

## **Chapter 8**

### **Guidance Notes to Counsel Handling Criminal Cases**

#### **1. Purpose**

- 1.1 These guidance notes are intended to provide guidance on the salient points that you, as counsel, should pay attention to when advising the Director of Legal Aid (“the Director”) on the merits of a case or when acting on behalf of an aided person as assigned counsel.

#### **2. Advice on Merits**

- 2.1 You may be asked by the Director to give an opinion concerning the merits of an application for criminal legal aid and to advise on any question of law arising out of an application. You may also be asked to attend a Section 26A review hearing.
- 2.2 The fees payable shall be such sum as assessed under the Legal Aid in Criminal Cases Rules, Cap. 221 (LACCR).

#### **3. Assignment under a Legal Aid Certificate**

- 3.1 The assignment of cases to you is made on the condition that you do not have any perceived or actual conflict of interest and it is incumbent on you to return the papers to the instructing solicitors if such condition could not be fulfilled. You should also return the papers immediately if it is foreseeable that you will not be able to perform your duties or you are under situations which render you unsuitable or unavailable for representing an aided person. To protect both the aided person and the public fund, you should return papers or notify us immediately if you have been arrested or charged with a criminal offence. You should also notify us and the assigned solicitor immediately if the aided person is your near relative<sup>1</sup>. Should you intend to suggest to the assigned solicitor any expert or mediator who is your near relative, you should notify both the assigned solicitor and us in writing. In other situations where you are uncertain whether it would be reasonable for you to act for an aided person, you shall notify the Director immediately. Failure to timely inform the Director may be referred to the Departmental Committee on Monitoring Assignments to Counsel and Solicitors (DMC) for investigation and consideration of appropriate sanction.

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<sup>1</sup> The expression “near relative” in this Chapter includes a spouse, parent, child, brother, sister or spouse of any of them.

3.2 The Legal Aid Certificate (“the Certificate”) provides the authority for the Director to pay counsel and solicitors for acting for an aided person. You should check the terms of the Certificate. If the Certificate is limited, payment will not be made for work done outside the scope of the Certificate.

#### **4. Release from Court**

4.1 You should seek approval from the Director before making an application to the Court to be released from all or part of a day’s hearing.

#### **5. Conferences with Aided Persons**

5.1 When assigned to conduct the defence for an aided person, you should hold at least one conference with the aided person before the Pre-trial Review and if there is no Pre-trial Review, before the day of the trial.

#### **6. Fees for undertaking criminal legal aid work**

6.1 Fees for undertaking criminal legal aid work will be assessed before assignment of a case and the amount of fees payable for the case will be stated on the brief or in the schedule to the assignment letter. To facilitate consideration of acceptance of an assignment, you will be advised of details of the case on matters such as the nature and number of charges, brief facts of the case, venue of the proceedings, date and estimated length of hearing (if known), volume of documents, intended plea of the aided person and any other matters which are relevant to the assessment. Assignment of a case will be subject to your acceptance of the fees assessed by the Director for representing the aided person which will include fees for preparation and the first day of the hearing (the brief), conference, any additional preparation time required and other court attendances pursuant to Rule 21 of the LACCR. Where time and circumstances permit, you may request to view the papers before agreeing to the fees and accepting the assignment.

6.2 Pursuant to Rule 21(8) of the LACCR, a re-determination can be sought by you or the Director on fees for preparation and any additional preparation time in appropriate circumstances having regard to any changes in the work reasonably expected to be done or work reasonably and actually done.

- 6.3 Whilst it is not possible to enumerate all the circumstances in which you may request for a re-determination, the following serve as examples of the change in circumstances which may justify re-determination of the agreed fees payable to the assigned counsel:
- (i) voluminous additional evidence or unused material provided after assignment;
  - (ii) unusual or extraordinary investigations or enquiries outside normal expectations which have to be undertaken;
  - (iii) research on specific or novel legal issues which were not previously identified or anticipated;
  - (iv) where the agreed fees were assessed on the basis of a guilty plea and the aided person proposes to change his plea to not guilty, or a Newton enquiry becomes necessary;
  - (v) consolidation with other criminal proceedings, joinder or a significant number of additional charges are laid after assignment of case;
  - (vi) re-determination of class of case on complicated legal issues which were not identified at time of assignment.
- 6.4 A re-determination of the agreed fees payable to you may also be conducted by the Director under circumstances such as:
- (i) withdrawal from legal aid by the aided person;
  - (ii) re-assignment of the case to another counsel;
  - (iii) discharge of the legal aid certificate;
  - (iv) the aided person has absconded or died;
  - (v) the brief is returned by you due to conflict of interest or personal reasons;
  - (vi) where there is a change of plea from not guilty to guilty by the aided person soon after assignment of the case.
- 6.5 Request for re-determination must be made in writing with justification and in a timely manner either immediately after the change in circumstances or at the conclusion of the case. On re-determination, any increase or reduction of preparation or additional preparation time will be calculated on an hourly basis at the applicable rate depending on the level of court. You will be advised in writing of the result of the re-determination and where appropriate, the adjusted fees.
- 6.6 A review can be sought in writing in respect of the Director's decisions on re-determination. Such decision will be reviewed by a directorate officer who was not involved in the original decision and who is senior to the directorate officer who made

the original re-determination. You will be advised in writing of the outcome of the review.

## **7. Duty to Report to Director of Legal Aid**

- 7.1 You must immediately notify the Director upon becoming aware of the following proceedings being brought against you:
- (a) any professional disciplinary proceedings; and/or
  - (b) any criminal charges.

Failure to timely inform the Director may be referred to the DMC for investigation and consideration of appropriate sanction. Without prejudice to the power of the Director to reassign the case or impose other conditions to protect the aided person and the public fund, you must also inform the Director in writing of the outcome of such proceedings and/or charges whilst you are still on the Legal Aid Panel.

## **8. Transcripts**

- 8.1 Your attention is drawn to Rules 13 and 63 of the Criminal Appeal Rules and Rule 20 of the LACCR which provide that the Court can release transcripts free of charge in legal aid cases.
- 8.2 In respect of appeal cases, requests for transcripts should only be made if you are satisfied that there are good reasons for so doing. The request should be limited to those portions of the transcript which are necessary for the proper conduct of the appeal. Your attention is drawn to the Court's comments on the request for transcripts in paragraphs 10 to 20 of the Reasons for Decision dated 29.6.2011 in CACC 293/2009.

## **9. Duties of assigned counsel upon conclusion of assignment**

### **9.1 *Application for costs***

- 9.1.1 You should consider making an application for costs at the end of the trial or hearing especially where the aided person has paid a contribution or incurred private legal costs prior to granting of legal aid (Attorney General's Reference (No.1) of 1994).

### **9.2 *Application for a certificate under Section 32 of the Hong Kong Court of Final Appeal Ordinance***

- 9.2.1 In the event that an appeal is dismissed and you consider that “a point of law of great and general importance” is involved in the decision, you should make an application for a certificate in accordance with Section 32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap.484 and Practice Direction 2.2 or 4.3 as the case may be. Should the Court decline to grant a certificate and in your opinion, this is a suitable case to apply to the Court of Final Appeal, the aided person should be advised to apply for legal aid.
- 9.2.2 In the event that an appeal is dismissed and you consider that “substantial and grave injustice” has been done in the case, the aided person should be advised to apply for legal aid to appeal to the Court of Final Appeal.

### **9.3 *Case Report and assessment of counsel's fees***

- 9.3.1 You should complete the Case Report Form and return it within 7 days of the conclusion of the case. When completing the Case Report Form, you should bear in mind Rule 9(a) of the LACCR requiring you to give a certificate to the Director as to whether or not in your opinion the aided person has reasonable grounds for an appeal against his conviction and/or sentence, and if so, settling those grounds.
- 9.3.2 When submitting the Fees Report Form you should forward such documents and other material to support your claim for payment in respect of court attendances and conferences in accordance with Rule 21 of the LACCR.
- 9.3.3 You can submit the Case Report Form and/or the Fees Report Form and/or Fee Note via the Legal Aid Electronic Services Portal (“LAESP”). To avoid duplication, once you have submitted the Case Report and/or the Fees Report Forms and/or Fee Note online, you should not send hard copies to the Director.

## **10. Protection of Personal Data**

- 10.1 Your attention is drawn to the Personal Data (Privacy) Ordinance, Cap.486 (“PDPO”), in particular, “Principle 4 of Schedule I – Security of Personal Data”.
- 10.2 Pursuant to Part V of the PDPO, your opinions and comments concerning the applicant or the aided person and the merits of the case may be disclosed to the applicant or the aided person.