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15 January 2004

Mrs Percy Ma
Clerk to the Panel on Administration
of Justice and Legal Services
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mrs Ma,

LegCo Panel on Administration of Justice and Legal Services

**Review on provision of legal aid services
Bar Association's submission**

Thank you for your letter of 2 December 2003, attaching a submission of the Hong Kong Bar Association on the captioned subject. As requested, our comments on issues raised by the Bar Association are set out in the ensuing paragraphs.

Whether the refusal of the Director of Legal Aid (DLA) to grant legal aid on grounds of means to a person charged with a serious criminal offence and who was unable to meet the costs of litigation would contravene the HKBOR

The Bar Association considers that should the DLA refuse to grant legal aid to a person charged with a serious criminal offence who was unable to meet the costs of his defence *only* because the financial resources of the person exceeds the financial eligibility limit, without considering whether there are merits in his defence, and whether it is in the interests of justice to grant him legal aid, this seems to contravene Article 11(2)(d) of the HKBOR. The Bar

Association also suggests that Rule 15(2) of the Legal Aid in Criminal Cases Rules ("LACCR") should be amended to ensure that legal assistance shall (not may) be provided to an applicant who does not have sufficient means to pay for it where the interest of justice requires so.

As pointed out in my letter to you of 20 October 2003, under Rule 15(2) of LACCR, the DLA has the discretion to grant legal aid to an applicant if he is satisfied that **it is desirable in the interests of justice to do so**, notwithstanding that the applicant's financial resources exceed the financial eligibility limit. As mentioned in my said letter, the DLA has indeed exercised his discretion under Rule 15(2) to waive the financial eligibility limit of legal aid applicants. With the existence of this in-built mechanism, the situation as suggested by the Bar Association in the preceding paragraph should therefore not arise. The operation of Rule 15(2) is consistent with Article 11 of the HKBOR.

The Bar Association also suggests that an absolute financial eligibility restriction in respect of legal aid for criminal cases be removed, but to allow instead for a gradation of eligibility restriction, so as to enable the DLA to require contributions towards the cost of higher court criminal representation such is reasonable in all the circumstances of the case.

As pointed out in my said letter, Article 11(2)(d) of the HKBOR does not guarantee an absolute right to free legal assistance. Since the cost of providing legal aid and assistance to those who cannot afford it is necessarily a charge on the public purse, there must surely be inbuilt mechanisms to regulate and limit the cost. As our legal aid policy is to ensure that no one with reasonable grounds for taking legal actions in a Hong Kong court is prevented from doing so because of a lack of means, public resources for legal aid is targeted at those who cannot afford the costs of conducting litigation on a private basis and therefore need publicly funded legal aid services. Determining the means of a legal aid applicant is accordingly one of the two cardinal criteria (the other being the merits test) for the grant of legal aid. Removing the financial eligibility limit for granting legal aid could mean that those who have sufficient means to pursue litigation in private would also get publicly assisted legal aid services. We fail to see how this can constitute a legitimate and rightful charge to the public purse and are unable to accede to the proposal for this reason, and on legal aid policy ground.

As to the Bar Association's suggestion that, instead of a clear-cut financial limit, there should be a gradation of eligibility requirement, setting aside the difficulties involved in the complex task of devising a set of objective eligibility criteria which are acceptable to all concerned, we are of the view that introducing different eligibility limits for different applicants/cases would give

rise to uncertainty and confusion, and may even give rise to concerns of subjectivity and arbitrariness in the assessment process of the legal aid applications.

The Bar Association also mentions that financial eligibility test was effectively abolished for criminal representation in England in April 2001. We note that the situation in the UK is somewhat unique. Nevertheless, those with sufficient means are required to contribute to the costs of their defence. According to information to hand, it is the established practice of many other jurisdictions, such as Ontario, British Columbia, Manitoba, Saskatchewan, Alberta in Canada; Victoria, New South Wales, Tasmania, Australian Capital Territory in Australia; Singapore and Malaysia, to continue to conduct means test before approving criminal legal aid applications.

Principles which should be adopted in considering the issue of financial eligibility limit for legal aid services, and how the limit should be set to give effect to the right of access to justice

The Bar Association has proposed a number of principles which should be adopted in considering whether or not legal aid should be granted in a particular case. In this regard, our responses are as follows:

(a) Proportionality:

The LAD is already taking into account the factor of proportionality in determining a legal aid application. In considering whether it is reasonable to grant legal aid in the particular circumstances of the case, the LAD considers such factors as whether the means used is reasonably proportionate to the aim sought to be achieved, and whether the applicant will obtain any pecuniary or non-pecuniary benefit from the proceedings for which legal aid is sought.

(b) Seriousness of the offence and the potential sentence involved in criminal cases:

The LAD also considers the factor of "seriousness of the offence and the potential sentence involved" in processing applications for criminal legal aid. The LAD would refer to the existing "Widgery criteria", which include such factors as whether the applicant is "in real jeopardy of losing his liberty or livelihood, or suffering serious damage to his reputation", or "the charges raise a substantial question of law". On the other hand, if the charges raise a substantial point of law, in the interests of justice, the DLA's discretion could be exercised in favour

of the applicant, even if the offence is not serious and the sentence is unlikely to be heavy.

(c) Complexity and length of case:

In processing applications for criminal legal aid, the LAD would take into account the complexity and length of a case. Under the "Widgery criteria", factors such as whether "the charges raise a substantial question of law", and whether "the nature of the defence involves the tracing and interviewing of witnesses, or expert cross – examination of a witness for the prosecution" are relevant to the complexity and length of the case. In civil cases, legal aid will be granted if the applicant passes both merits and means test. In considering the merits test, the LAD will consider whether there are reasonable grounds for proceedings and whether it is reasonable for legal aid to be granted. Factors such as complexity and length of a case are not directly relevant to the legal merits test in civil cases, though legal aid may be refused where it appears to the Director that on account of the simple nature of the proceedings a solicitor would not ordinarily be employed.

(d) Fundamental Rights:

At present, the DLA already has discretion under section 5AA of the Legal Aid Ordinance (Cap. 91) to waive the financial eligibility limit of legal aid applicants when human rights issues are involved, i.e. a breach of the HKBOR or an inconsistency with the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong is an issue. Such an arrangement has been put in place on human rights policy consideration.

(e) Prioritizing types of cases depending on the individual and public importance of the case:

The Bar Association has highlighted the importance of the need to prioritize types of cases for assistance under the legal aid service. We cannot agree more with this observation. Since legal aid is funded by the public coffer which is not unlimited, we have indeed prioritized legal actions for grant of assistance so that resources are targeted at those with the greatest need for help. Under the scope of our existing services, legal aid is not only provided to criminal cases, but is also available in civil proceedings relating to major areas of the livelihood of the community at large. They include family and matrimonial disputes, personal injury claims, employment disputes, tenancy

disputes, contractual disputes, immigration matters, professional negligence claims, and coroner's inquest. The scope of service is already very wide and covers all the types of cases mentioned by the Bar Association. It goes way beyond our international obligation under Articles 14(1) and 14(3) of the ICCPR¹.

(f) Fixed budget for the most expensive cases:

We note the Bar Association's suggestion. As pointed out in the Administration's response of June 2003 on the List of Issues for Review, if we go by overseas experience, Hong Kong is the exception of not having a cap on legal aid spending. Other jurisdictions subject their legal costs to a financial limit, and some even impose spending cap on each individual case. In the longer term, we may need to revisit the question of imposing a financial cap on legal aid spending in the light of our tight fiscal position.

Yours sincerely,



(Chan Yum-min, James)
for Director of Administration

¹ Article 14(1) of the ICCPR guarantees all individuals the right to a fair hearing in both criminal and civil proceedings (which involves the determination of an individual's civil right and obligation). Article 14(3) of the ICCPR further provides that a person charged with criminal offence shall be entitled to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it".