

For meeting on  
28 November 2005

**Paper for LegCo Panel on**  
**Administration of Justice and Legal Services**

**Search Warrants**

**I. Background of the Case**

1. On 6 May 2005, the Director of Legal Aid took out an application for leave to apply for judicial review of two Search Warrants obtained by the Police to enter the office premises of the Crime Section of the Legal Aid Department situated on the 25 Floor, Queensway Government Offices, Queensway and to seize certain documents. The application came about because of the prior involvement of Legal Aid Department (LAD) with a Mr. X who was indicted for the offence of rape in 2004. He was granted legal aid to defend the charge. Mr. X had given various instructions and documents to LAD and his solicitors for the trial. He eventually pleaded guilty to the offence.
2. Following his conviction, Mr. X was charged with the offence of perverting the course of justice. The allegation was that Mr. X had for some time continued in a not guilty plea to the charge of rape and had caused various family members and others to give a joint false defence for him at the rape trial, in which the rape victim would be said to have been wholly untruthful in her allegations. Legal aid was granted to Mr. X in April 2005 to defend the charge with LAD acting as his solicitors. Legal aid was subsequently discharged when he decided to engage his own solicitors in private practice.
3. On 28.4.2005, the Police attended LAD's office at Queensway Government Offices with a Search Warrant seeking entry to LAD's office premises and seizure of certain documents which Mr. X had sent to the solicitors acting for him in the rape trial and were now in LAD's possession. Conscious of the fact that legal professional privilege (LPP) might attach to the documents the Police wished to seize, LAD's staff handling the case resisted the execution of the Warrant. The Police officers eventually left without executing the Search Warrant after learning LAD's intention to seek urgent legal advice.

4. On 3.5.2005, upon Counsel's advice, LAD wrote to the Police seeking their agreement to desist in executing the Search Warrant and made it clear that in the event of their refusal to do so, LAD would take out proceedings to have the Search Warrant quashed.
5. On 5.5.2005, the Police came to LAD's office to execute a second Search Warrant. LAD advised the police officers that the documents, if seized, would be the subject of a Judicial Review challenge and would have to be placed in non-transparent bags and locked container pending the decision of the Court. The police officers left without executing the second Search Warrant. Later on in the same day, LAD filed an application to the court for an ex-parte interim injunction prohibiting the execution of the Search Warrants by the Police. The Court duly granted the order.
6. On 9.5.2005, the Court granted leave for the Director to apply for Judicial Review of the two Search Warrants. Full hearing of the Judicial Review was fixed to take place on 2.8.2005.
7. After leave was granted, settlement negotiation took place culminating in the Court making an Order on 28.7.05, by consent of the parties, that the Judicial Review application be withdrawn and the ex-parte interim injunction granted on 5.5.2005 be discharged.
8. On 4.8.2005, the Police, pursuant to the settlement agreement, applied to withdraw the second Search Warrant which was accordingly granted; the Police also confirmed that the first Search Warrant had been cancelled.

## **II. The Legal Aid Department's stance**

1. The LAD processes over 20,000 civil and criminal applications for legal aid each year and acts for the aided persons as their solicitors in about 30% of the cases that are granted legal aid. When acting for aided person in legally aided proceedings, the LAD's role is akin to a solicitor firm representing a privately funded client and there exists between LAD and the aided person a solicitor and client relationship. Furthermore, Section 24 of the Legal Aid Ordinance specifically provides that the "like privileges and rights as those which arise from the relationship of client, counsel and solicitor acting in their professional employment shall arise" as between an applicant for legal aid and the Director as well as between an

aided person and the Director when acting in any proceedings to which a legal aid certificate relates.

2. Because of the said relationship, the Director is duty bound to preserve the confidentiality of information or communications passing between the Director and the applicants/aided persons by upholding and safeguarding the principle of Legal Professional Privilege (LPP) which is indisputably recognized as one of the pillars upon which the administration of justice in Hong Kong rests and is protected by the Basic Law as a fundamental right.
3. The LAD's handling of the current case is a testament to the Director's determination to protect client's confidentiality and to invoke LPP in all circumstances where it is applicable. In effect, such determination dictated the course of action undertaken by the Director throughout this case.
4. The Director is mindful of the fact that the privilege belongs to the applicants/aided persons and that LPP has its limit and does not apply to communications between a client and his lawyer for the purpose of the furtherance of any crime.
5. As explained above, the Director's determination to protect client's LPP led him to challenge the Search Warrants by way of Judicial Review. By the same token, the ownership of the privilege and its limitation, which is settled law, likewise form the basis for the settlement of the Judicial Review application. The joint press release given by the Director and the Commissioner of Police (*Annex*) is clear evidence that the Director has used his best endeavours to maintain the fundamental right of confidentiality between him and an aided person.
6. The Director wishes to assure the public that he values the right of confidentiality of all applicants/aided person which is essential to the good administration of the legal aid services in Hong Kong. The Search Warrant episode has highlighted the resolve of the Department to maintain that right and it will continue to do so in future.

Legal Aid Department

Date : 18 November 2005

Ref. : LA/ADM/115/54 (Pt.12)

Joint Press Release of the Director of Legal Aid and the  
Commissioner of Police

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The Director of Legal Aid and the Commissioner of Police, having carefully examined all the legal issues concerned, have settled the differences between them over the production of the documents which the Commissioner of Police has sought by way of search warrant.

The Commissioner of Police has either the originals or copies of the documents sought to be seized but wishes to seek copies of the documents showing fax transmission details in order to ascertain which of the documents were relevant to an ongoing criminal case. The parties accept that it is settled law that legal professional privilege does not apply in respect of communications between a client and his solicitor for the purpose of furtherance of any crime. The Commissioner of Police will apply to withdraw the search warrant issued by Ms Chainrai, a Magistrate, on 5 May 2005 and will instead apply for a witness summons requiring the attendance of the relevant officer from the Legal Aid Department at the criminal trial to give evidence and to produce documents relevant to the case. In the event that there is any dispute at trial as to the privilege attaching to the aforesaid documents, this is a matter which will be decided by the trial judge.

The parties involved are constrained from further comment upon this matter as the documents sought to be seized are for use in an ongoing criminal trial and further comment might be seen as jeopardizing the integrity of that trial.