



**法律援助服務局**  
**LEGAL AID SERVICES COUNCIL**

Our Ref: ( 6 ) in LASC 5/5/41 Pt 4

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27 July, 2004

Clerk to LegCo Panel on Administration  
of Justice and Legal Services  
(Attn : Mr Paul WOO)  
Legislative Council  
Legislative Council Building  
8 Jackson Road, Central, H K

Dear **Mr Woo**,

**Legal Aid in Criminal Cases and  
the Court of Appeal case of WU Wai-fung**

As you may recall, this Council attended the Panel's meeting held on 29 January 2004. During the meeting, we discussed Court of Appeal's decision on the case of Wu Wai-fung and indicated that we would explore how incidents of this nature might be avoided.

This Council notes that –

- (a) The legal aid policy objective is to ensure that no one with reasonable grounds for proceedings in a Hong Kong Court is prevented from doing so because of a lack of means. The Legal Aid Department (LAD) will provide legal aid to those who satisfy the means test (and the merits test). An aided person might be required to make a contribution towards the cost of legal representation if, on a determination of his financial resources, he should be able to do so. The Court of Appeal's judgment in Wu's case did not question the requirement for means-testing and contribution.
- (b) The Director of Legal Aid (DLA) has the discretion to grant legal aid in criminal cases to an applicant whose financial resources exceed the financial eligibility limit if he is satisfied

that it is desirable in the interest of justice to do so subject to payment of a contribution, if required (Rules 15 & 16 of the Legal Aid in Criminal Case Rules [LACCR]).

In determining whether it is in the interests of justice, the Widgery Criteria will apply, namely -

- (i) the charge is a grave one, in the sense that the accused is in real jeopardy of losing his liberty or livelihood, or suffering serious damage to his reputation; or
  - (ii) the charges raises a substantial question of law; or
  - (iii) the accused is unable to follow the proceedings and state his own case, because of mental illness or other mental or physical disability; or
  - (iv) the nature of the defence involves the tracing and interviewing of witnesses, or expert cross-examination of a witness for the prosecution; or
  - (v) legal representation is desirable in the interests of someone other than the accused, as for example, in the case of sexual offences against young children, when it is not desirable that the accused should cross-examine the witness in person.
- (c) Once DLA decided that the applicant has sufficient financial resources to contribute to his legal aid, then by virtue of Rule 16 of the LACCR, the applicant has to pay a contribution. The amount of contribution shall be a debt due to DLA and is payable in a lump sum or by instalment on such day or within such period as DLA may determine.

Rule 16 must be read subject to Rule 13 in that for persons charged/convicted with the offence of murder, treason or

piracy with violence, the judge may grant legal/appeal aid certificate to them and exempt them from the means test and/or payment of contribution.

- (d) Without prejudice to Rule 9 of Legal Aid (Assessment of Resources & Contributions) Regulations, LAD has indicated that if the applicant can provide proof to the satisfaction of LAD that his assets are reduced, not with the intent of depriving himself of financial resources or otherwise dissipating funds so as to avail himself to be eligible for legal aid, as in the case of payment of a genuine and pressing debt, LAD would reassess his means and legal aid contribution accordingly.

In the Court of Appeal's decision in WU's case, in determining whether to grant an application under Rule 13, the Judge was not sitting as an appeal from DLA's decision, but he had to exercise a separate jurisdiction as required under the Rule. While LAD's decision was to be considered, the judge had to take into account other cogent factors, not least a critical assessment of the accused's right to a fair trial, particularly, given the seriousness of the crime, the penalty for it and, from the layman's perspective, the procedural complexities of the case. The Council has considered whether there is room for improvement in LAD's practice and whether it is desirable to amend legislation to ensure that persons charged with serious criminal offences will be legally represented at the trial.

Specifically, the Council has considered the following issues –

- (a) According to Rule 13(2) of LACCR, the court or a judge may exempt the accused person from the means test in a criminal case for "capital offences" (murder, treason or piracy with violence), offences formerly punishable by death, but this discretion does not exist in other criminal cases. We have considered whether discretion to waive means test should be extended from "capital offences" to other serious offences

punishable by life sentence. However as means assessment of legal aid applicants is one of the two cardinal criteria for granting legal aid, waiving means test should be very restrictive. Since the death penalty has been abolished, it appears that further extension of the exception to other serious offences is not justified.

- (b) The discretion to exempt means test in "capital offences" is given to the court and judges. The Council has considered whether DLA should also be given the same discretion. Under Article 11 of the Bill of Rights, there is no absolute right to free legal assistance in criminal proceedings. Currently, for those legal aid applicants whose financial resources are assessed to have exceeded the statutory maximum, DLA (which, by definition, includes any professional staff acting on his behalf) will consider on his own initiative whether it is desirable in the interest of justice to waive the upper limit and to offer the applicant legal aid. It appears that the current mechanism under Rule 15(2) already provides sufficient buffer to ensure that those who do not have sufficient means to pay for legal representation will be offered legal aid to defend his case or to pursue an appeal. To enlarge DLA's discretion to enable him to waive the means test for capital offences seems to be inconsistent with the existing legal aid policy and could create confusion and uncertainty or give rise to concern of subjectivity and arbitrariness; and
- (c) In view of the undesirable consequences of a defendant being not legally represented in a trial involving a serious criminal offence, the Council considers that legal aid can be granted by LAD in the first instance to a defendant charged with such an offence if he applies and accepts legal aid, although he may be unable to pay the required contribution at the time of acceptance. Unpaid balance of contribution will be recovered from the aided person as a civil debt due to DLA

under Rule 16(2) of LACCR. DLA agrees that he has a discretion to determine the manner in which a contribution should be paid, but points out that an applicant who is found eligible to be granted legal aid must first signify whether he accepts legal aid, bearing in mind that the applicant cannot be forced to accept legal aid against his own will especially if it is subject to the condition that he should pay a financial contribution. Acceptance of legal aid subject to payment of a contribution would prevent an aided person from disputing his liability to pay a contribution and the amount thereof in the event recovery proceedings are instituted against him for payment of the contribution.

Having considered the above issues, we come to the conclusion that current provisions will allow an aided person access to court. If any change is to be introduced, there will be the need to justify the change and to review current institutional arrangements.

Yours sincerely,



( LI Tin Yiu )  
Secretary

*JPL/LTY/rc*