

# 立法會

## *Legislative Council*

LC Paper No. CB(2)782/09-10(08)

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### **Panel on Administration of Justice and Legal Services**

#### **Background brief prepared by the Legislative Council Secretariat for the meeting on 25 January 2010**

#### **Legal Aid in Criminal Cases Rules**

#### **Purpose**

This paper provides an account of the discussions of the Panel on Administration of Justice and Legal Services (the Panel) on the coverage of legal aid services under the Legal Aid in Criminal Cases Rules (Cap. 221D) (the Rules).

#### **Background**

2. Rule 4 of the Rules sets out the categories of cases for which criminal legal aid may be granted before different courts, subject to an applicant's eligibility on means and merits (**Appendix I**). Under rule 4(1)(h), only persons who have been convicted of an offence are eligible for legal aid for an appeal to the Court of Final Appeal (CFA).

3. In its letter dated 14 April 2009 to the Legal Aid Services Council and copied to the Panel Chairman, the Hong Kong Human Rights Monitor (HKHRM) raised the concern that rule 4(1)(h) was too narrowly drawn and could cause injustice. It proposed that amendments be made to the Rules to allow for legal aid to be granted in cases going to CFA not involving a conviction.

#### **Discussions of the Panel**

4. The issues raised in HKHRM's letter were discussed at the Panel meeting on 25 May 2009. Members noted from HKHRM that there were situations where a criminal case could be worthy of consideration by CFA but did not concern a convicted person. For instance, the case might involve a person who had been made the subject of a hospital order after a determination not involving a conviction, or it might concern a defendant who had successfully invoked a stay of prosecution in the court of trial but was faced with the Government's application to appeal against the stay of prosecution. Members also noted a case going to CFA where legal aid had been sought but was not available because of rule 4(1)(h) (*Qamar Sheraz v HKSAR FACC 5/2007*). The case involved an acquitted defendant who had been refused costs. His appeal was allowed by CFA, which found that the judge who had acquitted him but refused him costs had been responsible for substantial and grave injustice. HKHRM urged the Administration to amend rule 4(1)(h) along the line of the more widely drafted rule 4(1)(f).

5. Members in general expressed support for HKHRM's proposal to amend the Rules as the loophole had wide implications on human rights protection. As cases going to CFA normally involved points of law of great and general importance, members were concerned that rule 4(1)(h) could result in denial of legal aid in cases with important constitutional or human rights implications. Members considered the sub-rule unconstitutional in that it was a blanket prohibition on the grant of legal aid in all cases going to CFA where no conviction was involved and such blanket prohibition had serious implications on the right of access to the court.

6. At the request of the Panel Chairman, the legal adviser to the Panel had made some observations on the availability of legal aid under the Rules. The legal adviser observed that the deficiency in the drafting of rule 4(1)(h) was also found in rule 4(1)(c) relating to appeals from the Court of First Instance or the District Court. As a result, legal aid might not be available under certain circumstances, for example, an appeal on costs after the legal aided defendant has been acquitted or discharged or any appeal after the non-legal aided defendant has been acquitted or discharged.

7. Members also noted another possible anomaly in rule 4(1)(a), (aa) and (b) as identified by the Hong Kong Bar Association. The Bar Association suggested that the issue of whether an accused person should be entitled to legal aid in respect of a reservation by the trial judge for the consideration of the Court of Appeal of a question of law which arose on the trial, pursuant to section 81 of the Criminal Procedure Ordinance (Cap. 221), should be considered, bearing in mind that the reservation was not an appeal and arguably was not part of the trial or proceedings to which the preparation and conduct of his defence related (rule 4(1)(a), (aa) and (b) of the Rules).

8. The Panel urged the Administration to amend the Rules expeditiously. The Administration was also asked to take into account the views of the Bar Association and the observations of the legal adviser on the coverage of legal aid in the Rules.

### **Latest development**

9. In October 2009, the Panel was advised that the Administration agreed on the need to amend Rule 4 and was prepared to introduce the relevant legislative amendments in the current legislative session. The Panel will be consulted on the legislative proposal at its meeting on 25 January 2010.

### **Relevant papers**

10. A list of the relevant papers which are available on the Legislative Council website (<http://www.legco.gov.hk>) is in **Appendix II**.

|          |      |                                   |                |              |
|----------|------|-----------------------------------|----------------|--------------|
| Chapter: | 221D | LEGAL AID IN CRIMINAL CASES RULES | Gazette Number | Version Date |
|----------|------|-----------------------------------|----------------|--------------|

|       |   |  |            |            |
|-------|---|--|------------|------------|
| Rule: | 4 | Legal aid for accused persons and appellants | 22 of 2004 | 16/07/2004 |
|-------|---|--|------------|------------|

## PART II

## GRANT OF LEGAL AID

- (1) Subject to any requirement to make contributions under Part III- (L.N. 204 of 1984)
- (a) an accused person committed for trial before the Court of First Instance may be granted legal aid under these rules for the preparation and conduct of his defence and for any plea arising from the indictment; (25 of 1998 s. 2)
  - (aa) an accused person in respect of whom proceedings have been transferred to the Court of First Instance under section 4 of the Complex Commercial Crimes Ordinance (Cap 394) may be granted legal aid under these rules for the preparation and conduct of his defence including any application for discharge under section 22 of that Ordinance and any appeal arising therefrom; (57 of 1988 s. 33; 25 of 1998 s. 2)
  - (b) a person charged before the District Court with any offence may be granted legal aid under these rules for the preparation and conduct of his defence and for any plea arising from the charge sheet; (L.N. 70 of 1973; L.N. 64 of 1978)
  - (c) a person convicted of any offence before the Court of First Instance or the District Court may be granted legal aid under these rules for any appeal to the Court of Appeal and in any proceedings preliminary or incidental thereto; (25 of 1998 s. 2)
  - (ca) a prescribed prisoner within the meaning of section 67C of the Ordinance may be granted legal aid under these rules for the purposes of any proceedings instituted under that section and any appeal or other proceedings arising therefrom or preliminary or incidental thereto; (22 of 2004 s. 4)
  - (d) the respondent in an appeal to the Court of Appeal under section 84 of the District Court Ordinance (Cap 336) may be granted legal aid under these rules for the appeal and in any proceedings preliminary or incidental thereto; (L.N. 169 of 1969)
  - (e) a respondent referred to in section 81A of the Ordinance may be granted legal aid under these rules for the hearing of an application for the review of any sentence under that section; (L.N. 167 of 1972)
  - (f) a person who is convicted by, or aggrieved by, an order or determination of a magistrate in respect of or in connexion with any offence may be granted legal aid under these rules for the purpose of any appeal to the Court of First Instance and any proceedings preliminary or incidental thereto; (L.N. 148 of 1973; 25 of 1998 s. 2)
  - (g) a respondent in an appeal by way of case stated by the Secretary for Justice under section 105 of the Magistrates Ordinance (Cap 227) may be granted legal aid under these rules for the appeal and in any proceedings preliminary or incidental thereto; (L.N. 65 of 1976; L.N. 362 of 1997)
  - (h) a person convicted of any offence may be granted legal aid under these rules for any appeal to, or any application for leave to appeal to, the Court of Final Appeal and any proceedings preliminary or incidental thereto; (L.N. 122 of 1982; 79 of 1995 s. 50)
  - (i) (Repealed L.N. 182 of 1993)
  - (j) an accused person in respect of whom a magistrate has appointed a return day for the continuation of committal proceedings may be granted legal aid under these rules for the preparation and conduct of his defence including any application for discharge under section 16 and any appeal arising therefrom; (48 of 1983 s. 5; L.N. 204 of 1984)
  - (k) a person ordered to appear before the Court of First Instance or the District Court to be dealt with under the Community Service Orders Ordinance (Cap 378) may be granted legal aid under these rules for the purpose of the proceedings; (L.N. 115 of 1985; L.N. 157 of 1986; 25 of 1998 s. 2)
  - (l) a person who is to be dealt with by a judge of the District Court under section 20 or 21 of the District Court Ordinance (Cap 336) may be granted legal aid under these rules for the purpose of the proceedings, (L.N. 115 of 1985; L.N. 157 of 1986)

if the Director is satisfied that his financial resources do not exceed the limits specified in section 5 of the Legal Aid Ordinance (Cap 91) in relation to the grant of legal aid under that Ordinance. (L.N. 427 of 1982; L.N. 323 of 1983; L.N. 115 of 1985; L.N. 199 of 1992)

(2) Where a person has been granted legal aid for any matter specified in paragraph (1) he may also be granted legal aid for any proceedings arising out of or connected with such matter, including any application for bail or an appeal against refusal to grant bail. (L.N. 204 of 1984)

(3) Where an accused person has been granted legal aid under paragraph (1)(a), (b) or (j) and a letter of request has been issued by the Court of First Instance under section 77E of the Evidence Ordinance (Cap 8) addressed to a court or tribunal exercising jurisdiction in a place outside Hong Kong, he may also be granted legal aid for any proceedings in that court or tribunal in connection with the letter of request. (L.N. 157 of 1986; 25 of 1998 s. 2)

## Legal Aid in Criminal Cases Rules

## Relevant documents

| <u>Meeting</u>   | <u>Meeting Date</u> | <u>Paper/Question</u>  |
|--|---------------------|--|
| Panel on<br>Administration of<br>Justice and Legal<br>Services | 25 May 2009         | <p>Letter dated 14 April 2009 from the Hong Kong Human Rights Monitor (HKHRM) to the Chairman of the Legal Aid Services Council<br/>[LC Paper No. CB(2)1428/08-09(01)]<br/><i>(English version only)</i></p> <p>Administration's preliminary response to HKHRM's letter<br/>[LC Paper No. CB(2)1428/08-09(02)]</p> <p>Submission on "Rule 4 of the Legal Aid in Criminal Cases Rules" from the Hong Kong Bar Association<br/>[LC Paper No. CB(2)1618/08-09(05)]<br/><i>(English version only)</i></p> <p>Minutes of meeting<br/>[LC Paper No. CB(2)1902/08-09]</p> |