

Re: Rule 4 of the Legal Aid in Criminal Cases Rules (Cap 221 sub. leg.)

**Submission of the Hong Kong Bar Association**

1. The Hong Kong Bar Association (“HKBA”) has received an invitation from the Legislative Council Panel on Administration of Justice and Legal Services (“AJLS Panel”) to participate in the discussion on the scope of criminal legal aid, particularly in respect of appeals to the Court of Final Appeal, raised by the Hong Kong Human Rights Monitor (“HKHRM”) in its letter of 14 April 2009.
2. The HKBA notes that rule 4(1) of the Legal Aid in Criminal Cases Rules (Cap 221 sub leg) (“the Rules”) extends legal aid, subject to the means test and a requirement to make a contribution, to “(h) a person conviction of any offence ... under these rules for any appeal to, or any application for leave to appeal to, the Court of Final Appeal and any proceedings preliminary or incidental thereto”.
3. The HKHRM’s letter has shown that there are cases where rule 4(1) extends legal aid to the intermediate appeal (such as an appeal against a costs order of a magistrate; and the Secretary for Justice’s appeal by way of case stated against a determination or an acquittal in a criminal case before a magistrate) but not to the final appeal from the judgment in that intermediate appeal, whether such final appeal is proposed to be taken by the unconvicted or acquitted defendant or the prosecution or Secretary for Justice.
4. The HKBA notes that the Court of Final Appeal has in its criminal jurisdiction the powers of the court from which the appeal lies; see the Hong Kong Court of Final Appeal Ordinance (Cap 484) s 17(2). Such powers may include the setting aside of an acquittal and the imposition or restoration of a conviction; see, for example, the Magistrates Ordinance (Cap 227) s 119(1)(d).

5. The HKBA agrees with the HKHRM that there is an anomaly in rule 4(1)(h) of the Rules, which should be rectified by amendment as soon as possible. An amendment in this regard should ensure that the extension of legal aid would not depend on whether the person concerned had been convicted but whether he had been entitled to legal aid in the intermediate appeal.
  
6. The HKBA further suggests that the AJLS Panel and the Legal Aid Services Council may wish to consider whether an accused person should be entitled to legal aid in respect of a reservation by the trial judge for the consideration of the Court of Appeal of a question of law which arises on the trial, pursuant to s 81 of the Criminal Procedure Ordinance (Cap 221), bearing in mind that the reservation is not an appeal and arguably is not part of the trial or proceedings to which the preparation and conduct of his defence relates; see the Rules, r 4(1)(a), (aa) and (b).

Dated 8<sup>th</sup> May 2009.

Hong Kong Bar Association