

香港人權監察

HONG KONG HUMAN RIGHTS MONITOR

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Submission of the Hong Kong Human Rights Monitor on **Criminal legal aid fees system** February 2008

1. The rule of law is important to every civilized society. It requires equality before the law, which is enshrined in the Basic Law, International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights Ordinance (HKBORO).¹
2. Equality before the law is meaningless without access to the law. True access to the law not only means formal access to the legal system and protection of formal rights, but also quality access through suitably experienced and knowledgeable legal advisors.
3. Legal representation is therefore central to the rule of law.
4. In criminal cases, legal representation is essential as the result can be conviction for a criminal offence, loss of good name and loss of a person's liberty. The fundamental right of freedom of the person which involves the right not to be arbitrarily and unlawfully deprived of one's liberty becomes engaged with the arrest of a person and continues with detention, bail and trial.² It is therefore incumbent upon every civilized society to ensure legal representation is available to all from point of engagement of this right.
5. To achieve equality before the law, publicly funded legal representation must be provided to financially disadvantaged persons who cannot afford to instruct private lawyers. A properly funded legal aid system therefore ensures that financially disadvantaged persons can enforce their legal and human rights with the assistance of competent legal representation. As stated in the recent Annual Report of Legal Aid Service Council, the vision of a legal aid service is to "actively [contribute] to upholding

¹ Article 26 of ICCPR and the equivalent Article 22 in the HKBORO provide that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

² Article 14(3)(d) of ICCPR and equivalent Article 11(2)(d) in HKBORO provides that "everyone [charged with a criminal offence] shall be entitled to the ...minimum guarantee" "...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".

Article 9(1) of ICCPR and equivalent Article 5(1) in HKBORO provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Article 9(4) of ICCPR and equivalent Article 5(4) in HKBORO provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

and enhancing the Rule of Law by striving to ensure Access to Justice and Equality before the Law to people of limited means.”³

6. Hong Kong does have a publicly funded criminal legal aid scheme. This however is seriously flawed. Not only is criminal legal aid not available for suspects from point of arrest but the lack of funding provided for criminal legal aid compromised the service and threatens to reduce criminal legal aid recipients to second class citizens.
7. This is so because the present system of payment for solicitors participating in this scheme effectively means that they receive no payment for preparation work. Given that any case is dependant upon proper preparation this translates to legally aided defendants being dependant upon the good will of participating criminal solicitors. This cannot be the basis for a legal aid scheme that is supposed to protect fundamental constitutional rights.
8. At present for example, \$6790 will be paid to a criminal legal aid solicitor for a case involving proceedings in the Court of First Instance which deals with the most serious of criminal cases.⁴ This fee represents payment for the first day of trial and all the preparation work. The market rate for a private criminal solicitor with 10 years experience ranges from HK\$ 3,500 to \$4000 per hour. The legal aid fee which covers the first day of trial and tens of hours of preparation work, represents less than two hours work at private market rates. This disparity is unsustainable.
9. The Administration has now acknowledged that payment for preparation work is necessary. An hourly rate has been proposed for pre-trial preparation work. The hourly rates offered for High Court and District Court case preparation are \$425 and \$300.respectively. These figures also presuppose that solicitors are able to read 90 pages of documents per hour. The Monitor considers these proposed fees to be unreasonably low.
10. The inevitable consequence of payment of such low fees will be the inexorable drain of quality and experienced criminal solicitors from the present criminal legal aid scheme. New solicitors will also be deterred from entering the scheme at all or for any meaningful period of time.
11. With criminal cases increasingly involving the mobilization of expanding investigative and prosecutorial resources as well as ever more complex legislation, the inequality of arms that presently exists between the government and the individual will become more pronounced. With the move of experienced solicitors away from the scheme, the ever more complex cases will be handled by declining pool of increasingly inexperienced solicitors. A person’s access to criminal justice will therefore increasingly depend upon an ability to pay privately and Hong Kong will be left with a second class legal aid scheme for second class citizens.
12. The scope of criminal legal aid has never been substantially overhauled and the existing criminal legal aid fee system has not been reviewed since 1992. Over the past 16 years, the market rates of privately instructed solicitors have increased with the economic

³ Legal Aid Services Council, *Annual Report 2006-2007*, p. 9.

⁴ Rule 21(1)(a) of Cap 221D.

development of Hong Kong. It should be remembered that fee rates for solicitors engaged in commercial work are substantially higher than those of privately instructed criminal solicitors. This already deters young solicitors from engaging in criminal litigation work. The lack of proper review of criminal legal aid fees will only further deter young solicitors from undertaking criminal legal aid work.

13. To ensure Hong Kong has a legal aid service that meets present and future requirements fit for a civilized and developed society the Monitor is of the view that the administration must allocate substantially increased funds for the provision of reasonable fees for solicitors participating in the criminal legal aid scheme. The Monitor sees no reason why this cannot be achieved by adopting the fee structure currently used for civil legal aid and regulated by an independent system of Taxation. Funds must also be allocated to enable an increase in the scope of legal aid to include representation from time of a suspect's arrest.