

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Processing of Legal Aid Applications relating to Judicial Review and
Assignment of Lawyers in Civil Legally-Aided Cases**

PURPOSE

The purpose of this paper is to set out the assessment criteria in processing civil legal aid applications in respect of judicial review cases, the policy/criteria of assigning lawyers to handle legal aid cases in general as well as providing statistics on assignment of counsel in private practice.

ASSESSMENT CRITERIA IN PROCESSING LEGAL AID APPLICATIONS

2. The policy objective of legal aid is to ensure that no one with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means.

3. Pursuant to the aforementioned policy objective, the Legal Aid Department (LAD) provides legal aid in the form of legal representation by solicitors and if necessary counsel to eligible persons in Hong Kong, irrespective of their nationality and residence. To qualify for legal aid, a person is required by law to satisfy the means and merits tests.

4. To ensure that only those cases with reasonable grounds for taking the proceedings are granted legal aid, all legal aid applications are processed by legal aid counsel appointed to serve in the LAD. In assessing the merits of an application, the LAD will consider the background of the case, evidence provided and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted. Regarding legal aid applications for judicial review, legal aid will be granted, subject to means, if

the applicant has a sufficient interest in the matter to which the judicial review application relates and the case has reasonable grounds. In the case of *R v. Legal Aid Board, ex p. Hughes* (1992) 24 H.L.R. 698, it was held by the English Court of Appeal that generally speaking, if the court grants leave, it is likely that the legal merits test will be satisfied.

5. Applicants are required to provide copies of the relevant documents to support their applications such as correspondence with the decision-making authority. If necessary, the LAD will write to the decision-making authority direct for the relevant documents.

6. The legal aid counsel responsible for the processing of the application will assess the merits of the cases once all the relevant documents are available. Independent counsel's opinion will be obtained unless the available documents already disclose strong ground for taking proceedings or that the issues raised are already covered by previous judgments/advice. If an application is refused, the applicant may appeal against the Director of Legal Aid (Director)'s decision to the Registrar of the High Court. The decision of the Registrar is final.

LEGISLATIVE FRAMEWORK ON ASSIGNMENT OF LEGAL AID CASES

7. Section 13 of the Legal Aid Ordinance (LAO) provides that where a legal aid certificate is granted, the Director may act for the aided person through legal aid counsel or assign any lawyers in private practice who are on the Legal Aid Panel (the Panel) selected by either the aided person if he so desires, or the Director.

8. In brief, Section 13 of the LAO stipulates that when a legal aid certificate is granted, the Director has the choice whether to act as solicitor and for the aided person to be represented by a legal aid counsel or to assign the case to a solicitor on the Panel. If the Director decides not to act, he may assign a solicitor on the Panel selected by the aided person or the Director may assign a solicitor on the Panel if the aided person makes no selection. As for

the assignment of counsel, if the circumstances of the case require it and irrespective of whether the case is handled in-house or by solicitors on the Panel, counsel in private practice and on the Panel may be assigned in the same way a solicitor is assigned depending on whether there is any nomination from the aided person.

9. Section 13 of the LAO does not therefore envisage the Director to act as solicitor in all legally aided cases. In general, the LAD handles up to one third of all matrimonial and personal injury related cases as solicitors for the aided persons. Insolvency and seaman's wages claims and majority of the enforcement cases are handled by in-house lawyers to achieve cost effectiveness. To avoid conflict of interests and to maintain the independence of the LAD, all judicial reviews cases are assigned out.

10. In addition, cases are assigned out if the aided person was already represented by a private practitioner before the grant of legal aid. The Director will not act where both parties are legally aided unless a party to the proceedings is already represented by the LAD at the time when legal aid is granted to the other party and there is no conflict of interest or prejudice to the aided person already represented by the Director if the LAD continues to act.

POLICY AND CRITERIA ON ASSIGNMENT OF PRIVATE LAWYERS

11. Cases that the LAD cannot or choose not to take up are assigned out to lawyers on the Panel. When distributing legal aid work to lawyers on the Panel, irrespective of the types of cases involved, the LAD will adhere to the fundamental principle that the aided person's interest is of paramount importance. The LAD's primary duty towards the aided person is to facilitate access to and attainment of justice through competent legal representation. To this end, the LAD has devised and published criteria on assignment of legal aid cases based on the experience and expertise of the lawyers. The criteria, which have been endorsed by the Legal Aid Services Council and are available at LAD's website and contained in the Manual for Legal Aid Practitioners, seek to ensure that the Director fulfills his duty of assigning competent lawyers to act for aided persons. The criteria include features such as imposition of a limit

on the number of assignments and amount of fees paid that aim to facilitate an equitable distribution of legal aid work. A copy of the assignment criteria is at **Annex**.

NOMINATION OF LAWYERS BY AIDED PERSONS

12. When aided persons decide to nominate their own lawyers, the LAD takes the view that the effect of Section 13 of the LAO is such that the aided person's nominations should be given due weight and should not be rejected unless there are compelling reasons to do so. Compelling reasons are when the nomination is likely to undermine the aided person's interest in the proceedings and/or to jeopardise the legal aid fund on account of matters such as previous unsatisfactory performance, adverse disciplinary action by regulatory bodies of the two branches of the profession, language requirements of the proceedings, or the aided person has made repeated/late requests for change of lawyer without any good reasons in support and where the hearing date is imminent.

13. In the absence of any compelling reasons as those mentioned above, the LAD is of the view that it does not have any valid ground under the existing legal framework to decline or question the nomination of the aided person. By the same token, unless there is evidence to the contrary, it is improper for the Department and would be a slur on the character and professional integrity of the nominated lawyer for the LAD to enquire if the nomination is prompted by some kind of questionable conduct on the part of the lawyer concerned.

14. In judicial review cases, any such enquiry may also be interpreted as an unnecessary and improper attempt to influence the outcome of legally aided proceedings when the lawyer nominated by the aided person is professionally qualified and has an untarnished professional record. It could also be construed as interference with the aided person's right of access to justice. The practice of acceding to the aided person's nomination in the absence of compelling reasons also serves to give recognition to the fiduciary nature of the relationship between a litigant and his legal representative which is a relationship that reposes total trust and confidence essential in the conduct of

legal proceedings and which contributes to the smooth operation of the justice system and protects the interest of aided persons.

ASSIGNMENT OF LEGALLY AIDED CASES TO COUNSEL IN PRIVATE PRACTICE

15. Statistics on the number of civil legally-aided cases where the assignments to private counsel are made pursuant to nominations by assigned solicitors/aided persons, and the distribution of the assigned legal aid cases among private counsel for the period from 2006-2010 are as follows –

Year	Number of civil cases where the assigned counsel are nominated by assigned solicitors or aided persons¹
2006	1 041
2007	924
2008	902
2009	1 012
2010	651

Year	Number of Private Counsel with Assignments					Total number of private counsel on the Legal Aid Panel who meet the minimum experience requirement
	Below 3 years of experience	3-5 years of experience	6-10 years of experience	Over 10 years of experience	Total	
2006	1	6	46	141	194	369
2007	1	13	39	151	204	398
2008	5	14	44	140	203	350
2009	7	16	49	155	227	346
2010	5	20	48	152	225	359

¹ LAD does not keep separate record on the number of cases where assigned counsel are nominated by aided persons.

ADVICE SOUGHT

16. Members are invited to note the assessment criteria in processing civil legal aid applications in respect of judicial review cases, the policy/criteria of assigning lawyers to handle legal aid cases, and the relevant statistics.

**Home Affairs Bureau
Legal Aid Department
January 2012**

Selection of Counsel and Solicitors for Legal Aid Assignments

Legal aid work is not distributed to counsel or solicitors on the Legal Aid Panel equally regardless of merits, the legally aided persons' interests being the paramount consideration. The Legal Aid Department's primary duty is therefore towards the aided persons by facilitating the access and attainment of justice through competent legal representation. Counsel or solicitors are selected by Legal Aid Counsel having regard to the level of experience and expertise of the practitioners concerned and the type and complexity of the particular case. In general, counsel or solicitors are selected in accordance with the following criteria:

General

2. Counsel or solicitors should -
 - (a) be on the Legal Aid Panel;
 - (b) be in active practice;
 - (c) have a satisfactory past performance record*;
 - (d) satisfy the minimum experience requirement specified for the relevant area of work;
 - (e) not exceed the limit on assignments of legal aid work and/or, where appropriate, costs and fees paid or payable for such work in the past 12 months;
 - (f) (in the case of solicitors) have the necessary support and facilities afforded by their firms to handle legal aid work.

Minimum Experience Requirements

Civil Case

3. Counsel or solicitors should -
 - (a) have at least 3 years of post-call / post-admission experience; and
 - (b) have handled a minimum number of civil cases in the relevant area of work within a specified period -
 - (i) for medical negligence, professional negligence, administrative / constitutional law (including Bill of Rights) cases, have handled at least 5 such cases* in the past 3 years; and

- (ii) for other cases, have handled at least 16 cases* in the relevant area of work in the past 3 years.

Criminal Cases

- 4. Counsel or solicitors should -
 - (a) have at least 3 years of post-call / post-admission experience;
 - (b) have handled at least 5 cases* in the past 3 years in the relevant area of work; and
 - (c) meet the minimum experience requirements specified below-
 - (i) *Cases in the District Court*
 - at least 3 years relevant criminal litigation experience;
 - (ii) *Cases in the Court of First Instance and appeals from the Magistrates' Court*
 - at least 5 years relevant criminal litigation experience;
 - (iii) *Appeals to Court of Appeal and Court of Final Appeal[#]*
 - Court of Appeal:
 - Counsel – at least 7 years relevant criminal litigation experience
 - Solicitors – at least 5 years relevant criminal litigation experience
 - Court of Final Appeal:
 - Counsel – at least 10 years relevant criminal litigation experience
 - Solicitors – at least 7 years relevant criminal litigation experience

* including both legally aided and non-legally aided cases

[#] the number of cases handled in the Court of Appeal and in the Court of Final Appeal are considered jointly for the purpose of counting past experience in paragraph (c)(iii) above.

- 5. For Senior Counsel, they are exempted from the minimum experience requirements for assignment of legal aid work.

Limits on Legal Aid Assignments

- 6. Assignments should not generally exceed the limits set out below -
 - Civil Cases:*
 - (a) for solicitors -- 45 cases within the past 12 months; and
 - (b) for counsel -- 25 cases within the past 12 months.
 - Criminal Cases:*
 - (a) for solicitors -- 30 cases or \$600,000 legal aid costs within the past 12 months (whichever occurs first); and

(b) for counsel -- 30 cases or \$1.2 million legal aid fees within the past 12 months (whichever occurs first).

7. Assignment to counsel and solicitors who do not meet the above selection criteria may be allowed with the approval of a directorate officer.

* In the assignment of legal aid cases, the Department will take into account such matters as the Record of Unsatisfactory Performance/Conduct and the record of disciplinary decisions of the Bar Association and the Law Society for which the Department maintains a separate list.