

Submissions to the Legal Aid Services Council
on a review of Legal Aid in Criminal cases

An Executive Summary

1. In the Submission Paper, the Bar Special Committee on Legal Aid Reform identifies the ways in which how the Legal Aid in Criminal Cases Rules ('the Rules') fail to remunerate barristers properly for 'work actually and reasonably done' in criminal cases. The current structure fails to account for the significant changes in the conduct and preparation of criminal proceedings that have taken place since their introduction nearly 40 years ago. The Rules are outdated and require an overhaul.
2. Significant changes in the preparation & conduct of criminal cases since the Rules were introduced are identified: the vast increase in the volume & type of evidence available; the proliferation of experts; the increase in 'multi-handed' trials; the increasing requirement for written submissions - all require lengthy preparation; preparation that is very largely unpaid under the current rules. The 'brief and refresher' system together with the statutory maxima simply fail to reflect the actual work done.
3. Various difficulties with the present system of fee assessment are examined including:
 - The lack of any or any proper remuneration for pre-trial preparation
 - The difficulties in respect of adjourned /collapsed cases
 - Remuneration for appeals
4. The statutory maxima have been reviewed. The conclusion is that they should be reviewed because they:
 - offer no flexibility to the Director of Legal Aid;
 - fail to recognize that the venue of trial (District Court of Court of First Instance) is of itself no indicator of the complexity or otherwise of a case;
 - are too low;
 - bear no comparison with the fees for civil litigation.
5. The disparity between criminal legal aid fees, civil legal aid fees, and the fee system operated by the Department of Justice for fiat counsel are considered.
6. Appeals. The all-inclusive maximum fee for the drafting of a notice of appeal (\$2,710) is derisory and there is no allowance for perusal, research or drafting.
7. 'Length & complexity'. There are no clear guidelines as to what amounts to "exceptional length" or "exceptional complexity". The manner in which applications are made for certificates of length &/or complexity are unsatisfactory. Further no defined manner of

assessment of fees once a certificate of length or complexity has been issued exists, nor is there a mechanism through which any assessment may be challenged.

CONCLUSION

8. The Rules are outdated. The present system has a number of problems as summarised above & further outlined in the submission paper.
9. The Bar submits there is a clear case for change. The Bar recommends that the Rules be reviewed in order that inter alia:
 - barristers may be paid for work actually and reasonably done in the preparation & conduct of criminal cases
 - the system rewards counsel for saving court time & public expense through preparation
 - the Director of Legal Aid is afforded greater flexibility
 - the level of fees can be addressed
10. There are various potential solutions: devising a fee structure system similar to that utilized by the Department of Justice for fiat counsel; marked briefs or taxation.

Special Committee on Legal Aid reform
Hong Kong Bar Association
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INTRODUCTION

1. Access to justice and equal protection under the law are hallmarks of any civilized society. To give effect to this goal a legal aid system was established in 1967. Recognizing the importance of these core values, the right to be legally represented in a criminal trial is enshrined in the Basic Law and the Hong Kong Bill of Rights Ordinance.
2. The provision of free or heavily subsidised legal representation for those who are unable to afford to engage lawyers privately goes a long way to achieve access to justice.
3. The current system and level of remuneration of barristers who undertake criminal legal aid work is unsatisfactory and unrealistically low, leading to a situation whereby an increasing number of experienced barristers are not engaging in criminal legal aid work because it is unremunerative.
4. As far back as 1992, in a paper circulated to members of the Legislative Council's Finance Committee (Ref: FCR(92-93) 66, 16 October, 1992), the Attorney General and the Director of Legal Aid indicated they had "*encountered considerable and increasing difficulty in engaging the services of experienced counsel of the appropriate calibre to conduct criminal cases. The Judiciary has already registered its concern over the recent decline in the quality of counsel appearing*

before the courts." This problem continues.

5. The Bar submits that properly funded access to criminal justice is essential to the rule of law.
6. It is in the public interest for the under-privileged and the poorer members of our society to be afforded the protection of the law by way of proper legal representation in criminal cases. Barristers, particularly experienced ones, should therefore be encouraged to provide their efficient and professional services to the Director of Legal Aid.

THE PRESENT SYSTEM & THE LACK OF FLEXIBILITY

7. The problem & lack of flexibility of the present system is best illustrated by the following examples.
 - (a) The maximum fee that the Director of Legal Aid can pay to an assigned barrister for conducting a complex commercial fraud, with 80 box files of potential evidence, in the District Court is \$13,600 on the brief. In other words for all the pre-trial preparation and the first day of the trial the maximum permitted fees are \$13,600.
 - (b) \$2,710 is the maximum fee the Director of Legal Aid may pay a barrister for the drafting of a notice of appeal. The appeal may be from a lengthy trial with hundreds or thousands of pages of transcript plus documentary evidence.

Given the above examples – and there are many more- it will come as no surprise that that barristers of good standing and with sufficient experience to handle complex work in the higher courts in Hong Kong avoid criminal legal aid work.

8. Given the level of fees there are grave concerns about an ‘equality of arms’. The Prosecution has experienced teams of trial & appeal advocates. The Department of Justice has the flexibility to brief out on a special fiat basis; the legally aided client is provided with a barrister who cannot be paid more than \$2710 for drafting his notice of appeal. The rhetorical questions must be posed – would this lead to an inequality of arms; to a situation where the legally aided client has a far less experienced advocate acting on their behalf?
9. Legal aid in criminal cases in the Court of First Instance and the District Court, and in appeals to and from those courts, is governed by the Legal Aid in Criminal Cases Rules (‘the Rules’) which are subsidiary legislation made under the Criminal Procedure Ordinance Cap.221.
10. Rule 21(1) provides for remuneration to be paid to barristers for “work actually and reasonably done” in connection with criminal cases.
11. Remuneration for work “actually and reasonably done” per Rule 21(1) is then made “subject to this rule”. The remainder of Rule 21(1) then proceeds in no fewer than nineteen sub paragraphs to set maximum amounts that may be paid for ‘work actually and reasonably done’ including the derisory maximum \$2,710 for preparing and drafting a notice of appeal.

12. If work is 'actually and reasonably done' in the preparation &/or course of criminal proceedings then logic demands that the lawyer ought to be paid for that work.
13. However, the current structure prevents, for example, the Director of Legal Aid paying more than a maximum of \$13,600 on the brief and \$6,800 as a daily refresher for a trial in the District Court; a trial that may involve:
- any number of box files of potential evidence, (dozens of box files are not uncommon),
 - dozens of witnesses
 - forensic accounting experts
 - vast amounts of 'unused material' (which despite it being 'unused' still needs to be assessed by trial counsel),
 - numerous submissions as to the admissibility of evidence &
 - written final submissions.
14. If trial counsel, through pre-trial preparation identifies ways in which the length of the trial can be reduced he will not be rewarded for doing so by the Director of Legal Aid. It is not that the Director of Legal Aid will not do so; he cannot do so. The Director of Legal Aid can pay for 'work actually and reasonably done' but only up to the maximum of \$6,800 per full day that is spent in court; not for any work done outside of court before or during the trial.
15. The payment of fees is arguably too heavily weighted towards court attendance and insufficient or indeed no account is taken of work done outside the court.

16. Other than for approved (by the Director of Legal Aid) conferences with the lay client (which in District Court cases may be remunerated to the maximum rate of \$880 per hour), no work done outside court by barristers can be paid for. No matter how much time is spent on pre trial preparation or in the conduct of out 'of court work' during the course of a case, it is all considered to have been included in the brief fee. The Director of Legal Aid cannot under the current Rules pay for the following work 'actually and reasonably done':

- Drafting and settling affirmations (e.g. for leave to appeal out of time)
- Poring over the reports of forensic accountants
- Reading and digesting the reports of doctors addressing physical &/or mental health issues
- Reviewing video recorded interviews of the defendants
- Analyzing CCTV or video footage of an alleged crime scene
- Viewing video recorded statements of alleged child victims that will (unless timely objections are raised to their admissibility), become their evidence in chief. Watching those video searching for leading, suggestive questions, analyzing when & how dolls with genitals (in sexual assault/incest), are introduced to ensure the rules governing the conduct of such interviews have not been broken.
- Drafting the objections to the admissibility of child or 'vulnerable witness' interviews
- Visiting the crime scene
- Corresponding with instructing solicitors
- Corresponding with the prosecution – even though the effect of the correspondence may be a much shorter trial
- Drafting of skeleton arguments, even if they have the effect of reducing the time spent in court, or if they are requested by the trial Judge.

THE CHANGES IN CRIMINAL CASES SINCE THE 1960's & THE REQUIREMENT FOR MORE PREPARATORY WORK

17. The Bar submits that the current structure of assessment and level of payment in criminal legal aid cases fails to take into account the significant changes that have occurred in many aspects of the conduct of criminal trials since the Rules were introduced in the 1960's, and as such there is a need for change.
18. Briefly, the significant changes in the preparation and conduct of criminal cases stems from inter alia the following factors (see (a)-(e) below), all of which have had the effect of increasing the time required for preparation.
- (a) The vast increase in the quantity of potential evidence at trial – in the 1960's, there were for example no: mobile telephones; ATM machines; computer generated records; CCTV cameras; tape or video recorded records of interview; DNA samples; facial mapping software programmes; tape recorders were rare; and of course there was no internet.
 - (b) The significant increase in the number of 'multi-handed' cases, i.e. cases in which there is more than one defendant on trial in the same case - caused by a number of factors including: the changing nature of criminal activity itself; the increased quantity of evidence available, (see (a) above); and the greater use of & reliance upon conspiracy charges.
 - (c) The substantial increase in experts – no longer are there simply fingerprint & ballistic experts, but inter alia: DNA; forensic accounting;

crime reconstruction; and voice analysis experts, plus a whole variety of medical experts in respect of both physical and mental health.

- (d) The growth in number & variety of 'white collar' crimes.
- (e) The far greater variety of criminal offences; the diversity of methods by which even 'traditional' offences can be committed; the substantial number of statutory and non-statutory alternatives; the ever increasing international element to crime & the increasing use of technology in the perpetration and detection of crime.

19. Barristers assigned to defend an aided person are obliged to assess all the potential evidence both as to its admissibility as well as what use may be made of it if admitted into evidence. This must be done before proper advice on the merits of the case can be rendered.
20. There are a growing number of cases in the District Court and Court of First Instance that involve a large amount of unused materials. These materials may be important. It is incumbent upon the barrister to ensure that such material is properly assessed.
21. Increasing use is made of written submissions. Grounds of objection in writing in respect of the admissibility of cautioned records of interview are now universally required by Judges. Written submissions setting out objections to the admissibility of evidence (other than cautioned statements) are frequently required. Judges increasingly request written arguments in support of legal propositions and written

final submissions.

22. Under the current Rules, preparation work, work that ensures the defendant gets a fair trial frequently has the affect of reducing the time spent in court is not taken account of. It cannot be paid for by the Director of Legal Aid under the current Rules.

DIFFICULTIES WITH THE CURRENT 'BRIEF & REFRESHER' SYSTEM

23. There is inadequate flexibility within the current system; it does not permit any or any adequate remuneration for out of court work done in preparation for or during the course of cases.
24. Recognition ought to be given to the fact that a barrister's work includes preparation work. Time spent on the preparation of cases can exceed the time spent in court. Adequate preparation by a barrister protects the interest of the aided person and enhances the efficient use of court time, thus saving public funds. The Bar therefore submits that it is in the public interest for barristers in criminal cases to be properly remunerated for out of court work.
25. At present there is no provision within the Rules to compensate a barrister where the assigned hearing was unable to proceed on the due date. For example – as happens in practice – if a trial is scheduled to start on a particular day and for any one of a variety of reasons, (which have nothing whatsoever to do with the barrister assigned by the Director of Legal Aid), does not start as scheduled, the barrister cannot be paid at all, or other than for the day in court on which the hearing was adjourned.

The barrister having 'blocked out' the length of the trial in his diary is left without remuneration for his pre trial preparation & an empty diary.

26. Incidents as described in the paragraph immediately above are not infrequent. In such a situation the barrister is not only in effect penalized for the 'lost days' (days that have been 'blocked out' of his diary which are now suddenly unoccupied and for which he will not be paid), but he will not be remunerated at all for the work actually and reasonably done (other than by the brief fee), for the preparation of the case.

THE STATUTORY MAXIMUM FEES

27. The Rules provide statutory maximum fees for different levels of court work. As noted above, the maximum daily fee (refresher) payable to counsel for trial in the District Court is \$6,800 (Rule 21(1)(e)); in the Court of First Instance for trial by jury it is \$10,205 (rule 21(1)(d)).
28. The Bar considers that the statutory maximum fees fail to recognise that issues involved in cases in the District Court, such as commercial fraud offences can be more legally &/or factually complicated and require more preparation than some Court of First Instance trials. In fact, experience reveals that preparation in some commercial fraud cases in the District Court can be far more time consuming than cases involving murder or rape in the Court of First Instance.
29. The Bar also takes the view that the fees are inadequate in the context of work that is actually done for the purpose of criminal proceedings. The inadequacies are

especially apparent when compared with remuneration in civil legal aid cases. The Bar does not see the justification for a differentiation between the fees payable in criminal and civil cases.

THE ASSESSMENT OF FEES

30. At present, a barrister aggrieved with the fee assessment may seek a review from the Director of Legal Aid. There is no transparency in the mechanism dealing with challenges to fees assessed in criminal cases by the Director of Legal Aid.
31. In civil cases, a judicial officer independent of the Director of Legal Aid conducts legal aid taxation. There is however no independent review mechanism where the Director of Legal Aid has assessed fees in criminal cases which are considered too low.

APPEALS

32. In respect of legally aided criminal appeals, the maximum fee for the drafting of a notice of appeal under Rule 21(1)(o), is HK\$2,710.
33. \$2,710 includes perusal of the trial bundle, the transcript of proceedings and is the maximum regardless of length &/or complexity. The fee is derisory and illogical.
34. There is no allowance for 'reading in', (the transcript alone may be hundreds or thousands of pages), research, or the drafting of skeleton arguments. Should the client suddenly decide to retain his own privately funded counsel before the appeal

is heard, the barrister will only receive payment for settling the notice of appeal; \$2,710.

35. By way of one example only, in an appeal to the Court of Appeal, a barrister of more than 30 years experience represented four appellants on charges of theft and assisting unauthorized entrants to enter Hong Kong. 5 hours on legal research, 3 hours settling the notice of appeal, and 8 hours to prepare full written submissions as directed by the Court of Appeal, a total of 16 hours were spent on the preparation for the appeal, plus the hearing of the appeal itself. The fee assessed and paid by the Director of Legal Aid to the barrister was \$24,160.

36. The Rules differentiate in the statutory maximum fees allowed to be paid for appeals simply by reference to the venue of trial in which the appeal originated. The Bar takes the view that the trial venue does not of itself affect the importance or complexity of a point that might be taken on an appeal, either against conviction or sentence.

EXCEPTIONAL LENGTH OR COMPLEXITY

37. At present, Rule 21 (2) & (3) allows the trial judge to certify that a case is exceptionally length or complex. If so certified the Director of Legal Aid may then increase the fees paid proportionally. The amount of the increase is determined by the Director of Legal Aid.

38. In practice, if at the conclusion of a trial the assigned barrister is of the view that the case was exceptionally lengthy or complex then that barrister makes an application

to the trial Judge.

39. The Bar considers this to be invidious as it requires a barrister to in effect request a vague and uncertain 'taxation' by a figure who may not necessarily be in the best position to assess the value of work done by the barrister.
40. There are no clear guidelines as to what 'exceptional or complexity' mean, nor any objective criteria as to the basis upon which the Judge may grant or refuse an application.
41. Further, there are no guidelines available to assigned barristers as to how the enhanced amount to be paid is calculated by the Director of Legal Aid.
42. There is no mechanism through which the refusal of a trial Judge to certify a trial as being lengthy or complex may be challenged. Nor is there any mechanism through which an assigned barrister may challenge the Director of Legal Aid's assessment of fees in light of a trial being certified as long &/or complex.
43. This is in contrast to court taxation in civil cases carried out by a judicial officer independent of the trial process.

THE BAR'S POSITION

44. The Bar considers that the current Rules are long overdue for revision &/or reform.
45. The current remuneration system does not cover work actually and reasonably done.

Preparation work is not properly taken into account and good calibre barristers are discouraged from undertaking criminal legal aid work, particularly appeals.

46. The statutory maximum fees: (a) fail to recognise that issues involved in cases in the District Court, (e.g. commercial fraud offences), can be more legally &/or factually complex than some in the Court of First Instance; (b) provide the Director of Legal Aid with very little flexibility and (c) are inadequate.
47. Thorough preparation by a barrister protects the interest of the aided person and enhances the efficient use of court time, thus saving public funds. If justice is to be done then a barrister must be properly prepared; under the present rules the preparation is carried out for free; and more experienced barristers do not take the work offered by the Director of Legal Aid.
48. The Bar submits that it is in the public interest for barristers in criminal cases to be properly remunerated for their work, both in & out of court work. Justice will be done more speedily & efficiently making better use of court time, reducing waiting lists & making better use of taxpayers' money

REFORM PROPOSALS (IN BRIEF)

49. The current Rules do have one attractive feature – they are simple. That simplicity however removes discretion and thus flexibility from the Director of Legal Aid.
50. Considerations for reform ought to include:

a. Marked briefs.

Provide the Director of Legal Aid with more discretion to assess and negotiate fees with barristers undertaking criminal legal aid work. Fees for assigned cases could be marked on the brief, and include a proper assessment of the preparation involved as well as indicate fees for other aspects of the case including, for example, pre trial applications or 'reading into' an appeal bundle.

b. The system adopted by the Department. of Justice, whereby cases that are 'briefed out' to prosecutors on special fiats are assessed on an individual basis. Fees reflect the perceived preparation that is required for trial, as well as in some instances fees for pre trial applications that may be made by the defence.

c. Taxation.

Fees for barristers in criminal legal aid could be assessed on a model similar to that which operates for civil practitioners in legal aid cases.

51. The Bar's position is that:

- the case for change has been made out & is long overdue
- the present structure does have the advantage of simplicity
- the present structure ought to heavily amended to remove the statutory maximum fees and thus present the Director of Legal Aid with greater flexibility when assigning barristers
- there ought to be marked briefs, assigned barristers can assess the fees being 'offered' and decide whether or not to take the work at that price.

52. The above changes would be fairly straight forward to implement, have the advantage of preserving the relative simplicity of the present system and afford the Director of Legal Aid the ability to brief experienced barristers for an appropriate fee when the nature & type of case called for it.
53. There is no logical basis for the discrepancy that exists between fees paid for barristers who prosecute and those assigned to defend by the Director of Legal Aid. There is a growing 'inequality of arms' as between the prosecution and publicly defence, and the situation should not be permitted to continue.

Special Committee on Legal Aid reform

Hong Kong Bar Association

Dated: 18 April 2005