



HONG KONG BAR ASSOCIATION

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Hon Priscilla Leung
Chairman of the Legislative Council Panel on Administration of Justice
and Legal Services
 The Legislative Council
 Tamar, Hong Kong.

Home Affairs Bureau
Attn Mr Patrick Li, Deputy Secretary for Home Affairs
 12th Floor, West Wing, Central Government Offices
 2 Tim Mei Avenue
 Tamar, Hong Kong.

Dear *Priscilla / Patrick*

Measures to Prevent the Misuse of the Legal Aid System and Assignment of Lawyers in Legal Aid Cases

I write regarding the LC Paper No. CB(4)1386/16-17(03) prepared by the HAB and the discussion of this matter at the LegCo Administration for Justice and Legal Services Panel on 18 July 2017.

The Hong Kong Bar Association is disappointed at the new measures which were first made known in the said paper, and which was subsequently adopted as a policy by letter from the Legal Aid Department dated 31 July 2017. The measures comprise (1) a general policy of not assigning the case to counsel who had earlier given a favourable section 9 opinion, and (2) a reduction in the assignment limits of the number of cases handled by individual lawyers.

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The new measures were put in place in the absence of any or any sufficient consultation with the HKBA (or the Law Society of Hong Kong). They were purportedly introduced to address a problem for which there does not appear to be any credible evidence. Further, they would increase the costs of/decrease the efficiency of the provision of legal aid.

No Consultation

The measures were first made known in the paper dated 13 July 2017, for discussion at the panel meeting on 18 July 2017 leaving inadequate time to seek views or collect evidence on these proposed new measures. Despite our objections which were given in our written submissions dated 17 July 2017 and through our Mr. Pirie at the panel meeting itself, LAD adopted these new measures by letter dated 31 July 2017. Given the inadequate notice and lack of previous consultation, it is not surprising that the restriction on assigning counsel who had previously provided section 9 opinions was not even discussed in the course of the panel meeting.

No Credible Evidence to Support the Need for New Measures

Dealing firstly with the restriction on assigning the further conduct of the case to counsel who had previously given a favourable section 9 opinion, the Bar is unaware of any credible evidence that there was abuse by counsel whose opinion on the merits of a case was sought by way of a section 9 opinion. Whilst some members at the panel meeting suggested that there was abuse of the legal aid system in cases involving judicial review, no evidence of such was presented at the panel meeting.

Instead, the figures and information provided by the LAD show the contrary, and that the LAD has been exercising strict control in granting Legal Aid Certificates in cases involving judicial review, with just a little over 6% of JR applicants granted Legal Aid Certificates in 2016, and the success rate of JR cases in 2016 being around 70%. Given that in JR cases, the Court will only grant leave where there is a reasonably arguable case, *ie* one which has a realistic prospect of success, the Bar believes that there are already sufficient safeguards to prevent abuse in the provision of a section 9 opinion.

In relation to the assignment limits, no reasonable time was given to consult with the HKBA or the Law Society, nor was there any explanation for the revised assignment limits, nor how such revised assignment limits were arrived at. Whilst the HKBA supports measures to curb abuse of legal aid, it has yet to see any valid and credible evidential based justification for the revision of the previous assignment limits.

The Revised Measures May Do More Harm

The HKBA considers that the revised measures may actually be detrimental to the efficient grant of legal aid and administration of justice generally. It has to be recognized that there are strict time limits in place for instituting proceedings. For JR cases, the application has to be made within 3 months of the decision which is being challenged. There will always be some lead time for an affected person to consider his legal position and then to seek out the necessary legal or other advice as to how to proceed. If after receipt of an application for legal aid, LAD counsel considers the papers and then decides to seek a section 9 opinion, counsel instructed will have to consider the relevant papers, conduct research, and prepare that opinion. If the case was thereafter to be assigned to another counsel, that second counsel must first be found and retained, and will again have to consider the papers and conduct research before he can prepare the application. This will be a wasteful duplication of effort. It would lead to further delay and probable failure to meet the statutory time limits. Even if the time limits could be met, the application will suffer from having to be rushed to meet the deadlines.

This concern is not limited to JR cases. In personal injury cases, the statutory time limit is 3 years. It is quite often the case that, for various reasons, by the time the plaintiffs apply for legal aid to commence legal actions, the statutory limitation period will expire soon. This is even more so in cases involving medical negligence, where expert opinion has to be obtained (often from overseas) to ascertain whether there even is a reasonable claim in the first place.

Furthermore, by assigning a case to a different counsel, the LAD may be forgoing the services of a suitable, specialist advocate. There are some areas of the law where specialist knowledge and skills are important, and the available pool of specialist advocates may be small. Some may have already been conflicted out, and others may not be readily available within the time limits. The aided person may then have to settle for “second-best” in the sense of counsel who may not be as experienced or specialized as counsel chosen to provide the section 9 opinion.

On a more general level, it is important that a core of specialist advocates be encouraged. This leads to more efficient work, and the ability to quickly identify and refine the issues which need determination by the courts. An indiscriminate policy to limit assignments to counsel tends to work against the building up of a body of specialists in a particular field.

Conclusion

We understand that the Hon. Mr Dennis Kwok, member of the Legislative Council representing the legal functional constituency, has called upon the Director of Legal Aid to suspend implementation of the revised policies pending further consultation and discussion. We support such suggestion and

urge that all relevant stakeholders could and should meet and discuss to identify and address the problems in the best and most effective way possible.

As a further step, we would urge the Panel to meet to consider in more detail the evidence, if any, of abuse by counsel instructed to give section 9 opinions and what steps could be taken to address them without causing unnecessary duplication of work and delay in providing legal aid for meritorious cases.

Yours sincerely,



Paul Lam SC
Chairman of the Hong Kong Bar Association

cc

1. Mr. Thomas Kwong Esq., Director of Legal Aid.
2. The Hon Mr Dennis Kwok.
3. Mr. Ruy Barretto SC, Chairman of the Standing Committee for Legal Aid Reform
4. Mr. Thomas So, President of The Law Society of Hong Kong.
5. Mr. Stephen Hung, Chairman of the Legal Aid Committee of the Law Society of Hong Kong.
6. Dr. Eric Li, Chairman of the Legal Aid Services Council.