawyers’ Law. The same difficulty potentially arises in respect of articles 11, 58 and 59 of the draft Bar Association Law, which respectively prohibit persons not registered as lawyers from providing legal services, including legal advice, and create a criminal offence and civil liability where the prohibition is violated.

representation that is substantially less effective than that on offer from commercially remunerated lawyers.

Three key difficulties can be identified as contributing to deficiencies in legal aid provided by public defenders and private lawyers (and regrettably, most of these can equally be said to affect prosecutors and judges).

(1) Resourcing issues

First, there is a clear lack of human and other resources in the institutions and organisations that are providing legal aid.

There is currently a significant imbalance between the OPG and the OPD in this respect, which must be remedied. However improving OPD resources in an ongoing way likely means ensuring that it is given control over its budget to the same extent as the OPG. The current arrangement, whereby the OPD is expected to maintain its “technical and functional independence” while the MOJ controls its budget, has proved unworkable. If this arrangement is maintained in the long term it is likely to cause the OPD to lag cumulatively further behind the OPG in terms of the state’s financial investment.

In relation to private legal aid provision, it is clear that those small organisations running programs for the provision of legal aid are also working with very limited resources. While these organisations may be in a slightly better position to manage their workload, it is clear that resourcing nonetheless has an impact on some aspects of their work, including the existence and quality of fundamental administrative systems, and the ability to adequately meet and take instructions from clients who live in remote areas.

Adequate resourcing is clearly a necessary requirement for the establishment of a more effective legal aid system. However it is not in itself sufficient to ensure quality legal representation: the most fundamental obstacle in this area appears currently to be education and training.

(2) Education and training

It is clear that the vocational teaching and training of aspiring lawyers must be dramatically improved so as to ensure that they develop skills such as case preparation, drafting and advocacy before they begin to practise.

The LJTC’s current curriculum⁹¹ is heavily focused on substantive law subjects and includes almost no skills-based teaching and is therefore deeply inadequate. Those interviewed for this report were largely of the view that its teaching is insufficient to prepare lawyers for practice, and this is borne out by evaluations which have been undertaken of the work of some private legal aid organisations. In contrast, the practical training on case management which was recently trialled by the LJTC received positive feedback through evaluations run by Mai Munisípiu, suggesting that this kind of training is recognized as particularly valuable by the trainee lawyers themselves.

It is noteworthy, however, that there are some understandable reasons for the LJTC’s current approach. The Timorese higher education sector remains weakly regulated, and a number of universities are offering law degrees of questionable quality and to far larger numbers of students than can be accommodated through the LJTC. Even for those graduates who are able to attain admission to the LJTC, it is perceived that further core legal education is necessary to rectify questionable university teaching. As a result, important

⁹¹Interview with Marcelina Tilman da Silva, Director General of the LJTC, 26 September 2016

vocational skills are relegated. It is certainly not possible to teach both substantive law subjects and the wide range of necessary practical skills within a course of 18 or 24 months. In order to address these problems, consideration should be given to imposing more rigorous standards at the university level, even if this results in the restriction of law degree offerings.

Ultimately, while it is important to focus on improving the courses run by the LJTC, a more fundamental review of legal training should be undertaken as part of the process of establishing an independent bar association. In Portugal (and in Brazil, from where the concept of the OPD was borrowed) the private bar association controls the vocational training and regulation of all lawyers. Lawyers qualified through the bar association may then subsequently proceed to seek a further qualification as a judge, prosecutor or (in the case of Brazil) a public defender. A comprehensive exploration of the most appropriate model for Timor-Leste is beyond the scope of this report, but it is clear that a system such as that of Portugal and Brazil would have the benefit of ensuring coherence and mobility within the legal profession, and potentially greater efficiency in the provision of training. If a well-functioning, adequately resourced, and truly independent bar association is established in Timor-Leste this should be among the matters to which it gives high priority.

Many core areas of legal practice clearly need to be the focus of improved training. However given the substantial number of domestic violence cases continuing to be dealt with in the Courts it is clear that one area of importance relates to the role of lawyers representing victims of domestic violence pursuant to article 25 of the Law Against Domestic Violence. Perhaps because of the general terms in which that provision is framed, confusion continues as to the scope of the legal assistance it requires. Despite the apparent views of some judicial actors, mere “accompaniment” or once-off advice at the beginning of a case is insufficient to assist victims to realize the core rights provided to them under the Law Against Domestic Violence (among them protection, compensation and alimony where appropriate). JSMP’s monitoring experience indicates that there is a need for ongoing independent representation for victims throughout the criminal process. This ensures that victims’ interests are represented to the prosecution, in order to ensure for example that charges are appropriately framed, appeals are lodged where necessary, and appropriate requests are made to the court for protective measures, compensation and/or alimony. Further education is needed to ensure that this role is understood not only by the lawyers offering legal services to victims, but also to other players in the judicial process.

Whatever system of professional training is adopted (or continued) in the future, it is clear that greater priority needs to be given to continuing legal education throughout lawyers’ careers. This is something currently lacking for all branches of the legal profession, although it appears to be felt most keenly by private lawyers. Formal training should form one component of this, whether delivered by the LJTC (as currently envisaged) or the future bar association. However recognition must also be given to the importance of training and skills development in the workplace. This currently appears to vary significantly between organisations. The presence of a large number of foreign trained lawyers in Timor-Leste might be considered a potential resource for this purpose, however to date it does not appear to have been usefully exploited. An amendment was introduced to the Private Lawyers’ Law 2013 to require each foreign private lawyer registered to work in Timor-Leste to work together with a Timorese lawyer.⁹² However in practice this has not occurred and it appears this may have been understood as one of the requirements with which foreign

⁹² Private Lawyers Law, article 2(5), introduced by Law No. 1/2013 on the Second Amendment to Law No. 11/2008 of 30 July on the Legal Regime of Private Lawyers and the Training of Lawyers.

lawyers need not comply during the “transitional period.” Since that period ended on 31 December 2016 it does not appear that practices have changed or that any steps are being taken to ensure that foreign lawyers comply with the requirement to work with a Timorese counterpart.

(3) Appropriate and functional oversight

A final contributing factor to the low quality of legal aid services is the lack of effective oversight or disciplinary mechanisms.

As explained above, oversight bodies exist in respect of all branches of the legal profession: judges, prosecutors and public defenders each have a “Superior Council”, while private lawyers are overseen by the Legal Profession Management and Discipline Council. However for the most part these mechanisms have not been functional beyond routine administrative tasks (such as registering new private lawyers in the case of the Legal Profession Management and Discipline Council). They have so far not fulfilled a significant role in overseeing the maintenance of quality standards or handling disciplinary cases.

The Superior Councils themselves have said that they have faced particular difficulties since the resolutions removing international judicial actors, as they take the view that no Timorese lawyers are sufficiently senior to act as an “inspector” in these bodies.⁹³ This has meant that these bodies have not undertaken some of their functions, such as reviewing the work of magistrates and public defenders for the purpose of determining promotions. It is hoped that the recent decision to readmit international judicial actors in line functions, including as “inspectors”,⁹⁴ will have some impact in this respect.

However significant changes will be required in order for these bodies to function as true oversight mechanisms. Currently they do not play any significant role in responding to reports of ineffective representation. It appears that such cases are rarely if ever brought before them and that their disciplinary work is both rare and largely focused on minor complaints. The Legal Profession Management and Discipline Council is reported to have received only one complaint, which concerned the disclosure of confidential information.⁹⁵ The Superior Council for the OPD hears complaints referred by judges when public defenders are late for or do not attend a court hearing, but have not been seized with more substantive complaints about work quality.⁹⁶ This is despite the fact that some private lawyers reported hearing stories from disgruntled clients about the handling of their case by public defenders.⁹⁷

The causes of this situation are likely multiple. Clients are almost certainly unaware of the possibility to make a complaint to these bodies. No requirement exists in law for private lawyers or public defenders to inform their clients of this possibility. The Councils themselves have also not proactively developed their activities in this area, whether by providing public information, requiring lawyers to inform clients, or by developing their own practices, systems or guidance. The absence of persons undertaking the role of judicial inspectors may

⁹³ Interview with Tiago Sarmiento, Legal Advisor in the Office of the President of the Republic (former member of the Superior Council of the Defence and current member of the Superior Council for the Public Prosecution). As at late 2016 only one international had been returned to this role, a Cape Verdian prosecutor serving as Inspector in the Superior Council of the Prosecution.

⁹⁴ Law No. 1/2017 on the Transitional Regime for the Recruitment of Non-Timorese Magistrates and Public Defenders and Second Amendment to Law No. 9/2011 of 17 August, approving the Organic Law of the Audit Chamber of the High Administrative, Tax and Audit Court.

⁹⁵ Interview with Nelinho Vital, 30 September 2016.

⁹⁶ Interview with Cancio Xavier, Public Defender, 22 September 2016

⁹⁷ interview with Sezaltina da Costa Freitas, FSSO, 28 September 2016

have contributed to this; but concerns have also been raised as to the independence of the bodies and whether a lack of independence prevents them from taking a robust approach when complaints are made. For example research for this report revealed a complaint lodged more than six months ago with the Prosecutor General in his capacity as President of the Superior Council for the Public Prosecution, which has to date still not been dealt with.

Of course, there are limits to how much these bodies could achieve even at their best. They cannot be expected to improve wholesale the quality of the legal profession on their own. However it seems clear that they could be doing more to (a) make themselves available for complaints; (b) handle the most egregious cases of ineffective representation; (c) proactively produce and promulgate standards and guidance for legal professionals; and (d) continuously observe and respond to the standards of quality being demonstrated in their respective areas.

It is hoped that improvements in this area might be possible with the creation of a bar association, but much will turn on its own strength, functionality and independence.

VI. RECOMMENDATIONS

Office of the Public Defender

The OPD is clearly under-staffed and under-resourced, such that it is both inaccessible to many and unable to provide high quality legal aid. This difficulty is clearly acknowledged by the government and the JSSP, and the following steps should be taken to address it:

1. The number of public defenders should be increased, and the OPD should comply with the means testing provisions in its statute so as to ensure insofar as possible that it only serves those who are without means. The OPD should, in particular, cease to represent for-profit companies.
2. Steps should be taken to increase the OPD's independence (particularly in respect of budget proposal and execution) preferably as a matter of law but at least in practice. The MOJ and the Parliament (in its budgetary oversight function) should ensure that investment in the OPD places it on an equal footing with the OPG in terms of its ability to finance its activities.
3. Efforts to increase the accessibility of the OPD throughout Timorese communities should be continued and strengthened. This includes ensuring that the plan to open offices in further municipalities is implemented. It should also include creating sustainable programs for community outreach and public information, particularly in remote areas where communities may be unaware of the OPD or its services.

Legal aid provision by private lawyers

There are currently very few private lawyers providing legal aid in Timor-Leste, and their work relies on short-term funding by foreign donors rather than a sustainable system of state funding. Such a system must be established as soon as possible in order to meet the legal needs of those of limited means and thus meet the clear commitment in the JSSP in this respect. In particular:

1. The proposed Bar Association Law should be passed as soon as possible, but only after careful consideration has been given to any suggested amendments to the current draft. Close consideration should be given to the suggestion that the training of private lawyers be brought under the control of the new bar association rather than the MOJ. In addition:
 - (a) the law should require the bar association to establish regulations for continuing professional development, including details of the training that should be undertaken by lawyers each year, mechanisms for the delivery of that training, and the consequences of failing to undertake that training;
 - (b) the requirement under the current Private Lawyers Law for foreign lawyers to work with a Timorese lawyer, which was (at least in practice) suspended during the transitional period, should be retained and brought into practice, whether it is included in the Bar Association Law itself or in regulations created by the bar association in due course;
 - (c) care should be taken to ensure that the law does not prevent the establishment and operation of paralegal programmes, and consideration should be given to the regulation of such programmes by the bar association.

2. A comprehensive system should be established for the operation of private legal aid provision, including advice and assistance in relation to informal justice mechanisms by private lawyers, and for its remuneration by the state at a level that enables private lawyers to receive an income similar to that of public defenders. Such a step would not in any way indicate a failure of the OPD's mission, but merely a recognition that the OPD cannot assist all of those in need of legal aid, not least because of conflicts of interest. The previously proposed draft Access to Courts Law provided a strong starting point for the establishment of such a system, but if it is to become the basis of a future legal aid system it should be carefully reviewed and amended. For example, thresholds and approaches used to determine indigence should be consistent as between the OPD and private lawyers. The system should ensure the availability of legal aid not only for representation in litigation, but also for legal advice and assistance outside the context of litigation. Specific provision should be made to ensure the sufficient funding of legal services for victims of domestic violence. Some other recommendations contained in this report may also need to be incorporated within the law, for example the operation of paralegal programs and the provision of legal advice and assistance outside the context of formal litigation, including in relation to informal justice mechanisms.
3. Pending action from the government in this area, donors should continue funding legal aid services provided by private lawyers. However further and different efforts should be made to maximise the quality of the services provided, not only through formal training but also through establishing arrangements for mentoring and on-the-job professional development. One means of achieving this would be to fund legal aid positions within firms that have experienced lawyers and established systems.

Legal training and continuing professional development

It is clear that the teaching and training of aspiring lawyers in Timor-Leste must be improved to ensure that lawyers are properly prepared for legal practice and remain competent throughout their careers. In particular:

1. The vocational teaching of all prospective lawyers must include comprehensive teaching in legal skills such as case preparation, drafting and advocacy. In this respect the inclusion of case management training to trainee private lawyers in 2015 was a positive step, and courses of this kind should be continued and expanded to include other skills-based subjects. Teaching of this kind will take a considerable amount of time, and the current courses will therefore have to be extended in duration and/or re-structured in order to create time for this additional teaching. This time could be created by teaching through Tetum rather than Portuguese and reducing the time spent on Portuguese language teaching.
2. Sufficient oversight must be maintained, whether by the LJTC or a future independent bar association, over the practical training placements for trainees. This should be designed to ensure that firms used for placements are appropriate for this role, and receive clear guidance as to the training and support to be provided.
3. Continuing professional development should be made a regulatory requirement for all lawyers, and a comprehensive system for its operation should be established. The country's legal system remains nascent, and it is therefore particularly important that lawyers are informed of important legislative changes. It is also important that lawyers

refresh and develop their practical skills, particularly during the early years of practice. This goal would also be furthered by imposing a requirement that foreign lawyers work together with Timorese lawyers and by focussing on on-the-job professional development for private lawyers providing legal aid.

4. In the shorter-term, pending the full implementation of improved education and training, donors and government could improve the quality of legal aid services being provided both through the OPD and private lawyers by supporting key training in areas of specific need. These could include for example, fundamental aspects of criminal procedure and professional ethics as well as case management.

Alternative forms of legal aid

In developing legal aid systems consideration should be given to:

- (1) The desirability of having lawyers (whether public defenders or private lawyers) involved in some instances in providing legal aid services in the informal justice sector. There are clearly some instances in which this is desirable, for example where a case proceeds *both* through the formal courts and through a community dispute resolution.
- (2) The extent to which community-based paralegals can and should be trained and organised to provide basic legal advice. This could include basic legal advice on substantive issues; advice on whether to use the formal or informal justice sector in particular cases; advice on how best to use informal justice mechanisms; and representation in informal justice processes, including negotiations and mediations.

Legal aid planning

Although there is an urgent need to increase the numbers of both public defenders and private lawyers who provide legal aid, there is a limit to the rate at which numbers can be increased. In particular, there is a limited pool of law graduates of a sufficient standard to be admitted to the LJTC each year, and there is a limit to the capacity of the OPD and other organisations delivering legal aid to train LJTC graduates who choose to work in the OPD or as private lawyers providing legal aid. The MOJ, and in due course the Timorese Bar Association, must therefore carefully assess the level at which the supply of public defenders and private lawyers providing legal aid can be effectively and sustainably increased, so as to ensure that numbers of LJTC students and trainee legal aid lawyers are increased as quickly as possible, but without undermining the quality of legal aid services.

ANNEX: BUDGET COMPARISON

Office of the Public Defender – Budget 2013-2017 (\$'000)

	2013	2014	2015	2016	2017
TOTAL	894	917	1562	1363	1310
Salary & Wages	583	673	673	779	917
Salary	575	673	673	778	917
Overtime	8	-	-	1	-
Allowances	-	-	-	-	-
Goods & Services	302	218	214	215	93
Local Travel	13	12	14	14	7
Overseas Travel	14	10	10	10	10
Training & Workshops	-	-	-	-	-
Utilities	14	19	11	11	7
Rental of Property	-	-	-	-	-
Vehicle Operation Fuel	19	12	17	18	7
Vehicle Maintenance	18	12	17	20	7
Vehicle Rental, Insurance & Service	-	-	-	-	-
Office Stationary & Supplies	11	17	15	15	3
Operational material and supplies	11	6	10	10	3
Fuel for generators	8	3	3	-	-
Maintenance of Equipment & Buildings	16	9	9	9	3
Operational Expenses	10	15	11	11	3
Professional Services	163	97	89	88	35
Translation Services	-	4	5	5	5
Other miscellaneous services	6	3	3	3	3
Payment of memberships	-	-	-	-	-
Transfers	-	-	-	-	-
Personal Benefit Payments	-	-	-	-	-
Public Grants	-	-	-	-	-
Public Grant Capital	-	-	-	-	-
Minor Capital	9	26	175	69	-
Purchase of Vehicles	-	-	170	29	-
EDP Equipment	-	19	-	25	-
Security Equipment	-	-	-	-	-
Communication Equipment	-	-	-	-	-
Other Miscellaneous Equipment	-	3	-	-	-
Furniture & Fittings	9	4	5	15	-
Office Equipment	-	-	-	-	-
Generators	-	-	-	-	-
Water Equipment	-	-	-	-	-
Capital Development	-	-	500	300	300
Acquisition of Buildings	-	-	-	-	-
Infrastructure Assets	-	-	500	300	300
Injection of Capital	-	-	-	-	-
Major Capital Equipment	-	-	-	-	-

Office of the Prosecutor General - Budget 2013-2017
(\$'000)

	2013	2014	2015	2016	2017
TOTAL	4766	3716	3221	2942	4128
Salary & Wages	1508	1422	1423	1402	2373
Salary	1500	1419	1418	1390	1621
Overtime	8	3	5	12	752
Allowances	-	-	-	-	-
Goods & Services	1707	1709	1162	1176	1500
Local Travel	69	57	65	54	78
Overseas Travel	80	67	75	60	45
Training & Workshops	34	14	17	10	7
Utilities	74	98	81	103	194
Rental of Property	1	-	-	-	-
Vehicle Operation Fuel	76	62	99	79	72
Vehicle Maintenance	73	52	59	68	71
Vehicle Rental, Insurance & Service	-	1	1	-	-
Office Stationary & Supplies	50	52	40	40	50
Operational material and supplies	27	31	20	5	33
Fuel for generators	21	17	13	11	5
Maintenance of Equipment & Buildings	60	113	40	149	55
Operational Expenses	66	59	46	36	45
Professional Services	994	996	574	539	806
Translation Services	2	1	1	1	2
Other miscellaneous services	80	103	29	22	38
Payment of memberships	-	-	-	-	-
Transfers	-	-	-	-	-
Personal Benefit Payments	-	-	-	-	-
Public Grants	-	-	-	-	-
Public Grant Capital	-	-	-	-	-
Minor Capital	179	348	136	185	245
Purchase of Vehicles	20	187	78	130	168
EDP Equipment	114	81	21	22	19
Security Equipment	-	-	25	-	-
Communication Equipment	7	7	-	-	-
Other Miscellaneous Equipment	10	15	-	1	4
Furniture & Fittings	35	37	10	22	26
Office Equipment	-	21	2	9	29
Generators	-	-	-	-	-
Water Equipment	-	2	-	1	-
Capital Development	1372	236	501	179	10
Acquisition of Buildings	-	-	-	-	-
Infrastructure Assets	1372	236	501	179	10
Injection of Capital	-	-	-	-	-
Major Capital Equipment	-	-	-	-	-