



## HONG KONG BAR ASSOCIATION

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3 December 2021

Mr. Lemuel WOO  
Clerk to Panel  
Panel on Administration of Justice and Legal Services  
Legislative Council Complex  
1 Legislative Council Road, Central  
Hong Kong.

Dear Mr. WOO,

### Panel on Administration of Justice and Legal Services

#### Re: Proposed Enhancement Measures to the Legal Aid System in Hong Kong

Following the Panel Meeting held on 26 October 2021, the Hong Kong Bar Association would like to provide you with a copy of its Position Paper dated 3 December 2021 on the LC Paper No. CB(4)1677/20-21(01) entitled "The Proposed Enhancement Measures to the Legal Aid System in Hong Kong". The Position Paper was endorsed at the Bar Council Meeting held on 2 December 2021 and submitted to the Legal Aid Department on 3 December 2021.

Yours sincerely,

Paul Harris, SC  
Chairman

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**Re: Proposed Enhancement Measures to the Legal Aid System in Hong Kong**

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Position Paper of the  
Hong Kong Bar Association ("**HKBA**")

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**A. Introduction**

1. This is HKBA's position paper in response to the Paper called "*Proposed Enhancement Measures to Legal Aid System in Hong Kong*"<sup>1</sup> ("**Paper**") tabled for discussion in a session at the Panel on Administration of Justice and Legal Services of the Legislative Council on 26 October 2021.
  
2. HKBA notes that the issue of alleged legal aid abuse and measures needed to combat it has previously been before the Legislative Council in 2017. The Administration's position in 2017 was that:<sup>2</sup>
  - (a) It was a fundamental principle that an aided person's interests are of paramount importance;
  
  - (b) If an aided person decided to nominate lawyers, the Legal Aid Department ("**LAD**") would give the aided person's nomination due weight. It would not reject their nominations unless there were compelling reasons, such as previous unsatisfactory performance from lawyers, disciplinary action by regulatory bodies or late nomination. In the absence of such reasons, the LAD did not believe it had grounds to question the nomination of an aided person.
  
  - (c) In particular, in the context of judicial review cases, an inquiry into the nomination of a legally aided person could be interpreted as an unnecessary and improper attempt to influence the outcome of legal proceedings. It could be seen as an interference with the assisted person's right of access to justice.

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<sup>1</sup> LC Paper no. CB(4)1677/20-21(01)

<sup>2</sup> Background brief prepared by the Legislative Council Secretariat for the meeting on 18 July 2017: Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases

- (d) If a lawyer urged someone to apply for legal aid for a judicial review and nominate that lawyer to act for them, unless the lawyer had provided misleading information, the Administration's view was that there was no impropriety in the arrangement.
3. It is noted that the Paper does not maintain that earlier position. Regardless, HKBA's position is that it supports the idea of legal aid reform and enlarging the pool of qualified lawyers in principle. However, reform and making more qualified lawyers available on the legal aid panel must not come at the expense of the right for people to choose their lawyers, which is a right protected under Article 35 of the Basic Law and Article 11 of the Hong Kong Bill of Rights, nor must it come at the cost of good quality legal representation.

**B. Fundamental rights engaged by the proposal in the Paper**

4. The proposal as presented in the Paper engages fundamental rights protected in the Basic Law and the Hong Kong Bill of Rights.
5. Article 35 of the Basic Law provides as follows:

*"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or representation in the courts, and to judicial remedies.*

*Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."* (emphasis added)

6. In addition, Articles 10 and 11 of the Hong Kong Bill of Rights guarantee the right to a fair hearing and minimum standards in protecting the rights of persons charged with criminal offences. They provide that:

Article 10

*"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ..."*

Article 11

*"(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—*

...

*(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

...  
*(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; ..."* (emphasis added)

7. Articles 10 and 11 of the Hong Kong Bill of Rights mirror Articles 14(1) and 14(3) of the International Covenant on Civil and Political Rights. They are also similar in content to Article 6 of the European Convention on Human Rights. Concerning these rights, the Court of Final Appeal has recognised that the European Court of Human Rights decisions, though not binding on the courts of Hong Kong, are of "high persuasive authority"<sup>3</sup>. The United Nations Basic Principles on the Role of Lawyers 1990 also provides that:

*"All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."* (emphasis added)

8. The relevant jurisprudence concerning criminal proceedings is to the effect that, while a legally aided person's right to choose lawyers is not absolute, the accused's wishes must be taken into account in an assignment process. The assisted person's wishes are subject to certain limitations where free legal aid is concerned and can be overridden when there are relevant and sufficient grounds for holding that this is necessary for the interests of justice.<sup>4</sup> Nonetheless, it is not right to simply remove the opportunity for the accused to express his wishes.
9. The Legal Aid in Criminal Cases Rules (Cap. 221D) do not expressly provide for the right of the accused to nominate lawyers of his choice. However, the constitutional right mentioned above means that the aided person's wishes must still be considered when the Director of Legal Aid assigns lawyers. A policy or practice to the effect that, in assigning lawyers to the legally aided person in criminal proceedings, the Director of Legal Aid should only accept (or respect) the accused's nomination of lawyers under exceptional

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<sup>3</sup> *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at para 27

<sup>4</sup> *Croissant v Germany* (App No 13611/88, 25 September 1992) at para 29; *Lagerblom v Sweden* (App No 26891/95, 14 January 2003) at para 54; *Mayzit v Russia* (2006) 43 EHRR 38 at para 66; *Re Kevin Maguire's Application for Judicial Review* [2018] UKSC 17; [2018] 1 WLR 1412 at para 34

circumstances may constitute a violation of Articles 10 and 11 of the Hong Kong Bill of Rights.

10. Article 35 of the Basic Law reinforces the position. It expressly guarantees the right to "choice of lawyers". While Article 35 of the Basic Law is not explicitly concerned with providing legal aid, nothing in Article 35 of the Basic Law limits the right to choose lawyers only to those who can afford to pay their lawyers. Indeed, it would be discriminatory to say that this right applies only to those with sufficient financial means to pay for their lawyers but not to indigent or persons of limited means. Such a situation would be inconsistent with equality before the law as guaranteed in Article 25 of the Basic Law.
11. Article 35 of the Basic Law informs a reading of section 13 of the Legal Aid Ordinance (Cap. 91), which provides that the Director of Legal Aid may "*assign counsel or solicitor, to be selected by the aided person, if he so desires, or otherwise selected by the Director*" (emphasis added).
12. Section 13 of the Legal Aid Ordinance (Cap. 91) was examined in a legal aid appeal concerning a decision of the Director of Legal Aid to change counsel representing a legally aided person in civil proceedings. The Registrar of the High Court recognised that the Director of Legal Aid had the "final discretion" or say in the choice of counsel but found that the Director's reasons for his decision to change counsel against the will of the legally aided person were unsustainable and set aside his decision<sup>5</sup>.
13. The Court of Appeal expressed a view that "*circumstances conceivably could develop in Hong Kong in which it was important that the aided person's choice of counsel be regarded as inviolate, notwithstanding a difference of view on the part of the Director*", and that, if the Director of Legal Aid's practice were not to respect the legally aided person's choice of counsel, the Court might find it appropriate one day to grant declaratory relief against such a practice.<sup>6</sup>

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<sup>5</sup> *Martnok Thanradee v Director of Legal Aid* [2014] 2 HKC 445

<sup>6</sup> *Keane v Director of Legal Aid* (unreported, CACV 49/2000, 15 June 2000) at para 21

14. Personal choice apart, there can be many good reasons why it would be in the interests of justice to select the lawyers chosen by the legally aided person. Often, the lawyer chosen would have represented the legally aided person in the early stages of the proceedings. For example, the lawyer could have provided advice to the legally aided person for some time. The lawyer could have represented the legally aided person before a magistrate before the case was transferred to the District Court or the High Court in criminal proceedings. In such cases, continuity of representation enhances the quality of legal assistance. It also saves costs. A lawyer who comes to a case 'cold' will have to read into the case and see the aided person for the first time.
15. Another issue is the equality of arms, which is an inherent feature of a fair trial. The justice system must give a party a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis an opponent<sup>7</sup>. A particular concern arising from the proposals is the long-term impact of the proposed cap in judicial review proceedings on the equality of arms.
16. Individual applicants who are poor or of only modest means make up the bulk of judicial review applications and depend on publicly funded legal aid. On the other side, respondents in public law cases are commonly represented by private lawyers instructed by the Department of Justice, which uses public funds like the LAD. Privately funded judicial review cases are relatively few.
17. As with practitioners in any other field of law, judicial review practitioners gain expertise and experience through doing cases. The proposed cap on judicial review related cases severely limits the development potential of lawyers who wish to become judicial review practitioners. There is no similar cap affecting the Department of Justice's choice of lawyers in public law cases. HKBA is concerned that this asymmetry may create an unequal playing field between residents and the public authorities.

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<sup>7</sup> *Ocalan v Turkey* [GC] (App No 46221/99, 12 May 2005) at para 140

**C. Public's right to legal advice in practice**

18. In criminal cases, defendants have the right to choose their lawyers as guaranteed by the Basic Law and the Hong Kong Bill of Rights as discussed under Heading B. In practice, provided that nominated lawyers are on the relevant legal aid panel, competent in the particular area of law and available, a defendant's nomination should be a significant factor when the Director of Legal Aid considers assignment.
19. Trust and confidence in lawyers are necessary for a healthy lawyer-client relationship. In criminal cases, the consequences of a conviction can be serious such as loss of personal liberty and reputation. If the Director of Legal Aid assigns a lawyer in whom the defendant does not have trust and confidence, the defendant may not be as frank and open as the situation requires. He might keep back important information that is critical to the case. He might withhold instructions or challenge the assigned lawyer's advice.
20. Such distrust will harm the effective and efficient conduct of the defence. The relationship between the assigned lawyer and the client may deteriorate and break up, in which case the Director of Legal Aid may have to assign another lawyer. Courts may have to adjourn cases. The result would be a waste of public money.
21. HKBA does not see any justification for the proposed measure that the Director of Legal Aid should only accept the legally aided person's nomination of lawyers under exceptional circumstances in criminal cases.
22. As for judicial review related cases, the proposed assignment cap appears to lack justification and be arbitrary.
23. The proposal singles out the statistics concerning judicial review related cases in 2020 without giving any details about such cases in the Paper, and then notes 'the public's concern on overconcentration of cases among certain solicitors and counsel'. However, particular circumstances of the cases are relevant and material in this context. For example, some applicants might be related (such as family in immigration cases), in which case there is then a need to assign the case to the same lawyers. Some cases may require expertise in a particular area of law, in which case there is also a need to assign these cases to lawyers

with the required knowledge and experience. Besides, the focus on 2020 may also not be a fair one, given the wide impact of COVID-19 on various fronts.

24. HKBA notes that no statistics have been disclosed regarding other kinds of civil cases. Is there, perhaps, a similar 'overconcentration of cases' in these other cases? If so, why do judicial review related cases need to be singled out for special treatment?
25. Judicial review applications are different from ordinary civil cases. They often involve issues beyond the applicant's interests or affect marginalised or vulnerable groups. They sometimes affect the public at large when a case concerns housing issues or electoral rights. They often involve a complex area of law such that the Government frequently imports specialist foreign lawyers to argue these cases. There must be a correct match between particular cases and expert lawyers to have effective and efficient legal representations. Lawyers would properly assist judges in coming to conclusions. The proposed cap on the number of assignments would likely result in a mismatch.
26. HKBA is concerned that the proposed cap on the number of assignments would not attract lawyers who intend to develop expertise in that particular area of law. Quite the opposite. If lawyers do not have sufficient cases to make specialisation worthwhile, the legal profession will have no specialist lawyers, which is against the public interest.
27. HKBA said in a paper called 'The Hong Kong Bar Association submission for 18 July 2017 AJLS Panel' dated 17 July 2017,<sup>8</sup> that the Director of Legal Aid appears to have adopted a policy or practice that he would give legal aid only after the Court grants leave for judicial review. Such policy or practice is wrong as a matter of legal principle. Under such policy or practice, applicants would have no option but to turn to lawyers willing to provide pro bono services. Should there be no one to provide such help, applicants may have to prepare their cases in person or even give up their right to go to court and commence proceedings, even if the case has merit.
28. In cases where applicants obtain pro bono legal services and are granted leave for judicial review, HKBA repeats its position in the 2017 submission. That was that the Director of

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<sup>8</sup> LC Paper No. CB(4)1419/16-17(02)



Legal Aid should have a flexible system enabling retroactive payment for necessary professional work, which was for unremunerated 'pre-legal aid' work carried out before proceedings start and third parties are involved. When the result of this work is that a judge says that there are grounds for a judicial review, HKBA considers that the lawyers that have provided necessary free legal services deserve credit, rather than them 'abusing' the legal aid system.

29. Where applicants are without help, HKBA is concerned that the Court sometimes needs to spend considerable time to deal with administrative or procedural matters before it is in a position to consider the merits of applications. Compared to other areas of law, the procedural issues which can arise in a judicial review can be complex, even when a party is legally represented.
30. Mr Justice Litton has referred to the issue of technical complexity in several judgments. One is *Oriental Daily Publisher Limited v Commissioner for Television and Entertainment Licensing Authority*. He stressed that a procedural defect would have severely compromised the court's ability to grant relief and emphasised "*the importance of parties paying close regard to procedural rules for the institution of legal proceedings*". He referred to it again in *Financial Secretary v Felix Wong*. At para 97, the judge described the parties as having gotten into a "*procedural tangle*", needing "*drastic procedural steps*" to cut through them.
31. Judges will have to deal with even more procedural problems if parties are unrepresented. For example, the Court would need to deal with the applicants directly to obtain basic documents, understand the applicants' cases, and understand their arguments on top of the various procedural issues that already arise in a legal aid context. Practical, timely and efficient legal representation would save the judicial resources and hence are essential for the administration of justice. Not only the parties but also the Court would benefit. In *Secretary for Security v Sakthevel Prabakar*,<sup>9</sup> Bokhary PJ (now NPJ), at para 73, acknowledged the debt which justice owed to the *non-refoulement* claimant's lawyers.

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<sup>9</sup> (2004) 7 HKCFAR 187

32. In any event, there is no evidence that the 'abuse' associated with free legal services cannot be adequately dealt with under the existing legal aid system and, where appropriate, under the disciplinary procedures of the relevant professional bodies.
33. As judicial review cases show, complex questions in different areas of law often arise. This aspect of these cases may involve comparative law research, as the Courts often find case law from other jurisdictions instructive. Whereas the applicants needing legal aid are often underprivileged, the proposed respondents are usually the Government or public bodies. These bodies are well-resourced and can instruct any lawyers without restriction. HKBA notes that when the present proposal is put forward, there is no corresponding or similar limitation on instructing lawyers on the part of the Government (or public bodies) or the Department of Justice being mooted. As stated above, HKBA is concerned that the proposed cap on the number of assignments in judicial review related cases would likely result in inequality of arms.
34. It is also not clear from the proposed cap on the number of assignments how the Director of Legal Aid would do the reckoning. For example, if a family of five is launching an application challenging an administrative decision affecting all of them, would the Director of Legal Aid count the case as involving five assignments (given that each person in the family would have their legal aid certificates)? If the Director of Legal Aid counts the case as involving five assignments, it would be unfair to the lawyers assigned if the allocation goes towards the quota. If so, probably no lawyer would be willing to take up the case. This is particularly so when the Director grants legal aid after the Court grants leave for judicial review, but the case is likely to be conceded by the respondent.
35. HKBA does not see why the considerations highlighted in the Paper concerning ordinary civil cases<sup>10</sup> should not apply in judicial review related cases. As stated above, HKBA sees no justification for singling out judicial review related cases for special treatment.

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<sup>10</sup> At paras. 12 -14

**D. Importance of Legal Aid in a Public Law Context**

36. Legal aid is particularly important in the broader context. This has been pointed out numerous times by figures in the Judiciary.

37. The former Chief Justice, Geoffrey Ma, observed at the 2016 Ceremonial Opening of the Legal Year that:<sup>11</sup>

*"Access to justice can also be measured by reference to the existence of legal aid in Hong Kong. Legal aid has over the years provided the necessary access to justice for many litigants. These have included people who have suffered serious injuries, their families, those persons who have had matrimonial problems and other people who have needed the protection of the law but who did not have the private means to engage legal representation. Certainly, in the important area of public law, legal aid has played its part in ensuring that Hong Kong's public law and constitutional law have properly developed, thus helping us to reach a greater understanding of our system of law...."*

38. In *Designing Hong Kong Ltd v The Town Planning Board and another*,<sup>12</sup> the Court of Final Appeal held at para 27(5) that:

*"...As the evidence before the court showed, Hong Kong's relatively generous system of legal aid (compared with many other jurisdictions) has ensured that most cases of public importance have over the years been determined by the courts. This has also been the Judiciary's experience. In the vast majority of PIL cases, particularly since 1997, legal aid has played a significant part. Put another way, as far as PIL cases are concerned; it is on the whole unlikely that a lack of means will prevent a PIL case from being heard. I say "on the whole" because there are no ready figures on any cases which may have slipped through the legal aid net. ..."*

39. The Legal Aid Services Council also stressed that one of the principles of providing legal aid in Hong Kong is *"the provision of legal aid services contributes to the development of the law and the proper administration of justice"* and *"the quality of legal aid services must be such as to ensure legal aid recipients have access to justice on a broadly equal basis to everyone else"*.<sup>13</sup>

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<sup>11</sup> <https://www.info.gov.hk/gia/general/201601/11/P201601110428.htm>

<sup>12</sup> (2018) 21 HKCFAR 237 at para 27(5)

<sup>13</sup> Legal Aid in Hong Kong published by Legal Aid Services Council in 2006, Chapter 10

40. There is no doubt that public law cases are essential to the rule of law and the proper understanding of how the law works. Public law is an area of law where litigation heavily relies on legal aid. It is important to ensure that legal aid is made available to deserving public law cases. Nevertheless, it should not stop there. Legally aided litigants should have public law specialists to make sure that there is a level playing field. Then the Judiciary receives the ablest assistance from counsel to do its job and adjudicate correctly and without undue delay.

#### E. Pro-Bono Legal Work

##### "Abuse"

41. HKBA agrees with the Paper when it condemns any form of abuse of the legal aid system. It is important to understand what exactly is supposed to be "abuse". HKBA has not received any formal complaints regarding the conduct or professionalism of a counsel assigned by the Director of Legal Aid.

42. If it is implied that *pro bono* work is, without more, abuse, this suggestion is rejected. The Paper itself at para 2 cites the case of *Designing Hong Kong Limited v the Town Planning Board and Secretary for Justice*<sup>14</sup> as an example of how the current legal aid system plays a significant part in public interest litigation. The Court of Final Appeal praised the legal team acting for the Applicant in that case ("DHKL"). They had worked on a *pro bono* basis.

*"We are grateful to counsel for the assistance they have given in this appeal, and like the Court of Appeal, we would commend in particular those representing DHKL who have acted pro bono in this important matter."*<sup>15</sup>

...  
*In thanking all the lawyers in the case, I am confident that no one would begrudge my making such thanks, especially to Designing's lawyers, they having acted pro bono."*<sup>16</sup>

43. HKBA has a Bar Free Legal Service Scheme. Providing *pro bono* services to those without means so that the right of access to justice constitutionally protected under the Basic Law is given meaningful effect is the responsibility of all counsel and the community. It must

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<sup>14</sup> [2018] HKCFA 16; (2018) 21 HKCFAR 237

<sup>15</sup> Para 9

<sup>16</sup> Para 65

be encouraged and not condemned. HKBA strongly objects to any attempt to discredit or smear *pro bono* work.

44. The importance and realities of *pro bono* work, even with the existence of a legal aid system, have been addressed by the former Chief Justice, Geoffrey Ma, at the 7<sup>th</sup> Asia Pro Bono Conference, 25 October 2018, Hong Kong, available on the website of the Hong Kong Court of Final Appeal<sup>17</sup>:

*"Many discussions begin with the various ways of defining "pro bono publico": the one I would like to use is the reference to the professional responsibility of legal practitioners to play a meaningful and proper role in the overall administration of justice."*<sup>18</sup>

...  
*... Particularly in recent years, however, legal aid has also significantly benefitted persons in public law cases in Hong Kong. A large proportion of the most significant cases in constitutional law since 1997 have involved at least one party being able to obtain legal aid. The limitations on legal aid are equally clear. Owing to the means requirement to qualify for it, many persons find themselves ineligible to apply for legal aid yet will scarcely have the means to enable them to go to court. The other significant limitation of legal aid is that where legal advice is required, as opposed to where court proceedings are involved, legal aid will generally not be available. This is where pro bono legal services step in."*<sup>19</sup>

...  
*In conclusion, as I mentioned earlier, not much is written about pro bono work, and there is, as a consequence, little publicity about it. The public very often is unaware of the time and effort devoted to this very real and tangible public service. For me, those who devote themselves to this service are truly unsung heroes."*<sup>20</sup> (emphasis added)

**Pro Bono lawyers 'stepping in' to supplement the limitations of the legal aid scheme – time imperatives in judicial review cases**

45. As mentioned by the former Chief Justice, it is perhaps because very little is written about the "unsung heroes" that the public may misunderstand *pro bono* work. Where the public becomes aware of a case in which the person was legally aided and yet was assisted initially on a *pro bono* basis, this was because the lawyers stepped in to fill the gap left by the limitations of the legal aid scheme as identified by the former Chief Justice. This scenario happens almost inevitably in judicial review cases for the following reasons.

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<sup>17</sup> [https://www.hkcfa.hk/filemanager/speech/en/upload/1215/\(For%20upload\)%202018.10.25%20-%207th%20Asia%20Pro%20Bono%20Conference,%20HK%202018.pdf](https://www.hkcfa.hk/filemanager/speech/en/upload/1215/(For%20upload)%202018.10.25%20-%207th%20Asia%20Pro%20Bono%20Conference,%20HK%202018.pdf)

<sup>18</sup> Para 2

<sup>19</sup> Para 7

<sup>20</sup> Para 19

46. Under ordinary circumstances, a plaintiff in a private law civil case, or an accused in a criminal case, does not need permission to raise arguments before the start of proceedings, which is referred to as "leave"<sup>21</sup> in judicial review cases and is an absolute requirement in these cases.
47. In 2007, the threshold for obtaining "leave" was made even more challenging when it was ruled that there should be a new test based on a "reasonably arguable claim which enjoyed realistic prospects of success"<sup>22</sup>. The revision of the test made it more difficult even to begin a judicial review case than before.
48. Further, the procedural rules of the High Court state that an *application* to obtain "leave" to begin a judicial review case:
- "shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."*<sup>23</sup> (emphasis added)
49. There is now a long line of cases<sup>24</sup> establishing that waiting for the Director of Legal Aid to grant legal aid is **not** a reason for the delay or for extending the time for such an application to be made.
50. It is therefore not uncommon that the legal advisers of a potential Applicant for judicial review must act and file an application to obtain leave from the Court (which now often requires a fully argued court hearing) on a *pro bono* basis within the three months. Legal aid is often only granted **after** "leave" has been obtained from the Court.
51. The cases that come to the public's attention are mostly cases in which the applicant obtained "leave". These were cases that were considered by the Court to be "reasonably arguable ... which enjoyed realistic prospects of success" and were subsequently granted legal aid. However, in these cases, the legal advisers originally had to act on a *pro bono*

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<sup>21</sup> Order 53, rule 3 of the Rules of the High Court (Cap. 4A)

<sup>22</sup> *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 677

<sup>23</sup> Order 53, rule 4 of the Rules of the High Court (Cap. 4A)

<sup>24</sup> See *AW v Director of Immigration* (unrep. 3 Nov. 2015) CACV 63/2015

basis because the Director of Legal Aid had yet to make a decision, and the case could not wait for him to make up his mind.

52. As indicated by the former Chief Justice, the lawyers in such cases had therefore acted on the basis that a matter of public importance which merited an application for judicial review should be brought before the Court notwithstanding that there was no guarantee of remuneration. This was carrying out a public duty, not abuse.

53. Another common scenario for why lawyers must first act *pro bono* is that the Director of Legal Aid initially refuses legal aid. An applicant who is aggrieved by a refusal decision can appeal to the Registrar of the High Court<sup>25</sup>, but this process is not covered by legal aid. Suppose a legal aid case has come to the public's attention, but the lawyers had initially acted on a *pro bono* basis. In that case, this is because the legal team had demonstrated to a judicial officer why the reason to refuse legal aid was wrong and that the case had merit and should have been able to clear the "leave" threshold. It is another example of Counsel continuing with the case out of a sense of public duty, on a *pro bono* basis without any guarantee of remuneration.

### **Non-Refoulement Cases**

54. As has already been much documented, there are a significant number of unrepresented litigants, mainly non-refoulement applicants, making applications for judicial review. This class of unrepresented litigants arises because the avenue for appeal of their cases from the Torture Claims Appeals Board / Non-Refoulement Claims Petition Office ("TCAB") is judicial review.

55. However, while the Duty Lawyer Service provides the legal representation before the TCAB, there is no system of "follow-up" to assess whether there are merits to seek judicial review of the decision of the TCAB.

56. By their nature, all these cases potentially involve a risk to life and limb, of torture and of the worst forms of treatment if the decision to remove the person was wrongly decided.

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<sup>25</sup> Section 26, Legal Aid Ordinance (Cap. 91)

Not only does legal aid not cover advice on the merits of such cases, but there is also no system of referral at all between the Duty Lawyer Service and the LAD. This means that the potential applicants are difficult to find and communicate with, let alone have their cases assessed.

57. Non-Refoulement applicants are therefore dependent on Non-Government Organisations and other charitable services, which in turn reach out to lawyers for assistance *necessarily* on a *pro bono* basis. Work in this area requires particular legal expertise, sensitivity to circumstances of such clients, and procedural dexterity since the applicant may already have filed papers without complying with procedural rules and require remedying. It is often difficult to appreciate what took place before the TCAB because there is no system of "transferral of papers" between the Duty Lawyer Service and the subsequent lawyers. Again, HKBA commends such work, providing vital legal services without remuneration because of the limitations of the legal aid scheme.

#### **The further assignment of those providing *pro bono* assistance**

58. As noted by the Paper, there is no mandatory requirement that the lawyers who assisted *pro bono* must always be assigned by the Director of Legal Aid. Those lawyers were assigned as a matter of common sense and logic.

59. As already stated in the Paper regarding civil cases at para 12:

*"Allowing nomination for these cases recognises the fiduciary nature of the relationship between APs and their lawyers, who may have already represented them at the early stage of the proceedings or in the lower courts, and hence save the time, effort and in turn legal costs arising from having to familiarise with the case details."*

60. Those remarks apply with even greater force in judicial review related cases. The lawyers who initially acted *pro bono* must inevitably have prepared the case well to obtain "leave" from the Court. To do so, these lawyers need to be highly experienced and knowledgeable in the areas of law relevant to that case to obtain "leave" in such a short timeframe. It is a matter of good administration for the Director of Legal Aid to further assign these lawyers.



## **Criminal cases**

61. The Duty Lawyer Service and legal aid in criminal cases only cover certain court hearings but do not cover initial advice or legal visits at the time of the arrest. In 2019, many persons were arrested and detained by the very institution against which they had protested and expressed their discontent. Inevitably, these are tense situations requiring legal assistance based on a relationship of trust and confidence between the arrested person and these lawyers.
62. It is *in the interests of the arrested person* for such lawyers to continue their assistance, even if on a *pro bono basis* for the duration of what is inevitably a long and complex trial. HKBA has received no complaints from such persons or legally assigned counsel about this arrangement. On the contrary, such legally assigned counsel are often grateful for the additional assistance.
63. Further, one of the aims of the proposal is to "enhance the pool of qualified lawyers." The Director of Administration stated in a letter to the Administration of Justice and Legal Services Panel on 26 October 2021 that:
- "For example, the counsel assigned by the LAD may wish to train another counsel who is less experienced and yet to meet the assignment criteria for legal aid cases, and suggest engagement of such counsel on a pro bono basis to assist in the case and to gain experience. In the circumstances in which the suggestion concerned does not involve public expenditure, and there is no objection from the Court, the LAD will give consideration."*
64. Therefore, the assistance on a *pro bono* basis in criminal legal aid cases supports the objective of enhancing the pool with suitably experienced counsel. Disallowing this arrangement would be detrimental to achieving such objective.

### **F. Other Abuse not mentioned in the Paper**

65. On the other hand, HKBA has received feedback on potential abuse of the system, which relates to counsel **already** on the criminal legal aid panel, manoeuvring themselves into monopolistic situations. It appears to arise from relationships with clerks, who obtain nominations for specific counsel assignment, even though they have no prior relationship

with the lay client, never assisted the lay client in the past, and may not have the necessary experience.

66. HKBA stresses that the purpose of allowing the nomination of Counsel in criminal legal aid cases is to fulfil the obligations under Article 11(2)(d) of the Hong Kong Bill of Rights so that **effective** legal representation is provided to the defendant for a fair trial and access to justice. Where such nominations are not made on an informed basis and are not in the defendant's interests, the nomination for the private interests of a clerk or a counsel would indeed be an abuse. This is contrary to the spirit of providing *pro bono* services. The abuse lies in the fact that this is not a genuine *bona fide* nomination at all.

67. HKBA will communicate this concern to the Law Society, as this stems from how law firms retain clerks on a consultancy basis. HKBA would further urge the Director of Legal Aid to consider nominations **only** if they reflect the genuine will and interests of the defendant.

3 December 2021