

Submission of the Hong Kong Bar Association for the Meeting
of the Legislative Council Panel on the Administration of Justice
and Legal Services to be held on 30th January 2012 on the
Provision of Legal Aid for Judicial Review Cases

1. **Judicial Review is a part of the system of checks and balances in a free society.** It is a means by which ordinary citizens and corporations obtain redress against Government for errors of fact and law, irrational or unreasonable decisions, abuse of power and bad governance. The power of judicial review exercised through the courts is a vital force for ensuring Government decision-making is relatively fair and honest. Knowing that decisions have to be supported by evidence and adequate reasons means that Government officials need to adopt basic and reasonable standards of good administration as they may be accountable to the public through the courts. The public interest is involved. Judicial decisions in this area are important precedents and beacons for guiding and/or improving government conduct and decision making in future.
2. Judicial Review is vital for supporting the rule of law and preventing the rule of political expediency or arbitrary or unreasonable power.
3. **Legal aid is one of the four pillars of our justice system,** alongside the Judiciary, the Legal Profession and the Department of Justice. It is a key institution in providing access to justice and the rule of law and equality before the law for persons of limited means.
4. The reason why this is so important was stated by Hon. Donald Tsang, then Chief Secretary for Administration on the 22nd January 2002, when he said *“The rule of law is the cornerstone of our society. It protects the rights of individuals and provides a level playing field for all. In upholding the rule of law, we need to facilitate the community’s access to our justice system. Here our Legal Aid Services play a crucial role. Through the provision of publicly funded Legal Aid Services, the Government seeks to ensure that no one with reasonable grounds for taking legal action in Hong Kong is prevented from seeking justice because of a lack of means.”* See Legal Aid in Hong Kong, LASC 2006, page 33. Additional to this, the Legal Aid Services Council adopted in 1999 as its Vision that it would *“actively (contribute) to upholding and enhancing the Rule of Law by striving to ensure Access to Justice and Equality before the Law to people of limited means.”*
5. **Legal aid is part of our human rights.** Article 10 of the Universal Declaration of Human Rights and other conventions and case law have led to a situation whereby the *“entitlement to Legal Aid has become a manifestation of the human right to a fair hearing in the determination of a person’s rights and obligations and of any criminal charge against him. A hearing to determine the rights and obligations of a person or a criminal charge against him may be held to be unfair and in breach of the human right, with sanctions to follow, if he is deprived of*

legal aid to engage legal representation.” See Legal Aid in Hong Kong, page 43. This continues to quote from the Judgment of Cheung JA in *New World Development Co. Ltd v Stock Exchange of Hong Kong* (2005) 2 HKLRD 612 at 622 where Cheung J stated: “*Lawyers are an integral part of the administration of justice. The rule of law depends on a very large extent on the presence of competent and independent-minded lawyers. ... a person in an advanced and open society is entitled to seek the assistance of independent experts such as a lawyer when he faces legal problems. Just as we will not expect a sick person to read up the medical textbooks in order to find a cure for his illness, we should not expect a lay-person to be able to advance his own case when he is faced with a serious charge. The entitlement to legal representation if a person so wishes is a basic and fundamental part of the concept of fair trial.*”

6. **Legal aid is not independent of the Government but if properly administered may be relatively operationally independent.** In Hong Kong we are fortunate to have a relatively well organized Legal Aid Department which has the funds with which to provide access to justice according to statute and known standards. Unfortunately, however, the Department is not independent of Government. It is therefore susceptible to political pressures and influence from more senior officials. There has been a long standing perception that the LAD is just another Government institution instead of being an independent pillar of the justice system. In the light of this institutional lack of independence, it is vital that the Legal Aid Department is both perceived and does in fact operate as independently as possible. In particular, it is important that the Department instructs independent and expert lawyers to advise, take forward and advance fearlessly those cases which are judicial reviews against errors by Government. This has been dealt with in detail by Kumar Ramanathan SC, the Chairman of the Bar in his speech at the Opening of the Legal Year on 9th January 2012 which is attached in full for citing the bedrock principles of the Hong Kong Bar. He explained the cab rank rule. “*Under that rule any barrister who is not otherwise engaged or conflicted out and competent in the relevant area of law, must appear for any client willing and able to pay an appropriate fee, even if he/she disapproves of the client’s character or cause.*” “*The rule negates the identification of the advocate with the cause of his client and therefore provides the advocate with protection against governmental or popular victimization. The only duty that is more important to an advocate than the duty to his own client is his duty to the Court.*”
7. **Legal aid has to be granted by reference to legal and statutory considerations,** not irrelevant considerations such as politics and personalities. Legal Aid is granted subject to a statutory merits test which comprises the Legal Merits and the Reasonableness of the Case test. This is set out in Legal Aid in Hong Kong, pages 117 to 119. The criteria area as follows:
 - (a) As regards the Legal Merits this states: “A person will not be granted legal aid in connection with any proceedings unless he shows that he has **reasonable grounds** for taking, defending, opposing or continuing such

proceedings or being a party to it. This test is concerned with the legal merits of the case, i.e. whether the claim has a reasonable prospect of success. This legal merits test serves the following functions: (i) It ensures that legal aid is not an instrument by which litigation becomes an easy first resort whenever there is a conflict of interest between parties; (ii) It assists the legal aid authority in exercising caution in providing support to one individual in civil proceedings against another; and (iii) It protects public funds from misuse by ensuring legal aid is not granted for vexatious or frivolous litigation.” The book provides further explanation.

- (b) The other limb of the merits test is the Reasonableness Test: “In section 10(3)(c) ... is a wide and general test under which the Director can take into account all the factors which would influence a private client considering taking proceedings. It is **additional** to the legal merits test. One particular aspect of the “reasonableness” test involves consideration of whether the benefits to be obtained in any proceedings justify the likely costs, one of the most important factors for a private client considering litigation. The question for the Director is whether the game is worth the candle...the Director should take account of the following considerations: (a) the value of the benefit sought by the applicant, bearing in mind that benefit in this context is not confined to financial benefits but includes matters such as personal right, status, reputation and dignity of the applicant; (b) the chances of succeeding in obtaining that benefit in the practical sense; and (c) the costs of doing so.” Again, the book provides further explanation.

8. **The Legal Aid Services Council** is a statutory body appointed by the Chief Executive. The purpose is to have members of the public and the legal profession who scrutinize legal aid services and delivery, provide supervision, advice and an element of accountability and a limited measure of operational independence.
9. **Further to this, judicial review cases have an additional layer of scrutiny to ensure that only meritorious cases proceed to litigation.** On top of the Legal Aid Department’s merits testing, which under section 9 of the Legal Aid Ordinance involves obtaining opinions from independent counsel, in a judicial review case there is a second vetting in that for such a case to proceed prior leave of the Court is required. This ensures that the Government is protected against frivolous applications and only meritorious cases proceed. The issues are usually complex. The test is not to ensure only winning cases receive Legal Aid but those which are reasonably arguable under the judicial review test.
10. **Need for greater independence arises from litigation against Government.** There are opinions that legal aid is very often refused for judicial review cases because Government is on the other side. It is of course only human nature that the Director of Legal Aid, a Government servant, would not want to make a

decision to grant legal aid which may be perceived by others in the Administration as an unwanted embarrassment. Operational independence can be compromised. It is because of this and other reasons that the Legal Aid Services Council in its Report said that the Legal Aid Department should become an independent authority and no longer be a part of Government.

11. Section 9 of the Legal Ordinance enables the Department to obtain independent and expert advice on the merits of a case with a view to granting legal aid. This is especially important in judicial review cases. Unfortunately, however, the Legal Aid Department has been known to abdicate its responsibility by requiring the Applicant to self-fund the initial Application for Leave for judicial review and then, only if the court decides to grant leave, does the Director subsequently grant legal aid. In the Bar's view this is not a legitimate or proper use or application of the Legal Aid Ordinance. Much work and costs are incurred at the Application stage and the litigant of limited means is thus deterred from access to justice and equality before the law, contrary to the whole purpose of legal aid.

12. As noted in *Legal Aid in Hong Kong* at page 203, the actual expenditure of the LAD involving judicial reviews on immigration related matters between 1998 and 2002 was only about 2-3% of the total expenditure for civil cases. This point is highlighted because during this period many certificates were issued to right of abode claimants. Criticisms faced by Legal Aid Department are not new as can be seen by *Legal Aid in Hong Kong* pages 202-204. The book states: "*The object of publicly funded legal aid is to 'ensure that no one who qualifies for legal aid is denied access to justice because of lack of means'. A person having a reasonable cause in law (and thus satisfying the merits test for legal aid) should, subject to his or her qualifying under the means test, be provided with legal aid. Only through this way may grievances be heard, fundamental rights protected, and illegality and injustices exposed. The Legal Aid Department, having been placed with the statutory responsibility of administering the legal aid schemes, will have to seek to operate independently through for example the commissioning and use of opinions from legal practitioners in private practice and the assigning out of such cases. Such measures may lessen concern of applicants, though not eliminating them, since the decision of approval or disapproval of the application and the assignment of cases are vested in the officers of the Legal Aid Department, who are nonetheless civil servants. The public will have trust in the responsible officers in making those decisions if it is recognized by both parties that publicly funded legal aid services are made available to a person qualifying under the relevant scheme, irrespective of whether the furtherance of his or her cause in the court coincides with the object of the social movement of which he or she is a member; and that it is not an abuse of legal aid services for a qualifying and meritorious case of any such person to be litigated in the court on legal aid. Ultimately, a refusal to grant legal aid can be reviewed by the Registrar of the High Court, and where applicable, by the Legal Aid Review Committee in accordance with the Legal Aid Ordinance. Safeguard is in place by law to ensure independence in decision-making in the grant of legal aid.*"

13. The relevant principles and statements of the position are readily available to be applied to deal with the current concerns. The operational independence of the Legal Aid Department operating according to law must be upheld and this is buttressed by the independence of the Bar and its individual members working under their professional duties as summarized above. In recent judicial reviews, after going through the Legal Aid vetting process the cases went through the High Court leave process, a further vetting, and the cases even won at first instance. This demonstrates the value of our current justice system of which the Legal Aid system is an important pillar.
14. **The current system needs to be much improved to provide access to justice in cases of public interest litigation.** It is necessary to strengthen the Legal Aid pillar of the justice system by making legal aid available to group or class litigation. This will need to be done in advance of further Civil Justice Reform. There will be cases where numerous persons in a class are affected by government decision making which will require legal aid to a class to achieve efficient access to justice, especially where such litigation is in the public interest.

Hong Kong Bar Association

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