

CHAPTER 6

Framework: The Law and Practice of Provision of Legal Aid

INTRODUCTION

This Chapter attempts to produce a record of the law and practice of the provision of legal aid within the constitutional and statutory framework of Hong Kong. Organized into three parts, the first part outlines the common law position regarding access to legal advice and right to legal representation. The second part describes the constitutional underpinnings of legal aid found in the Basic Law of the Hong Kong Special Administrative Region (“the Basic Law”)¹ and by virtue of Article 39 of the same, the International Covenant on Civil and Political Rights 1966 (“the ICCPR”).² Lastly, the statutory framework for the provision of litigation-based legal aid in Hong Kong pursuant to the Legal Aid Ordinance³ and the Legal Aid in Criminal Cases Rules⁴ is examined in the context of the practice, in order to form a comprehensive picture of each stage of the legal aid process.

COMMON LAW POSITION

Access to legal advice has been expressed as “one of the fundamental rights enjoyed by every citizen under the common law”.⁵ It is a right that, like the right to have unimpeded access to a court,⁶ the presumption of innocence,⁷ and the right against self-

1 Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990) (1990) 29 ILM 1511.

2 GA Res 2200 (XXI) (1966), 999 UNTS 171, (1967) 6 ILM 368. The Covenant entered into force on 23 March 1976 (except Article 41, which entered into force on 28 March 1976).

3 I.e. Cap. 91, Laws of Hong Kong.

4 I.e. Cap. 221 sub. leg. D, Laws of Hong Kong.

5 Per Lord Hope of Craighead in *R v Shayler* [2003] 1 AC 247 at [73] (House of Lords).

6 See *Raymond v Honey* [1983] 1 AC 1 (House of Lords) where at 13, Lord Wilberforce described it as a “basic right”.

7 See *Woolmington v Director of Public Prosecutions* [1935] AC 462 (House of Lords) where Viscount Sankey LC stated at 481: “Throughout the web of the English criminal law one golden thread is always to be seen, that is that it is the duty of the prosecution to prove the prisoner’s guilt”.

incrimination,⁸ the common law guards jealously against abrogation or interference.

Allied to the right to have access to legal advice is the paramount duty the common law places upon the court to ensure that the trial or hearing before it is fair. Legal representation is increasingly considered as a significant factor for the court to weigh as to whether proceedings before it are fair. The desirability of legal representation is well recognized. For example, Mason CJ and McHugh J of the High Court of Australia stated in *Dietrich v R* that representation by counsel ‘is in **the best interests** not only of the *accused* but also of *the administration of justice* that an accused be so represented, particularly when the offence charged is serious’. The reasons are not only that, as Lord Devlin stressed, “where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down”,⁹ but also that the unrepresented litigant “is unable dispassionately to assess and present his or her case in the same manner as counsel for the [prosecution]”. The suggestion that the judge may guide the unrepresented litigant throughout the trial so as to ensure that his case is effectively presented is, in the opinion of Mason CJ and McHugh J, “inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems”.¹⁰ The judge, as Sutherland J of the United States Supreme Court noted, “cannot investigate the facts, advise and direct the defence, or participate in those necessary conferences between counsel and accused which sometimes partake of the character of the confessional”.¹¹

This, however, is not to say that legal proceedings are necessarily unfair if there is no legal representation for a particular litigant and he or she has to act in person. The court has to consider the disadvantage of lack of legal representation together with other factors, including the seriousness of the allegations or contentions, the penalty, liability or other consequences that proof or establishment of the allegations or contentions, or failure to prove or establish them, would attract, and, from the layman’s point of view, the procedural complexities of the case,¹² before deciding whether the litigant concerned has had or would have had a fair hearing in the circumstances of the particular case; and whether, if fair hearing has not or would not have been accorded to him or her, the remedy (if any) to be granted to redress the unfairness, such as a re-hearing.¹³

8 See *Fu Kin Chi v Secretary for Justice* [1998] 1 HKLRD 271 (Court of Final Appeal) where Li CJ stated at 278: “At common law, a person has the privilege from being compelled to answer questions, the answers to which might tend to expose him to any punishment or penalty (including a disciplinary one) and this privilege is capable of application in non-judicial proceedings”.

9 Devlin, Patrick, Lord, *The Judge* (Oxford: Oxford University Press, 1979) p 67.

10 *Dietrich v R* (1992) 177 CLR 292 at 301-2; 109 ALR 385 at 389 (cited with approval by the Court of Appeal in *HKSAR v Wu Wai Fung & Anor* [2003] 4 HKC 259 at 275 and by Yuen JA in *Dr Ip Kay Lo Vincent v Medical Council of Hong Kong (No 2)* [2003] 3 HKC 579 at 600 (Court of Appeal)). See also a similar statement of Cheung JA in *New World Development Co Ltd & Ors v Stock Exchange of Hong Kong Ltd* [2005] 2 HKLRD 612 (Court of Appeal) at 622.

11 *Powell v Alabama* 287 US 45 (1932) at 61.

12 See *HKSAR v Wu Wai Fung & Anor*, supra at note 10, at 274. See also *Hinds v Attorney General of Barbados & Anor* [2002] 1 AC 854 (Privy Council).

13 See *R v Board of Visitors of HM Prison, The Maze, ex p Hone* [1988] AC 379 (House of Lords); *Re an Inquiry into Mirror Group Newspapers Plc* [1999] 3 WLR 583 (English Chancery Division); *R (on the application of Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 (English Divisional Court); *New World Development Co Ltd v Stock Exchange of Hong Kong Ltd* [2004] 3 HKC 233 (Court of First Instance).

BASIC LAW AND THE HONG KONG BILL OF RIGHTS ORDINANCE

Article 35 of the Basic Law provides:¹⁴

“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 for 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 supplied).

Article 39 of the Basic Law provides¹⁵ that the provisions of the ICCPR¹⁶ as applied to Hong Kong shall remain in force and shall be implemented through the laws of Hong Kong. Restrictions to the rights and freedoms enjoyed by Hong Kong resident must be prescribed by law and must not contravene the provisions of the ICCPR as applied to Hong Kong. The Court of Final Appeal has held that Article 39 incorporates the provisions of the ICCPR as applied to Hong Kong into the Basic Law and the Hong Kong Bill of Rights Ordinance¹⁷ provides for the incorporation of the provisions of the ICCPR into the laws of Hong Kong.¹⁸

Article 14(1) of the ICCPR and Article 10 of the Hong Kong Bill of Rights Ordinance are in identical terms. Both provide, inter alia, that:

“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 of law, everyone shall be **entitled to a fair and public hearing** by a competent, independent and impartial tribunal established by law” (emphasis supplied).

Article 14(3)(d) of the ICCPR and Article 11(2)(d) of the Hong Kong Bill of Rights are also in identical terms. Both provide, inter alia, that:

“In the determination of any criminal charge against him, everyone shall be entitled to the following **minimum guarantees, in full equality** ... (d) ... 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 supplied).

It can be readily noted that Article 35 of the Basic Law guarantees rights some of which are also encompassed by the provisions of the ICCPR quoted above. The Court of Final Appeal has considered the relationship between the provisions of the ICCPR as applied in Hong Kong under Article 39 in Chapter III of the Basic Law and the rights provided in

14 See, supra, note 1. By virtue of Article 41 of the Basic Law, persons in Hong Kong other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed under Chapter III of the Basic Law, including Article 35 of the same.

15 Ibid.

16 See, supra, note 2.

17 I.e. Cap. 383, Laws of Hong Kong.

18 *HKSAR v Ng Kung Shiu & Anor* [2000] 1 HKC 117 (Court of Final Appeal) at 134. The Court of Final Appeal subsequently described the provisions of the Hong Kong Bill of Rights as “the embodiment of the ICCPR as applied to Hong Kong”: *Shum Kwok Sher v HKSAR* [2002] 3 HKC 117 at 131.

other provisions in the same Chapter. It has held that the ICCPR as applied to Hong Kong, as incorporated in the Hong Kong Bill of Rights Ordinance, only provides for minimum standards for rights which are internationally recognized.¹⁹

In the present context, what calls for determination are whether Article 35 of the Basic Law does confer, in relation to the rights to confidential legal advice and choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, rights *in addition to* those guaranteed under Articles 14(1) and 14(3)(d) of the ICCPR (and Articles 10 and 11(2)(d) of the Hong Kong Bill of Rights) and particularly whether the additional rights (if any) include a right to have the services of the provider of the legal services in question publicly funded. The jurisprudence on these issues is developing.²⁰ On the one hand, it should be noted that neither the Court of Appeal nor the Court of Final Appeal has yet confronted the question of whether a provision in Chapter III of the Basic Law conferring fundamental rights of Hong Kong residents, may and does confer rights more generous than those in the ICCPR and the Hong Kong Bill of Rights. On the other hand, the Court of First Instance has held in relation to Article 35 of the Basic Law that one of the rights set out therein (namely the right of access to the courts and not one of the rights in Article 35 under discussion) may be restricted, together with the test for permissible limitations to that right.²¹

The fundamental rights guaranteed under Articles 14(1) and 14(3)(d) of the ICCPR (and hence Articles 10 and 11(2)(d) of the Hong Kong Bill of Rights) can be better understood not only by reference to the views of the United Nations Human Rights Committee (“UNHRC”), but also from the comparative jurisprudence of the European Court of Human Rights, which hears and determines complaints of violation of the equivalent provision of the European Convention for the Protection of Rights and Fundamental Freedoms 1950 (“ECHR”),²² namely Article 6, which provides:

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- 19 *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 (Court of Final Appeal) at 490-491.
- 20 See *Dr Ip Kay Lo Vincent v Medical Council of Hong Kong (No 2)* [2003] 3 HKC 579 (Court of Appeal) where Cheung JA expressed a view at 584 that Article 35 of the Basic Law “is not concerned with the provision of free legal aid by the government” and “also does not enable the litigant to insist to have a particular lawyer, even though that lawyer may not be available to handle the case or is not willing to represent him”. Cf *New World Development Co Ltd & Ors v Stock Exchange of Hong Kong Ltd* [2005] 2 HKLRD 612 (Court of Appeal) where Cheung JA stressed at 623 the fundamental nature of the entitlement to legal representation to a fair hearing.
- 21 *Lau Kwok Fai Bernard v Secretary for Justice; Government Park and Playground Keepers Union & Ors v Secretary for Justice* (unreported, 10 June 2002, HCAL 177, 180/2002), where Hartmann J of the Court of First Instance held that the right to access to the courts under Article 35 of the Basic Law can be limited and then formulated and applied a proportionality test for limiting that right. Ma CJHC approved the analysis of Hartmann J in *Lau Kwok Fai Bernard & Anor v Secretary for Justice & Anor* [2004] 3 HKLRD 570 (Court of Appeal) at 595. The Court of Final Appeal further added in *Ng Yat Chi v Max Share Ltd & Anor* [2005] 1 HKLRD 473 that the right to access to the courts does not include a right to abuse the court’s process; and that restrictive proceedings orders aiming at controlling vexatious litigants are proportionate measures pursuing the legitimate aims.
- 22 *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 221 (which was signed on 4 November 1950 and entered into force on 3 September 1953).

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal established by law.

(2) ...

(3) Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, **if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...**” (emphasis supplied).

As far as legal aid in civil proceedings is concerned, both the UNHRC and the European Court of Human Rights have indicated that there was *no express obligation* as such for a State Party to provide legal aid for individuals *in all cases*.²³ What the UNHRC and the European Court of Human Rights are concerned with is the *fairness of the hearing in the light of the lack of legal aid for an individual with insufficient means, a matter which takes account of the nature and circumstances of the hearing*.

In *Currie v Jamaica*, the UNHRC held that Article 14(1) of the ICCPR was infringed where the absence of legal aid before the Constitutional Court had denied a prisoner “the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing”.²⁴

In *Airey v Ireland* the European Court of Human Rights considered that all that Article 6(1) of the ECHR required “is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1)” and recognized that “there may be occasions when [appearing before a court in person, even without a lawyer’s assistance] secures adequate access ... to the [court]. Indeed, much must depend on the particular circumstances”. On the other hand, the article “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court”.²⁵ Matters like the importance of what is at stake for the complainant in the proceedings and the disparity of the respective levels of legal assistance enjoyed by the parties to the litigation would be examined. In particular, the European Court of Human Rights would examine “upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer”, a factor which required taking into account the personal abilities and circumstances

23 *Currie v Jamaica* (Comm 377/89) (UNHRC) (noted in Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press (2nd ed), 2004), [14.16]); *Airey v Ireland* (1979) 2 EHRR 305 (European Court of Human Rights) at 317.

24 *Currie v Jamaica* (Comm 377/89) (UNHRC).

25 *Airey v Ireland* (1979) 2 EHRR 305 (European Court of Human Rights).

of the complainant and the complexity of both the substantive and procedure laws applicable to the case.²⁶

Consideration by the European Court of Human Rights of the factors described above is illustrative of **the principle of equality of arms**, a component of the broader concept of a fair trial, requiring that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.²⁷

The European Court of Human Rights provided in the case of *P, C and S v United Kingdom* a statement of general principles on the relationship between legal aid and the right to fair trial under the ECHR. Although there is no automatic right under the ECHR for legal aid or legal representation to be available for a litigant who is involved in civil proceedings, Article 6 of the ECHR may be engaged under two inter-related aspects. *Firstly*, failure on the part of a State Party to provide an applicant with the assistance of a lawyer may breach this provision, where such assistance is **indispensable for effective access to court**, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case.²⁸ *Secondly*, the key principle governing the application of Article 6 is **fairness**. *In cases where a litigant appears in court notwithstanding lack of assistance of a lawyer and manages to conduct his or her case in spite of all the difficulties, the question may nonetheless arise as to whether the procedure taken was fair.*²⁹ *In this connection, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.*³⁰

The right of access to a court under Article 6 of the ECHR is not absolute and may be subject to legitimate restrictions. Where an individual’s access is limited either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation does not impair the very essence of the right and where it pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.³¹ Thus, though the pursuit of

26 Contrast *McVicar v United Kingdom* (2002) 35 EHRR 22 (European Court of Human Rights), where the complainant, a well-educated and experienced journalist (who was represented by a specialist defamation lawyer before trial), was held to have been not prevented from presenting his defence effectively to the court, nor was he denied a fair trial, by reason of ineligibility of legal aid, with *Steel and Morris v United Kingdom* (unreported, 15 February 2005, App No 68416/01) (European Court of Human Rights), where the complainants, two persons on income support defending a “complex” and “exceptionally demanding” libel suit by McDonald’s, the fast food chain, were held to have been deprived of a fair trial by reason of ineligibility of legal aid.

27 See *De Haes and Gjisels v Belgium* (1997) 25 EHRR 1 at 57 (European Court of Human Rights). For observations on possible development of this principle, see Ashworth, Andrew, *Legal Aid, Human Rights and Criminal Justice* in Young, Richard and Wall, David (eds), *Access to Criminal Justice* (London: Blackstone Press, 1996) pp 55-69.

28 See *Airey v Ireland* (1979) 2 EHRR 305 (European Court of Human Rights).

29 There is the importance of **ensuring the appearance of the fair administration of justice** and a party in civil proceedings must be able to **participate effectively**, inter alia, by being able to put forward the matters in support of his or her claims. An example is *McVicar v United Kingdom* (2002) 35 EHRR 22 (European Court of Human Rights).

30 *P, C and S v United Kingdom* (2003) 35 EHRR 31 (European Court of Human Rights) at [88]-[91].

31 *Ashingdane v United Kingdom* (1985) 7 EHRR 528 (European Court of Human Rights) at 546-547.

proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the matter in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to court.³² The European Court of Human Rights expanded on the issue of legitimate restrictions to the right of access to court in connection with lack of availability of legal aid in *Steel and Morris v United Kingdom* and stated that:³³

“It may therefore be **acceptable to impose conditions on the grant of legal aid** based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings. Moreover, it is **not incumbent upon the State to seek through the use of public funds to ensure total equality of arms** between the assisted person and the opposing party, as long as each side is afforded **a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary**” (emphases supplied).

In criminal proceedings, it can be readily appreciated that both the ICCPR and the ECHR provide for greater protection. The UNHRC considers that whether it is in the **interests of justice** to require the State to assign legal assistance is a question to be seen in the light of the nature of offences with which the complainant was charged³⁴ and the prospects of success in the case of an appeal³⁵ but once the State has decided to assign legal assistance, it is incumbent upon the State to ensure that legal representation it provides **guarantees effective representation**.³⁶ However, an accused is not guaranteed under Article 14(3)(d) of the ICCPR a choice of counsel assigned under legal aid.³⁷

32 See *Del Sol v France* (unreported, 26 February 2002, App No 46800/99) (European Court of Human Rights); and *Ivison v United Kingdom* (unreported, 16 April 2002, App No 3903/97) (European Court of Human Rights). See also *M v United Kingdom* (1983) 6 EHR 310 (European Commission of Human Rights).

33 *Steel and Morris v United Kingdom* (unreported, 15 February 2005, App No 68416/01) (European Court of Human Rights).

34 *O F v Norway* (Comm 158/83) (UNHRC); *Lindon v Australia* (Comm 646/95) (UNHRC) (noted in Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press (2nd ed), 2004), [14.108]).

35 *Z P v Canada* (Comm 341/88) (UNHRC) (noted in Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press (2nd ed), 2004), [14.109], though the learned authors of that work seek to limit this ruling to appeals in relation to non-capital cases).

36 *Borisenko v Hungary* (Comm 852/99) (UNHRC); *Kelly v Jamaica* (Comm 253/87) (UNHRC) (noted in Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press (2nd ed), 2004), [14.107] and [14.113] respectively). See also *Henry v Trinidad and Tobago* (Comm 752/97) (UNHRC); *Taylor v Jamaica* (Comm 797/96) (UNHRC); and *Shaw v Jamaica* (Comm 704/96) (UNHRC). This however does not mean that assigned counsel's incompetence would generally impinge upon the Article 14(3)(d), unless the counsel's actions are manifestly contrary to the interests of justice; see Joseph, Schultz & Castan (*supra*), [14.114]-[14.116], [14.120].

37 See *Pratt and Morgan v Jamaica* (Comm 210, 225/87) (UNHRC); *Teesdale v Trinidad and Tobago* (Comm 677/96) (UNHRC).

The European Court of Human Rights explained in the case of Pakelli v Germany that Article 6(3)(c) of the ECHR guarantees to an individual charged with a criminal offence three rights with the object of ensuring effective protection to the rights of the defence. While the article preserves the right to defend oneself in person, it further guarantees that a “person charged with a criminal offence” who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; and if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require”.³⁸

There is no definition of “sufficient means” in the ECHR. Nor is there any case of the European Court of Human Rights on the factors to be taken into account in the means test to determine an award of legal aid. On the other hand, it has been held that it is not incompatible with the ECHR Article 6 for the state to require an accused to pay after the trial the costs of lawyers appointed to conduct his defence, provided his means after the trial are to be considered.³⁹

On the test of “the interests of justice”, the European Court of Human Rights has indicated that it requires the relevant State authority to consider the complexity of the criminal proceedings, the capacity of the individual to represent himself, and the severity of the potential penalty,⁴⁰ and not to take the narrow approach of requiring actual prejudice to be shown in case of denial of legal aid.⁴¹ On the other hand, the European Court of Human Rights has held that “interests of justice” does not mean granting legal aid automatically to any convicted person who wishes to appeal, with no objective likelihood of success, after receiving a fair trial at the first instance.⁴²

38 *Pakelli v Germany* (1984) 6 EHRR 1 (European Court of Human Rights) at 10. Cf *Advisory Opinion OC-11/90 “Exceptions to the Exhaustion of Domestic Remedies”* where the Inter-American Court of Human Rights held on 10 August 1990 that since Article 8(2)(d) and (e) of the Inter-American Convention on Human Rights indicated that the accused has a right *to defend himself personally or to be assisted by legal counsel of his own choosing* and that, if he should choose not to do so, he has *the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides* but did not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his *economic status* if, when in need of legal counsel, the state were not to provide it to him free of charge. The Court then read Article 8 to require legal counsel only when that is necessary for a fair hearing. Any state that did not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.

39 *Croissant v Germany* (1992) 16 EHRR 135 (European Court of Human Rights).

40 *Quaranta v Switzerland* (1991) Series A No 205 (European Court of Human Rights). If the criminal proceedings expose the individual to possibility of imprisonment, that itself is usually sufficient for the grant of legal aid under the “interests of justice” test understood by the European Court of Human Rights: *Benham v United Kingdom* (1996) 22 EHRR 293. See also *Pham Hoang v France* (1992) 16 EHRR 53 where the European Court of Human Rights held that the denial of legal aid to an individual convicted on appeal of importing drugs and ordered to pay large sums to the customs authorities for a further appeal violated Article 6(3)(c) of the ECHR, see Ashworth, Andrew, *Legal Aid, Human Rights and Criminal Justice* in Young, Richard and Wall, David (eds), *Access to Criminal Justice* (London: Blackstone, 1996) pp 55-69.

41 *Artico v Italy* (1981) 3 EHRR 1 (European Court of Human Rights).

42 *Monnel and Morris v United Kingdom* (1987) 19 EHRR 205 (European Court of Human Rights).

Hong Kong jurisprudence on the corresponding provisions of the Hong Kong Bill of Rights Ordinance⁴³ is both underdeveloped and confined to the context of criminal proceedings. In *R v Fu Yan*, the Court of Appeal, drawing on cases of the European Court of Human Rights and the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms 1982, held that Article 11 of the Hong Kong Bill of Rights did not implicate “an absolute right to legal aid in criminal trials or, a fortiori, in appellate proceedings. Neither public funds nor judicial resources are limitless **What must be viewed is the interests of justice overall, with a bias towards the interests of the individual appellant.** . . . [The] case must be looked at as a whole and the most significant factor in any assessment of the interests of justice must be whether or not there are merits in the appeal” and “whether there appear to be “reasonable grounds”” (emphasis supplied).⁴⁴ In *R v Mirchandani*, the Court of Appeal affirmed that Article 11(2)(d) of the Hong Kong Bill of Rights did not confer an absolute right to legal aid “without payment”. Two conditions must be satisfied: “the interests of justice” must require that legal aid be provided but only if the person concerned “does not have sufficient means to pay for it”. Considerations other than the interests of justice⁴⁵ may legitimately intervene and the Court of Appeal held that “there is **nothing objectionable in principle** to a regime under which persons who claim the right to free legal assistance are “means tested” to determine whether or not they have “sufficient means”” (emphasis supplied). The Court of Appeal proceeded to hold that there was nothing then in force relating to legal aid in criminal cases which violated the Hong Kong Bill of Rights Ordinance.⁴⁶ Both of these cases were decided in 1992 and have not been subject to challenge since.

The Government has long acknowledged that it is in line with the ICCPR not to impose any residency restriction on applicants for civil and criminal legal aid.⁴⁷

In summary, a legal aid authority must, in deciding whether to grant legal aid in a particular case, consider the following factors so that he may exercise his discretion consistently with the human rights jurisprudence discussed above:

- the personal abilities and circumstances of the litigant;
- the importance of what is at stake for the litigant in the proceedings;
- the complexity of the substantive legal issues involved in the proceedings;
- the complexity of the legal procedures involved in the proceedings;

43 I.e. Articles 10 and 11(2)(d).

44 *R v Fu Yan* (1992) 2 HKPLR 107 at 120-122.

45 The Court of Appeal cited fiscal considerations, such as the charge on public revenue of legal aid requiring in-built mechanisms to regulate and limit the cost, and the due regard that must be paid to the overall funds available for others before the courts and for the different needs of the society.

46 *R v Mirchandani* (1992) 2 HKPLR 196 at 206-207, [1992] 2 HKCLR 174.

47 Administration Wing, Chief Secretary for Administration’s Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997) paragraphs 36, 37. Earlier, the Working Group on Legal Aid Policy Review maintained the principle that the eligibility for the grant of legal aid should be linked to the legal system rather than to the residential or immigration status of the applicant: Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 10.

- the nature of the dispute of fact involved in the proceedings and the manner of proof (for example, through the use of expert evidence or examination of witnesses) necessary for the satisfactory resolution of that dispute;
- the disparity (if any) of the legal assistance enjoyed by the parties to the proceedings;
- the desirability (if any) of expedition in the resolution of the dispute involved in the proceedings;
- the public perception of fair administration of justice and the related rationale of maintaining public confidence in the system of administration of justice;
- the likelihood of success in the litigant's case; and
- the proportionate use of limited public funds to aid or assist litigants who cannot reasonably afford competent legal representation with their own means.

LEGAL AID ORDINANCE

The Legal Aid Ordinance⁴⁸ is enacted to make provision for the granting of legal aid in civil actions to persons of limited means and for incidental and connected purposes.⁴⁹

CIVIL LEGAL AID: ORDINARY LEGAL AID SCHEME AND SUPPLEMENTARY LEGAL AID SCHEME

Legal aid for civil proceedings is available under two schemes under the Legal Aid Ordinance. The Ordinary Legal Aid Scheme is available for any person⁵⁰ whose financial resources do not exceed HK\$155,800⁵¹ for:

48 I.e. Cap. 91, Laws of Hong Kong.

49 Legal Aid Ordinance (Cap. 91) Long Title.

50 Legal aid however is not to be granted to a person to whom a chose in action is assigned for any purpose connected with that chose in action by a body of persons corporate or unincorporate: *Ibid*, section 5(2).

51 Originally, the limits of financial eligibility of legal aid were set at disposable income of HK\$500 a month and disposable capital of HK\$3,000. The said limits were raised to disposable income of HK\$700 a month and disposable capital of HK\$4,000 in August 1972 (LN 168/1972); disposable income of HK\$1,000 a month and disposable capital of HK\$10,000 in May 1977 (LN108/1977); disposable income of HK\$1,500 a month and disposable capital of HK\$15,000 in December 1982 (LN 425/1982); disposable income of HK\$2,200 a month in January 1986 (LN 5/1986). The criteria for determination of financial eligibility of legal aid were replaced in June 1992 with that of financial resources not exceeding HK\$120,000 (Legal Aid (Amendment) Ordinance 1991 (27 of 1991) section 4). The said limit of financial resources was raised to HK\$144,000 in July 1995 (Legal Aid (Amendment) Ordinance 1995 (43 of 1995) section 3); and to HK\$169,700 in May 1997 (Legal Aid (Amendment) Ordinance 1997 (8 of 1997) section 2). On 12 July 2004, the said limit of financial resources was reduced to HK\$155,800 (LN 45, 99/2004). The Administration has proposed pursuant to the 2005 annual review on financial eligibility limits that the said limit of financial resources be increased by 1.6% to HK\$158,300.

- (1) Civil proceedings in the Court of Final Appeal, the Court of Appeal, the Court of First Instance, or the District Court;
- (2) Civil proceedings before any person to whom a case is referred in whole or in part by any of the said courts;
- (3) Inquests into deaths under the Coroners Ordinance⁵² where, following a request for legal aid in that behalf by the family of the deceased person concerned, the Director of Legal Aid is of the opinion that the interests of public justice require that legal aid be given;⁵³
- (4) Proceedings in the Lands Tribunal under Part II of the Landlord and Tenant (Consolidation) Ordinance;⁵⁴
- (5) Negotiations prior to the issue of legal proceedings, including mediation, and for the payment of compensation by the Motor Insurers' Bureau for which no legal proceedings are issued; and
- (6) An application to the Mental Health Review Tribunal.

However, the following proceedings are excepted:

- (1) Proceedings wholly or partly in respect of defamation, other than the defence of a counterclaim alleging defamation;
- (2) Relator actions;
- (3) Proceedings for the recovery of a penalty where the proceedings may be taken by any person and the whole or part of the penalty is payable to the person taking the proceedings;
- (4) Election petitions arising from Legislative Council and District Council elections;⁵⁵
- (5) Proceedings in the Court of First Instance or District Court, in the case of a defendant, proceedings where the only question to be brought before the court is as to the time and mode of payment by him of debt (including liquidated damages) and costs;
- (6) Proceedings incidental to any proceedings mentioned in this list;
- (7) Proceedings in the Small Claims Tribunal under the Small Claims Tribunal Ordinance;⁵⁶
- (8) Proceedings in the Labour Tribunal under the Labour Tribunal Ordinance;⁵⁷ and

52 I.e. Cap. 504, Laws of Hong Kong.

53 The Director of Legal Aid may approve the grant of legal aid to one and, only one, person being the surviving spouse, child, father, mother, brother or sister of the deceased, but if there is no person of any of the descriptions either in being or, to whom a grant of legal aid can reasonably be made, the Director may for that reason approve the grant of legal aid to some other person who, in the opinion of the Director, may reasonably be regarded as a surviving close relative of the deceased: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 15A.

54 I.e. Cap. 7, Laws of Hong Kong.

55 Except where the petitioner claims that a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the ICCPR as applied to Hong Kong is an issue and the Director of Legal Aid is satisfied that, having regard to the matters set out in section 10(3) of the Legal Aid Ordinance, the petitioner would be granted a legal aid certificate: Legal Aid Ordinance (Cap. 91) Schedule 2, Part II, paragraph 4.

56 I.e. Cap. 338, Laws of Hong Kong.

57 I.e. Cap. 25, Laws of Hong Kong.

- (9) Proceedings
- (a) involving money claims in derivatives of securities,⁵⁸ currency futures or other future contracts;
 - (b) for the recovery of a loan made in the ordinary course of business conducted by the person seeking legal aid;
 - (c) involving disputes between limited companies or their shareholders regarding the respective rights of the company and the shareholders;
 - (d) arising out of disputes over partnerships; and
 - (e) for the taxation of costs, unless the person was previously aided in the action for which an order for costs was made.⁵⁹

The **Supplementary Legal Aid Scheme** is available for any person to whom legal aid is not available under the Ordinary Legal Aid Scheme because his financial resources are in excess of the amount prescribed for that scheme; and whose financial resources do not exceed an amount prescribed for the Supplementary Legal Aid Scheme (which at present stands at HK\$432,900⁶⁰) for:

- (1) Civil proceedings in the Court of First Instance or the Court of Appeal, brought by the aided person for damages in a claim arising from personal injuries to, or the death of, any person and proceedings incidental to such proceedings including the defence of any counterclaim;
- (2) Civil proceedings in the District Court brought by the aided person for damages in a claim arising from personal injuries to, or the death of, any person where the claim exceeds HK\$60,000 or where, in the opinion of the Director of Legal Aid, the claim is likely to exceed HK\$60,000 and proceedings incidental to such proceedings including the defence to any counterclaim;
- (3) Proceedings in the District Court brought by the aided person under the Employees' Compensation Ordinance,⁶¹ and

58 This expression means options to buy or sell interests in, certificates of interest of participation in, warrants to subscribe to or rights (other than shares) in, the capital of, or an instrument issued by, a company, government authority or other body: Legal Aid Ordinance (Cap. 91) Schedule 2, Part II, paragraph 11.

59 Ibid, section 5(1), Schedule 2. The Legislative Council is empowered to amend the amount of financial resources specified in section 5 and Schedule 2 by resolution: Ibid, section 7.

60 Originally, the upper limit of financial eligibility for the Supplementary Legal Aid Scheme was set in terms of income not exceeding HK\$15,000 a month and disposable capital not exceeding HK\$100,000. In June 1992, the criteria for determination of financial eligibility was replaced with that of financial resources exceeding \$120,000 but not exceeding HK\$280,000 (Legal Aid (Amendment) Ordinance 1991 (27 of 1991) section 5), which was revised in July 1995 to financial resources exceeding \$144,000 but not exceeding HK\$400,000 (Legal Aid (Amendment) Ordinance 1995 (43 of 1995) section 5); in May 1997 to financial resources exceeding HK\$169,700 but not exceeding HK\$471,600 (Legal Aid (Amendment) Ordinance 1997 (8 of 1997) section 3); and in July 2004 to financial resources exceeding HK\$155,800 but not exceeding HK\$432,900 (LN 45, 99/2004). The Administration has proposed pursuant to the 2005 annual review on financial eligibility limits that the said limits of financial resources be increased by 1.6% to financial resources exceeding HK\$158,300 but not exceeding HK\$439,800.

61 I.e. Cap. 282, Laws of Hong Kong.

- (4) Civil proceedings in the Court of First Instance, Court of Appeal or District Court, brought by the aided person for damages for medical, dental or legal professional negligence where, in the opinion of the Director of Legal Aid, the claim is likely to exceed HK\$60,000 including the defence of any counterclaim.⁶²

THE FORM OF LEGAL AID

Legal aid made available under the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme consists of representation, on the terms provided for by the Legal Aid Ordinance, by the Director of Legal Aid or by a solicitor and, so far as necessary, by counsel including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to bring to an end any proceedings.⁶³

EXPENSES FOR LEGAL AID

The expenses of legal aid provided under the Legal Aid Ordinance (with the exception of expenses incurred under the Supplementary Legal Aid Scheme, which are to be met by the Supplementary Legal Aid Fund, unless such expenses are expenses that cannot be paid out of the Supplementary Legal Aid Fund) are to be met by the Director of Legal Aid from moneys provided by the Legislative Council.⁶⁴

The Supplementary Legal Aid Fund is a fund administered by the Director of Legal Aid,⁶⁵ consisting of the proceeds of any loan or grant made to the Director for the purposes of the Fund,⁶⁶ contributions payable from persons granted legal aid under the Supplementary Legal Aid Scheme, the proceeds of and interest on any investments of the moneys of the Fund,⁶⁷ moneys paid or repaid to the Director under section 19 or 19A of the Legal Aid Ordinance or retained under section 19B of the Ordinance where the aided person is aided under the Scheme, and such other moneys as may be prescribed.⁶⁸ The Fund is to be charged with the expenses of the Scheme,⁶⁹ any security provided under section 18B of the Ordinance and to be provided out of the Fund, the payment of interest and the repayment of moneys borrowed by the Director for the purpose of the Scheme as well as all charges and expenses payable in connection with such a borrowing, the

62 Legal Aid Ordinance (Cap. 91) section 5A, Schedule 3 (except claims in the Court of First Instance or District Court for damages for assault and battery).

63 Ibid, section 6.

64 Ibid, section 27.

65 The Director is empowered to invest the moneys of the Supplementary Legal Aid Fund in such manner as the Financial Secretary may approve: Legal Aid Ordinance, section 29(4). The Director must keep proper accounts and proper records in relation thereto of the affairs of the Fund, which are to be audited by the Director of Audit: Ibid, section 31.

66 Ibid, section 30 (including temporary borrowing power by way of overdraft or otherwise, and non-temporary borrowing power with the prior approval of the Financial Secretary).

67 Surplus moneys in the Supplementary Legal Aid Fund are placed on fixed deposits with authorized institutions to earn interest.

68 Ibid, sections 29(1), (2).

69 Such expenses include payments to counsel and a solicitor and any costs payable by the Director under section 16C of the Legal Aid Ordinance where the aided person receives legal aid under the Supplementary Legal Aid Scheme.

payment of fees charged to the Fund in respect of the services afforded by public servants under the Scheme,⁷⁰ and such expenses as may be prescribed.⁷¹

APPLICATION FOR CIVIL LEGAL AID

A person may apply to the Director of Legal Aid for legal aid for civil proceedings,⁷² whether in his own right or in a representative or fiduciary capacity.⁷³ If the person who wishes to be granted legal aid is an infant,⁷⁴ the application shall be made on behalf of the infant by his father, mother or guardian (i.e. including such person as the Director of Legal Aid considers may be properly appointed by the court to be the next friend or guardian ad litem of the infant).⁷⁵ The application for legal aid must be in such form and accompanied by such statutory declaration, verifying the facts stated in the application, as may be prescribed.⁷⁶

If an application for legal aid under the Legal Aid Ordinance is made, the Director may:

70 Ibid, section 29(5).

71 Ibid, section 29(3).

72 Ibid, section 8(1).

73 A person who applies for legal aid in a representative capacity must expect that if legal aid is granted, it is granted to him to enable him to take legal proceedings in a representative capacity. However, references in *ibid*, section 8(1) to a person who wishes to be granted legal aid in a representative capacity extends to a person who wishes to be granted legal aid for making application to a court or the Court of Final Appeal for an order enabling civil proceedings (being civil proceedings in respect of which legal aid may be granted under the Legal Aid Ordinance (Cap. 91)) to be conducted on behalf of a person who is mentally disordered: *Ibid*, section 8(4).

A person makes an application in a fiduciary capacity if, for example, he makes the application as the trustee or personal representative of an estate in connection with the taking or defending proceedings in respect of the trust property or the estate.

If legal aid is granted to a person applying in a representative or fiduciary capacity, the legal aid certificate would be issued in the name of the representative or fiduciary on behalf of the principal or estate.

74 “Infant” is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to mean a person who has not attained the age of 18 years.

75 Legal Aid Ordinance (Cap. 91) section 8(3). The legal aid certificate issued will be in the name of the infant, stating the name of the person by whom he has applied: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 4(4).

76 Legal Aid Ordinance (Cap. 91) section 8(2). Any person seeking or receiving legal aid who (a) wilfully fails to comply with any regulations as to the information to be supplied by him; or (b) in furnishing any information required by such regulations knowingly makes any false statement or false representation, is guilty of a criminal offence. Proceedings for such an offence may, notwithstanding any law prescribing the time within which such proceedings may be brought, be brought within two years after the commission of the offence or within one year next after the first discovery thereof by the prosecutor, whichever is the shorter: *Ibid*, section 23.

The application form instructs that: “You should make full and frank disclosure of all assets owned by you and your spouse”. One cannot be the judge in one’s own cause in this regard. Thus a statement to the effect that the legal aid applicant did not own any shares when in fact the applicant had shares held in his account on behalf of others was a false one: *HKSAR v Chan Ying Lok Samson* (unreported, 14 March 2006, HCMA 1177/2005) (Court of First Instance).

- (a) make such inquiries as he thinks fit as to the means of the applicant and as to the merits of the case;⁷⁷
- (b) require the applicant to furnish such information and such documents as the Director may require for the purpose of considering the application;⁷⁸
- (c) require the applicant to attend personally before the Director;
- (d) refer the application, or any matter arising out of the application, to counsel or solicitor, whose name is on the appropriate panel, to investigate the facts and make a report thereon or to give any opinion thereon or on any question of law arising out of the application;⁷⁹
- (e) take or cause to be taken such steps as may be necessary to conserve the interests of the applicant or of any person on whose behalf the applicant is acting pending determination of his application; and

77 As a matter of practice, the Director approaches Government departments on an ad hoc basis to seek information from the departments for the purpose of making inquiries into the merits of the case connected with a legal aid application. Although the Director would indicate in the request for information that the information received may be forwarded to the assigned lawyers occasionally, the departments would supply the information required upon the Director undertaking that the information would be used for the sole purpose of inquiring into the merits of the case and remain confidential throughout. The Director does not retain the files supplied. A practice has also developed for the police force and the Labour Department to retain files of accident investigations if a request is made for its use in connection with litigation on legal aid.

For the purpose of making inquiries into the merits of the case, the Director is entitled to be supplied free of charge with a copy of the minute or relevant extract from the register referred to in section 35A of the Magistrates Ordinance (Cap. 227) in any relevant proceedings and in accordance with the provisions of that section; with a copy of the pleadings and any other document in any relevant proceedings; with a transcript of the evidence in any proceedings to which the application relates and, in the event of there being any other relevant proceedings (being proceedings not before a magistrate), with a transcript of the relevant evidence in such other proceedings and also, if such other proceedings are criminal proceedings, of the judge's summing up in such other proceedings: Legal Aid Ordinance, section 9(a).

78 The information and documents are required to enable the Director to determine the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required; the question whether it is reasonable that a certificate should be granted; and the financial resources of the applicant: Legal Aid Regulations (Cap. 91A) regulation 3(2).

79 Reference to counsel under this provision for an opinion on the merits of a legal aid application is maintained as standard practice before legal aid counsel makes a decision on whether legal aid should be granted if there is no precedent or decided cases on the subject or the case is one of complexity or the case raises a novel point of law: Legal Aid Services Council, *Annual Report, 2003-2004*, p 41. This practice introduces a degree of independent investigation of the application, and brings a degree of transparency to the decision-making of legal aid applications, particularly applications for legal aid to commence applications for judicial review against the decision of a Government department or public body. Occasionally, Masters hearing an appeal against refusal of legal aid may direct the Director to obtain counsel's opinion to assist their decision-making. Once instructions are sent out to counsel, it is for counsel to advise what other investigation or materials are required to enable him to render an opinion on the merits of the application. The Director will endeavour to assist. Funding for section 9 opinions has never been a problem. Nevertheless, the effectiveness of this practice as a safeguard depends on the provision of adequate funding and broad ranged instructions to enable full and proper investigation of the factual and legal issues and of the necessary materials for the merits of the application to be properly assessed.

- (f) defray expenses incidental to any of the foregoing matters out of any funds in his control which are available for the purpose.⁸⁰

MEANS TEST

In processing an application, the Director of Legal Aid will apply the means test by considering the applicant's financial resources in accordance with the provisions of the Legal Aid Ordinance and the regulations made under the Ordinance. He is empowered to determine the financial resources, income, disposable income and disposable capital of a person and the extent of his liability to contribute in respect of any proceedings.⁸¹ He may re-determine that person's financial resources if there appears to be a change in the circumstances of that person and may after such re-determination, re-determine that person's maximum contribution.⁸²

The financial resources of an aided person is to be assessed by multiplying that person's monthly disposable income by 12 and adding his disposable capital to that sum.⁸³ Assessment of financial resources by taking into account both income and capital of a legal aid applicant, separately calculated, represents a practical way of assessing

80 Legal Aid Ordinance (Cap. 91) section 9.

81 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 3. Any public officer may act on behalf of the Director of Legal Aid in connection with the determination of a legal aid applicant's financial resources.

82 Ibid, regulation 11. The Director may also make an amended determination to substitute for the original determination: Ibid, regulation 12. The usual practice of the Legal Aid Department is to re-assess the means of an applicant before making an offer of legal aid if the means investigation report of the applicant is more than 6 months old by the time the offer is to be made. Furthermore, the Department will re-assess the means of an aided person at any time if information obtained from a third party or from documents produced in the course of the aided proceedings suggests that the financial resources of the aided person may exceed the eligibility limit. On the other hand, the Director has a discretion not to discharge legal aid if it is appropriate not to do so; see note 149 infra.

83 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 2A.

Provisions are made to regulate the making of such determinations in relation to the subject matter of dispute, applications in representative or fiduciary capacity, the resources of a spouse, resources of an infant applicant, resources of persons receiving Comprehensive Social Security Allowance, and deprivation or conversion of resources by the person concerned: Ibid, regulations 5 to 9.

The resources of an infant applicant are not aggregated with those of his parents so as not to deter parents to pursue legal proceedings on behalf of the infant, bearing in mind that any damages or sum recovered would be subject to the directions of the court: Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997* (December 1997) paragraph 26. An example is the case of *Sun Jeremy (a minor) (by Mong Sien Yee Cynthia, mother and next friend) v Hong Kong Adventist Hospital (operated by Seventh Day Adventist Corp (HK) Ltd) & Anor* (HCPI 266/1999) where the infant son of the daughter of a successful businessman, Mong Man Wai, was granted legal aid to pursue medical negligence action against the hospital and paediatrician caring for him; see *Hong Kong Economic Times* (24 September 2005) A 20.

eligibility.⁸⁴ Only disposable income or capital is taken into account, in order to ensure that no one is placed in such a position that his standard of living is reduced below acceptable levels.⁸⁵

The methods of determining disposable income and disposable capital are prescribed by subsidiary legislation made under the Legal Aid Ordinance. The purpose of the subsidiary legislation is to prescribe the mechanism of ascertaining whether a legal aid applicant is of limited means in accordance with the Legal Aid Ordinance. The concern of the legislation must be to assess the amount of finance that a legal aid applicant can raise, if required, to fund his litigation. It is not the concern of the legislation to establish the net financial worth of a legal aid applicant.⁸⁶

The **disposable income** of a legal aid applicant is ascertained by first computing the income of the person concerned, which would be treated as including the income of that person's spouse.⁸⁷ Generally, his income from any source⁸⁸ shall be taken to be the income which he may reasonably expect to receive (in cash or in kind) during the period of computation, that income in the absence of other means of ascertaining it being taken to be the income received during the preceding year.⁸⁹ The disposable income of the

84 The Working Party on Legal Aid, which introduced the approach of assessing financial resources, noted that because income represents a "flow" of spending power occurring over a period of time, and capital represents a "stock" of wealth existing at a point in time, it was incorrect in strict economic terms to add the stream of income a person receives over a particular period to the capital he possesses at a point in time. The Working Party explored an either/or approach excluding the addition of income to capital but rejected it after it became clear that such an approach would make someone with substantial capital assets eligible for legal aid: *Legal Aid: A Report by the Working Party* (January 1986) ("the Scott Report") paragraphs 2.19, 2.20.

85 The Scott Report, paragraph 2.21. The Legal Aid Policy Review 1997 affirmed the use of the concept of "disposable" financial resources (as opposed to *all* resources) possessed by an applicant, on the ground that the Government should not expect a person to spend all his resources in conducting private litigation and suffer financial difficulties as a result: Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997), paragraph 8.

86 *Ng Ai Kheng Jasmine v Master M Yuen & Anor* (unreported, 8 March 2004, HCAL 46/2003) (Court of First Instance) at [23].

87 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 7(1), (2). The resources of spouses are aggregated to prevent abuse: Scott Report, paragraph 2.35.

88 Sources of income include wages or salary from employment, income from trade or business, rental income from leasing or sub-letting of premises, contributions from other members of the family residing with the person concerned, including a cohabitee (if the contribution is more than sufficient to cover the living expenses of the person concerned), and contributions from non-residing members of the family.

89 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 1, Part I. Provisions are made for the computation or determination of income in respect of any emolument, benefit or privilege receivable otherwise than in cash, and income from a trade, business or gainful occupation other than an employment at a wage or salary.

In any event, in computing income from any source there shall be disregarded such amount, if any, as the Director considers to be reasonable having regard to the nature of the income or to any other circumstances of the case. The Director may in this connection and subject to proof to his satisfaction take account of any loss or reduction of future income. For criminal legal aid, a person concerned who is remanded in custody can usually be treated as having nil income, without any regard to the actual earnings he received the 12 months period prior to his application for legal aid or remand in custody. Save as to this matter, the means investigation of a person concerned in criminal legal aid requires consideration of all other of his financial resources.

person concerned is computed by subjecting the computed income of the person concerned to specified deductions, namely:

- An allowance in respect of the person concerned and his dependants,⁹⁰ equivalent to the 35-percentile household expenditure of the particular household size consisting of the person concerned and his dependants;⁹¹
- If the income of the person concerned consists, wholly or in part, of a wage or salary from employment, a reasonable amount to provide for (a) the care of a dependent who is an infant or unable to take care of himself by reason of his mental or physical condition during the time that that person is at work (whether that person is absent from the home or not);⁹² (b) any payment made by that person by way of contribution to a pension or retirement scheme; and (c) any payment made by that person for salaries tax;
- If the income of the person concerned consists, wholly or in part, of profits from a trade, business or gainful occupation other than an employment at a wage or salary from employment, a reasonable amount to provide for the care of a dependent who is an infant or unable to take care of himself by reason of his mental or physical condition during the time that that person is at work (whether that person is absent from the home or not);
- If the person concerned is a householder, an amount representing net rent payable of the rent or mortgage payment, rates, management fees, insurance and any yearly expenses of his main or only dwelling (provided that such an amount does not exceed 50% of his income); and if he is not a householder, the cost of his living accommodation;
- Income arising from any capital asset (for example, rental income from real property upon which the applicant relies on as the principal source of his income) which has been included in the computation of the disposable capital of the person concerned; and
- Regular payments the person concerned makes for the maintenance of a spouse living separate or apart or a former spouse; or a child⁹³ (if the spouse or child (as the case may be) has not been taken into account as a dependent of the person concerned in the calculation of the allowance referred to above).⁹⁴

90 Where the resources of a spouse of the person concerned are to be treated as the resources of the person concerned in the exercise, the spouse would be deemed to be a dependent for the purpose of this deduction: Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 7(3).

91 For discussion on the adoption of this measure of living standard, see Chapter 8 below.

92 A reasonable amount in the context of the care of a dependent infant while engaging in employment is an amount not exceeding the minimum allowable wage for hiring a foreign domestic helper prescribed by the Labour Department.

93 The amount to be deducted is to be the amount actually paid where the payment is made under a court order; or in any other case, a reasonable amount determined by the Director having regard to the circumstances of the case, though not exceeding whichever is the lower of the amount actually paid as maintenance and the 35-percentile household expenditure differential between a hypothetical household consisting of only the person concerned and the person(s) for whose maintenance the payment is made as dependent(s) and a hypothetical household consisting of only the person concerned.

94 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 1, Part II.

The **disposable capital** of a legal aid applicant is ascertained by including in the computation of his capital the amount or value of a resource of a capital nature⁹⁵ ascertained as on the date of the application.⁹⁶ No provision is made for consideration to be given to a debt owed by a person concerned. Nor is provision made to enable any liability or encumbrance attached to a capital resource to be included in the computation of disposable capital.⁹⁷ For a resource that does not consist of money, its amount or value is to be taken as the amount which that resource would realize if sold in the open market.⁹⁸ Prima facie, such an amount is the net proceeds of sale, which would, in the case of property subject to an encumbrance, be the sale price less the sum required to discharge the encumbrance. It follows therefore that in relation to a mortgaged property, the amount or value that the owner stands to get would be the balance of the sale price, after deducting the outstanding indebtedness under the mortgage.⁹⁹ Where the sale price is insufficient to discharge the outstanding indebtedness, the owner would obtain nothing from the sale of the property. The aforesaid analysis indicates that for a resource consisting of property that has a market value less than the indebtedness secured by the property (i.e. a property of negative equity), the amount or value computed of it would be zero.¹⁰⁰

95 Resources of a capital nature include cash at bank or in hand, the value of any interest in land other than the person concerned's main dwelling, the value of shares and other investments, the value of jewellery, watches and antiques, the value of vehicles and vessels, the value of the person concerned's business or trade, money receivable, value of life assurance or endowment policy, interest in an estate, trust or other fund, gifts of value, and in criminal cases, bail money and assets specified in a restraint order. A debt is not of a capital nature even though it arose out of a hire-purchase agreement for a property subsequently repossessed and sold: *Shem Yin Fun v Director of Legal Aid & Anor* [2003] 1 HKC 568 (Court of First Instance).

96 However, the Director is to compute the capital resources of the person concerned to take account of any substantial fluctuation in the value of a resource, any substantial variation in the nature of a resource affecting the basis of computation of its value, any extinguishment of a resource, or any new resource coming into the possession of the person concerned, that is brought to the notice of the Director between the date of application and his determination: Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 2, paragraph 1, proviso.

97 *Ng Ai Kheng Jasmine v Master M Yuen & Anor* (unreported, 8 March 2004, HCAL 46/2003) (Court of First Instance) at [25].

98 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 2, paragraph 2.

99 Cf Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 2, paragraph 8(2), which prescribes that the Director must take account of the value to the person concerned of any interest in a dwelling which is not his main dwelling but nonetheless is a dwelling he resides any sum which might be obtained by borrowing money on the security thereof.

100 *Ng Ai Kheng Jasmine v Master M Yuen & Anor* (unreported, 8 March 2004, HCAL 46/2003) (Court of First Instance) at [22], disapproving of *Leung Kwai Lin Cindy v Director of Legal Aid* [2000] 4 HKC 516 (Legal Aid Review Committee), a decision binding on neither the Masters hearing legal aid appeals nor the court; see *Shem Yin Fun v Director of Legal Aid & Anor* [2003] 1 HKC 568 (Court of First Instance).

The value of the business of a person concerned, in which he is the sole owner or a partner, is to be taken as either (a) such sum, or his share of such sum, as the case may be, as could be withdrawn from the assets of such business without substantially impairing the profits of such business or the normal development thereof; or (b) such sum as that person could borrow on the security of his interest in such business without injuring the commercial credit of that business, whichever is the greater.¹⁰¹

In the computation of the capital of a person concerned, the following are not to be included:

- the household furniture and effects of the main or any dwelling house occupied by him;
- articles of personal clothing;
- the personal tools and equipment of his trade, not being part of the plant or equipment of a business in which the person concerned is the sole owner or partner;
- sum of money which the person concerned has received or is entitled to receive from a body of which he is a member by way of financial assistance towards the cost of the proceedings in respect of which legal aid is applied for;
- in relation to a personal injuries or fatal accident claim, amount of compensation received by the person concerned under the Employees' Compensation Ordinance,¹⁰² the Pneumoconiosis (Compensation) Ordinance,¹⁰³ or the Occupational Deafness (Compensation) Ordinance;¹⁰⁴ and an amount from the moneys received by the person concerned under an insurance policy in respect of the injury that the Director of Legal Aid considers to be reasonable to provide for the care and medical treatment and appliance which are likely to be required by the injured person as a result of the injury over the 3-year period commencing on the date of application;¹⁰⁵
- amount of money paid to the person concerned under the Traffic Accident Victims Assistance Scheme;
- amount of any interim payment made to him in accordance with a court order or in accordance with an agreement having the same effect as such an order; and
- reasonable amount or value (if any) of a donation or gift the person concerned received.¹⁰⁶

101 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 2, paragraph 5. The Director is empowered to compute the amount of a person concerned's capital in the same manner if he stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, in lieu of ascertaining the value of his stocks, shares, bonds or debentures in that company: *Ibid*, paragraph 4.

102 I.e. Cap. 282, Laws of Hong Kong.

103 I.e. Cap. 360, Laws of Hong Kong.

104 I.e. Cap. 469, Laws of Hong Kong.

105 The Director, in determining the amount to be so disregarded, must have regard to the circumstances of the case, including but not limited to, the amount (if any) actually incurred to provide for the care and medical treatment and appliance required by the injured person as a result of the injury during the 12-month period immediately preceding the date of application; and the medical evidence (if any) as to the care and medical treatment and appliance which are likely to be required by the injured person as a result of the injury.

106 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) Schedule 2, paragraphs 7, 9, 12, 12A, 13. See, in this connection, *Questions raised as high-living socialite passes means test of having finances of less than \$169,700; Model's luxury life no bar to legal aid*, South China Morning Post (18 April 2000) p 3.

In computing the financial resources, income, disposable income or disposable capital of the person concerned, the value of the subject matter of dispute in respect of which application for legal aid has been made will be disregarded.¹⁰⁷

The Director of Legal Aid is empowered to waive the limit of financial resources imposed on the applicant under the Ordinary Legal Aid Scheme where the application involves proceedings in which a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the ICCPR as applied to Hong Kong is an issue.¹⁰⁸ He has otherwise no discretion to waive the financial eligibility limits for civil legal aid, unlike the situation for criminal legal aid.¹⁰⁹

However, the Director is empowered to refuse to grant legal aid, if, in his opinion, the applicant has disposed of any capital or income for the purpose of satisfying the conditions specified for the granting of legal aid or has failed to maximise his earning potential so as to expend or reduce his financial resources for that purpose.¹¹⁰

Subject to consideration of the legal merits of the proceedings and other factors, the Director is empowered to grant to a person a legal aid certificate to which that person is entitled under the provisions of the Legal Aid Ordinance in connection with any proceedings if he is satisfied that legal aid is sought in connection with proceedings for which legal aid may be granted under the Ordinary Legal Aid Scheme or, as the case may be, under the Supplementary Legal Aid Scheme; and the financial resources of that person do not exceed the amount specified for the relevant legal aid scheme.¹¹¹

MERITS TEST: LEGAL MERITS

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.¹¹² 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

107 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 5(1). However, periodical payments of maintenance made under an order of a court is not to be treated as the subject matter of the dispute for the purpose of regulation 5(1): *Ibid*, regulation 5(2). On the other hand, maintenance payments may be deducted in the computation of disposable income in specified circumstances: *Ibid*, Schedule 1, Part II, paragraph 9.

108 Legal Aid Ordinance (Cap. 91), section 5AA.

This provision does not cover proceedings in which a violation of an article of the Basic Law is an issue.

109 The Legal Aid Services Council has recommended further exploration on empowering judicial officers to refer unrepresented litigants in civil cases to the Director for him to consider waiving the financial eligibility limits, so that adequate legal representation may be provided to achieve a proper degree of fairness and justice; see Legal Aid Services Council, *Legal Aid* (Issue No 8) (July 2005) p 8.

110 Legal Aid Ordinance (Cap. 91) section 10(2).

111 Legal Aid Ordinance (Cap. 91) section 10(1).

112 *Ibid*, section 10(3).

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.¹¹³

In applying the legal merits test, the Director of Legal Aid is to give due weight to all relevant material but is not bound to accept the opinion of counsel or others on the merits. The Director is to look at the prospects of success of the action as a whole and not just the prospects of success of the next step in the proceedings.¹¹⁴ The Director does not, in applying the legal merits test, adjudicate on the issues, but must be satisfied that there is an issue of fact or law for which it is reasonable to submit to the court for decision.¹¹⁵ On the other hand, there may be cases where the prospects of success are uncertain and merits further investigation with limited legal aid. However, legal aid will not be granted regardless of prospects of success and merely on the basis that the defendant is likely to settle rather than contest the case up to trial, even though it might be suggested that a private litigant might make such a choice to secure a settlement. Estimate of prospects of success will tend to become more reliable as the case progresses. Where legal aid is applied for an appeal against a first instance judgment, one would expect proper estimate of prospects of success and possibly even good prospects of success for legal aid to be granted.¹¹⁶ For the purpose of the legal merits test, factors such as the amount claimed and the likely costs of the action are not directly relevant. Rather they are important factors to be taken into account under the “reasonableness” test under section 10(3)(c) of the Legal Aid Ordinance.¹¹⁷

MERITS TEST: REASONABLENESS AND OTHER GROUNDS OF REFUSAL

A person may be refused legal aid where it appears to the Director of Legal Aid that:

- (a) only a trivial advantage would be gained by the applicant from such proceedings;
- (b) on account of the simple nature of the proceedings a solicitor would not ordinarily be employed;
- (c) it is **unreasonable** that the applicant should be granted legal aid in the particular circumstances of the case;

113 The Scott Report, paragraph 3.3. The legal merits test is applied rigorously in relation to an application for appeal aid.

114 *R v Area Committee No 1 (London) Legal Aid Area ex p Rondel* [1967] 2 All ER 419 at 421 (Queen’s Bench Division).

115 See *R v Legal Aid Board ex p Hughes* (1992) 24 HLR 698 (English Court of Appeal).

116 The Legal Aid Board, *The Legal Aid Handbook 1998/99* (London: Sweet & Maxwell, 1998) paragraph 7-02.7.

117 I.e. the Legal Aid Ordinance (Cap. 91) section 10(3)(c). On the other hand, it cannot be said that the legal merits test and the “reasonableness” test are unrelated, as the approach of the Director should not be substantially different from that of a solicitor or counsel advising a private client; see *R v No 8 Area Committee of the Legal Aid Board ex p Megarry* (unreported, 1 July 1994, CO/2709/93) (Queen’s Bench Division).

- (d) since making the application the applicant has departed Hong Kong and remained outside Hong Kong for any continuous period of 6 months;¹¹⁸
- (e) the applicant has failed to comply with a requirement of the Director made for furnishing of information and documents, or for personal attendance;
- (f) the applicant has allowed an offer of legal aid to lapse or has indicated that he wishes to withdraw his application; or
- (g) there are other persons concerned jointly with, or having the same interest as, the applicant in seeking a substantially similar outcome of the proceedings¹¹⁹ unless the applicant would be prejudiced by not being able to take his own or joint proceedings.¹²⁰

The “reasonableness” test in section 10(3)(c) above 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.¹²¹ Legal aid will not normally be granted where the applicant will gain no real benefit from the proceedings, or where it is unlikely that any judgment obtained could be enforced.¹²² In other words, the Director must constantly bear in mind the need to protect the legal aid fund. In considering whether it is reasonable in the circumstances of a case to grant legal aid despite its obvious legal merits, the

118 In deciding whether the ground in (d) should be applied, legal aid counsel must have regard to the following factors: (i) Whether the absence of the legal aid applicant from Hong Kong is voluntary (for example, repatriation of Vietnamese asylum seekers or departure due to expiry of immigration visa); (ii) Whether such absence has affected communication with the legal aid applicant; and (iii) Whether the case can be more appropriately pursued outside Hong Kong.

119 Other persons have the “same” interest as the applicant if each person (including the legal aid applicant) is seeking an identical outcome to the proceedings, for example, an order, injunction or declaration which would benefit all equally without the need for them to issue separate proceedings. Other persons do not have the “same” interest as the legal aid applicant if each person has a special interest which might result in different orders for each, such as a claim for damages which must be individual to each person, even if the claims arise from a single event. In such a case, the other persons would have only similar interests not the “same” within the meaning of this provision. There may be cases where the persons concerned have both the “same” interest and similar interests. An example of such a case may involve an application by co-owners that common parts of a block of flats be repaired (the “same” interest) and in the same proceedings, each co-owner claims damages (a similar interest): The Legal Aid Board, *The Legal Aid Handbook 1998/99* (London: Sweet & Maxwell, 1998) paragraph 7-06.

120 Legal Aid Ordinance (Cap. 91), section 10(3).

121 See *R v Legal Aid Area No 8 (Northern) Appeal Committee ex p Angell & Ors* [1990] 1 Med LR 394 (English Queen’s Bench Division). It is said that in England, the Legal Aid Board will have to consider this issue as objectively as possible, and it is not enough merely for the client to assert that the case is important. Some substantial benefit to the client will be needed to justify the grant of legal aid especially if the case is marginal on the merits or the costs are likely to be high: The Legal Aid Board, *The Legal Aid Handbook 1998/99* (London: Sweet & Maxwell, 1998) paragraph 7-03.9.

122 See *Wookey v Wookey, Re S (a minor)* [1991] 3 WLR 135, [1991] 3 All ER 365 (English Court of Appeal).

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.

Legal aid may be refused if it appears to the Director that the applicant has available to him rights or facilities which make it unnecessary to obtain legal aid, or if the applicant has a reasonable expectation of obtaining financial or other help from a body of which he is a member, and that he has failed to take all reasonable steps to enforce or obtain such rights, facilities or help. Legal aid may also be refused if there are more effective ways of pursuing a civil claim; or if there are alternatives to civil litigation.

Legal aid is devised to assist those whom it finances in the course of litigation and not directly to assist other parties to the proceedings or other members of the public who are not parties to the proceedings in determining points of general interest.¹²³

The Legal Aid Department issues guidance notes to legal aid counsel for processing of legal aid applications. Generally, legal aid counsel should make every effort to process and reach a decision in respect of an application within 3 months from the date of application. Legal aid counsel should not defer a decision on the legal aid application because of prospect of a negotiated settlement between the application and the opposite party, provided that the application itself has legal merits. Guidance notes have been issued on the processing of applications relating to the following types of litigation: labour disputes, employees' compensation claims and their related personal injury claims, applications for judicial review,¹²⁴ immigration cases, matrimonial cases (including enforcement of maintenance), running down cases,¹²⁵ and landlord and tenant cases.

EMERGENCY CERTIFICATE

An application may be made to the Director of Legal Aid for an emergency certificate.¹²⁶ The information and documents to be provided to the Director must be such as to enable the Director to determine whether the applicant is likely to fulfil the conditions under which legal aid may be granted under the Legal Aid Ordinance; and it is in the interest of

123 See *United Dominions Trust Ltd v Bycroft* [1954] 3 All ER 455 (English Court of Appeal) at 459.

124 Legal aid counsel is to consider whether there is prima facie an arguable case if the legal aid application is made before leave of the court is obtained. Legal aid should generally be granted where the court has granted leave to apply for judicial review. If the prospect of success of the proposed application for judicial review is less than even, legal aid counsel should consider if in the particular circumstances of the case, there are factors justifying the grant of legal aid, such as an issue pertaining to a fundamental right guaranteed under the Basic Law.

125 Legal aid should be offered if the police contemplates prosecuting the opposite party for careless, dangerous or reckless driving. On the other hand, legal aid counsel should also bear in mind issues of quantum and contributory negligence which may render a claim unmeritorious.

126 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 7. No application for emergency certificate can be made if legal aid is sought under the Supplementary Legal Aid Scheme.

Most applications for emergency certificate involve cases such as application for habeas corpus, admiralty case (arrest of a ship), domestic violence and personal injury cases where the relevant limitation period have become a matter of concern; see Legal Aid Services Council, *Annual Report, 1999-2000*, p 91.

justice that the applicant should, as a matter of urgency, be granted legal aid. Considerations are given in this respect to situations where delay could cause risk of miscarriage of justice, unreasonable hardship upon the applicant, or exceptional problems in the handling of the case. However, an emergency certificate will not be granted where it is obvious that the applicant is unlikely to satisfy the usual means test or merits test.¹²⁷

An emergency certificate usually covers the immediate step or steps which should be taken to protect the interests of the applicant. It does not as a matter of course cover all future work in the case but only the minimum steps.¹²⁸

An emergency certificate is to remain in force for a period of six weeks or a longer period as the Director may allow, not exceeding three months, unless within that period a legal aid certificate is issued in respect of the proceedings to which the emergency certificate relates, in which case the emergency certificate is deemed to have been revoked. If the Director decides not to grant a legal aid certificate in respect of proceedings to which the emergency certificate relates within that period, he is obliged to revoke the emergency certificate.¹²⁹

STAY OF PROCEEDINGS DUE TO LEGAL AID APPLICATION

If an action¹³⁰ has been commenced or if an appeal has been lodged in respect of any proceedings and any party, or any person who wishes to be joined as a party, makes an application for legal aid, the Director of Legal Aid must, as soon as practicable after the application is made, notify the other party or each of the other parties, and file in the court in which the action is commenced or in the court in which the appeal is lodged, as the case may be, a memorandum of such notification.¹³¹ The Director must do the same in respect of the case where any party to an action, or any person who wishes to be joined as a party, makes an application for legal aid to prosecute an appeal or proceedings in the nature of an appeal.¹³² If any memorandum is so filed, then, unless otherwise ordered

127 See Legal Aid Services Council, *Annual Report 1999-2000*, p 90.

128 Ibid.

129 See Legal Aid Services Council, *Annual Report, 1999-2000* pp 90-91.

130 This expression includes any cause or matter for the purposes of the section: Legal Aid Ordinance (Cap. 91) section 15(9).

131 Ibid, section 15(2). No fee shall be charged in respect of the filing of the memorandum: Ibid, section 15(8). Where an application for legal aid was made to pursue an intended appeal the notice of which had not yet been served, then the memorandum should be filed with the court in which litigation was completed and from which the intended appeal was being pursued. If an appeal was already subsisting, then the memorandum would be filed with the court which is to hear the appeal: *Brook v Law Society of Hong Kong (No 1)* [1998] 1 HKC 595, [1998] 1 HKLRD 113 (Court of Appeal).

132 Ibid, section 15(3).

by the court in which the memorandum is filed,¹³³ all proceedings in the action or in the appeal or in both the action and the appeal will, by virtue of this provision, be stayed for the prescribed period of 42 days and during such period (unless otherwise ordered by any such court) time fixed by or under any law or otherwise for the doing of any act or the taking of any step in the proceedings will not run.¹³⁴ The time during which proceedings are automatically stayed may be reduced or extended by order of the court in which the memorandum is filed.¹³⁵

LEGAL AID CERTIFICATE

After the Director of Legal Aid has approved an application for legal aid, he will notify the applicant of the terms upon which a legal aid certificate will be issued to him.¹³⁶ An applicant who wishes a legal aid certificate to be issued to him on the terms notified must within 14 days of being so notified, or within such further period as the Director may allow, signify his acceptance of those terms in the specified form and lodge it with the Director.¹³⁷ The Director will issue a legal aid certificate upon compliance with the procedure above.¹³⁸

The legal aid certificate should be filed by the Director of Legal Aid in the registry of the court in which proceedings for which legal aid has been granted have been commenced,¹³⁹ as soon as practicable after the issue of the certificate; and in any other

133 Courts should be slow to lift the statutory stay before the application for legal aid is determined, since the primary function of the court in civil proceedings is to do justice between the parties. The court may intervene when, for example, the continuation of an *ex parte* injunction might do irreparable harm to the defendant and it appears that the application for legal aid by the plaintiff is simply to obtain an advantage through the statutory stay, and thus the automatic continuation of the injunction: *Lee Shiu Ming v Yeo Hiap Seng (Hong Kong) Ltd* (unreported, 14 July 1993, Civ App 39/1993) (Court of Appeal). See also *Lo Siu Lan & Anor v Hong Kong Housing Authority* (unreported, 1 February 2005, CACV 378/2004) (Court of Appeal). Cf *Wellmart Development Ltd v Chan Siu Wan Flora & Ors* (unreported, 8 October 2004, HCA 1888/2004) (Court of First Instance) which distinguished *Lee Shiu Ming* (*supra*) and considered in the context of the case the merits of the case of the party making the legal aid application, and the reasons for any delay in making that legal aid application.

134 *Ibid*, section 15(4) and the Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 7A. However, the filing of the memorandum shall not operate to prevent the making of (a) an interlocutory order for an injunction or for the appointment of a receiver or manager or receiver and manager; or (b) an order to prevent the lapse of a caveat against dealings with land; or (c) any other order which, in the opinion of the court in which the memorandum is filed, is necessary to prevent an irremediable injustice: Legal Aid Ordinance (Cap. 91) section 15(5). Unless otherwise ordered by the court in which the memorandum is filed, the filing of the memorandum does not operate to prevent the institution or continuance of proceedings to obtain, enforce or otherwise carry into effect any such order as is mentioned in subsection (5) or a decree to the like effect: *Ibid*, section 15(6).

135 Legal Aid Ordinance (Cap. 91) section 15(7).

136 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 5(6). An applicant under the Ordinary Legal Aid Scheme will also be notified of the maximum amount of his contribution as determined by the Director.

137 *Ibid*, regulation 5(7).

138 *Ibid*, regulation 5(9).

139 This includes the Court of Final Appeal: Legal Aid Ordinance (Cap. 91) section 14(5).

case, upon the commencement of such proceedings in that court, and no court fee shall be charged upon the filing of such certificate.¹⁴⁰

A legal aid certificate may be issued in respect of the whole or a part of proceedings in a court of first instance; or proceedings in an appellate court, but no certificate may relate to proceedings (other than interlocutory appeals) both in a court of first instance and in an appellate court.¹⁴¹ The certificate must not refer to more than one action, cause or matter except in the case of matrimonial proceedings; an application for grant of representation (which is necessary to enable an action, which is the subject matter of the certificate, to be brought); or where the Director decided to extend the certificate to proceedings which may be taken to enforce or give effect to any order or agreement made in the proceedings in respect of which the certificate was issued.¹⁴²

Legal aid certificates may be limited in terms of scope of work and/or specific steps in the proceedings, depending on the nature and complexity of the case concerned.¹⁴³ Unless an extension to the certificate has been granted beforehand, the assigned solicitors on a limited legal aid certificate will not be paid for work done outside the limitation. Extension of a limited legal aid certificate may only be granted following a review of the merits of the case (including its reasonable prospect of success) and the cost-benefit factor (i.e. whether the benefits, including the non-pecuniary benefit, to be obtained justify the likely costs).

AMENDMENT OF LEGAL AID CERTIFICATE

The Director of Legal Aid may amend a legal aid certificate if he is of the opinion that:

- (a) there is an error on the face of the certificate; or

140 Ibid, section 14(1). An aided person who prosecutes any appeal or proceedings in the nature of an appeal (otherwise than an interlocutory appeal), without having filed a legal aid certificate in the court appealed to is deemed for the purposes of the Legal Aid Ordinance (Cap. 91) not to be an aided person: Ibid, section 16(2). (A further legal aid application must be made and legal aid secured before proceeding on an appeal, as by virtue of the Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 6, a legal aid certificate must not refer to more than one action and therefore cannot include both an action at first instance and an appeal therefrom.) A person must not take, defend, oppose, continue or be a party to an appeal to, or an application for leave to appeal to, the Court of Final Appeal as an aided person unless he has been granted a legal aid certificate for that purpose: Ibid, section 16A.

141 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 5(1).

142 Ibid, regulation 6.

143 Cases may be granted a limited legal aid certificate to enable it to be further investigated or subject to counsel's opinion, so that the claim may be further substantiated or its prospects of success better assessed.

Another common manner in the use of limited legal aid certificates is to limit the scope of work in stages up to and include (a) discovery of documents and exchange of witness statements; (b) pre-trial review; and (c) trial, so that each stage provides a checkpoint for monitoring assigned out cases. In cases involving an application for judicial review, the legal aid certificate may initially be limited to seeking leave to apply for judicial review, and then extended to cover the substantive hearing if leave is granted. In matrimonial cases, the legal aid certificate is limited to exclude a defended suit.

- (b) it has become desirable for the certificate to extend to proceedings, other steps, other proceedings,¹⁴⁴ or proceedings which may be taken to enforce or give effect to any order or agreement made in the proceedings in respect of which it was issued; or the bringing of an interlocutory appeal; or
- (c) it has become desirable for the certificate to extend to any steps having the same effect as a cross-action or reply thereto, or a cross appeal; or
- (d) it has become desirable to add or substitute parties to the proceedings in respect of which the certificate was issued; or
- (e) it has become desirable for the certificate not to extend to certain of the proceedings in respect of which it was issued; or
- (f) a change of solicitor or counsel is required.¹⁴⁵

The Director may also amend a legal aid certificate if the circumstances by reference to which the Director has determined an aided person's financial resources have altered.¹⁴⁶

REVOCAION OR DISCHARGE OF LEGAL AID CERTIFICATE

The Director of Legal Aid is empowered to revoke or discharge any legal aid certificate in specified circumstances.¹⁴⁷ A person whose legal aid certificate is revoked is deemed never to have been an aided person in the proceedings to which the certificate related, and a person whose certificate is discharged will, from the date of discharge, cease to be an aided person in these proceedings.¹⁴⁸

The Director **may discharge** a legal aid certificate:

- (a) at any time at the request of the person to whom it is issued;
- (b) where an aided person has been required to make a contribution and any payment in respect thereof is more than 30 days in arrears;
- (c) if he is satisfied that the proceedings to which the legal aid certificate relates have been disposed of;
- (d) where he is satisfied that the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued.¹⁴⁹

144 However, the certificate generally should not refer to more than one action, cause or matter: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 6.

145 Ibid, regulation 6A.

146 Ibid, regulation 6B.

147 Legal Aid Ordinance (Cap. 91) section 11. If the Director revokes or discharges an aided person's legal aid certificate he must forthwith issue a notice of discharge or revocation to the aided person: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 8(6). Where the certificate so revoked or discharged has been filed in the registry of any court, the Director must forthwith file a notification of his decision with the registry of such court: Ibid, regulation 8(7).

148 Ibid, regulation 9(1).

149 A legal aid certificate will not be discharged on this ground until the aided person has been given an opportunity to show cause why the certificate should not be discharged: Ibid, regulation 8(2)(d).

- (e) if he is satisfied that the aided person has died; or that the aided person has had a bankruptcy order made against him;
- (f) if he is satisfied that the aided person has failed to render to the counsel or solicitor assigned to him any assistance necessary or desirable to enable such counsel or solicitor to discharge in a proper or adequate manner his duties as counsel or solicitor to such person;
- (g) if he is satisfied that the financial resources of an aided person exceed the applicable prescribed limits;¹⁵⁰ or
- (h) where an aided person has been outside Hong Kong for a continuous period exceeding six months.¹⁵¹

The Director **must discharge** a legal aid certificate if he considers that the aided person no longer has reasonable grounds for taking, defending or being a party to the proceedings or, as the case may be, that it is unreasonable in the particular circumstances for him to continue to receive legal aid.¹⁵²

In the case where the Director is satisfied that an aided person:

- (a) has knowingly made a false statement or false representation concerning any information furnished by him; or
- (b) has wilfully failed: (i) to disclose his financial resources; (ii) to disclose any material fact concerning his financial resources; (iii) to make a true and correct disclosure of his financial resources; (iv) to comply with any regulation as to information to be furnished by him; (v) to disclose any material fact concerning such information; (vi) to comply with any regulation as to documents to be furnished by him; (vii) to disclose any material fact concerning such documents; (viii) to comply with his statutory duty to report any change in the financial circumstances in reference to

150 The Director need not discharge a legal aid certificate on this ground if he is satisfied that it is appropriate not to do so: *Ibid*, regulation 8(2A). A legal aid certificate will not be discharged on this ground until the aided person has been given an opportunity to show cause why the certificate should not be discharged: *Ibid*, regulation 8(2)(fa). The Director was given a discretion not to discharge a legal aid certificate on this ground because discharging a certificate for this reason may in some circumstances bring hardship to the aided person as he may have to give up his claim in order to avoid exposing himself to the risk of paying a substantial amount of costs in the event of his losing the case. It may also not always be in the interest of the legal aid system to do so, since the Legal Aid Department may have already involved heavily in the case: Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997) paragraph 41. The Director usually considers whether to discharge a legal aid certificate on this ground bearing in mind the interests of justice and the need to protect the legal aid fund and the Supplementary Legal Aid Fund, as the case may be, and if a legal aid certificate is not to be discharged, the maximum contribution of the aided person may be re-determined.

151 *Ibid*, regulation 8(2).

152 *Ibid*, regulation 8(3). A legal aid certificate will not be discharged on this ground until the aided person has been given an opportunity to show cause why the certificate should not be discharged. In *Iverson v Iverson* [1966] 1 All ER 258, Latey J advised that "if at any stage of a case an assisted person's advisers are of the opinion that he has not, or no longer has, a reasonable prospect of success or that, though there is a reasonable prospect of success, nothing worthwhile is to be gained by pursuing the case, or if for any other cause it appears to them unreasonable that he should continue to receive legal aid, it is their duty to report to the area committee".

which the original determination was made where he has reason to believe that such change may affect the terms or continuation of his legal aid certificate; or (ix) to attend any interview when so required by the Director;

He has the option of revoking or discharging that person's certificate, after that person has been given an opportunity to show cause why the certificate should not be revoked or discharged.¹⁵³ In this connection, a legal aid certificate is usually revoked if it is shown to a high standard of proof that, viewed objectively, the aided person knows or has reason to believe that committing the misconduct complained of may affect favourably his eligibility or continued eligibility for legal aid (upon being satisfied of either the means test or the merits test, or both).

The court is empowered, at any time during the hearing of any proceedings to which an aided person is a party, to consider, upon application by or on behalf of any other party to the proceedings or by the Director, whether the aided person has wilfully failed to comply with any regulation as to the information to be furnished by him; or, in furnishing any such information has knowingly made a false statement or false representation; and on any such application the court may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision will be final.¹⁵⁴

Where a notification of the discharge or revocation is filed in the registry of the court, all proceedings in the litigation will, unless the court otherwise orders,¹⁵⁵ be stayed for a period of 14 days and during such period time fixed by or under any law or otherwise for the doing of any act or the taking of any step in the proceedings shall not run.¹⁵⁶

If the legal aid certificate of a person is discharged or revoked, then, upon determination of the proceedings to which the certificate relate, the costs of the proceedings, incurred by or on behalf of that person, will, as soon as practicable thereafter, be taxed or, as the case may be, assessed, and the Director will remain liable for the payment of any costs so taxed or assessed, though he retains the right to recover from that person such costs paid or payable.¹⁵⁷ Yet, if the person to whom the certificate

153 Ibid, regulation 8(4).

154 Ibid, regulation 8(5). No order will be made by the court until the aided person has been given an opportunity to show cause why the legal aid certificate should not be revoked, or, as the case may be, discharged. If such an order is made revoking or discharging an aided person's certificate, the officer of the court will forthwith inform the Director: Ibid, regulation 8(8).

155 The Court of Appeal examined the effect of the statutory stay and the consequences of lifting the stay in *Yu Pik Ying & Anor v Director of Immigration* [2002] 1 HKC 18.

156 Ibid, regulation 9(7). The time during which proceedings are stayed by virtue of this provision may be reduced or extended by order of a judge of the court in which the litigation is pending: Ibid, regulation 9(8).

157 Ibid, regulations 9(3), (5). The amount recoverable is reduced by any amount received by the Director by way of contribution if aid was not granted under the Supplementary Legal Aid Scheme; or, where aid was granted under the Supplementary Legal Aid Scheme, by the amount of any interim contribution and the application fee: Ibid, regulation 9(5A). Accordingly, the Director's right to recover from a person concerned whose legal aid certificate has been revoked extends to all the costs and expenses incurred in the proceedings less any contribution already made since the person concerned is deemed never to have been an aided person in the proceedings to which the legal aid certificate related.

was issued continues to take, defend or be a party to the proceedings to which the certificate related, the provisions of the Legal Aid Ordinance which relate to sums recovered by virtue of an agreement relating to costs made in favour of an aided person apply in so far as the costs were incurred while he was an aided person; and the provisions of the Ordinance which relate to an aided person's liability by virtue of an order for costs made against him apply in so far as the costs were incurred while he was an aided person.¹⁵⁸

If a person has applied for and been refused a certificate on two or more occasions where the applications relate to substantially the same cause or matter; or in any other case, on four or more occasions, and it appears to the Director that his conduct has amounted to an abuse of the facilities provided by the Legal Aid Ordinance, the Director may order that no consideration shall be given to any future application by that person. However, no such direction may apply to any application by that person on behalf of an infant; or remain in force for a period longer than three years.¹⁵⁹

LEGAL AID APPEALS

An applicant for legal aid or an aided person who is aggrieved by any order or decision of the Director of Legal Aid made under any provision of the Legal Aid Ordinance, including refusal of legal aid on means or merits grounds, may appeal to the Registrar of the High Court in chambers¹⁶⁰ against that order or decision.¹⁶¹ A legal aid appeal is initiated by notice in writing to attend before the Registrar of the High Court without a fresh summons, within 14 days of the order or decision complained of, or such further time as may be allowed by the Registrar.¹⁶²

Upon the initiation of the legal aid appeal, the appellant is to be served with a document entitled "Reasons for Refusal" ("the Reasons document") by the Legal Aid Department at least three clear working days before the date of hearing of the appeal. The Reasons document will set out, as far as practicable, the background of the application, a list of the documents considered to be relevant to the legal aid appeal and relied upon by the legal aid counsel when the decision was made, the reasons for the decision, the legal authorities, articles, textbooks (if any) relied upon when the decision was made, the particulars of evidence or other matters considered and relied upon when the decision was made, the opinion obtained from counsel or solicitor under the Legal Aid Ordinance, and the legal aid counsel's own opinion and analysis of the issues of fact and/or law relevant to the case and the reasoning for such opinion. The Reasons document will serve as the written submission to the Registrar of the High Court. In addition to the Reasons document, the appellant should also be provided with copies of all such documents that

158 Ibid, regulation 9(6).

159 Ibid, regulation 11. Legal aid applicants who have made repeated and unsuccessful applications for legal aid will be sent a standard notice drawing their attention to the regulation and the effect of an order under the regulation by the Director.

160 The Registrar of the High Court's statutory duty to hear and determine legal aid appeals may be discharged by any of the Deputy or Assistant Registrars of the High Court (commonly known as Masters) by virtue of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

161 Legal Aid Ordinance (Cap. 91) section 26(1).

162 Ibid, section 26(2).

are referred to or relied upon in the Reasons document, except documents provided by that person; documents which have been supplied by a third party subject to conditions which prevent disclosure to that person; and documents which cannot be disclosed without breaching the Personal Data (Privacy) Ordinance¹⁶³ and any undertaking given by the Legal Aid Department to other organizations.¹⁶⁴

There should be at least one clear day between service of the notice of the appeal and the day of hearing, unless otherwise ordered by the Registrar of the High Court.¹⁶⁵ In practice, however, the Legal Aid Department will ensure that there are at least three clear working days between service of the notice of the appeal and the day of hearing. A hearing of a legal aid appeal may be conducted in either or both of the official languages.¹⁶⁶ The appellant has the right to representation by counsel or a solicitor at his own expense, or on a pro bono basis, at the hearing of the appeal.¹⁶⁷ He may, alternatively, be accompanied by another person or a trainee solicitor who, however, may not conduct the appeal on his behalf. A legal aid appeal is a hearing de novo from the decision of the Director and the Registrar exercises administratively the statutory power vested in him under the Legal Aid Ordinance, and his function is not intended to be ancillary or incidental to exercise of judicial power.¹⁶⁸ The Registrar has to ensure that the legal aid appeal is conducted in accordance with natural justice.¹⁶⁹ The decision of the Registrar on a legal aid appeal¹⁷⁰ is final.¹⁷¹

163 I.e. Cap. 486, Laws of Hong Kong.

164 Legal Aid Services Council, *Annual Report 1999-2000*, pp 97-101. Attention of the Registrar of the High Court or the Master hearing the legal aid appeal should be drawn to the existence of any documents which have not been disclosed to the appellant so that he or she may consider whether the “overriding public interest” requires disclosure of the documents to ensure that the minimum requirement of fairness is met in the circumstances of the legal aid appeal.

165 Legal Aid Ordinance (Cap. 91) section 26(3).

166 Ibid, section 26(4A).

167 Ibid, section 26(3A).

168 *Bui Thi Chin v Director of Legal Aid* [1994] 1 HKC 441 (High Court); *Nguyen Trong Son v Director of Legal Aid* (unreported, 3 June 1999, LAA 20/1999) (High Court).

169 *Director of Legal Aid v Van Can On* [1997] HKLRD 635 (Court of Appeal). Where the Registrar of the High Court is provided with documents by the Director on conditions as to disclosure, he has at least two options. The first is to require the Director to identify the documents he relies upon, making it clear that he will provide copies of them to the appellant. The second is to take the view that all relevant documents put before him by the Director should be disclosed to the appellant in spite of the conditions the Director seeks to impose. See also *Nguyen Trong Son v Director of Legal Aid* (unreported, 3 June 1999, LAA 20/1999) (High Court).

170 The Registrar of the High Court will give written notice of the decision on an appeal under this section to the Director and to the person who made the appeal and will adequately state in the notice the reasons for the decision: Legal Aid Ordinance (Cap. 91) section 26(5). Cf Sze, Ping-fat, *Legal Aid and the Hong Kong Bill of Rights* (2002) 166 JP 242 (where the author criticized both the Director and the Registrar for not providing a “reasoned” decision in a legal aid appeal).

171 Ibid, section 26(4). The Registrar of the High Court may refer any appeal, and must refer an appeal against a decision of the Director to exclude a counsel or solicitor from a panel, for decision of a judge of the High Court in chambers, in which event the decision of the judge is final. The decision can however be challenged by way of application for judicial review: *Tsao Yung v Director of Legal Aid* (unreported, 13 May 2002, HCAL 99/2002) (Court of First Instance); *Lam Shin Chun v Registrar of the High Court* (unreported, 20 January 2004, HCAL 115/2003) (Court of First Instance).

An applicant for legal aid or an aided person who is aggrieved by any order or decision of the Director made in relation to an application for legal aid to appeal to, or to apply for leave to appeal to, the Court of Final Appeal may bring the order or decision on review before a Legal Aid Review Committee¹⁷² composed of the Registrar of the High Court;¹⁷³ a barrister qualified to practise in Hong Kong;¹⁷⁴ and a solicitor qualified to practise in Hong Kong.¹⁷⁵ A review is initiated by notice in writing delivered to the Director and the chairman within 28 days of the order or decision complained of or within such longer period as the chairman may allow and the notice shall be accompanied by a certificate by counsel practising in Hong Kong stating that the person aggrieved has a reasonable prospect of success in the appeal and the grounds for that opinion.¹⁷⁶ The committee is empowered to:

- (a) make such inquiries as it thinks fit as to the means and condition of the applicant and as to the merits of his case;
- (b) require the applicant to furnish such information and such documents as the committee thinks fit;
- (c) require the applicant to appear personally before the committee; and
- (d) receive evidence and, for that purpose, administer an oath.¹⁷⁷

The applicant and the Director¹⁷⁸ are entitled to appear personally before the committee or by counsel or solicitor¹⁷⁹ and may submit representations in writing.¹⁸⁰ The committee may, if it is satisfied that the person aggrieved has a reasonable prospect of success on appeal, and that it is reasonable in the particular circumstances of the case that he should be granted legal aid, reverse or vary the order or decision of the Director refusing or

172 The expenses of the committee, including such reasonable fees of the barrister and solicitor members as may be determined by the chairman, shall be paid by the Director from moneys provided by the Legislative Council: *Ibid*, section 26A(9).

173 The Registrar of the High Court is to be the chairman of the committee.

174 The barrister must be eligible to be appointed as a judge of the High Court and should be appointed by the Chairman of the Hong Kong Bar Association.

175 *Ibid*, section 26A(1). The solicitor must have practised as a solicitor for not less than ten years in a common law jurisdiction and should be appointed by the President of The Law Society of Hong Kong. The chairman may appoint a public officer to be secretary of the committee: *Ibid*, section 26A(2).

176 *Ibid*, section 26A(3).

177 *Ibid*, section 26A(4).

178 The Director may be represented at the hearing of the committee by counsel who has appeared for the applicant in the court below, though his role in the hearing is essentially that of an *amicus curiae*. He has a duty to the committee, in appropriate circumstances, to resile from his earlier opinion and not to rigidly argue against granting of legal aid: Legal Aid Services Council, *Annual Report 2002-2003*, p 37.

179 The chairman is empowered to order that (a) such fee of counsel for the certificate; and (b) such fees and expenses of counsel or solicitor appearing before the committee as determined by the chairman as being proper in the circumstances, shall be paid by the Director of Legal Aid out of funds under his control which are available for that purpose: *Ibid*, section 26A(8). It should be noted that the chairman needs not make an order for a counsel's certificate which has been provided through the publicly funded scheme administered by the Legal Aid Services Council and described below.

180 *Ibid*, section 26A(5).

limiting legal aid in respect of the appeal and may direct the Director to grant a legal aid certificate to him; and if not so satisfied it shall affirm the order or decision of the Director.¹⁸¹ The decision of the committee of the substantive merit of the review is final.¹⁸²

For this purpose, the Legal Aid Services Council administers a scheme by which an applicant wishing to appeal before the committee but without the means to engage counsel to provide a certificate on the prospects of success of the proposed appeal may apply, without payment of a fee, for such a counsel's certificate to be provided by a counsel under instruction from a solicitor, both of whom are listed on separate panels maintained by the Council. An applicant may apply for a counsel's certificate once only for the same case.¹⁸³

CONDUCT OF CIVIL PROCEEDINGS ON LEGAL AID

If a legal aid certificate is granted, the Director of Legal Aid may act for the aided person in any proceedings, or part of any proceedings. The Director may assign counsel or solicitor¹⁸⁴ selected by the aided person or otherwise selected by the Director,¹⁸⁵ and the Director is to endorse on the legal aid certificate the name of any counsel or solicitor

181 Ibid, section 26A(6). The committee is not empowered to waive financial limit of eligibility: *Leung Kwai Lin Cindy v Director of Legal Aid* [2000] 4 HKC 516 (Legal Aid Review Committee).

182 Ibid, section 26A(7). The chairman will give written notice of the decision on an appeal under this section to the Director and to the person who made the appeal and will adequately state in the notice the reasons for the decision: Ibid, section 26A(10).

183 See Chapter 5. The Legal Aid Department will review the application if the counsel's certificate indicates that there are reasonable prospects of success in the proposed appeal.

The Legal Aid Services Council's scheme does not cover legal representation before the committee. However, an applicant who has obtained a counsel's certificate may apply to the Bar Free Legal Service Scheme for assistance: Legal Aid Services Council, *Annual Report 2002-2003*, p 36.

184 If a solicitor is assigned for the purpose of any proceedings any other solicitor in the same firm may act for the aided person therein: Ibid, regulation 17(2). Nonetheless, the solicitor assigned remains personally responsible for the conduct of the case.

185 The Court of Appeal recognized in *Keane v Director of Legal Aid* (unreported, 15 June 2000, CACV 49/2000) that the Director of Legal Aid had an obvious interest in ensuring that counsel assigned to the aided person's case was suitable and was likely to advise the legally aided person that his choice of counsel was unsuitable or that other counsel should be assigned, with a view to reaching an agreement on the assignment of counsel. The choice of counsel of an aided person was not to be rejected without compelling reasons. In the absence of any choice of counsel being expressed by the aided person, the Director would make a selection and assignment by reference to the *Guidelines on Assigning Counsel and Solicitors for Legal Aid Work* (Legal Aid Department, April 1997) (now incorporated into the *Manual on Assignment and Monitoring of Legal Aid Cases to Private Practitioners* (Legal Aid Department, November 2000)).

assigned.¹⁸⁶ He may, if he is of the opinion that any proceedings are, or may become, of exceptional difficulty or importance, state in the certificate that the aided person should be represented by two counsel, one of whom may be leading counsel, in such proceedings.¹⁸⁷

The Director is to prepare and maintain separate panels of counsel and solicitors enrolled on the rolls of barristers or solicitors maintained in accordance with the provisions of the Legal Practitioners Ordinance¹⁸⁸ who are willing to investigate, report and give an opinion upon applications for the grant of legal aid and to act for aided persons.¹⁸⁹ Any counsel and solicitor so enrolled is entitled to have his name included on the panel¹⁹⁰ unless the Director is satisfied that there is good reason for excluding him by reason of his conduct when acting or assigned to act for persons receiving legal aid or of his professional conduct generally.¹⁹¹ Any counsel or solicitor may at any time request the Director to remove his name from the panel and the Director will comply with such request, save that if he has been assigned to act for an aided person, he requires the permission of the Director.¹⁹²

If the name of counsel or a solicitor is entered on the panel, the presence of his name on the list carries with it the obligation also to act for an aided person in any appeal from the court in which he has so acted; and in any proceedings before any person to whom the proceedings are referred by the court in which he has so acted.¹⁹³

Counsel or a solicitor selected for assignment to act for an aided person in proceedings, whether by the aided person or by the Director, must be selected from the panel and no leading counsel may be selected by an aided person, except where it is shown that the proceedings are or may become of exceptional difficulty or importance, unless the Director consents thereto.¹⁹⁴

186 Legal Aid Ordinance (Cap. 91) section 13(1). Where counsel or solicitor is assigned to act after a legal aid certificate is filed in court, or in any case where a new assignment is made in lieu of counsel or solicitor assigned previously, the Director is not required to endorse on the certificate the name of the counsel or solicitor so assigned, or newly assigned, as the case may be, but may, instead, give notice of such assignment or new assignment in writing to the proper officer of the court in which proceedings are pending: *Ibid*, section 14(2).

187 *Ibid*, section 13(2).

188 *I.e.* Laws of Hong Kong, Cap. 159.

189 Legal Aid Ordinance (Cap. 91) section 4(1). The Director is to enter in the panel any limitation as to the number per annum or as to the type of proceedings in which a counsel or solicitor is prepared to act for aided persons and shall give effect to such limitation: *Ibid*, section 4(2).

190 The Director must not include the name of a counsel or solicitor on the panel unless he is satisfied that such counsel or solicitor has a current practising certificate and must remove from the panels the name of any counsel or solicitor who does not have a current practising certificate: *Ibid*, section 4(4).

191 *Ibid*, section 4(3). A counsel or solicitor may be removed from the relevant panel if his or her unsatisfactory performance, breach of legal aid legislation, or professional misconduct is of an extremely serious nature (*i.e.* the act or default has substantially prejudiced the client's interests, put the legal aid fund at risk, or brought the legal aid service into disrepute). A counsel or solicitor who has been suspended from practice after disciplinary proceedings will also have his or her name removed from the relevant panel.

192 *Ibid*, sections 4(5), 25(2).

193 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 17(1).

194 Legal Aid Ordinance (Cap. 91) section 13(3). See *Keane v Director of Legal Aid* (unreported, 15 June 2000, CACV 49/2000) (Court of Appeal).

The Director's policy on assignment of cases to legal practitioners in private practice is based on the fundamental principle that **the interests of the aided person are of paramount consideration** and, accordingly, the **best available representation** should be provided commensurate with the needs of the aided person but subject to the financial restraints imposed on the expenditure of public moneys.¹⁹⁵ The Director has formulated guidelines and criteria for carrying out his policy on assignment. Where the aided person has not expressed a preference of legal practitioners for assignment and the Director decides not to act for the aided person, selection of counsel and/or solicitor for assignment is based on the following criteria:

- (a) The counsel or solicitor should be a member on the relevant panel and should hold a current practising certificate;
- (b) The counsel or solicitor should be available and in active practice;
- (c) The counsel or solicitor should have a satisfactory past performance record;¹⁹⁶
- (d) The counsel or solicitor should satisfy the minimum experience requirement specified for the area of law relevant to the case to be assignment;¹⁹⁷
- (e) The counsel or solicitor should not have exceeded 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;¹⁹⁸ and
- (f) In the case of a solicitor, he or she should have the necessary support and facility afforded by his or her firm to ensure that legal aid work is handled competently and expeditiously.

195 The Scott Report, paragraph 5.29.

196 The Legal Aid Department maintains the following record, where appropriate, in respect of legal practitioners on the panels: (a) evaluation reports of assigned counsel or solicitor completed by legal aid counsel under specified circumstances, namely (i) where the performance or conduct of the counsel or solicitor is considered unsatisfactory; (ii) where the counsel or solicitor has been included on the record of unsatisfactory performance/conduct; (iii) or where the assignment in question is the first assignment of the counsel or solicitor concerned; (b) record of unsatisfactory performance/ conduct (being a record maintained of counsel or solicitors whose performance is regarded as grossly unsatisfactory; who have failed to comply with legal aid provisions; or who have committed professional misconduct); (c) remarks on the panel; and (d) relevant disciplinary decisions of the relevant professional body.

197 Minimum experience requirements vary with the area of law concerned. For civil cases, the counsel or solicitor concerned must have at least 3 years of post-call/ post-admission experience in the legal field; and have handled a specified minimum number of cases in the relevant area of civil practice within a specified period (which is generally at least 16 such cases (whether legally aided cases or non-legally aided cases) within the past 3 years, though the requirement is less for specialized areas such as medical negligence, professional negligence, and constitutional and administrative law (i.e. at least 5 such cases within the past 3 years)).

198 Different types of limits have been put forward for legal aid counsel to observe. For civil cases, a solicitor is limited to 50 cases in the past 12 months, whereas counsel to 30 cases in the past 12 months. On the other hand, assignment of counsel or solicitors that have exceeded the relevant limit(s) may be allowed if it is in the interests of the aided person.

Assignment of a case to counsel or solicitors not meeting the criteria above requires special permission which involves considering factors such as:

- (a) Whether the counsel or solicitor has acted for the aided person before legal aid is applied for;
- (b) Whether the counsel or solicitor has relevant experience in cases of similar nature; and
- (c) Whether the counsel is instructed to act as junior to a more senior counsel.

Special procedures have been adopted for selecting solicitors in cases of difficulty, sensitivity and public importance involving a large number of legal aid applications; and for selecting and agreeing fees with counsel or solicitors for assignment for obtaining opinions on the merits of legal aid applications.

From time to time, the Legal Aid Department may instruct an expert to give an opinion to assist in determining the merits of a legal aid application, to prepare a report, to advise in writing or in a conference on evidence produced by the parties in litigation, to provide evaluation or testing services, or to give oral evidence in court in respect of a legally aided case. The Department oversees the assignment of experts through a Monitoring Committee on Assignment to Experts. The committee sets the criteria for inclusion and removal of names from a list of experts suitable for assignment.¹⁹⁹ It reviews and up-dates every two years this list of experts and decides applications for inclusion in the list. It also sets guidelines for selecting and instructing experts and oversees if the criteria and procedures for engagement of experts under these guidelines are complied with. In selecting an expert, the interests of the aided person are always the paramount concern. Legal aid counsel of the Department are to take into account the complexity of the case, the fees chargeable and the competency of the expert.²⁰⁰ The Department is under no legal obligation to engage an expert included on the list of experts and may engage experts not on the list of experts or overseas experts.²⁰¹ Where a case is assigned out, it is the responsibility of the assigned solicitor to select the expert and he or she is not confined to select among the names on the Department's list of

199 The name of an expert is included on the list of experts after consideration of his past satisfactory performance in legal aid assignments, acceptance of his opinions by the court or lawyers as expert evidence, or good reputation of his expertise in his own field or among lawyers. The name of an expert is removed from the list of experts in the following circumstances: (a) death; (b) cessation of practice; (c) upon request of the expert concerned; loss of contact; (d) non-recognition of expertise by court or other relevant authorities; (e) unacceptable charges of the expert concerned; and (f) unsatisfactory performance, including sub-standard expertise or absence of experience in the relevant field, failure or dilatoriness in acting on instructions of the Legal Aid Department, and unsatisfactory quality of testimony in court.

200 Legal aid counsel of the Department are encouraged to assign experts on the list of experts for legal aid cases because those experts may have previously been instructed and their performance been proved to be satisfactory by the Department or are known to be acceptable in their areas of expertise before inclusion on the list.

201 Engagement of an overseas expert requires justification on the grounds of non-availability or unsuitability of local experts and lack of cost-effectiveness of instructing local experts when compared with the total costs of instructing an overseas expert to assist in Hong Kong.

experts, though he must first obtain the Department's permission to obtain the service of an expert.²⁰²

RELATIONSHIPS AS AMONG AIDED PERSON, LEGAL AID DEPARTMENT AND ASSIGNED LAWYER

The relationship among the legal aid applicant/ aided person, the Legal Aid Department, and the assigned lawyer(s) is multi-faceted. The relationship between the Department and the legal aid applicant/ aided person is one between a government department and a member of the public. Where the Department acts on behalf of the aided person, the relationship between them is similar to that between a solicitor and his client, subject to the provisions of the Legal Aid Ordinance. Where the case is assigned out to counsel and solicitors in private practice, a tripartite relationship arises among the Department, the aided person and the counsel and solicitors, with the Department retaining a monitoring role to ensure that, in providing legal aid services, the users' interests are best served and public funds are employed in a cost effective manner.²⁰³ The Legal Aid Ordinance provides that the relationship among an applicant for legal aid, the Director of Legal Aid and counsel and solicitor to whom the application is referred; and the relationship among an aided person, the Director and counsel and solicitor assigned to act for him in any proceedings to which a legal aid certificate relates, will attract privileges and rights like those which arise from the relationship of client, counsel and solicitor acting in their professional employment.²⁰⁴

Provisions are made to regulate the conduct of proceedings assigned to a solicitor. If it appears to the aided person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for permission to take any one or more of

202 Legal Aid Department, *Guidelines on Assignment to Experts*.

203 For a discussion of the managerial and monitoring roles of the Department in discharge of its administrative accountability, see Chapter 5 and *Ngao To Ki v Attorney General* [1981] HKLR 259 (Court of Appeal).

204 Legal Aid Ordinance (Cap. 91) section 24(1). It should however be noted that the privileges and rights that arise as a result of the professional employment, such as legal professional privilege, may be limited by express provisions of the Legal Aid Ordinance (Cap. 91) and regulations made under it. An example is the requirement of giving information as to progress and disposal of the assigned legal proceedings to enable the Director to discharge his statutory functions: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 12(9), (10). Another example may be the reporting requirement under regulation 21 of the Legal Aid Regulations (Cap. 91 sub. leg. A) to the Director of "unreasonable requirements" in respect of the conduct of the case. Otherwise, the Director is duty bound because of the relationship provided under section 24 and implicit in his role when acting for an aided person in legally aided proceedings to preserve the confidentiality of information or communications passing between him and applicants or aided persons by upholding legal professional privilege; see Legal Aid Department, *Paper for LegCo Panel on Administration of Justice and Legal Services: Search Warrants* (18 November 2005) (LC Paper No CB(2)470/05-06/(01)).

certain specified steps,²⁰⁵ he must (unless the certificate provides for the act in question to be done) apply to the Director for authority so to do, and no payment will be allowed on taxation for any such step taken without the approval of the Director.²⁰⁶ The Director may give general authority to a solicitor acting for an aided person in any particular class of case to obtain experts' opinion and to tender expert evidence, and if so he shall state the maximum fee to be paid for any report or opinion or expert witness. Otherwise, authority is required to obtain expert's opinion and to tender expert evidence²⁰⁷ and in the absence of authority, no payment will be made for the report or opinion of an expert or for expert's evidence tendered by or on behalf of an aided person.²⁰⁸ If it appears to the aided person's solicitor necessary for the proper conduct of the proceedings for an act to be done, but that act is either unusual in its nature or involves unusually large expenditure, he must request for the Director's prior approval of the act, and, where such prior approval has been obtained, no question as to the propriety of the act shall be raised on taxation as between solicitor and client.²⁰⁹

If an aided person's solicitor or counsel has reason to believe that the aided person has required his case to be conducted unreasonably so as to incur unjustifiable expense or has required unreasonably that the case be continued; or has wilfully failed to comply with any regulation requiring him to provide information or in furnishing such information has knowingly made a false statement or a false representation, the solicitor or counsel must forthwith report the fact to the Director.²¹⁰

An aided person must not without the permission of the Director discharge any counsel or solicitor assigned to act for him.²¹¹ Counsel or solicitor assigned to act for an

205 The steps are: (a) to add any further party to the proceedings; or (b) to bespeak any transcript of shorthand notes of any proceedings; or (c) to lodge any interlocutory appeal; or (d) to instruct more than one counsel; or (e) to set up or set off any right or claim having the same effect as a cross-action (other than a counter-claim or set-off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party; or (f) to file any counter-claim, cross-petition or cross-appeal; or (g) to represent the aided person at an inquest into the death of a person under the Coroners Ordinance (Cap. 504) which gives rise to the proceedings to which the certificate relates: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 12(2).

206 Ibid, regulation 12(2).

207 In practice, the assigned solicitor has to obtain prior approval of the Legal Aid Department before incurring any expert fees and ensure that the expert selected is of proven ability, the fees chargeable are reasonable, and the performance is satisfactory. He has to certify that the services of the expert are necessary and have actually been delivered. He also has to advise the expert to be instructed that his or her fees would be subject to taxation and that in the event of fees already paid by the expert being reduced on taxation, the sum overpaid should be refunded to the Department: Legal Aid Department, *Guidelines on Assignment to Experts*.

208 Ibid, regulations 12(3) to (5). Retrospective approval may be given having regard to all the circumstances of the case including the strength and quality of the expert report and the overall merits of the case. If no such approval is given, then neither the aided person nor the Legal Aid Department will be responsible for the expert fees incurred: Legal Aid Department, *Guidelines on Assignment to Experts*.

209 Ibid, regulation 12(6).

210 Ibid, regulation 21(1).

211 Legal Aid Ordinance (Cap. 91) section 25(1).

aided person must not discontinue his aid without the permission of the Director.²¹² However, any solicitor or counsel may give up an aided person's case if, in his opinion, the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued.²¹³

An aided person's solicitor must give the Director such information regarding the progress and disposal of proceedings to which the legal aid certificate relates as the Director may from time to time require for the purpose of performing his functions under the Legal Aid Ordinance.²¹⁴

If, in relation to any proceedings to which a person who has made an application for legal aid or an aided person is a party, any other party makes an application for legal aid, the provisions of the Legal Aid Ordinance applies to both such parties.²¹⁵ However, the Director must not himself act for either party but must assign, in proceedings before the Court of Final Appeal, counsel or solicitor selected by the Director; or in other proceedings, counsel or solicitor selected by the aided person or otherwise by the Director from the panel, to act for each aided person. If the Director is already acting in any proceedings to which an aided person is a party when such other party makes application for legal aid, the Director may, if in his opinion no conflict of interest or prejudice to any aided person arises, continue to act and if he so continues to act, he must assign from the panel a solicitor and, additionally or alternatively, counsel to act for the other aided person.²¹⁶

212 Ibid, section 25(2). This provision does not prejudice the right of counsel or solicitor to refuse, or to give up, a case on reasonable grounds: Ibid, section 25(3). But if the solicitor or counsel is uncertain whether it would be reasonable for him to continue acting for an aided person, he must report the circumstances to the Director: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 21(2).

213 Ibid, regulation 12(7). If any solicitor or counsel exercises his right to give up an aided person's case on this ground or on the ground that the aided person has wilfully failed to provide the information to be furnished by him or in furnishing such information has knowingly made a false representation, the solicitor or counsel must make a report to the Director of the circumstances in which that right is exercised: Ibid, regulation 12(8). Solicitor and counsel are advised to approach the consideration of any problem as to incurring reasonable expense to attain justice in an assisted case in the same way as if the lay client were a person whose means enabled him to fight that particular case in a reasonable manner: *Francis v Francis and Dickerson* [1955] 3 All ER 836 at 839 (Sachs J). See also *Fraser v Fraser* (1982) 3 FLR 98 (English Court of Appeal).

214 Ibid, regulation 12(9). A solicitor is not precluded, by reason of any privilege arising out of the relationship between solicitor and client from disclosing to the Director any information or from giving any opinion which may enable the Director to perform his functions under the Ordinance: Ibid, regulation 12(10). In particular, a solicitor who has acted or is acting for an aided person, on being satisfied that the aided person has died or has had a bankruptcy order made against him, must report the facts to the Director.

215 Legal Aid Ordinance (Cap. 91) section 12(1).

216 Ibid, section 12(1), proviso, (2). In addition, consideration may sometimes have to be given to discharge the legal aid certificate of one or more parties to civil proceedings where it is discovered that legal aid has been granted to opposing parties to the same proceedings and that upon review, it is concluded that the litigation would bring no or virtually little benefit to the parties but rather a loss to the general revenue.

The Legal Aid Department may have to re-assign counsel or solicitor if it is discovered that case progress or the performance of the assigned counsel or solicitor is unsatisfactory; or if the aided person makes a reasonable request on the ground that the assigned counsel or solicitor is not acting in his or her interest; or if re-assignment is sought by the assigned counsel or solicitor for a good reason. Where a re-assignment is to be made, the aided person's written understanding on the costs implication arising out of the re-assignment and the operation of the Director of Legal Aid's first charge should be secured.

The retainer of any solicitor and counsel acting for an aided person in proceedings to which a legal aid certificate relates will, upon receipt by him of notice of revocation or discharge of the certificate by the Director or upon its revocation or discharge by the court, forthwith determine.²¹⁷

LIABILITY OF AIDED PERSON FOR FEES AND COSTS

An aided person in connection with any proceedings will not be liable in respect of those proceedings for court fees or for fees payable for the service of process or for any fees due to the bailiff in connection with the execution of process.²¹⁸ On the other hand, the Director of Legal Aid is, on his behalf, entitled to be supplied free of charge with a transcript of the evidence in those proceedings and, in the event of there being any other relevant proceedings, with a transcript of the relevant evidence in such other proceedings²¹⁹ and also, if such other proceedings are criminal proceedings, of the judge's summing up in such other proceedings.²²⁰

Counsel and solicitor acting for an aided person by assignment will be paid by the Director such fees and costs for so acting as prescribed under the Legal Aid (Scale of Fees) Regulations.²²¹ The expenses incurred in connection with the proceedings, as far as they would ordinarily be paid in the first instance by or on behalf of the assigned solicitor assigned, will be so paid, except in the case of those paid directly by the Director, and the expenses paid by the solicitor will be refunded to him by the Director.²²²

217 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 9(2).

218 Legal Aid Ordinance (Cap. 91) section 16B(c). Such costs will be deemed to have been paid by him for the purposes of any order or agreement of costs made in the aided person's favour with respect to the proceedings to which the legal aid certificate relates. The Director then is to have the responsibility of dealing with such fees, fees payable, and costs under, *ibid*, sections 19, 19A(1) and 19B(1)(b).

219 "Transcript" includes the transcript of the official shorthand note and any official typescript of the judge's manuscript note: *Ibid*, section 2(1).

220 *Ibid*, section 16B(d).

221 *Ibid*, sections 16B(b), 20 and the Legal Aid (Scale of Fees) Regulations (Cap. 91 sub. leg. C). Thus no person who, pursuant to any reference under the Legal Aid Ordinance (Cap. 91), makes any investigation or report or gives any opinion or certificate or who acts for an aided person, may take or agree to take or seek from an aided person any fee, profit or reward (pecuniary or otherwise) in respect thereof (except the case of contributions to the Director): *Ibid*, section 22(1). Contravention of this provision is a criminal offence: *Ibid*, section 22(2).

222 *Ibid*, section 16B(a).

An aided person may be required to make a contribution to the Director.²²³ His liability for costs is to be determined in the following manner:²²⁴

- He is not liable for costs²²⁵ incurred by the Director on his behalf, which is in excess of the aided person's contribution.²²⁶
- If a court or the Court of Final Appeal makes an order for costs against him, or an agreement is entered into for the payment of costs by him,²²⁷ in favour of a person not receiving legal aid:²²⁸
 - (a) in any case in which the party not receiving legal aid is a defendant or respondent in the proceedings (other than a defendant or respondent to a counterclaim or cross-petition), or in the case of an appeal (including an appeal to, or an application for leave to appeal to, the Court of Final Appeal) is a respondent therein (other than a respondent to a cross-appeal) such costs will be paid by the Director;²²⁹
 - (b) in any case in which the party not receiving legal aid is a defendant to a counterclaim or respondent to a cross-petition, or in the case of an appeal (including an appeal to, or an application for leave to appeal to, the Court of Final Appeal) is a respondent to a cross-petition, the costs occasioned by the counterclaim, cross-petition or cross-appeal filed by or on his behalf will be paid by the Director;²³⁰
 - (c) in any case in which the party not receiving legal aid is an appellant in an appeal (including an appeal to, or an application for leave to appeal to, the Court of Final Appeal) and in the court whose judgment or order is appealed against the plaintiff was an aided person, such costs will be paid by the Director; and²³¹

223 Ibid, section 16B(e).

224 Ibid, section 16B(f).

225 Costs in this connection relates only to costs arising in respect of proceedings to which, and during the period to which, a legal aid certificate relates. The liability for costs of an aided person is not otherwise affected: Ibid, section 16C(2).

226 Ibid, section 16C(1)(a).

227 Costs in this connection relates only to costs arising in respect of proceedings to which, and during the period to which, a legal aid certificate relates. The liability for costs of an aided person is not otherwise affected: Ibid, section 16C(2).

228 The Court of Final Appeal held in *Common Luck Investment Ltd v Director of Legal Aid* (2002) 5 HKCFAR 467 that section 16C of the Legal Aid Ordinance (Cap. 91) was to provide a code by which a non-aided person's costs entitlement against the Director could be seen on the face of the court's order, thus avoiding disputes which might result in further litigation. Therefore, it necessarily involved going by the parties' formal designation. In the vast majority of cases, form will naturally follow substance when the question is who is the plaintiff and who is the defendant. A mismatch between substance and form in this connection can arise in a case where proceedings not begun by writ are ordered to continue as if begun by writ, and in which directions are made as to who is to be the plaintiff and who is to be the defendant. In such cases, submissions should be made at the direction hearing pointing out the implications to determination of the entitlement of a non-aided person for costs to be paid by the Director.

229 Legal Aid Ordinance (Cap. 91), section 16C(1)(b)(i).

230 Ibid, section 16C(1)(b)(ia).

231 Ibid, section 16C(1)(b)(ib).

- (d) in any other case, neither the Director nor the aided person will be liable for such costs unless a contribution is payable by him,²³² in which case the Director on his behalf will pay such costs to the extent that the contribution is in excess of the costs incurred by the Director on his behalf.²³³
- If a court or the Court of Final Appeal makes an order for costs against him, or an agreement is entered into for the payment of costs against him, in favour of a person who is also receiving legal aid,²³⁴ neither he nor the other person will be liable for such costs in excess of his contribution and the contribution of the party who is liable for the payment of costs under such order or agreement will be charged first with the costs of both parties and thereafter the contribution of the other party will be charged to the extent of his own costs in so far as such costs are not recovered from the contribution of the party liable to pay costs.²³⁵

The limitations of liability for costs of an aided person as described above extend, in the case of an aided person who has been granted legal aid in a representative or fiduciary capacity, to any other person on whose behalf the aided person is acting and for the benefit of any fund held for such other person; and, in the case of an aided person who has been granted legal aid as the guardian of an infant, to the infant.²³⁶

Where it appears to the court or the Court of Final Appeal that a legal aid certificate has been obtained by fraud or misrepresentation, or that an aided person has acted improperly in bringing or defending any legal proceedings or in the conduct of them, the court or the Court of Final Appeal may order an aided person²³⁷ to pay the costs of the Director and of the counsel and solicitor who acted for him or the costs of the other party, or the costs of the Director and such counsel and solicitor and such party.²³⁸ Where such an order is made, the costs will be taxed as if the party ordered to pay them were not an aided person.²³⁹

Where an aided person is obliged to furnish security for costs, the Director is empowered to provide such security out of funds in his control which are available for that purpose.²⁴⁰

232 Pursuant to *ibid.*, section 18(1)(b).

233 *Ibid.*, section 16C(1)(b)(ii).

234 Costs in this connection relates only to costs arising in respect of proceedings to which, and during the period to which, a legal aid certificate relates. The liability for costs of an aided person is not otherwise affected: *Ibid.*, section 16C(2).

235 *Ibid.*, section 16C(1)(c).

236 *Ibid.*, section 16C(3).

237 The expression includes, in any case where the legal aid certificate has been revoked or discharged before the making of the order, the person who immediately before such revocation or discharge was the aided person: *Ibid.*, section 17(2).

238 *Ibid.*, sections 17(1), (3). The costs so ordered to be paid shall, unless otherwise directed by the order, include fees and charges of the nature referred to in section 16B(c) and (d): *Ibid.*, section 17(5).

239 *Ibid.*, section 17(4).

240 *Ibid.*, section 18B. If legal aid has been granted to an aided person under the Supplementary Legal Aid Scheme any such security shall be provided out of the Supplementary Legal Aid Fund.

REQUIREMENT OF AIDED PERSON TO PAY CONTRIBUTION

An aided person under the Ordinary Legal Aid Scheme must, if required by the Director of Legal Aid, pay to the Director a contribution towards the sums that may be or become payable on his account by the Director.²⁴¹ If the total contribution paid by such an aided person is more than the net liability of the Director on his account,²⁴² the excess shall be repaid to him.²⁴³

A person who is issued with two legal aid certificates, one for employees' compensation and the other for common law damages arising out of the same circumstances, is liable to pay only one amount of contributions for the two certificates.²⁴⁴

It is a long-standing policy in many jurisdictions that those who can afford to contribute towards their own legal representation should do so. While a person should not be pushed to poverty because of the need to engage in litigation, he should not be absolved from the need to make choices.²⁴⁵ The requirement to contribute to his costs should encourage him to attach a realistic priority to the pursuit of legal remedies. The scales of contributions have been drawn up on the basis of a number of **principles**: (i) all aided persons should be asked to contribute towards the costs of litigation, according to their financial capacity, thereby ensuring equity; (ii) the rate of contribution should be on

241 Ibid, section 18(1)(b). In assessing the amount of contribution, if any, payable in respect of any proceedings, the Director must have regard to their probable cost and must not assess an amount in excess of any maximum amount provided for by the Legal Aid Ordinance (Cap. 91): Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 5(3).

Regulation 13 and Schedule 3, Part I of the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) provide for the maximum contribution of an aided person, assessed in respect of that person's financial resources. Separate tables of contributions are provided for aided persons under the Ordinary Legal Aid Scheme and aided persons granted a certificate for proceedings in which a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the ICCPR as applied to Hong Kong is an issue. The Director is empowered to increase the contribution he has assessed if the sum assessed is less than the maximum contribution permissible and it appears that the costs incurred or likely to be incurred under the legal aid certificate are or are likely to exceed the contribution so assessed, up to the amount or likely amount of those costs or to such maximum contribution, whichever amount is the less: Ibid, regulation 6C.

242 The expression "net liability of the Director of the Legal Aid on the aided person's account" refers to the aggregate amount of (a) sums paid or payable by the Director on his account in respect of the proceedings to any solicitor or counsel (or, where the Director acts for a person, sums which would have been so payable if the Director had not so acted) and not recouped by the Director from sums recovered under an order or agreement for costs made in favour of that person with respect to the proceedings; (b) any amount paid or payable by the Director under Legal Aid Ordinance (Cap. 91) section 16C on behalf of that person; and (c) the amount of any expenses defrayed by the Director under section 9(f) in respect of the grant of legal aid to that person: Legal Aid Ordinance (Cap. 91), section 18A(2).

243 Ibid, section 18(3).

244 Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B) regulation 15.

245 Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 15.

a more gradual sliding scale;²⁴⁶ and (iii) the contribution scale should be user-friendly to aided persons.²⁴⁷

Any contribution payable by an aided person to the Director is a debt due to the Director and must be paid in the prescribed manner.²⁴⁸ If a certificate, other than a certificate granted under the Supplementary Legal Aid Scheme, has been discharged the person to whom the certificate was issued will remain liable for the payment of his maximum contribution, if any, as determined by the Director up to the amount paid or payable by the Director upon taxation or assessment following determination of the proceedings.²⁴⁹

246 Realistic levels of contributions should be required and accordingly the rate of contribution should increase gradually across the lower levels of financial capacity and rise steeply above a certain threshold: The Scott Report, paragraph 2.31. In designing the contribution table, the maximum contribution for the lower segments (where most of the legal aid applicants will fall within) should be 20% and for the upper segment, the principle applied was that the residual financial capacity after paying contributions should remain constant in order to ensure that while persons in the higher financial capacity group would be paying a larger contribution, the remaining financial resources available to them would be the same. Some in the upper segment are anticipated to be not using the legal aid service because their potential contribution would cover the full cost of the case and so they may choose to consult private practitioners. Others who face cases of indeterminate length, considerable complexity and consequently high legal cost, would find the legal aid service of benefit as a protection against the possibility of high costs and as an insurance against the liability to pay heavy costs to other party should they fail in their action: *Ibid*, paragraph 2.33.

247 Administration Wing, Chief Secretary for Administration's Office, *Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997) paragraph 48. Revision to the scales should have regard to the principle that aided persons should not be pushed to the limits of their potential resources: Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 37.

248 Legal Aid Ordinance (Cap. 91) section 18(2). The Director may order the contribution to be paid in instalments or the whole or part of it to be paid before a legal aid certificate is issued and in fixing the method of payment, the Director is to have regard to all the circumstances, including the probable length of time which any certificate issued as a result of the application will be in force, the actual monthly income of the aided person after deduction of basic and essential expenditure, and the amount of available assets, including savings and readily realizable assets: Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 5(5). Generally, the contribution is not to be paid by instalments if the amount of the contribution is less than the value of half of the available assets of the aided person. On the other hand, if the amount of the contribution is more than the value of half of the available assets of the aided person, then payment by instalments may be allowed with the first instalment payment be half of such value.

Where an aided person's contribution remains unpaid and all necessary steps have been taken to recover the outstanding contribution, the Director may exercise delegated powers under the Public Finance Ordinance (Cap. 2) section 38 and Accounting Regulations to write off the outstanding sum up to the extent of HK\$250,000 provided that no fraud or negligence on the part of a public officer is involved.

249 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 9(9).

DIRECTOR'S FIRST CHARGE

The amount of a contribution to the extent that it is unpaid; and, except where legal aid has been granted under the Supplementary Legal Aid Scheme, if the total contribution is less than the net liability of the Director of the Legal Aid on the aided person's account,²⁵⁰ a sum equal to the deficiency, will be a first charge for the benefit of the Director²⁵¹ on any property, whether situated in Hong Kong or otherwise, which is recovered or preserved for the aided person in the proceedings²⁵² or in any other proceedings in respect of which the person is aided and which, in the opinion of the Director, are substantially related to or connected with the proceedings in which the property is recovered or

250 See, *supra*, note 242.

251 If the property recovered or preserved is land or an interest in land, the charge shall vest in the Director of Legal Aid, who may register the charge under the Land Registration Ordinance (Cap. 128) and may enforce the charge in any manner which would be available to a chargee in respect of a charge given *inter partes*: Legal Aid Ordinance (Cap. 91) section 18A(3A). Special provisions apply to the case where the property in question is to be used as a home for the aided person or his dependents so that enforcement of the charge is deferred upon the Director satisfying that the property will provide adequate security for any sum he would have retained in respect of the property, subject to the accrual for the benefit of the Director simple interest at the rate of 10% per annum or at a rate, calculated by reference to the best lending rate of the note-issuing banks, prescribed under the Legal Aid (Charge of Property) (Rate of Interest) Regulation (LN 225/2005) (though the Director is empowered to waive payment of interest so accrued in cases of serious hardship or where it is in all the circumstances just and equitable to do so): *Ibid*, section 18A(3B). In deciding whether the charging of interest would cause serious hardship to the aided person, the Director is to consider all relevant factors, including the personal circumstances of the aided person, the financial circumstances of the aided person, and the value of the property recovered or preserved under legal aid (both at the time when the property was recovered or preserved and at the time when the outstanding payment is made by the aided person). In considering whether it would be just and equitable to exercise the discretion to waive or reduce interest, the Director would take into account the specific circumstances of individual cases, in particular unforeseen circumstances which might affect the financial or other position of the aided person. For example, the Director may consider exercising his discretion to waive or reduce interest if it is found that the remaining balance of the sale proceeds of the property less the liability of the aided person is so small or such that the charging of interest, or part thereof, would have the effect of depriving the aided person of any benefit at all out of the property recovered or preserved.

252 In this connection, "the property recovered or preserved for the aided person in the proceedings" include: (a) his rights under any compromise arrived at to avoid or bring to an end the proceedings and any sums recovered under an order or agreement for costs made in his favour with respect to the proceedings; and (b) where the legal aid certificate granted to him in respect of the proceedings is revoked or discharged, any property subsequently recovered or preserved by or for him in the proceedings or by virtue of any compromise arrived at to avoid or bring to an end the proceedings; and (c) any property recovered for the benefit of any person on whose behalf the aided person is acting or for the benefit of any estate or fund out of which that aided person is entitled to be indemnified: *Ibid*, sections 18A(3), 32(6).

preserved.²⁵³ The underlying principle of the first charge has been described as being “to put the legally assisted person as far as possible in the same position in relation to proceedings as an unassisted person, whose first responsibility at the end of the proceedings is to pay whatever legal costs that are not being paid by the other side. It prevents an assisted person from making a profit at the expense of legal aid and is a deterrent to running up costs unreasonably.”²⁵⁴ Needless to say, the first charge is imposed to protect the legal aid fund.²⁵⁵

A typical example for the first charge to apply is where upon a successful claim for money or property under legal aid, a shortfall occurs between the contribution paid by the aided person and the costs and expenses incurred by the legal aid fund in the civil proceedings to which the legal aid certificate relates (including the legal costs which cannot be recovered from the opposite party pursuant to a costs order). A first charge arises on the property recovered or preserved in respect of the shortfall. Another example for the first charge to apply is where an injured person has obtained legal aid for making two claims: one for making an employees’ compensation claim and the other for commencing an action for common law damages. If the employees’ compensation claim is unsuccessful and there is a consequential deficit on the aided person’s account with the Director, then a first charge arises on any common law damages recovered in respect of the same accident in proceedings in which the person was also legally aided.

Legally aided persons have to be properly advised of the possible amount of the first charge by reference to the following factors:

- the likely amount of damages or value of property recovered or preserved;
- the amount of costs involved, i.e. the costs already incurred and are likely to be incurred;
- the likelihood of the court ordering the opposite party to pay the costs of the aided person;
- the ability or otherwise of the opposite party to pay the costs if ordered by the court to do so;

253 This part of the provision addresses the situation where an aided person has more than one legal aid certificate contemporaneously for two sets of proceedings (or one certificate for one set of proceedings issued almost immediately after the conclusion another set of proceedings) which are substantially related, for example one for wardship and the other for divorce, and the legal aid fund is unable to recover the costs incurred in one set of proceedings out of the fruit of litigation in the other. “Substantially related” refers in this context to the requirement that the proceedings in respect of their costs the Legal Aid Department intends to charge should be essential or of significance to the other proceedings in which property was recovered; or that the issues or matters raised in one set of proceedings should play a pivotal role or have a deciding influence in the determination of the issues or matters in the other set of proceedings.

254 See Legal Aid Board, *The Legal Aid Handbook 1998/99* (London: Sweet & Maxwell, 1998) describing the similar mechanism in England. The first charge provides some security for payment of the assigned solicitor’s fees somewhat analogous to a solicitor’s lien. See *Hanlon v The Law Society* [1981] AC 124 (House of Lords); *Manley v The Law Society & Anor* [1981] 1 WLR 335 (English Court of Appeal).

255 The Scott Report, paragraph 7.7.

- the effect of the first charge on the amount of damages or value of property recovered or preserved if the court makes no order as to costs, or if the opposing party fails to pay the costs as ordered by the court; and
- any contribution the aided person has made or is to make towards legal aid costs.

The first charge does not prevent a court or the Court of Final Appeal allowing damages or costs to be set off against other damages or costs in any case where a solicitor's lien for costs would not prevent it²⁵⁶ and also does not apply to five categories of payments or awards.²⁵⁷ On the other hand, the first charge has priority over a victim's entitlement of having compensation being paid out of money taken from a convicted person's prisoner's property or money paid into court.²⁵⁸

LEGAL AID TAXATION

If, in any proceedings to which an aided person is a party, judgment is signed in default of appearance or defence; or the court gives judgment or makes a final order in the proceedings, the judgment or order must contain a direction (in addition to any other direction as to taxation contained in the judgment or order) that the costs of any aided person will be taxed.²⁵⁹ Where there has been no order for taxation, the amount of the costs shall be fixed by the Director of Legal Aid.²⁶⁰

256 Legal Aid Ordinance (Cap. 91) section 18A(4).

257 I.e. (a) any interim payment under an order or an agreement having the same effect as an order; (b) maintenance pending suit or a periodical payment under an order made in domestic proceedings, or under an agreement having the same effect as an order, for the maintenance of a child, spouse or former spouse unless the payments are for the maintenance of a spouse or former spouse and are at a rate exceeding HK\$4,800 (or its equivalent) each month; (c) where the payment of maintenance for a spouse or former spouse is payable at a rate exceeding HK\$4,800 (or its equivalent) each month, the first HK\$4,800 (or its equivalent) of each payment; (d) the payment of arrears of maintenance except to the extent that paragraph (b) would otherwise apply; and (e) an amount recovered by way of employee's compensation to the extent that the charge would apply the deficiency attributable to a common law claim by the aided person arising out of the same circumstances: *Ibid*, section 18A(5). The Legislative Council may by resolution amend the rate of maintenance payments specified herein: *Ibid*, section 22A(a).

258 Criminal Procedure Ordinance (Cap. 221) section 73(3), (4). See *Registrar, District Court v Li Kai & Anor* (unreported, 14 March 2006, CACV 183/2005) (Court of Appeal).

259 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 15(1). Failure to obtain an order for taxation can result in the assigned solicitor being responsible for all the disbursements incurred and not being paid his own costs. If, in any proceedings to which an aided person is a party, the proceedings are, or have been, brought to an end without a direction having been given as to the aided person's costs being taxed; or a judgment or order in favour of an opposite party, that included a direction that the aided person's costs be taxed has not been drawn up or as the case may be entered by him, an order that the aided person's costs be taxed will be made on ex parte application to the Registrar of the High Court (or the Registrar of the Court of Final Appeal) by his solicitor or the Director and the costs of the application and taxation will be deemed to be costs in the proceedings to which the certificate relates or related: *Ibid*, regulation 15(2).

260 *Ibid*, regulation 10(4).

On the taxation of costs in proceedings to which an aided person is a party, costs will be taxed for the purposes of the Legal Aid Ordinance according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested.²⁶¹

It is possible for the aided person, the assigned solicitor and the Director to discuss whether an offer received in respect of party and party costs from a paying party might be acceptable, having regard to the need to safeguard the aided person's exposure to common fund costs.²⁶² An offer, in order to be effective, must be divided at least into offers for profit costs, counsel's fees, and other disbursements, so that at least a portion

261 Legal Aid Ordinance (Cap. 91) section 20A(1). The common fund basis of taxation (which allows a reasonable amount in respect of all costs reasonably incurred), though more restrictive than that of between solicitor and own client, is more generous than the party and party basis (which allows all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed). The practical difference between the two bases lies in the latitude which the litigant may enjoy in the conduct of his case. The description of the common fund basis as being more generous is a reference to being more generous or less strict in approach but not in quantum so that where a proper sum is allowed for some item of work on the party and party basis, it would be wrong *ipso facto* to allow more on a common fund basis; see *Ngan Wun Yeung v Lok Sin Tong Benevolent Society Kowloon & Ors* [2000] 2 HKC 404 (Court of First Instance), following the Lord Chancellor's Department's *Notes for Guidance on the Taxation of Civil Costs* (July 1982), paragraph 12.

262 *Tso Wing Yu Anita v Lau Siu Fan* [1998] 2 HKC 286 (Court of First Instance). Section 22 of the Legal Aid Ordinance (Cap. 91) does not prohibit such discussion. Nor do regulations 9 to 15 of the Legal Aid (Scale of Fees) Regulations (Cap. 91 sub. leg. C). See also *Leung Cheung Hong v Golden Pond Restaurant Ltd* (unreported, 21 March 1997, HCA 5399/1989) (High Court) as to the suggested process of consultation the Director may make of the assigned solicitors and counsel and the aided person in relation to an offer before fixing the amount of common fund costs without taxation pursuant to regulation 4 of the Legal Aid (Scale of Fees) Regulations in the light of an agreement with them, thus removing the need of requesting for transfer of an item of costs between the party to party side and the common fund side. In practice, the Director has indicated that no prior approval is necessary for the assigned solicitor to agree costs with the paying party in lieu of taxation, provided that the agreement does not adversely affect the amount of common fund costs and disbursements payable by the Director or the aided person to the assigned solicitor. Where a request is made by an assigned solicitor for transfer of an item of costs from the party and party column to the common fund column, the Costing Unit of the Legal Aid Department will agree to the requested transfer if it is right and proper to do so.

of the offer may be considered and accepted and the scope of the aided person's bill that requires taxation reduced with consequential saving in taxation costs.²⁶³

Provisions are made to impose a duty on an aided person's solicitor to safeguard the interest of funds in the Director of Legal Aid's control on taxation, to enable a solicitor or counsel to seek authority to object to taxation, and for the costs of hearings in connection with such matters be paid out of the funds in the Director's control.²⁶⁴

263 *Tso Wing Yu Anita v Lau Siu Fan* [1998] 2 HKC 286 (Court of First Instance). An offer in this connection is a Calderbank offer that a taxing master may properly take into account when considering an order for the costs of taxation.

The practice thus generated has resulted in instances of the assigned solicitor reaching agreement with the solicitors of the paying party on solicitor's profit costs and disbursements prior to taxation, leaving the matter of counsel's fees the only item unresolved but with practically no one before the taxing master to firmly and fairly explain and uphold the counsel's fees, since counsel are often not involved in the taxation process and the assigned solicitor, having reached agreement on his or her own profit costs and disbursement, makes no active effort to ensure that all matters which are properly to be taken into account are placed before the taxing master, pursuant to the Legal Aid (Scale of Fees) Regulations (Cap. 91 sub. leg. C) regulation 15(a), and to use the best endeavour to ensure that a proper fee for the work done by counsel on behalf of the aided person is allowed on taxation; see *Guidance Notes to Solicitors Handling Civil Cases* (Legal Aid Department, July 2001), paragraph 9.14. The taxation work, rather, is often contracted out to a law costs draftsman. In the event that counsel fees are disallowed because the work should have been done by assigned solicitor, counsel should be paid a reasonable amount for the work done from the profit costs of the assigned solicitor.

If, in the end, the taxed counsel fees are lower than the offer from the paying party, the taxing master may order costs in favour of the paying party for the taxation costs incurred after issue of the offer, to be borne by the aided person (and thus the legal aid fund), and sometimes the assigned solicitor personally. See *Tso Wing Yu Anita v Lau Siu Fan* (supra). Even if the taxing master declines to order costs in favour of the paying party, he may disallow the fees of the law costs draftsman and may further make a suitable order on the liability of those fees, as between the assigned solicitor and the aided person, see *Ng Ka Ho (an infant) v Yeung Kwok Leung* (unreported, 14 February 2006, DCPI 28/2004) (District Court).

264 Legal Aid (Scale of Fees) Regulations (Cap. 91 sub. leg. C) regulations 9 to 14. Authority to object to taxation is to be given in appropriate cases. When such authority is given, the ensuing proceedings are deemed to be proceedings to which the aided person's legal aid certificate relate and the costs of such proceedings shall be paid out of funds under the control of the Director. The aided person, however, will not be required to make any contribution on account of the costs of such proceedings: *Ibid*, regulation 15B. In practice, there were occasions where assigned counsel were given authority to object to the taxation of counsel fees by way of review only if the assigned counsel would pay or underwrite to pay the costs of the review or appeal; see *Ngan Wun Yeung v Lok Sin Tong Benevolent Society Kowloon & Ors* [2000] 2 HKC 404 (Court of First Instance). Neither the Legal Aid Ordinance (Cap. 91) nor its regulations appear to provide express authority for the imposition of such a condition. The granting of authority by the Director upon the counsel's providing a costs indemnity undertaking is done in cases where the Director is of the view that the proposed review does not have a reasonable prospect of success and is given as a matter of concession by way of agreement.

The Director is entitled to attend and be heard on taxation hearings,²⁶⁵ to raise objections or to apply for a review of the taxation in accordance with the relevant rules of court.²⁶⁶ The duty of the Director's representative in a taxation hearing is to ensure that the amount of common fund costs claimed is fair and reasonable.

Provisions are made for the fees and costs of and incidental to the conduct of the proceedings and the appearance of officers of the Legal Aid Department appointed under the Legal Aid Ordinance in relation to legally aided cases that are conducted or assigned in-house at any stage of the relevant proceedings, deeming the officers generally to have the status of a barrister and solicitor duly admitted under the Legal Practitioners Ordinance.²⁶⁷ Any costs or fees received by such an officer will be paid into the general revenue unless legal aid has been granted under the Supplementary Legal Aid Scheme, in which case they will be paid into the Supplementary Legal Aid Fund.²⁶⁸

LEGAL AID FEES FOR COUNSEL AND SOLICITOR

The fees payable by the Director to counsel acting for an aided person is such as may be allowed on taxation or, in default of taxation, as may be fixed by the Director, not exceeding such amount as in his opinion would have been allowed if there had been taxation.²⁶⁹

265 The Director may, through a representative, attend a taxation hearing of party and party costs ordered in favour of an aided person if the paying party is expected not to attend, and make representations on the party and party costs. The rationale for the Director's participation is that the Director underwrites to pay the party and party costs in the event that the paying party defaults payment.

266 Legal Aid Ordinance (Cap. 91) section 20A(2).

267 Legal Aid Regulations (Cap. 91 sub. leg. A) regulations 18 to 19.

268 Ibid, regulation 20.

269 Legal Aid (Scale of Fees) Regulations (Cap. 91 sub. leg. C) regulation 4. Brief fees of counsel are normally agreed beforehand between counsel and solicitors. In contrast, an assigned counsel on legal aid has a statutory right to taxation of their fees. See *Leung Cheung Hong v Golden Pond Restaurant Ltd* (unreported, 21 March 1997, HCA 5399/1989) (High Court); *Tso Wing Yu Anita v Lau Siu Fan* [1998] 2 HKC 286 (Court of First Instance). The Director usually makes an offer to counsel of legal aid fees, by reference to what would be allowed on taxation. If counsel finds on an occasion that the offer cannot be accepted and wishes to exercise the right, he is obliged to consider the reasonableness of his fees.

Following party and party taxation, if counsel is dissatisfied with the taxed counsel fees and institutes a review, it is the assigned solicitor who is to bear the costs of the opposite party in the case of dismissal; see *Ngan Wun Yeung v Lok Sin Tong Benevolent Society Kowloon & Ors* (supra). The Director will consider the merits of the counsel's objections in deciding whether he gives authority for the review. Authority will be given if the Director considers there is merit in the objections. On the other hand, if the Director considers there is no merit, he adopts the practice in the absence of relevant statutory provision of giving authority only upon the counsel undertaking personally to indemnify the public fund or the aided person in case an adverse costs order is made at the review. It is said that all these matters may constitute disincentives to counsel to undertaking legal aid assignments.

The amount payable by the Director of Legal Aid to a **solicitor** acting for an aided person is the full amount allowed on taxation on account of disbursements, and of profit costs; and in cases where fixed costs are applicable and the solicitor has made an election to take fixed costs, the full amount of such fixed costs, or, in default of taxation or where an election to take fixed costs has not been made, an amount as may be fixed by the Director, not exceeding such amount as in the opinion of the Director would have been allowed if there had been taxation or would have applied if there had been an election to take fixed costs.²⁷⁰

The Director is empowered to make an advance to counsel or solicitor before taxation of an amount not exceeding 75% of the sum which the Director estimates to be payable and such advance is to be on account of moneys so payable.²⁷¹

EXECUTION AND ENFORCEMENT AGAINST PARTY ON CIVIL LEGAL AID

A court or the Court of Final Appeal may make an order for costs²⁷² in favour of or against an aided person in the same manner and to the same extent as it may make an order for costs in favour of or against any other person.²⁷³ If it makes an order for costs in favour of an aided person, there shall also be payable by the person against whom the order for costs is made the court fees and other fees and charges which, but for the Legal Aid Ordinance, would have been payable by the aided person.²⁷⁴

If, in any proceedings to which an aided person is a party, an order or agreement is made providing for the recovery or preservation of property for the benefit of the aided person and, by virtue of the Legal Aid Ordinance, there is a first charge on the property for the benefit of the Director; or an order or agreement is made for the payment of costs to the aided person, the aided person must, unless there is a direction from the Director to

270 Ibid, regulation 5. However, the Director may at any time, while a legal aid certificate is in force, pay to the aided person's solicitor such sums as the Director may approve for disbursements to be made by the solicitor in respect of the proceedings to which the certificate relates. Where such approval is obtained, no question shall be raised on taxation as between solicitor and client as to the propriety of any disbursements made in accordance with such approval: Ibid, regulation 12(11).

271 Ibid, regulation 6. If the amount paid exceeds the amount payable, the counsel or solicitor must repay the excess to the Director.

272 This expression includes any judgment, order, decree, award or direction by a court or the Court of Final Appeal for the payment of the costs of one party in the proceedings by another party, whether given or made in those proceedings or not: Legal Aid Ordinance (Cap. 91), section 2(1).

273 Ibid, section 19(1). However, the order may only be enforced against the aided person and the Director to the extent permitted by section 16C of the Legal Aid Ordinance.

274 Ibid, section 19(1A)(a). Any court fees and other fees and charges which become payable to an aided person under paragraph (a) shall be paid to the Director, who alone shall be capable of giving a good discharge of them: Ibid, section 19(1A)(b). Section 16B(c) and (d) of the Legal Aid Ordinance removes the liability of the aided person to court fees and those other fees and charges.

the contrary,²⁷⁵ take such proceedings as may be necessary to enforce or give effect to such order or agreement.²⁷⁶

The Director has the right to enforce an order for costs in favour of an aided person made in proceedings for which the Director has issued a legal aid certificate, whether the certificate has been discharged or revoked, and the Director may bring proceedings in his official name in a court of competent jurisdiction to recover the costs ordered.²⁷⁷

PAYMENT AND DISPOSAL OF MONEYS WITH DIRECTOR OF LEGAL AID

All moneys²⁷⁸ which may become payable to an aided person,²⁷⁹ whether:

- (a) by virtue of an order, including an order of the Court of Final Appeal, made in connection with the proceedings to which his legal aid certificate relates;
- (b) by virtue of any agreement made in connection with the proceedings to which his legal aid certificate relates, whether such agreement be made before or after the proceedings are actually begun;
- (c) being moneys paid into court or the Court of Final Appeal by him or on his behalf in connection with the proceedings to which his legal aid certificate relates and ordered to be repaid to him; or
- (d) being moneys standing in court or in the Court of Final Appeal to the credit of any proceedings to which his legal aid certificate relates,

275 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 14(3), where the aided person has to satisfy the Director that having regard to the probable cost of any proceedings referred to or the likelihood of their being successful, it would be unreasonable to take them. This power to give the direction may be exercised in the absence of an application by the aided person. If the Director, having made the direction, is of the opinion that it is expedient so to do he may enforce any order for the payment of money in his name: *Ibid*, regulation 14(4).

276 *Ibid*, regulation 14(2).

277 *Ibid*, regulation 9(6A). Statutory authority in this respect is necessary since costs awarded to an aided person by the court (including party and party costs and disbursements) are not debts due to the Government. The Director, from time to time, may have to “drop case” (i.e. take no enforcement action) against the paying party if he is satisfied that the costs are not recoverable or the costs of enforcement are out of proportion to the amount of costs to be recovered. A decision to “drop case” against the paying party does not affect the common fund costs.

278 This provision applies in relation to all sums which may become payable to an aided person, notwithstanding any provision in the Employees' Compensation Ordinance (Cap. 282); or the High Court Ordinance (Cap. 4); or any other law, which restricts the payment of any sum to any person; or prohibits the payment of any sum to any person: Legal Aid Ordinance (Cap. 91), section 19A(3).

279 In this provision, this expression includes an aided person whose legal aid certificate has been revoked or discharged: *Ibid*, section 19A(5).

will be paid or repaid, as the case may be, to the Director²⁸⁰ unless the Director by notice in writing to the person responsible for payment and to the aided person directs otherwise.²⁸¹

Upon receipt of all moneys paid to him, whether in respect of awards of costs or moneys due to the aided person, the Director will retain any sum paid by virtue of an order or agreement for costs made in the aided person's favour; a sum equal to the amount by which any property recovered or preserved is charged for the benefit of the Director as mentioned above (i.e. the Director's first charge); and any costs recovered in proceedings taken by the Director in his own name under regulations made under the Legal Aid Ordinance.²⁸² Then having paid to the Registrar of the High Court or the Registrar of the Court of Final Appeal any court fees and other fees and charges paid to him, the Director is to pay the balance to the aided person or, if the court so directs, to the court or to some other person.²⁸³ The Director nonetheless has the overriding discretion to, upon receipt of any such payment, pay such proportion thereof as he thinks fit to the aided person without complying with the above if he is satisfied that compliance would cause serious hardship to any person.²⁸⁴

Any interest or dividend received by the Government under the Legal Aid Ordinance on all moneys paid to the Director by or on behalf of an aided person must be paid into the general revenue.²⁸⁵

LIABILITY AND INDEMNITY AGAINST DIRECTOR OF LEGAL AID

If, after proceedings have been instituted in any court or the Court of Final Appeal, any party becomes an aided person in regard to those proceedings, the Director of Legal Aid will only be liable to pay so much of the costs of the proceedings as are incurred while a

280 Only the Director shall be capable of giving a good discharge for moneys which may become payable to the Director under this provision: *Ibid*, section 19A(4).

281 *Ibid*, section 19A(1). This provision does not apply if any court or the Court of Final Appeal, authority or person, in exercise of a power under any law, gives any direction or exercises any discretion as to the payment of any sum to an aided person, and in such case the court or the Court of Final Appeal, authority or person shall provide that the sum payable to the aided person shall be subject to a first charge to be retained by the court or the Court of Final Appeal, authority or person for the benefit of the Director as a first charge for any sum due to be paid or repaid to him under the Legal Aid Ordinance (Cap. 91): *Ibid*, section 19A(2).

282 *Ibid*, section 19B(1)(a). However, if the Director is satisfied that it would cause serious hardship to any person to retain any such sum under this paragraph and that it is in all the circumstances just and equitable to reduce the sum to be so retained, the amount to be so retained shall be reduced by such amount not exceeding HK\$57,400 as the Director may determine. The Director also has delegated power under the Public Finance Ordinance (Cap. 2) section 38(1)(a) and Financial Circular No. 10/92 to make a waiver of moneys due to the Government up to the extent of HK\$250,000 in each case, provided that no fraud or negligence is involved on the part of a public officer.

283 *Ibid*, section 19B(1)(b), (c).

284 *Ibid*, section 19B(2).

285 *Ibid*, section 19C(1).

legal aid certificate is in force.²⁸⁶ Any solicitor who has acted in the proceedings on behalf of the aided person before the date of the certificate, and any solicitor who has by law a lien on any documents necessary for the proceedings to which the certificate relates and who has delivered them up subject to his lien, may give notice of the fact to the Director.²⁸⁷ If damages or costs are recovered for the aided person in the proceedings, the Director will pay to such solicitor out of the sum so recovered the costs to which he would have been entitled on a taxation between solicitor and own client.²⁸⁸

The rights conferred by the Legal Aid Ordinance on an aided person does not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised, except as provided by the Legal Aid Ordinance.²⁸⁹ If a person having any such right to be indemnified against expenses incurred in connection with any proceedings receives legal aid in connection with those proceedings, then (without prejudice to the effect of the indemnity in relation to his contributions, if any, to the Director) the right will operate also for the benefit of the Director as if the expenses incurred by him on behalf of the said person in connection with the proceedings had been incurred by such person.²⁹⁰ Whereupon a person's right to be indemnified against expenses incurred in connection with any proceedings operates for the benefit of the Director, any sum recovered for the benefit of the Director shall be deducted from the total of all sums payable by the Director in respect of such proceedings and the balance remaining shall be the maximum recoverable from such person.²⁹¹

CONFIDENTIALITY

A person must not disclose information given for the purposes of the Legal Aid Ordinance²⁹² concerning a person seeking or receiving advice, assistance or representation otherwise than to enable the proper performance by a person of a function under the Ordinance; to advise on, institute and pursue criminal proceedings for an offence arising out of the operation of the Ordinance or to report the proceedings; or with

286 Legal Aid Regulations (Cap. 91 sub. leg. A) regulation 10(1).

287 Ibid, regulation 10(2).

288 Ibid, regulation 10(3). In any case where legal aid other than that under the Supplementary Legal Aid Scheme was granted and where the sums so recovered are insufficient to pay these costs in full and also to meet the net liability of the Director on the aided person's account the sum recovered in the proceedings shall be divided between the Director and the solicitor in proportion to the amount owing to each, and the first charge for the benefit of the Director imposed by virtue of the Legal Aid Ordinance (Cap. 91) on property recovered or preserved in the proceedings will take effect accordingly.

289 Legal Aid Ordinance (Cap. 91) section 24(3).

290 Ibid, section 21(3). In determining for the purposes of any such right the reasonableness of any expenses, the possibility of avoiding them or part of them by taking advantage of this Ordinance shall be disregarded: Ibid, section 21(2).

291 Ibid, section 21(6).

292 Information given to counsel or a solicitor acting in that capacity by or on behalf of a person seeking or receiving advice, assistance or representation under the Legal Aid Ordinance is not information given for the purposes of the Ordinance: Legal Aid Ordinance (Cap. 91) section 24(6).

the consent of the person concerned and, if he does not give the information, the consent of the person who does.²⁹³

The Legal Aid Department has introduced an arrangement to request legal aid applicants to give consent to access by the Audit Commission to their case files on a voluntary basis.²⁹⁴

LEGAL AID IN CRIMINAL CASES RULES

The Legal Aid in Criminal Cases Rules are made by the Criminal Procedure Rules Committee,²⁹⁵ with the approval of the Legislative Council, pursuant to section 9A of the Criminal Procedure Ordinance.²⁹⁶ They are rules made to provide for the granting of legal aid in criminal cases to persons of limited means²⁹⁷ and to accused persons who are without legal representation for the purpose of assisting the court in its consideration of the question of fitness to be tried of such persons,²⁹⁸ and contain detailed provisions on the mechanism and operation of the means test, the determination of the contribution towards costs and expenses to be made by a person receiving legal aid under the rules, the scale of fees and costs which are to be paid to solicitor or counsel acting for an aided person (or submitting any opinion for the purpose of the rules), and the forms to be used for the purpose of the rules.²⁹⁹

The Criminal Procedure Rules Committee is chaired by the Chief Judge of the High Court and consists of two judges,³⁰⁰ the Secretary for Justice or a law officer nominated by him, the Director of Legal Aid or a legal aid officer nominated by him, a barrister nominated by the Hong Kong Bar Association, a solicitor nominated by The Law Society of Hong Kong, and the Registrar of the High Court.³⁰¹

The expenses of legal aid granted under the Legal Aid in Criminal Cases Rules are to be met from moneys provided by the Legislative Council.³⁰²

293 Ibid, section 24(4). This provision does not apply to information in the form of a summary or collection of information set out in a manner that does not enable information concerning a particular person to be ascertained from it: Ibid, section 24(5).

294 See Chapter 5 above.

295 The Criminal Procedure Rules Committee is established under section 9 of the Criminal Procedure Ordinance (Cap. 221).

296 Cap. 221 sub. leg. D, Laws of Hong Kong.

297 Criminal Procedure Ordinance (Cap. 221) section 9A(1).

298 Ibid, section 9A(1A). Although the Criminal Procedure Rules Committee does not appear to have made any rules pursuant to this section, it should be noted that a legal aid certificate granted to an accused does cover representation concerning his fitness to plead as part of his defence.

299 Ibid, section 9A(1)(a)-(h).

300 The two judges are one Justice of Appeal and one judge of the Court of First Instance, both of whom are appointed by the Chief Judge of the High Court: Ibid, section 9(1)(b), (c).

301 Alternatively, a Deputy Registrar of the High Court appointed by the Chief Judge of the High Court. The Registrar or the Deputy Registrar, as the case may be, shall serve as secretary to the Criminal Procedure Rules Committee: Ibid, section 9(1)(h).

302 Ibid, section 9A(2). The provision of moneys by the Legislative Council is effected pursuant to the Public Finance Ordinance (Cap. 2). As to the practice adopted for adjustment of criminal legal aid fees payable to assigned lawyers, see text to note 362, *infra*.

SCOPE OF CRIMINAL LEGAL AID

Rule 4 of the Legal Aid in Criminal Cases Rules provides for the scope of legal aid in criminal cases. When the Legal Aid in Criminal Cases Rules were enacted in 1969, the scope of legal aid in criminal cases was limited to trials before the Supreme Court³⁰³ by way of committal, appeals to the Full Court³⁰⁴ by persons convicted of an offence before the Supreme Court or the District Court, appeals by way of case stated to the Full Court by the Attorney General³⁰⁵ under the District Court Ordinance,³⁰⁶ and appeals to the Supreme Court by persons in respect of an order or determination of a magistrate in respect of or in connection with an offence.³⁰⁷ Subsequent amendments extended the scope of legal aid in criminal cases to trials before the Court of First Instance by way of transfer under the Complex Commercial Crimes Ordinance,³⁰⁸ trials before the District Court;³⁰⁹ applications for review of sentence by the Secretary for Justice; appeals by way of case stated to the Court of First Instance by the Secretary for Justice under the Magistrates Ordinance; appeals and applications for leave to appeal to the Court of Final Appeal; committal proceedings before a magistrate after the appointment of a return day; appearances before the Court of First Instance or the District Court under the Community Service Orders Ordinance;³¹⁰ and committals for contempt under the District Court Ordinance.³¹¹

AVAILABILITY OF CRIMINAL LEGAL AID

A person involved in any of the types of proceedings described above may be granted legal aid, subject to any requirement to make contributions, if the Director of Legal Aid³¹² is satisfied that his financial resources do not exceed the limits specified in the Legal Aid Ordinance³¹³ in relation to the grant of civil legal aid under the Ordinary Legal Aid Scheme.³¹⁴ A person granted legal aid for any one of the types of proceedings described above may also be granted legal aid for any proceedings arising out of or connected with

303 I.e. now the Court of First Instance.

304 I.e. now the Court of Appeal.

305 I.e. now the Secretary for Justice.

306 I.e. now the District Court Ordinance (Cap. 336) section 84.

307 Legal Aid in Criminal Cases Rules 1969 (LN 130/1969), coming into operation on 1 January 1970.

308 I.e. Cap. 394, Laws of Hong Kong.

309 A magistrate is obliged to inform an accused person of his right to apply for legal aid upon transferring the charge or complaint to which he relates to the District Court: Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 19(2).

310 I.e. Cap. 378, Laws of Hong Kong.

311 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 4(1).

312 This refers to the Director of Legal Aid appointed under section 3 of the Legal Aid Ordinance (Cap 91) and any Deputy Director of Legal Aid, Assistant Director of Legal Aid and Legal Aid Officer so appointed: *Ibid*, rule 2(1).

313 I.e. Cap. 91, Laws of Hong Kong.

314 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 4(1). The present financial eligibility limit for the Ordinary Legal Aid Scheme of civil legal aid under the Legal Aid Ordinance (Cap. 91) is HK\$155,800.

such matter, including any application for bail or an appeal against refusal to grant bail.³¹⁵ A person granted legal aid for trial before the Court of First Instance or the District Court, or for continuation of committal proceedings after appointment of a return day may also be granted legal aid for any proceedings in a court or tribunal exercising jurisdiction in a place outside Hong Kong in connection with a letter of request issued by the Court of First Instance³¹⁶ addressed to that court or tribunal.³¹⁷

A person who is committed for trial upon a charge of murder, treason or piracy with violence; is convicted of such a charge and proposes to appeal; or wishes to oppose an appeal to, or an application for leave to appeal to, the Court of Final Appeal in proceedings involving such a charge is to be granted legal aid only after consideration by the Director of his financial resources. The Director must grant him legal aid if his financial resources do not exceed the limits referred to in the Legal Aid in Criminal Cases Rules.³¹⁸

APPLICATION FOR AND GRANT OF CRIMINAL LEGAL AID

An application for legal aid in criminal cases is to be made to the Director of Legal Aid in such manner and form as the Director requires.³¹⁹ Generally, in determining an application for legal aid by an applicant, the Director must consider all the circumstances of the case;³²⁰ and the financial resources of the accused person.³²¹ The Director is not to grant an application for legal aid unless he is satisfied that legal aid is **desirable in the interests of justice**.

315 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 4(2).

316 I.e. a letter of request issued under the Evidence Ordinance (Cap. 8) section 77E.

317 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 4(3).

318 Ibid, rule 13(1). The relevant limit is the financial eligibility limit for the Ordinary Legal Aid Scheme of civil legal aid under the Legal Aid Ordinance (Cap. 91). The Director is to assign a solicitor and one or two counsel, one of whom may be leading counsel, as he thinks fit, to represent the accused person or appellant: Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 13(3).

319 Ibid, rule 5.

320 Ibid, rules 6, 10. In determining an application for legal aid by an accused person, the Director must consider, in particular, any recommendation of the committing magistrate. Where the accused person is charged with murder, treason or piracy with violence, the Director only has to consider his financial resources: *supra*, note 318.

In determining the application for legal aid by an appellant, the Director must consider, in particular, the certificate of counsel assigned to represent him at his trial (where he was so represented pursuant to legal aid). Where the application for legal aid is in respect of an appeal to, or an application for leave to appeal to, the Court of Final Appeal, the Director may, before granting an appeal aid certificate, refer the application for legal aid, or any matter arising out of the application, to any counsel or solicitor to investigate the facts and make report thereon and to give an opinion thereon or on any question of law arising out of that application: Ibid, rule 13A.

321 The Director is to assess the financial resources of each applicant for legal aid in criminal cases in accordance with the Legal Aid (Assessment of Resources and Contributions Regulations) (Cap. 91 sub. leg. B) as if the applicant were a person applying for legal aid under the Legal Aid Ordinance (Cap. 91), and those regulations apply accordingly.

The Director is **empowered**, if he is satisfied that it is **desirable in the interests of justice**, to grant legal aid to an applicant notwithstanding that on assessment he determines that the applicant's financial resources exceed the limits referred to in the Legal Aid in Criminal Cases Rules.³²² An example for the exercise of this statutory discretion is where the criminal trial is likely to be long, complex and costly.³²³

The Director considers whether granting legal aid is **desirable in the interests of justice** by reference to the so-called "**Widgery criteria**", namely a non-exhaustive list of factors to be taken into account:

- (a) the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or serious damage to his reputation;
- (b) the determination of the case may involve consideration of a substantial question of law;
- (c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of the official languages, mental illness or other mental or physical disability;
- (d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution; and
- (e) it is in the interests of someone other than the accused³²⁴ that the accused be represented."³²⁵

On the other hand, where the application is one for legal aid to pursue an appeal, the significant factor to be taken into account must be whether there is some substantial matter of law or fact capable of being argued and accordingly, the merits of the intended appeal.³²⁶

322 Ibid, rule 15(2). This rule requires the Director to first assess the applicant's financial resources before deciding whether to exercise his discretion. If he cannot assess the financial resources, he cannot exercise his discretion. It is the applicant's obligation to make full and frank disclosure: *Mirchandani v Attorney General* [1994] 2 HKLR 117 (Court of Appeal); *Mou Chi Luen Peter & Anor v Director of Legal Aid* (unreported, 14 November 1997, HCAL 61, 78/1997) (Court of First Instance). Having assessed the financial resources, the Director can then take into account matters such as the length and complexity of the case and the extent by which the means of the applicant exceed the statutory limit in considering whether to exercise his discretion: *R v Mirchandani* (1992) 2 HKPLR 196 (Court of Appeal).

323 Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993), paragraph 14.

324 The example given in the Widgery Report is when it is undesirable that the accused be left without representation is the case of sexual offences against young children.

325 Adopted from the *Report of the Departmental Committee on Legal Aid in Criminal Proceedings* (1966) (Cmnd 2934), chaired by Widgery J, between paragraphs 168 and 180. The report indicated that "if a case exhibits none of these features then, prima facie, it is not a case in which the interests of justice require that the accused should be professionally represented. If, however, one or more of these features is present, there are grounds for thinking that representation is desirable".

326 *R v Fu Yan* (1992) 2 HKPLR 109 (Court of Appeal). The merits test is applied rigorously in cases of appeal: Scott Report, paragraph 3.3.

If the Director is satisfied that an applicant should be granted criminal legal aid, he is to grant him a legal aid certificate or an appeal aid certificate (as the case may be)³²⁷ and assign a solicitor and, where appropriate, one or two counsel, one of whom may be leading counsel, as the Director thinks fit, to represent him.³²⁸ If the Director is not satisfied that an applicant should be granted legal aid, he is to refuse the application and give notice to the appropriate court of his refusal.³²⁹ A refusal of legal aid on the basis that the Director is not satisfied that the financial resources of the applicant do not exceed the relevant amount specified in the Legal Aid in Criminal Cases Rules is final and may not be disturbed.³³⁰

Except in relation to an appeal to the Court of Final Appeal or an application to the Court of Final Appeal for leave to make such an appeal, the Court of Appeal or a judge thereof, a judge of the Court of First Instance or a District Judge has the power to grant an accused or appellant whose financial resources do not exceed the statutory limit, a legal aid certificate or appeal aid certificate (as the case may be) if it appears to the court or the judge that such an accused or appellant should be granted legal aid notwithstanding the Director's refusal. The Director must thereupon assign a solicitor and, where appropriate, one or two counsel, one of whom may be leading counsel, as the Director thinks fit, to represent the accused person or appellant.³³¹

In the case of a person who is committed for trial upon a charge of murder, treason or piracy with violence; or is convicted of such a charge and proposes to appeal against it, the Court of Appeal or a judge thereof, or a judge of the Court of First Instance has the like powers of the Director to grant him a legal aid certificate or an appeal aid certificate, as the case may require, and the court or judge, if it or he thinks fit, may by order exempt the accused person or appellant from the requirements of making contributions.³³²

The discretion of the court or judge to grant legal aid in criminal proceedings is quite a separate jurisdiction from that of the discretion of the Director. The court or the judge does not sit on appeal from the refusal of the Director. The discretionary power given to the court or the judge to override the Director's decision has to be looked at in a wholly different context. Consideration should be given to the overall complexity of the case, examined from the perspective of a layman with no adversarial experience who is about to embark on his own defence. While the Director's decision is a factor to be considered,

327 The legal aid certificate or appeal aid certificate is to be in a form provided by the Director and must be forwarded by the Director to the accused person or appellant (as the case may be) with a copy to the appropriate court in Hong Kong and to solicitor or counsel assigned: Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rules 7(2), 11(2).

328 Ibid, rules 7(1), 11(1). The Director may, in lieu of assigning solicitor or counsel to an accused person or appellant, represent the accused person or appellant: Ibid, rule 14.

329 Ibid, rules 8(1), 12(1). The Director may, in lieu of assigning solicitor or counsel to an accused person or appellant, represent the accused person or appellant: Ibid, rule 14.

330 Ibid, rules 8(2), 12(2). Such refusal, while not capable of being disturbed by the trial court, might be subject to the supervisory jurisdiction of the Court of First Instance by way of application for judicial review; see *R v Mirchandani* (1992) 2 HKPLR 196 (Court of Appeal).

331 Ibid, rules 8(3), 12(3).

332 Ibid, rule 13(2). The Court of Appeal or the judge is to assign a solicitor and one or two counsel, one of whom may be leading counsel, as he thinks fit, to represent the accused person or appellant: Ibid, rule 13(3).

there are other cogent factors the judge has to take into account when exercising his discretion, not least a critical assessment of the accused's right to a fair trial, given the seriousness of the crime, the penalty and the procedural complexities of the case. Financial considerations (if any) which prevented the accused from receiving legal representation he should have had from legal aid should not be given overriding or undue weight.³³³

DISCHARGE AND REFUSAL OF CRIMINAL LEGAL AID

The Director of Legal Aid is empowered to discharge a legal aid certificate or an appeal aid certificate if he is satisfied that it is desirable in the interests of justice to do so. Except in proceedings relating to appeals to, or applications for leave to appeal to, the Court of Final Appeal, the Court of Appeal or a judge thereof, a judge of the Court of First Instance, or District Judge has a like power to discharge a legal aid certificate or an appeal aid certificate, where appropriate.³³⁴

The Director's refusal to grant legal aid in the case of an application for legal aid in relation to an appeal to the Court of Final Appeal, or to make an application to the Court of Final Appeal for leave to make such an appeal,³³⁵ may be reviewed before a committee provided under section 26A of the Legal Aid Ordinance.³³⁶ To assist an applicant aggrieved by such refusal, the Legal Aid Services Council has, since April 2002, operated a scheme by which an applicant who passes the means test may obtain for free a counsel's certificate necessary for the purpose of the review.³³⁷ The certificate is to be provided by counsel and solicitor selected from panels maintained by the Council.³³⁸ If the counsel's certificate states that the applicant has reasonable prospects of success in relation to the proceedings before the Court of Final Appeal, the Director is to review his decision.³³⁹ If the Director maintains his refusal after review, the Council is to assist the applicant to initiate a review by giving written notice to the Registrar of the High Court and the Director.

333 *HKSAR v Wu Wai Fung & Anor* [2003] 4 HKC 259 (Court of Appeal).

334 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 14A.

335 This includes proceedings relating to any opposition to such an appeal or application: *Ibid*, rule 2(2)(c).

336 *Ibid*, rule 14B(2).

337 An applicant in a criminal case may apply for a counsel's certificate twice in respect of the same case if he applies for legal aid in respect of conviction and sentence separately and is refused legal aid on both occasions.

338 Counsel must be in private practice for at least ten years and solicitors at least seven years before they are eligible to join the panel. Both must have handled at least three criminal appeal cases in the Court of Appeal or the Court of Final Appeal in the past three years.

339 The applicants are advised to initiate a review at the same time by giving notice to the Registrar of the High Court and the Director.

PAYMENT OF CONTRIBUTION FOR CRIMINAL LEGAL AID

The Director of Legal Aid is empowered to require an aided person³⁴⁰ to pay a contribution towards the sums payable on his account by the Director.³⁴¹ The amount of contribution required to be paid is to be calculated in the manner as if the aided person required to pay the contribution had been granted civil legal aid under the Ordinary Legal Aid scheme provided under the Legal Aid Ordinance³⁴² and is a debt due to the Director payable in a lump sum or by instalments on such day or within such periods as the Director may determine.³⁴³ If the total contribution made by a person in respect of any proceedings is more than the net liability of the Director on his account, the excess is to be repaid to him.³⁴⁴

ASSIGNMENT OF LAWYERS ON CRIMINAL LEGAL AID

Counsel and solicitors are assigned by the Director of Legal Aid from separate panels of counsel and solicitors willing to act for aided persons, prepared and maintained by the Director.³⁴⁵ Any counsel³⁴⁶ or solicitor³⁴⁷ is entitled to have his or her name included on the appropriate panel, unless the Director is satisfied that there is good reason for excluding him by reason of his conduct when acting or assigned to act for persons receiving legal aid or of his professional conduct generally.³⁴⁸ The Director has to be satisfied that a counsel or solicitor has a practising certificate³⁴⁹ before including his or her name on a panel and is to remove from the panel the name of any counsel or solicitor who does not have a practising certificate.³⁵⁰ The Director is to enter in the appropriate

340 I.e. a person who has been granted a legal aid certificate or an appeal aid certificate: *Ibid*, rule 2(1).

341 *Ibid*, rule 16(1). Under *ibid*, rule 13, the court or judge, as the case may be, has the power to order that an accused person or appellant to which that rule applies, be exempt from the requirement of rule 16.

342 I.e. in accordance with Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B).

343 Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 16(2).

344 *Ibid*, rule 18.

345 *Ibid*, rule 3(1).

346 I.e. a person who is enrolled as a barrister on the roll of barristers maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap. 159), and who, at the material time, is not suspended from practice: Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 2(1).

347 I.e. a person enrolled on the roll of solicitors maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap. 159), and who, at the material time, is not suspended from practice: Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) rule 2(1).

348 *Ibid*, rule 3(4).

349 "Practising certificate" means a practising certificate in force under section 6 or 30 of the Legal Practitioners Ordinance (Cap. 159): *Ibid*, rule 3(10).

350 *Ibid*, rule 3(5).

panel any limitation as to the number per annum³⁵¹ and as to the type of proceedings³⁵² in which a counsel or solicitor is prepared to act for aided persons and give effect to such limitation.³⁵³ A counsel or solicitor may at any time request the Director to remove his name from a panel, and the Director must comply with such request³⁵⁴

Where a solicitor is assigned to an aided person for the purpose of any proceedings, any other solicitor in the same firm as the solicitor assigned may act for that aided person except where the solicitor is instructed to act as advocate as well as instructing solicitor, whether in the District Court or in committal proceedings, and may only do so in those cases if the Director gives his prior consent.³⁵⁵

Without prejudicing the right of counsel or solicitor to refuse, or to give up, a case on reasonable grounds, a counsel or solicitor assigned to act for an aided person shall not discontinue his aid without the permission of the Director.³⁵⁶

Solicitor or counsel assigned to represent an accused person under legal aid has the duty, if the accused person is convicted, to give a certificate to the Director as to whether or not in his opinion the accused person has reasonable grounds for an appeal against his conviction or sentence or both and, if so, settling those grounds; and if the accused person proposes to appeal, to give notice of appeal or of an application for leave to appeal and to attend to any matter preliminary thereto.³⁵⁷

Counsel or solicitor retained by or on behalf of the aided person before the issue of the legal aid certificate must not withdraw from the proceedings without the permission of a judge after the issue of the legal aid certificate. The Director is to set off the amount received by the counsel or solicitor prior to the issue of the legal aid certificate in assessing the fees payable to the counsel and solicitor.³⁵⁸

Solicitor or counsel assigned to represent an accused person or to an appellant on legal aid is entitled upon application to receive free of charge from the appropriate court in

351 The Director has set the following limits: A solicitor is limited to 30 cases or HK\$600,000 in legal aid costs in the past 12 months (whichever occurring first), whereas counsel to 30 cases or HK\$1.2 million in legal aid costs in the past 12 months (whichever occurring first). On the other hand, assignment of counsel or solicitors that have exceeded the relevant limit(s) may be allowed if it is in the interests of the aided person.

352 The Director has laid down the following minimum experience requirements: The counsel or solicitor concerned must have at least 3 years of post-call/ post-admission experience in the legal field; have handled at least 5 criminal cases (whether legally aided cases or non-legally aided cases) within the past 3 years; and meet further minimum criminal litigation experience specified for different categories of trial (which is sub-divided into plea and sentence, simple trial and complicated trial) and appellate work (which is sub-divided into appeal against sentence and appeal against conviction), varying from at least 3 years for plea and sentence work in the District Court to at least 10 years for complicated trials in the Court of First Instance, appeals against conviction before the Court of Appeal and appeals to the Court of Final Appeal.

353 Ibid, rule 3(3).

354 Ibid, rule 3(9), except where he has been assigned to act for an aided person, in which case, he or she must obtain leave from the Director.

355 Ibid, rule 3(6).

356 Ibid, rules 3(7), (8).

357 Ibid, rule 9.

358 Ibid, rule 17.

Hong Kong a copy of the transcript of the proceedings or of the depositions, including documentary exhibits, if any, in the case.³⁵⁹

REMUNERATION OF ASSIGNED LAWYERS ON CRIMINAL LEGAL AID

The fees payable to a solicitor or counsel assigned under the Legal Aid in Criminal Cases Rules to represent an aided person are to be determined by the Director of Legal Aid **having regard to the work actually and reasonably done³⁶⁰ and, subject to a number of additions and exceptions, in accordance with a set of scale fees provided under those rules.**³⁶¹

In October 1992, the Finance Committee of the Legislative Council resolved that the fees in the scale are to be reviewed biennially. In June 2003, the Finance Committee delegated to the Director of Administration the authority to approve future adjustments of the fees, provided that the extent of adjustment is not greater than the movement of consumer prices as measured by Consumer Price Index (C) during the reference period. In each review exercise, the Government takes into account mainly changes in the consumer prices during the reference period, the actual or anticipated difficulties in engaging the services of counsel and solicitors, and other factors such as the state of the economy and office rental. The Government also consults the Hong Kong Bar Association and the Law Society of Hong Kong, and the Panel on Administration of Justice and Legal Services of the Legislative Council of its proposal to adjust fees. The adjustment is effected by the Director of Administration exercising his authority and inviting the Criminal Procedure Rules Committee to amend rule 21 of the Legal Aid in Criminal Cases Rules.³⁶²

In general terms, the fee scale for legal aid in criminal cases is set in the following manner:

359 Ibid, rule 20.

360 A claim for fees shall be submitted to the Director in such form and manner as he shall require: Ibid, rule 21(7).

361 Ibid, rule 21(1). The scale as provided for at commencement on 1 January 1970 was first revised in November 1979 to effect a rise in fees varying between 30% and 160% (LN 289/1979). The scale was subsequently revised in January 1982 (LN 414/1981), in April 1987 (LN 83/1987) (effecting a rise varying between 30% to 36%), in April 1990 (LN 87/1990) (effecting a rise varying between 20% to 100%), in April 1991 (LN 101/1991) (effecting a rise varying between 20% to 25%), in November 1992 (LN 351/1992) (effecting a rise varying between 12.5% to 50%), in April 1994 (LN 154/1994) (effecting a rise varying between 11% to 33%), in April 1995 (LN 119/1995) (effecting a rise of roughly 20%) and in May 1997 (LN 235/1997) (effecting a rise of roughly 18%). The scale was last amended in 2003 to effect a reduction of 4.3%; see Legal Aid in Criminal Cases (Amendment) Rules 2003 (LN 174/2003) (approved by the Legislative Council by resolution dated 3 July 2003 (LN 173/2003)).

362 The Director of Administration has reserved a 4.4% reduction in criminal legal aid fees, which was said to be the result of the biennial review of criminal legal aid fees in 2004, for consideration together with the findings of the next biennial review due in mid-2006; see Letter of the Director of Administration to the Legislative Council Panel on Administration of Justice and Legal Services dated 11 July 2005 (LC Paper No CB(2) 2319/04-05(01)).

- (a) Fees for trial hearings are to be paid by a fixed fee for solicitors and such fees not exceeding a limit for counsel, and additionally if the trial is not concluded on the day on which it started, a daily fee within a band in respect of the second and every subsequent day;
- (b) Fees for appeal hearings are to be paid by a fixed fee for solicitors and such fees not exceeding a limit for counsel, and additionally if the appeal is not concluded on the day on which it started, a daily fee within a band in respect of the second and every subsequent day;
- (c) Fees for conferences are to be paid to counsel at an hourly rate not exceeding a limit, as appears to the Director to be proper in the circumstances;
- (d) Fees for committal proceedings are to be paid by a fixed fee for solicitors and such fees not exceeding a limit for counsel, and additionally if such proceedings are not concluded on the day on which it started, a daily fee within a band in respect of the second and every subsequent day; and
- (e) Fees for settling a notice of appeal other than grounds of appeal in the certificate to the Director of Legal Aid are to be paid such fees not exceeding a limit, as appears to the Director of Legal Aid to be proper in the circumstances.

Fees to Senior Counsel are such fees as appear to the Director to be proper in the circumstances. Fees to counsel and solicitors assigned under an appeal aid certificate in respect of appeals to, or applications for leave to appeal to, the Court of Final Appeal, and fees to counsel and solicitors to make inquiries in relation to an application for legal aid for such an appeal aid certificate are such fees as appear to the Director to be proper in the circumstances.

There are circumstances in which the fees payable can be increased or additional fees made payable. If in the opinion of a judge before whom a trial or appeal is heard, the case is of exceptional length or complexity, the judge may so certify and thereupon, the fee payable to counsel and the fee payable to a solicitor may be increased by such amount as appears to the Director to be proper in the circumstances, and the daily fee provided for may also be increased proportionately.³⁶³

Fees are payable to a solicitor in respect of expenses actually and reasonably incurred by himself and his clerk in travelling to or from the court and to and from any place visited for the purpose of preparing or conducting any trial or appeal; and any other out-of-pocket expenses actually and reasonably incurred.³⁶⁴

Where a solicitor or counsel (other than Senior Counsel) represents two or more accused persons or two or more appellants to whom he has been assigned by the Director and who are tried together or whose appeals are heard together, the fee, including the daily fee, payable to a solicitor, may be increased by such amount as appears to the Director to be proper in the circumstances; and the fee, including the daily fee, payable to a solicitor in respect of his advocacy; or to counsel (other than Senior Counsel), may be increased by 10% for each additional accused person or appellant so represented up to a maximum of 50% where six or more accused persons or appellants are so represented.³⁶⁵

Where in the Court of First Instance counsel represents two or more appellants to whom he has been assigned by the Director and whose appeals are heard on the same

363 Ibid, rules 21(2), (3).

364 Ibid, rule 21(4).

365 Ibid, rule 21(5).

day, there shall be payable to counsel, in respect of all the appeals, such fee in accordance with the scale applicable to trial hearings before the Court of First Instance as appears to the Director to be proper in the circumstances.³⁶⁶

The current structure of the fee scale for criminal legal aid has been the subject of sustained criticism. Both the Hong Kong Bar Association and the Law Society of Hong Kong have indicated that it does not reward **work actually and reasonably done** because of the passage of time, the “significant changes in the preparation and conduct of criminal cases” and insufficient account being taken of actual preparation work done. As a result, it offers little incentive for adequate and effective preparation that “enhances the efficient use of court time, thus saving public funds”. Clear guidelines for assessing fees by the Director and for certifying cases of exceptional length and complexity by the court would be necessary.³⁶⁷

The Working Party on Legal Aid took on board similar criticisms in 1986³⁶⁸ and recommended a review of the criminal legal aid fee structure to remedy inadequacies, with suggestions that for greater flexibility in deciding the fee level; appropriately remunerating preparatory work; and procedure for taxation of fees by an assigned lawyer dissatisfied with assessment by the Director.³⁶⁹ None of these recommendations have been adopted.³⁷⁰

In October 2005, the Legal Aid Services Council expressed support for a review of the criminal legal aid fee system, stressing that the quality or delivery of legal aid services must not be affected adversely by procedural matters or the level or the structure of fees; and that the aided person should be effectively represented.³⁷¹

At a meeting of the Administration of Justice and Legal Services Panel of the Legislative Council in December 2005, the Director of Administration undertook to endeavour to give due consideration to the views of the two legal professional bodies and the Legal Aid Services Council; and that the Administration was committed to ensuring that the following principles would be upheld in the study of the issue, namely (a) proper and effective legal representation for the legally aided person; (b) general compatibility of the fees system with the prosecution fees regime; and (c) reasonable and effective

366 Ibid, rule 21(6).

367 See Hong Kong Bar Association, Special Committee on Legal Aid Reform, *Submissions to the Legal Aid Services Council on the Review of Legal Aid in Criminal Cases* (18 April 2005) and Law Society of Hong Kong, *The Law Society's Position Paper on the System of Remuneration of Solicitors for Conducting Criminal Legal Aid Work* (1 June 2005).

368 The Scott Report listed the criticisms: (i) Criminal legal aid fees were too low; (ii) There was no arrangement for appeals by the assigned lawyer against the Director's assessment of fees payable; and (iii) The system of payment of fees was too heavily weighted towards court attendances: *Legal Aid: A Report by the Working Party* (January 1986) paragraph 6.8.

369 Ibid, paragraphs 6.10, 6.11.

370 All amendments subsequent to 1986 to rule 21 of the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D), with the exception of the Legal Aid in Criminal Cases (Amendment) Rules 1991 (LN 101/1991), have been insubstantial, making provision merely for increases or reduction of fees. The 1991 amendment re-enacted the fee scale structure without any material change.

371 Legal Aid Services Council, *Legal Aid* (Issue No 9) (October 2005) p 2.

remuneration for legal aid lawyers within the remits of public affordability.³⁷² Subsequently, a discussion group, chaired by the Director of Administration with members representing the Judiciary, the Department of Justice, the Legal Aid Department, and the two legal professional bodies, was set up to examine options for reforming the criminal legal aid fees system, including (a) adjustments to the existing statutory scheme with respect to the levels of remuneration and items in respect of which remuneration can be made; (b) adoption of a “marked brief” system; and (c) adoption of a taxation system.³⁷³

372 Administration Wing, Chief Secretary for Administration’s Office and Legal Aid Department, *LegCo Panel on Administration of Justice and Legal Services: Criminal Legal Aid Fees System* (December 2005) (LC Paper No CB(2)657/05-06(02)).

373 Hong Kong Bar Association, Circular No 033/06 (13 March 2006).