



Review of Criminal Legal Aid Fee System
Submission of the Law Society of Hong Kong

1. The Law Society of Hong Kong has been engaged in discussions with the Administration on the review of the criminal legal aid fee system for about two years since March 2006. However, no real progress has been made in spite of the broad consensus that the fee system should be improved. The crux of the matter now lies with the resources the Administration is prepared to put into the criminal legal aid system to assist citizens who cannot afford private legal representation in criminal trials.
2. In March 2007, the Administration proposed a schedule of fee rates to be applied under a new criminal legal aid fee structure, under which for the first time solicitors' pre-trial work would be remunerated on its own. Solicitors' pre-trial preparation work is crucial to the barristers' presentation of the defendant's case in criminal proceedings. The Law Society believes it is the Administration's recognition of the importance of solicitors' preparation work that resources are set aside for it. Solicitors acting in legal aid cases are assisting defendants to confront the full weight of the Government's investigative and prosecution resources, especially in pre-trial preparation. These resources far outweigh those of all but the very wealthy. Such inequality of arms between the prosecution and defence seriously compromises the basic rights of those facing criminal charges.
3. This inequality of arms situation is exacerbated by the fact that criminal investigations are getting ever more complicated and far reaching. The communications and technology advances of the past 16 years have resulted in an increased number of prosecutions involving law enforcement agencies from around the world, greater use of expert and surveillance evidence, and more complex laws that require more specialist knowledge. All these impact upon the preparation work that has to be done if defendants are to be properly represented. The Law Society would like to reiterate that it is time to "level the playing field" and make available to individuals who cannot privately afford their own defence the same adequacy of resources as is available to the prosecution.

4. However, the Administration's claim that it is giving "proper recognition" to solicitors' pre-trial preparation rings very hollow when one looks at the proposed rates. The hourly rates proposed by the Administration for the criminal pre-trial work are HK\$425 and HK\$300 for High Court and District Court respectively. The Law Society has indicated and subsequently reiterated the proposal was unrealistic as it would not provide any incentive or prospect of any meaningful discussion. The Law Society also wishes to note that discussion on some of the items in the proposed new fee structure, such as the assumption that solicitors read 90 pages of documents in one minute for preparation, is not conclusive yet. It cannot be taken for granted that the Law Society is bound by the 90-pages-per-minute basis for calculating the reading fee.
5. The Administration insisted the proposed rates were non-negotiable. But the Law Society sees no justifiable ground to put in a new fee structure while derisively low fee rates remain as the starting point for the reform. The Administration has argued its proposed rates will provide at least a 30% increase in criminal legal aid expenditure but this does not reflect the full picture and is misleading. While a 30% increase may look substantial in terms of a percentage change, it does not in reality represent any significant improvement to the existing fee system given the non-existent or very low base rate.
6. The Law Society agrees public money should be used prudently, but one should consider the matter in the context of the chronic underfunding of the criminal legal aid system. For years, solicitors have been subsidising the criminal legal aid system through their own private resources. All along the preparation work put in by solicitors that were not covered by the fixed criminal legal aid fee were effectively rendered on a pro bono basis. The Administration owes it to the community to address the fundamental resource issue that concerns citizen's rights in criminal trials.
7. To gauge practitioners' views about the criminal legal aid fee system, the Law Society conducted a survey of solicitors and law firms engaged in criminal law litigation between 17 October 2007 and 6 November 2007. Key findings include:-
 - There was an overwhelming consensus by solicitors and law firms that the criminal legal aid system must be improved, to cope with the increasingly complex nature of criminal trials and to attract high quality and experienced solicitors to take up criminal legal aid work. The majority of the solicitors and firms (93.9% of solicitors and 86.1% of firms) were either somewhat dissatisfied or very dissatisfied with the criminal legal aid fee.
 - The majority of solicitors (69.6%) and firms (78.6%) considered that the actual time they spent on cases was the most important factor in determining their fees in criminal legal aid work.

- A significant portion of the solicitors (47.0%) and firms (35.7%) indicated that they have considered ceasing to act in criminal legal aid cases, with the majority citing the low level of fee as the main reason.
8. It is alarming to find out from the survey that almost half of the responding solicitors had considered ceasing to act in criminal legal aid cases. The survey also found that the most senior group (solicitors with 15 years of experience or more) and the least experienced group of respondents (3 years or less experience) had the highest proportion of practitioners indicating that they have considered ceasing to act in criminal legal aid cases. This finding suggests that many senior practitioners may drop out and that the majority of young solicitors are unwilling to be involved, potentially leading to a significant shrinking of the pool of solicitors working on criminal legal aid cases.
 9. The Law Society's position is that the hourly rate in criminal legal aid should be at a par with the civil taxation rates on a party-to-party basis. For example, the party and party taxation rates are HK\$2,400 to HK\$3,000 per hour for a 5-6 years' experienced solicitor for High Court civil proceedings and HK\$1,400 per hour for a trainee solicitor. We understand that in civil cases, the Administration may recover part of the costs from the other party, whereas in criminal trials this is not possible. Nevertheless, a huge discrepancy in the remuneration for practitioners undertaking the two types of legal aid work simply cannot be justified.
 10. The Government's stated policy objective is to better protect the rights and well-being of the less privileged members of society. To live up to its responsibility and comply with the policy objective, it is of utmost importance for the Bureau to devote adequate resources to ensure that the basic civil and legal rights of those who are of slender means or who are otherwise underprivileged are adequately protected.

The Criminal Law & Procedure Committee
The Law Society of Hong Kong
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