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URGENT

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Chairman
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By post, fax (2838-5053) and email (colasc@netvigator.com)

Dear Mr. Chan,

LASC's Work Plan for 2009-2010: Rule 4, Legal Aid in Criminal Cases Rules

We write to draw your attention to a gap in the criminal legal aid system that can cause real injustice. We hope the Legal Aid Services Council will include this issue in the Work Plan for 2009-2010 so that urgent action will be taken for pressing for a change in the Legal Aid in Criminal Cases Rules to allow for legal aid to be granted in cases going to the CFA not involving a conviction.

As you know, legal aid in criminal cases in the High Court and Court of Final

Appeal is governed by the *Legal Aid in Criminal Cases Rules*, Cap. 221D ('the Rules'). The types of case where legal aid is available are identified in Rule 4. Rule 4(1)(h) deals with legal aid for appeals to the Court of Final Appeal ('CFA'). The types of case where legal aid is available under that sub-rule are cases where a person has been 'convicted' of an offence.

You know that the test used in for granting leave to appeal in criminal cases is that the matter involves 'a point of law of great and general importance' or that 'it is shown that substantial and grave injustice has been done'. (See s. 32(2) *Hong Kong Court of Final Appeal Ordinance*, Cap. 484.)

A criminal case can involve a point of law so described or a substantial and grave injustice and so be worthy of consideration by the CFA but not concern a person 'convicted'. For example, the case may involve a person who has been made the subject of a hospital order after a determination not involving a conviction or it may concern a defendant who has successfully invoked a stay of prosecution in the court of trial. We are aware of one case going to the CFA where legal aid had been sought but was not available because of this sub-rule. The case involved an acquitted defendant who had been refused an order for costs. The CFA found in that case that the judge who heard his appeal from the magistrate, who had acquitted him but refused him costs, had been responsible for a substantial and grave injustice. (See *Qamar Sheraz v. HKSAR FACC 5/2007*)

Recently, a trend has started for the prosecution to case state determinations that are neither convictions nor acquittals. This has arisen in the context of the CFA saying that magistrates should not dismiss charges where a law has been successfully challenged on constitutional grounds but should make a 'determination' that can be the subject of a case stated by the prosecution. (See: *SJ v. Yau Yuk Lung and anr* [2007] 3 HKLRD 903 at 68-76) Obviously, such cases are likely to involve points of law of great and general importance and, if the determination was in the magistrates' court, that could well be the reason why legal aid is granted under Rule 4(1)(f) of the Rules, a more broadly drafted rule which covers any determination by a magistrate (...a person who is convicted by, or aggrieved by, an order or determination of a magistrate in respect of or in connection with any offence...). If the constitutional

point in such a case is sufficient to grant legal aid under this sub-rule, it follows that Rule 4(1)(h) should allow legal aid to be granted for an appeal to the CFA.

In view of this, we urge the Legal Aid Services Council to press for a change in the Rules to allow for legal aid to be granted in cases going to the CFA not involving a conviction.

Yours Sincerely,



LAW Yuk-Kai,

Director



c.c.

Dr Hon Margaret NG, Chairperson, Legislative Council Panel on Administration of Justice and Legal Services

Mr. TSANG Tak Sing, JP, Secretary for Home Affairs, Home Affairs Bureau

Mr Benjamin CHEUNG, JP, Director of Legal Aid, Legal Aid Department

Mr. Russell COLEMAN, SC, Chairperson, The Hong Kong Bar Association

Mr. Lester G HUANG JP, President, The Law Society of Hong Kong