二零零五年十二月十五日會議
參考文件

立法會司法及法律事務委員會
刑事法律援助費用

目的

委員會擬就香港刑事法律援助費用制度進行討論。

背景

2. 《刑事訴訟程序條例》的附屬法例《刑事案件法律援助規則》(規則)訂明支付予辦理刑事法律援助案件的大律師及事務律師的費用表。任何經由政府當局建議對規則的修訂，須由刑事訴訟程序規則委員會訂明，並經立法會按先審議後訂立的程序決議通過。雖然在法律上費用表只對法律援助署(法援署)具約束力，但律政司通常按相若的費用表聘用大律師代表控方。於獲法律援助的刑事案件而言，此舉通過促使控方及辯方的律師都使用相若的費用表，有助確保任何一方均不會在聘用私人執業律師時享有重要的不公平優勢。

3. 立法會財務委員會在一九九二年批准大幅向上調整有關費用。考慮到當時法律從業員的經營開支(例如辦公室租金及員工開支)、消費物價，以及聘用私人律師服務遇上的困難，當時費用的上調幅度由 25%至 100%不等。根據財務委員會的決定，當局自此每兩年檢討費用水平一次。進行每兩年一次的檢討時，當局考慮參照期內消費物價的變動、聘用私人大律師及事務律師服務的任何實際或預計會出現的困難，以及整個經濟狀況及辦公室租金等其他因素。自一九九二年起費用的變動列出如下－

參照期	調整	有關消費物價的改變
一九九二年四月 – 一九九四年三月	+20.34% (由 1.4.1995 起生效)	+20.34%
一九九四年四月 – 一九九六年三月	+18.18% (由 16.5.1997 起生效)	+18.18%
一九九六年四月 – 一九九八年三月	凍結	+10%
一九九八年四月 – 二零零零年三月	凍結	-8.8%

參照期	調整	有關消費物價的改變
二零零零年四月 – 二零零二年三月	-4.3% (由 4.7.2003 起生效)	-4.3%

4. 按照財務委員會批准的機制，費用對上一次調整是依據二零零二年進行的每兩年一次檢討而在二零零三年六月經由立法會通過的。就該次費用調整時，香港律師會(律師會)於二零零三年六月告知當局兩個法律專業團體已成立聯合工作小組，全面檢討刑事法律援助費用制度，以期向當局提交共同意見書。

5. 儘管如此，該兩個專業團體於二零零五年四月告知當局它們只會各自提交意見書。我們分別在二零零五年四月和六月收到香港大律師公會(大律師公會)和律師會正式的意見書。法律援助服務局(法援局)亦於二零零五年十月底向當局提交意見。它們的意見書分別載於附件 A 至 C。

6. 與此同時，二零零四年的每兩年一次的檢討於參照期內錄得了 4.4%的通縮率。法援署在聘用高質素和富經驗的律師方面並無遇到困難。在二零零四年，法律援助律師名冊上有 584 名大律師及 1409 名事務律師表示有興趣接辦刑事案件，較二零零三年之數目分別增加 7.5%及 6.3%。大部份表示有興趣的大律師及事務律師均富經驗，而大概 80%的刑事法律援助工作都是交由取得資格後有超過 10 年經驗的大律師及事務律師負責。在上述的情況下，我們應根據既定機制調低費用。但是，考慮到兩個法律專業團體提出的意見及持續的通縮後的經濟趨勢反彈，我們在二零零五年七月知會法援局、該兩個法律專業團體和委員會，當局決定不按照通縮率調低費用，但會留待下次在二零零六年年中進行每兩年一次檢討時，把上述 4.4%的減幅與檢討結果一併考慮。

兩個法律專業團體及法律援助服務局的意見

7. 建議檢討的共同事項包括－

(a) 訂明費用的水平；

(b) 支付超逾法定上限的之費用的彈性；

(c) 審訊前預備工作的費用；

(d) 根據異常複雜或異常費時案件證書之簽發而增加費用；

(e) 按原審法庭的級別釐定上訴案件費用；以及

(f) 會議費用。

8. 法援局大致贊同上述費用制度之檢討，在認同應以公帑維護公義的同時，法援局亦認為應在政府負擔能力內讓有需要且符合資格申請法律援助的人獲有效代表進行訴訟。

當局的初步回應

9. 刑事法律援助費用此議題涉及對法律援助服務重要的政策及財政影響，及其影響範圍可能涉及律政司。我們將致力考慮及小心研究兩個專業團體及法援局的意見。

10. 就此，於研究刑事法律援助費用制度的議題時，當局定會確保以下原則得以維護－

(a) 法律援助受助人獲得恰當及有效之法律代表進行訴訟；
(b) 費用制度與控方的費用制度大致相若；及
(c) 於政府負擔能力內給予法律援助律師合理及有效的酬償。

未來路向

11. 首席法官於向我們轉述兩個專業團體的關注時提議當局在有適當的代表下就議題進行檢討。考慮到首席法官的建議，我們正在研究一個讓兩個法律專業團體直接參與的機制，以助在此重要議題上直接交流意見。首席法官就此已答允考慮委派一位司法機構的代表參與討論。當局將於建議準備妥當後諮詢法援局，然後諮詢立法會。

12. 歡迎委員就此事提出意見。

政務司司長辦公室
行政署

法律援助署

二零零五年十二月

Annex A
附件 A

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

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 rapein 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 changes 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

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
Dated: 18 April 2005

Annex B
附件 B

THE LAW SOCIETY'S POSITION PAPER ON THE SYSTEM OF REMUNERATION OF SOLICITORS FOR CONDUCTING CRIMINAL LEGAL AID WORK

This Paper discusses some of the issues which have arisen over recent years regarding the remuneration of solicitors who represent legally aided defendants in criminal cases. It does not deal with representation through the Duty Lawyer Scheme nor does it purport to speak for the Bar of Hong Kong.

This Paper draws upon a Paper received from the late John Mullick in 2002 when he was a member of the Bar Association's Special Committee on Legal Aid Reform. A copy of that Paper was sent to the Law Society and is annexed to this Paper as ***Appendix. 1.***

1. Introduction

1.1 The provision of legal representation to defendants who would otherwise be unrepresented is an essential attribute of a civilized and fair criminal justice system. Providing such representation goes some way towards addressing the inequality of arms between the prosecution and the defendant. The defendant in criminal proceedings faces the panoply of the Government's financial and investigative resources. Those resources far outweigh the resources of all but the most affluent. The grave dangers of unjust conviction and imprisonment, even where a defendant is privately represented are amply illustrated by Lau Chi Wai v. HKSAR Final Appeal No. 4 of 2004 (Criminal) [2004] 3 HKLRD 444. The Court of Final Appeal's judgment is annexed to this Paper as ***Appendix 2.***

1.2 The good administration of our system of criminal justice dictates that such an inequality of arms should be redressed. Whilst there is a public interest in ensuring that those who are guilty are convicted, it is much more in the public interest to ensure that those who are innocent are not convicted. There is therefore an overriding public interest in ensuring that the criminal justice system operates fairly and that "due process" is followed to achieve as far as possible the proper outcome of the particular case. The quality of a Legal Aid Scheme must depend upon the extent to which it redresses the inequality of arms between the prosecution and the defence and the contribution it makes to "due process".

2. The Legal Aid Scheme

2.1 Procedure, evidence and practice in criminal cases is governed by the Criminal Procedure Ordinance, Cap. 221 (CPO). The CPO was amended in 1969 to introduce a new section 9A. That section enables the Criminal Procedure Rules Committee ('Rules Committee") established by s. 9 of the CPO, to make rules for the granting and administration of legal aid in the criminal courts. These rules have been made. They are the Legal Aid in Criminal Cases Rules (CPO, sub-leg) ('the Rules") which came into force on 11th January 1970.

2.2 The Rules create a self-contained system for the grant and administration of legal aid. They have changed little over the past 35 years. The Rules do not therefore take account of more recent developments in Hong Kong: alibi notices, advance disclosure of expert evidence, organized and serious crime procedures, complex commercial crimes, vulnerable witnesses, the Hong Kong Bill of Rights Ordinance, Cap. 383 or the Basic Law.

2.3 The Legal Aid Scheme the subject of this Paper applies to the District Court ("DC"), the Court of First Instance ("CFI"), the Court of Appeal ("CA") and the Court of Final Appeal ("CFA"). A separate Duty Lawyer Scheme provides for representation before Magistrates. By definition therefore defendants represented under the Rules are those facing the more serious or more complex charges: those are cases that either cannot be tried before Magistrates or, where they could be so tried, the prosecution has opted for trial in the DC or the CFI because of the complexity of the case and/or the likely penalty upon conviction after trial.

3. The Rules

3.1 The Rules invest the Director of Legal Aid ("DLA") with the responsibility for administering the legal aid system. Rule 3 requires the DLA to prepare and maintain separate panels of barristers and solicitors to represent legally aided defendants. Rule 4 sets out who may be granted legal aid and what that will cover. Under Rule 5 applications for legal aid must be made to the DLA. Rule 6 gives the DLA the responsibility for determining whether or not a person is entitled to receive legal aid and, if necessary, upon what terms. Rule 7 provides that if the DLA is satisfied a person should have legal aid, a legal aid certificate shall be granted.

4. Fee and Cost Levels

4.1 Though the DLA is responsible for the operation of legal aid, the DLA has no authority to create the fee structure of legal aid. That is the responsibility of the Rules Committee. Section 9A of the CPO is silent about how fees and costs should be assessed.

4.2 The Rules Committee apparently plays little part in setting fee and cost levels. "Biennial Reviews" of fees were conducted by the Administration with adjustments of fee levels being linked to the Consumer Price Index. A summary of the "Biennial Reviews" carried out by the Administration over the recent years are as follows:

1998: Despite a recorded increase of 10% in the CPI(C) for the reference period no upward adjustment was made to fees. The explanation was that an upward adjustment could not be made in view of the worsening economic climate and market conditions.

2000: The CPI(C) decreased by 8.8% during the reference period. However, as this more or less offset the CPI(C) increase accumulated in the previous reference period, the Administration chose to freeze fee levels.

2002: Because the CPI(C) declined by 4.3% during the reference period, the Administration proposed a reduction of fees by 4.3%. This was approved by the Finance Committee on 13 June 2003.

2004: The Administration has sought a further 4.4% reduction in the fees following the decrease in the CPI(C) for the reference period.

4.3 Both the Bar and the Law Society have objected to this. Copies of the relevant documentation are annexed to this paper as ***Appendix 3***.

4.4 The proposed 4.4% reduction comes at a time when office rents are again rising and will impose further strains upon those practitioners engaging in legally aided defence work.

4.5 The reality is that fees and costs in real terms have not risen for 20 years. The consequence is that the level of fees paid for criminal legal aid has progressively fallen. At the same time, criminal litigation has become more complex and demanding. There is, for example, greater use of expert evidence, greater use of video taped interviews, surveillance on video tape and more detailed investigation especially by the ICAC and the CCB. The result has been that many practitioners have concluded that it is simply not possible to undertake legally aided

criminal work and sustain a viable legal practice. This reduces the pool of lawyers available to undertake legal aid work and calls into question the overall viability of the legal aid scheme and its effectiveness in redressing the inequality of arms between the prosecution and defendants. It is essential to the system of justice that fees are adequate to provide remuneration to attract the right calibre of person to practise criminal law. The perils of under-payment are well known in undermining the good administration of a system intended to serve the public.

4.6 Issues then arise whether the criminal legal aid scheme as it now stands is consistent with the spirit and/or the letter of Article 36 of the Basic Law:

> *Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.*

4.7 The Article envisages freedom of access to lawyers and timely protection of lawful rights and interests. Where private representation is beyond the means of the litigant then, particularly in criminal law, the Administration is obliged to provide the means for the citizen to be legally represented at trial, for example through a legal aid scheme.

4.8 These issues were addressed by the European Court of Human Rights (Fourth Section) in Steel and Morris v The United Kingdom (Application No 68416/01) a copy of which is annexed as ***Appendix 4***. The case arose out of defamation proceedings commenced against Steel and Morris by McDonalds. Steel and Morris were without means. At that time, defamation proceedings were outside the scope of the United Kingdom's civil legal aid scheme. The proceedings were complex and protracted. The ECHR held that the denial of legal aid to Steel and Morris had "*deprived them of the opportunity to present their case effectively before the (trial) court and contributed to an unacceptable inequality of arms with McDonald's.*" The UK was ordered to pay compensation and to offer Steel and Morris a re-trial.

4.9 The ECHR addressed inequality of arms in the context of civil litigation; its strictures are even more apposite in criminal litigation.

4.10 If a legal aid scheme is to provide "timely protection" and address the too many "inequality of arms" between the prosecution and the defendant it must be effective.

4.11 The scheme will not be effective, in the sense of providing representation for defendants, unless practitioners are adequately remunerated. If work is not adequately remunerated, it may not be done or, if done, done poorly. In the long run, there may well be more cost and expense by prolongation of trials and appeals which might otherwise have been avoided, not to mention the possibility of serious miscarriages of justice. Whilst society may have little time for those who commit crime, our system demands that persons brought before the criminal courts are treated fairly and justly and are convicted only upon due process. A properly remunerated legal aid system is an essential attribute of due process.

4.12 Defendants who are unable to afford to instruct a lawyer privately must not be further disadvantaged by an inadequate legal aid system, nor should the legal system lay itself open to a charge of hypocrisy by purporting to provide legal representation in name but depriving it of substance.

4.13 ***The Contradiction within the Rules***

It is worth noting in this respect that Rule 21(1) refers to fees being assessed 'having regard to the work actually and reasonably done" which implies that all work done under the legal aid certificate will be rewarded provided it is actually and reasonably done. However that is contradicted by the set fees in Rule 21(1) (a), (aa), (ab), (b).

4.14 As well as ensuring that legally aided defendants are adequately represented, measures must be in place to ensure that public funds are used efficiently and properly. This can be achieved by requiring proof that:

a) the work for which remuneration is claimed was done;

b) it was necessary; and

c) was done properly and with reasonable economy.

4.15 Essentially that is what the system of taxation of costs in civil litigation is designed to ensure. Taxation of claims for fees in criminal litigation has attractions and these will be addressed later in this Paper (see paragraphs 21.3 to 21.6).

5. The Solicitor and Legal Aid

5.1 A solicitor representing a defendant under a legal aid certificate has all the responsibilities that are owed to the privately funded client with the added obligation not to waste the Legal

Aid Fund. The solicitor must ensure the particular case is dealt with expeditiously and economically. The requirements for expedition and economy must, however, be viewed in the context both of the solicitor's professional duty to the legally aided client and the case the legally aided client has to face. Work that is done during the retainer may, with the benefit of hindsight, be shown to have been un-necessary. That, however, must not be the criteria in the context of criminal litigation. In the proper preparation of a criminal case, work has to be done in the context of the situation as it presents itself at the time the work was done.

5.2 As an example, it may be suggested that time spent interviewing potential alibi witnesses was un-necessary where the defendant pleads guilty at trial. However that guilty plea may well have come about because the potential alibi witnesses were found wanting when interviewed by the solicitor and the defendant then accepts informed and reasoned advice to plead guilty. Work done by the solicitor interviewing those witnesses has brought about an overall saving of public money but, as will be discussed later on in this Paper, that professionalism is not recognized and therefore is not rewarded.

6. Solicitors' Fees under the Rules

It is appropriate to set out some detail of the present fees.

6.1 Solicitors' (and barristers') fees are governed by Rule 21(1) of The Rules. Rule 21 is annexed to this paper as ***Appendix 5***.

6.2 *The "Brief Fee"*

The Rule essentially provides for a brief fee, a daily fee and certain traveling and out of pocket expenses. The brief fee for cases heard in the CFI is, at present HK$6,790. This covers all the preparatory work undertaken by the solicitor up to the day of the trial and the first day of the trial. The brief fee is fixed by law and takes no account of the time actually and properly spent and the work done in preparing the case for court.

6.3 The brief fee appears to be premised upon an assumption that no, or minimal, work will be, or needs to be, done by the solicitor in advance of the trial. That is unrealistic and takes no account of the solicitor's professional responsibility, the duty to the client, the court and the complexity of criminal trials.

6.4 The solicitor's duty is to ensure that the defendant is not convicted except upon sufficiently cogent and admissible evidence. Pre-trial preparation is inevitable if the defendant's case is to be properly put before the court, which requires preparation and attention to detail. This is essential if the defendant is to be properly represented at trial: as such it should be properly recognized and remunerated. .

6.5 ***The "Daily Fee"***

For the second and subsequent days of a trial in the CFI, the fee will range between HK$830 and HK$4,420. These fees are unrealistic. Even though a barrister appears at trial, the solicitor remains responsible for the smooth running of the case. Ideally, the solicitor having the conduct of the case should attend court throughout the proceedings. At the very least the instructing solicitor must ensure a responsible member of staff who is thoroughly conversant with the case attends court each day to assist the barrister. The instructing solicitor should personally attend court on the first day of the trial and be present when the jury is selected and when the defendant makes the decision whether or not to give evidence and, if so, be present whilst the defendant gives evidence and at verdict and sentence. In addition the instructing solicitor must be available to personally attend the trial whenever circumstances require, must keep in touch with the staff member attending the trial and be contactable throughout the trial. The daily refresher does not compensate those responsibilities.

6.6 Where the case will be tried in the Court of First Instance ("CFI") the solicitor has the added responsibility of properly briefing the barrister. It is truism that counsel can only be as good as their papers allow them to be. It is also a truism that solicitors do not discharge their professional responsibilities by simply bundling up papers and passing them to counsel. Adequately instructing counsel invariably means reading and considering numerous statements and other paper exhibits, taking the defendant's instructions on those statement and exhibits and ensuring that counsel is fully appraised of all relevant issues both of fact and of law.

6.7 Solicitors must always be conscious of the consequences, to the defendant and to themselves, if they fall below the high standards which are rightfully expected from them. Those sanctions can include civil proceedings by the client, penalties imposed by their professional body, strictures from the Bench and adverse publicity in the media, all of which can impact upon their professional lives. Representing a client under a legal aid certificate is not therefore a matter to be entered upon lightly or ill-advisedly, nor should a legal aid system place the solicitor in a position where work which is necessary and proper is not done or is done at the expense of the solicitor's practice. Unfortunately the legal aid system as it stands at present does both.

6.8 The CFA's judgment in the recent case HKSAR v Zabed Ali FACC No. 2 of 2003 [2003] 2 HKLRD 849; 6 HKCFAR 192, an appeal against a conviction for murder which is annexed to this paper as ***Appendix 6*** illustrates the complexities of criminal litigation and is but one example of complex issues which must be fully considered before trial.

7. Problems with a Set Brief Fee

7.1 This section of the Paper addresses some of the problems that are regularly encountered by solicitors undertaking legally aided defence work. The system presents as illogical and ill thought out. In reality the work that has to be done if the defendant is to be adequately represented at trial means that the daily fee is expended several times over before the case comes to trial. Legal aid defence work then becomes a pro bono activity but with all the professional responsibilities and obligations of a privately funded instructions.

7.2 The present system of remuneration takes little or no account of the complexities of the case and fails to remunerate work which the solicitor must carry out if the defendant's interests are to be adequately protected. The concern is that the realities of contemporary commercial life will lead to inadequate preparation of cases. In the long run this will be detrimental to the criminal justice system and to society in general. A recent survey by the Law Society of Hong Kong is annexed to this paper as ***Appendix 7*** and illustrates some of the issues of concern.

7.2 Whilst it may be suggested that a solicitor who accepts a legally aided case should not complain if, in the event, the set fee proves inadequate, this overlooks the central issue of the adequacy of the system itself and is tantamount to acceptance that the system as it now stands is defective. Before taking on a privately funded case, the solicitor finds out enough about the case to quote a realistic fee. If, in the event, that fee proves inadequate, the solicitor has no recourse. That is a very different situation to where the solicitor is invited to accept a case without any opportunity of assessing what is involved, let alone making an informed assessment. At the very least the solicitor should have an opportunity to look at the papers and consider what is involved before having to decide whether or not to accept the case.

8. The Illogicality of the system.

A number of problems can arise from the payment of the present very low set brief fee.

8.1 There is little incentive for any in-depth reading of extensive case papers. This could result in inadequate preparation for trial and inadequate protection of the defendant's interests.

8.2 The set fee is payable whether the defendant pleads guilty or not guilty. The implications here are that a defendant might be advised to plead not guilty so that the daily refresher fee is obtained or conversely might be advised to plead guilty as that would bring the same fee for less work. That the system produces such a potentiality is the essential cause for concern.

8.3 There is little incentive to check for unused material. The prosecution has a duty to disclose relevant unused material to the defence. Practicality however dictates that the defence requests disclosure. Where there is disclosure, the material disclosed must be carefully examined. The risk is with a set fee that this examination will not take place or will be done cursorily, again to the detriment of the defendant and indeed to the system.

8.4 There is little incentive to engage experts to counter expert evidence called by the prosecution. This is particularly relevant in view of the additional work required to get the DLA to agree the fees of an expert, to locate the appropriate expert and, if necessary, to arrange for the expert to attend trial, sometimes from overseas.

8.5 Overall the payment of a low set fee may be said to discourage efficiency and does not reward efficiency and excellence. The conscientious solicitor therefore carries out work not because it will be remunerated but because of professional ethics, responsibility and pride in a job well done, to avoid potential detrimental consequences to the defendant and to avoid falling foul of the rules of professional conduct. That, it is suggested, is not the basis upon which a legal aid system worthy of the name should operate.

8.6 An example of the problems which can arise from accepting a set fee case on a take it or leave it basis are illustrated where the defendant will be dealt with in the CFI. The solicitor will generally be instructed only after the defendant has been committed for trial. That committal will invariably have been a short, or paper, committal. In the interest of the defendant the committal papers must be read to consider whether an application should properly be made to a judge for a discharge under s.16 of the CPO, as was done in HKSAR v Yan Pan Yue [2005] 1 HKLRD 648, on the grounds that the evidence disclosed in the documents handed to the (magistrate's) court under s.80C(1) of the Magistrates Ordinance, Cap. 227 is insufficient to establish a prima facie case against the defendant. It may be that the solicitor concludes that no application should be made, but nonetheless the papers must \be read. The solicitor who fails to do that and who fails to advise the defendant about a possible application for discharge is not representing the defendant properly. Time spent on these matters could well exceed the set fee, irrespective of any other preparatory work: again the solicitor's professionalism and attention to detail is not rewarded.

9. Examples of work which is not properly rewarded

- the brief fee is the same regardless of number of documents the solicitor has to read.
- conferences with client.
- conferences with counsel.
- conferences with experts, instructing experts, negotiating fees, obtaining authorization from the DLA for those fees and arranging employment visas for overseas experts to enable them to attend the trial. .
- visiting the police station to view prosecution exhibits (items of real evidence will not be released by the police and it is essential to view these as part of the case preparation).
- visit to scene of crime to assist preparation.
- interviewing potential witnesses: particularly where the defence is an alibi such interviewing is necessary if the defendant's interests are to be protected.
- preparing proofs of evidence of witnesses (which is required by the DLA) and confirming with the witnesses that the proofs are accurate and complete.
- conferences with prosecution to try and agree evidence or resolve issues before trial.
- where the prosecution will rely upon confessions or admissions, considering issues of admissibility and attending a parade to enable the defendant to identify which officers he has accusations against prior to Voir Dire: judges usually require this to be done before the first day of trial to avoid delays.
- following up on unused material disclosed by the prosecution to see if full disclosure has been made or whether, by implication, there is further material which should be disclosed.

10. The complexity of the case

The invariable practice is for the DLA to telephone solicitors inviting them to take on legally aided cases. The solicitor is given very little information about the case before having to decide whether or not to accept it. The brief fee is not negotiable. The solicitor must take it or leave it. By taking it the solicitor enters into an open-ended commitment. The assumption at that stage is that the defendant will plead not guilty. Where a defendant pleads guilty at call over in the DC or has pleaded guilty at committal proceedings before a Magistrate and has been committed to the CFI for sentence, the DLA will usually instruct counsel direct.

11. Comparison with instructions to prosecute

11.1 The position of the defendant's solicitor is very different to that of the solicitor who is instructed to prosecute for the Secretary of Justice.

11.2 The solicitor instructed to prosecute receives very considerable help. The case has been prepared before it gets to the solicitor. The prosecuting solicitor will have a team of police to answer any questions, check evidence, make any further enquiries, get witness summonses and serve them. The Officer in Charge of the Case (OC case) is readily available to provide assistance and clarification.

11.3 The defending solicitor does not receive any assistance but starts completely from scratch: another example of the inequality of arms between the prosecution and the defendant.

11.4 This disparity of approach could be viewed as a deliberate failure to address the inequality of arms issue and is relevant to arguments that the legal aid system as it now operates is not consistent with Article 35 of the Basic Law.

12 Attendant problems of the Set Fee approach

The solicitor assigned to represent a defendant in the CFI or in the DC or on an appeal to the CA or to the CFA may do considerable work and, in the event, not even receive the set fee. In other situations the fee paid to the solicitor does not reflect the work done or the overall costs saving of that work. This can arise in a number of situations.

12.1 *Losing the client*

Defendants in criminal cases often have unrealistic expectations of what the solicitor can do for them. They are variously demanding, concerned, argumentative, in denial, confused and sometimes aggressive. A solicitor may do considerable work, only for the defendant to find the money for private representation near the trial. The solicitor acting under legal aid certificate must then hand over the complete file to the new solicitor. The legally aided solicitor will not receive anything for the work done under the legal aid certificate. Rule 21 only provides a brief fee. As the case has not yet reached trial, no fee is payable under the certificate. The privately instructed solicitor then gets, free of charge, the benefit of all the work done to date.

12.2 *The absconding client*

Defendants fail to appear for trial for a number of reasons. Again a considerable amount of work may have been done. It may be that the defendant will eventually attend court and the

solicitor will receive the set fee and, where appropriate, the daily fee. However there is an element of uncertainty about this and in any event the solicitor has to wait for payment. Similarly where the defendant dies before trial, there will only be a short court appearance to formally dispose of the charge or charges. The set fee may well not reflect the work that had actually been done in anticipation of a not guilty plea. This situation may be alleviated somewhat if the Court can be persuaded to grant a certificate of complexity as discussed below in paragraphs 14 to 14.5 but there is no certainty about that.

12.3 ***Pleading guilty***

It is not unusual for the defendant who has steadfastly protested innocence to plead guilty at trial. There may be a variety of reasons for this. The plea may be after sound advice from the solicitor based upon enquiries the solicitor has made from potential witnesses, from a weakening of resolve as the trial date approaches or from a belated acceptance of guilt. In that event, however much work has been done, the solicitor only receives the set fee, unless the Court can be persuaded to grant a certificate of complexity. Unless that is done no account is taken of the work which underpins the advice to plead guilty. No credit is given for the resultant saving of court time and public money.

12.4 ***Additional Evidence***

Sometimes the guilty plea follows upon notices of additional evidence served by the prosecution. This additional evidence may strengthen the prosecution case to such an extent that the defendant is left with little option but to plead guilty to at least secure a worthwhile reduction in sentence. By that time considerable work may have been done by the solicitor. That work is wasted because of the failure of the prosecution to get its case in order early enough for the defence solicitor to have the full picture: another example of inequality of arms. It is illogical in that situation that work which has been wasted through no fault of the defendant's solicitor should not be properly remunerated. A certificate of complexity might be obtained, but again there is no guarantee. It might be interesting to speculate upon opportunities that might be presented by the Costs in Criminal Cases Ordinance, Cap. 492 to the defendant who is privately represented in that situation.

12.5 ***Reducing or Dropping the charge***

It is not unknown for the prosecution to drop charges before the trial date for a variety of reasons. If the charge is not dropped completely it may be reduced, for example from an attempted murder to a wounding with intent, which may bring about a guilty plea. These situations will now be examined

12.5.1 Private Counsel may be briefed and might take a different view of the strength of the prosecution case. Private Counsel is generally not briefed until relatively close to the trial date, by which time the defence will have done most of its work. The defence cannot afford the luxury of waiting until trial counsel is appointed before preparing its case: to do so would be unprofessional and negligent. Again, unless a certificate of complexity is granted, the legal aid solicitor only receives the set fee. Work that has been properly and necessarily done is not remunerated. Again this presents as an invidious situation and one brought about by the failure of the prosecution to get its house in order early enough.

12.5.2 There may be an offer to plead by one defendant which leads to the prosecution not proceeding against other defendants. The charges may be dropped because the solicitor has negotiated with the prosecution or an offer of a plea to a lesser charge might be accepted. Again the defence solicitor is disadvantaged by the invariable practice of the prosecution not briefing out prosecutions until relatively close to the trial date. Until trial counsel is appointed there is a marked reluctance on the part of the prosecution to negotiate with the defence. Even where Government Counsel will prosecute, trial counsel is assigned only relatively close to the trial date. Until then the prosecution case is controlled by preparation counsel. Preparation counsel is, understandably, reluctant to take responsibility for discussing pleas or other arrangements which might shorten the trial.

12.5.3 The non-appointment of trial counsel until relatively close to the trial date is a handicap to what otherwise could be meaningful negotiation between the defence and the prosecution. New information may have come to light which undermines the prosecution case. It is often in the best interest of the defendant to reveal this to the prosecution in advance of the trial as this might avoid a trial altogether. Indeed this would be consistent with the professional duty to the defendant and the duty to protect public funds. Again, unless a certificate of complexity is obtained only the set fee will be paid.

12.5.4 Where the defence is an alibi, particulars of that must be given to the prosecution before the trial. The prosecution may find the alibi is unbreakable and drop the charges. Unless a certificate of complexity is obtained only the set fee will be paid, irrespective of the amount of work done and irrespective of the overall saving of costs.

13. The Contested Case

No two cases are alike but this section of the Paper sets out some of the matters that will need to be addressed when preparing the defendant's case.

13.1 ***Reading the Paper and Viewing the exhibits***

The prosecution papers must be read before sensible instructions can be taken from the defendant and informed advice given. The prosecution case may be extensive. There may be a considerable quantity of paper exhibits all of which must be read and absorbed if the defendant is to be properly represented. Particularly where the prosecution is relying upon surveillance evidence it will be necessary to view videotapes. These tapes should first be viewed without the client being present to enable the solicitor to form a detached view. The defendant will then be interviewed and shown the video by the solicitor so that instructions can be taken. This assumes that the defendant is on bail. More complications arise where the defendant is in custody.

13.2 ***Taking instructions***

Once the prosecution papers have been read and all exhibits have been viewed, instructions must be taken from the defendant and any defence witnesses.

13.2.1 Witnesses must be interviewed separately and in the absence of the defendant to guard against concoctions and tailoring of evidence and the potentially adverse consequences this could have for the defence case.

13.2.2 Interviewing and proofing witnesses can take up considerable time. Witnesses are, understandably, not able to take time of work to be interviewed: they have to be located and interviewed at their convenience. Proofing witnesses is not the sort of work that can necessarily be delegated to e.g. a trainee solicitor or a junior clerk.

13.3 ***Alibi defences***

This may entail the solicitor undertaking quite considerable work attempting to verify the claimed alibi. Each potential alibi witnesses must be interviewed separately and in the absence of the defendant. Any other procedure is to risk concoction and tailoring of statements with potentially disastrous consequence at the trial. Once all the alibi witnesses have been proofed, the defendant's instructions have to be taken. The defendant must be advised on any issues which arise. If the alibi defence is to proceed, particulars of the alibi must be prepared and served upon the prosecution in advance of the trial.

13.4 ***Expert witnesses***

Expert evidence will often be needed. There may not be a suitable expert within Hong Kong. Time and effort will be expended in locating the expert. The expert then has to be sufficiently briefed so that they can give an opinion. That opinion must then be discussed with the client and with counsel. If the expert is to give evidence at the trial, a work visa will be needed. The

solicitor must attend to that.

13.5 ***Conferences***
Counsel will require at least one conference before the start of the trial. Where expert evidence is involved or the case is complex more than one conference may be necessary. For a variety of reasons the solicitor will need to attend those conferences: indeed counsel may require that attendance.

13.5.1 Apart from the most routine situation, attending counsel at conference cannot be left to trainee solicitors or inexperienced support staff. Allied to conferences attended by counsel, it will generally be necessary to see the defendant several times during the case preparation. If the defendant is in custody there are the attendant difficulties and expenditure of visiting the defendant.

13.5.1 It is worth noting here that Rule 21(f), (g) and (h) provides for additional fees for conferences to be paid to counsel over and above their set fee. The absence of a similar provision for solicitors is anomalous.

13.6 ***Amending charges or serving additional evidence***
It is not unknown for charges to be amended. This can entail considerable extra work for the defence solicitor. Similarly the prosecution may serve Notices of Additional Evidence before the trial. In either event work that has been done may be adversely affected or more work has to be done. Again, through no fault of its own, the defence is put to additional effort and expense. Unless a certificate of complexity is granted only the set fee (and any daily fee) is payable,

14. Certificates of Complexity
The trial judge can grant a certificate of complexity under Rule 21(2) and (3). That certificate enables the DLA to increase the fee payable under Rule 21(1) (a) by such amount as appears to be proper in the circumstances.

14.1 The solicitor must make the case for a certificate of complexity. There is no set criterion for the grant of a certificate of complexity. Essentially it depends upon the view taken by the trial judge based on events in the courtroom. Judges will generally have little or no appreciation of the preparation wok involved. What may, in fact, have been a complex case during the preparation for trial may not appear complex to the trial judge because the quality of the preparation (and co-operation between the defence and the prosecution) enabled the trial to

run smoothly. The more smoothly the trial runs, the less complex it appears. Absent a detailed consideration of the solicitor's file, and there would be obvious problems with the trial judge seeing the file, the trial judge will not have any worthwhile appreciation of the work done. The irony is that a certificate of complexity could be refused because the quality of the preparation anticipated and addressed in advance possible complications at trial.

14.2 There is no appeal from the refusal of the trial judge to grant a certificate of complexity.

14.3 Even if a Certificate of Complexity is granted, the DLA is simply given discretion to allow fees above the Rule 21 levels. There is no obligation upon the DLA to exceed the payments set out in Rule 21. If the DLA decides to exceed the payments set out in Rule 21, the practice is to pay an increased brief fee. This is arbitrary and takes no account of work actually done. Any increased brief fee or daily fee is on a take it or leave it basis.

14.4 There is no appeal from the refusal of the DLA to award fees above the levels in Rule 21.

14.5 Rule 21 (2) in any event imposes a high standard as the reference is to exceptional length or complexity. It is suggested that this is too high a standard and is, in any event, in conflict with Rule 21(1) which refers to work actually and reasonably done. A case which is not of exceptional length and complexity may well merit an additional payment to the solicitor where professionalism and expertise has brought about an overall saving of costs.

15. Work after conviction

It is the professional responsibility of solicitor and counsel to see the defendant after conviction and give preliminary advice on the prospects of an appeal.

15.1 Rule 9 imposes additional duties on the solicitor acting under a Legal Aid Certificate. The solicitor must provide the DLA with a certificate stating whether there is or is not a reasonable ground for appeal and, if there is settle the grounds of appeal and if the legally aided person proposes to appeal, give notice of the appeal or of an application for leave to appeal and attend to any matter preliminary thereto. This is very much an open commitment for which the solicitor is not remunerated.

15.2 The DLA will only grant a legal aid certificate under Rule 11 upon being satisfied that legal aid should be granted. The work referred to in Rule 9 must be done before the DLA considers the application for an appeal aid certificate. The relevant Practice Directions on appeals to the CA and to the CFA, annexed to this Paper as ***Appendix 8***, must be complied with.

Quite extensive work may need to be done, and done quickly, to protect the interests of the convicted person without any remuneration for the solicitor concerned. A further anomaly is that the solicitor who does all this work may not be assigned the appeal.

16. Appeals to the Court of Appeal (CA)

The amount of work that needs to be done will vary from case to case. A solicitor acting under an appeal aid certificate may be confronted with unanticipated, complex and time consuming issues: for example the admissibility of new evidence or issues arising from an apparent failure by the prosecution to disclose relevant unused material in advance of the trial. Whilst a certificate of complexity can be granted by the CA, this is not usually done.

17. Appeals to Court of Final Appeal (CFA)

17.1 There is little in the Rules about appeals to the CFA. Rule 13 refers to appeals to the CFA but only in relation to proceedings involving charges of murder, treason or piracy with violence. There is no mention of the CFA in Rule 21. Appeals lie to the CFA in criminal cases only where "*a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done*". By implication these are complex and involved cases. The CFA is not simply a second Court of Appeal.

17.2 .In practice the DLA contacts the solicitor and offers a fee for preparation and daily refresher. This is again an open-ended commitment. Professional responsibility will likely result in the solicitor accepting instructions because he or she represented the appellant in the court or courts below. Again the fee may well not cover the work that has to be done. The incongruity of CFA appeals being inadequately funded and the element of pro bono work that is consequentially required should be obvious.

18. Unexpected work on Appeals

Appeals are often, or may become, complex. This will be particularly so in appeals to the CFA given the requirements that have to met before the CFA can hear an appeal. Even in what may be termed routine appeals there may, for example, be several appellants, all of whom may be legally aided. For perfectly good reasons separate representation may be essential if individual interests are to be protected. In such cases appeal courts have been known to order the preparation of a common bundle of authorities rather than each party producing its own bundle. That order may well be advantageous to the court but the burden of preparing that bundle will

almost inevitably fall upon the lawyers for the First Appellant. This results not only in additional unremunerated extra work but the incurring of additional costs of photocopying the necessary documentation. In other cases complex issues of the admissibility of new evidence may arise. Even with a certificate of complexity work actually, reasonably and properly done may not be remunerated

19. Legal Aid and the Costs in Criminal Cases Ordinance Cap. 492, (CCCO)

The CCCO brings awards of costs in criminal cases in line with the award of costs in civil proceedings. Though orders for costs are discretionary, costs should follow the event. Costs may be awarded against the prosecution or against the defendant. Those costs are not to be punitive but "*shall be such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for any expenses properly incurred by him in the course of those proceedings, including any proceedings preliminary or incidental thereto*".

19.1 The Ordinance contains various provisions about the calculation of costs, but the recurrent theme is that costs shall be such sum as a court or a judge considers just and reasonable. Account is therefore taken of the work done in the particular case. Provision is made for the taxation of costs. Where an order for taxation of costs is made, costs in the magistrate's court and in the District Court are taxed by the Registrar of the District Court. Where an order for taxation is made by a judge or by the Court of Appeal, those costs shall be taxed by the Registrar of the High Court.

19.2 The principle that costs under the CCO should be "*such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for any expenses properly incurred by him in the course of those proceedings, including any proceedings preliminary or incidental thereto*" recognises that there should not be any upper limit on awards of costs and that costs should depend on the quality and necessity of the work actually and properly done in the particular case.

19.3 The CCO has put in place a sophisticated structure for the assessment of costs in criminal cases. That sophistication and the recognition that costs are compensatory is in sharp contrast to the arbitrary and restrictive approach to fees under the Rules. There is an apparent, and serious anomaly.

20. Analysis

The matters addressed in this paper underline the need to give immediate and thorough attention to the question of how legally aided criminal defence work is resourced. The present

system of a set fee and daily fees does not adequately remunerate those who engage in this work. This has serious implications for the criminal justice system. There is a public interest in criminal cases being conducted professionally, efficiently and expeditiously. Legal aid defence is becoming, if indeed it has not already become, a pro bono exercise. The criminal legal aid scheme is funded by the practices of the lawyers assigned to represent the legally aided defendant. In short Hong Kong has a criminal legal aid system on the cheap. The question is how much longer that approach can continue.

20.1 Over the last five years Hong Kong has undergone a period of deflation during which prices have either dropped or remained constant. Indications are that that situation is now changing. There are reports of rents in Central District increasing by over 30% in the last 12 months. Clearly, as is evidenced by 40.96 percent increase in Stamp Duty revenue over the amount in 2003-4, the property market is active. Interest rates are rising. Pressures are building up for wages and salaries to increase. On 10th May 2005 the SCMP carried a report of a landlord in Central raising the rent of a business premises from $38,000 per month to $80,000 per month. The revenue from both salaries and profits tax for 2004-05 has increased by some 20% over 2003-04. Inevitably costs will rise.

20.2 If the criminal justice system is to continue to operate, solicitors must be sufficiently well remunerated that they remain in practice. The current proposal to reduce legal aid fees is unrealistic and illogical against the anticipated all around increase in costs.

20.3 Hong Kong, rightly, takes pride in the rule of law and the openness and fairness of its society. The criminal law brings the citizen into contact with the State. It is therefore a matter of self-interest for the State to ensure that those who are brought before the criminal courts are properly and professionally represented so that justice is seen to be done. That is indeed the spirit of Article 35 of the Basic Law. An efficient and effective criminal legal aid system is fundamental if that spirit is to be adhered to.

21. Suggestions

A number of possible solutions may be considered.

21.1 *Increase the daily fee and the refresher.*

Attractive as this might seem, it is not the answer. It would simply perpetrate the present arbitrary and unsatisfactory system and perpetuate an upper limit on fees. The objective must be to achieve the most effective use of resources by looking at the criminal justice system as a whole. This means taking account of savings that will follow from more efficient use of court

time, more attention to pre-trial considerations and improvements in prosecution practices. Essentially what needs to be achieved is a system that rewards efficiency and excellence so that there is an overall saving of resources. How then might this be achieved?

21.2 ***Assess remuneration "having regard to the work actually and reasonably done"***

Implementation of this principle would, it is suggested, result in a merit based approach to remuneration. Hourly rates for different types of work and for different categories of fee earners might be used as a guideline but the overall approach would be based upon efficiency and upon excellence. The nature and complexity of the case and the way in which it was dealt with by the assigned lawyer would dictate the remuneration.

21.3 ***How might this be achieved?***

There is a long established system of taxation of costs in civil litigation. There is now a taxation process in criminal litigation under the CCO. This system is close to the system of taxation of costs in civil litigation. Whilst costs normally follow the extent, the taxation system enables successful parties to recover only such costs as they can justify to the taxing officer. This makes it incumbent upon solicitors to keep careful records of work done and, more important, to justify that work and the way in which it was done to a taxing officer. The taxing officer is a professional, an officer of the court and is independent of the parties.

21.4 The machinery for taxation of costs in criminal cases under the CCCO could be used to assess remuneration under a legal aid certificate. This would have the merit of tapping into an established system. It could also lead to a unified approach to costs and fees throughout criminal litigation. The legal aid solicitor would put in an itemized claim to the DLA. The DLA could accept that claim or not. If the claim was not accepted then there would be taxation. This would leave the solicitor to justify the claim to the taxing officer. This would bring both transparency and the remuneration of work actually and reasonably done.

21.5 The debit side of going to taxation is that the process can be lengthy. Cash flow is an important consideration and it would be appropriate to consider how taxation procedures might be improved. One possibility might be for a basic payment to be made either when the solicitor is assigned or upon the completion of the trial. A basic payment when the solicitor is assigned would at least go some way towards alleviating the problem of the defendant who arranges private representation shortly before the trial.

21.6 *Extra Resource Implications.*

Almost inevitably a taxation system will lead to solicitors being more appropriately remunerated than they now are. There will however be costs savings to offset that increase. Cases will likely be dealt with more efficiently. There will be some additional taxations but it is not thought that this will overload the existing machinery. The premium will be upon the solicitor justifying what has been done. Any views expressed by the trial judge could be taken into account on taxation. This would be particularly relevant where an apparently complicated or lengthy case has been shortened because of the way it has been dealt with.

21.7 *Practical Considerations.*

Abolition of the daily fee and refresher fees in favour of remuneration on a work actually and reasonably done basis will impose additional burdens upon solicitors. Work that is not actually and reasonably done will not be remunerated. This places a premium upon excellence, professionalism and accurate record keeping. As the claim for costs will only come to the taxing officer if there is disagreement, the views of the DLA about the requested costs will be before the taxing officer and will be the starting basis for the taxation. Work that is not justified to the taxing officer will not be paid for. This is certainly not the creation of an open cheque for solicitors. The disallowance of costs is a powerful sanction. Incompetence or attempts to claim for work that has not been done that might be revealed on a taxation could lead to action by the Law Society, by the DLA removing the solicitor (and perhaps their firm) from the Panel of Solicitors kept under Rule 3(1) or, where appropriate, by criminal proceedings.

21.8 *Orders for Costs*

Under the CCOO costs are at the discretion of the court. As a general principle, costs will follow the event. Where a legally aided defendant is acquitted, the practice is not to award costs, other than the amount of any legal contribution, upon the basis this would simply be a transfer of funds from one Government Department to another. It might be appropriate to re-visit that approach. If the solicitor appointed under a legal aid certificate is to be paid on the basis of work that was necessary, might it not lead to an overall increase in efficiency if upon an acquittal of a legally aided defendant the prosecution were ordered to pay costs. This might entail, for example, the prosecution putting its mind to accepting an offer of a plea to a lesser offence at an early stage in the proceedings. Again there would be an overall saving of costs

22 Conclusions

This paper has shown there are serious deficiencies in the present criminal legal aid scheme. In essence the present scheme does not recognize work properly and efficiently done. It does not reward excellence. It is, in short, a criminal legal aid scheme on the cheap.

22.1 The scheme has only continued because of the professionalism and responsibility of those solicitors who are prepared to take on what is effectively pro bono work. This is a situation which cannot be allowed to continue. As Mr. Philip Dykes SC Chairman of the Hong Kong Bar Association in his address at the Opening of the Legal Year 2005 observed, the adequate remuneration of those engaged in legally aided defence work is a genuine rule of law issue. Though he was addressing the issue from his position as Chair of the Bar, his remarks are no less apposite to the remuneration of solicitors who undertake criminal defence work for legally aided clients.

22.2 Reference has already been made to the EHCRs censure of the United Kingdoms failure to afford legal aid in defamation proceedings to defendants who were without means. The non-availability of legal aid had deprived those defendants of the opportunity to present their case effectively before the trial court and "contributed to an unacceptable inequality of arms" with the plaintiffs. All that was in the context of civil litigation. There is an even greater need to address inequality of arms in criminal litigation. An essential element in addressing that inequality is the adequate remuneration of lawyers engaging in criminal legal aid work.

The Law Society of Hong Kong
1 June 2005

Annex C
附件 C

法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: in LASC/CR 2/2/1 Pt.4
Yr Ref :

E-mail : ceolasc@netvigator.com
Web-site : http://www.info.gov.hk/lasc/
Tel : 2838 5037

26 October 2005

Ms CHANG King Yiu
Director of Administration
Chief Secretary for Administration's Office
12/F, West Wing, CGO
Central, Hong Kong

Dear King Yiu ,

Review of Legal Aid in Criminal Cases

The Hong Kong Bar Association has drawn our attention to the necessity of reviewing the Legal Aid in Criminal Cases Rules (LACCRs). Subsequently we became aware that the Law Society had written to the Government in a similar vein. The issues they raised were considered by Council at its recent meetings.

The question of criminal legal aid fees has been a subject of deliberation before, and as we observed, the Administration should undertake a comprehensive review on the remuneration system in the belief that any question on fees should not affect the quality or delivery of legal aid service. As you know, we are currently studying the consultants' report on cost control and monitoring of case progress to explore avenues to enhance value for money. We are conscious that public funds are expended to uphold justice, and that effective representation should be provided to those in need and eligible for legal aid, within the limits of public affordability.

Specifically, Council would like to make the following points :

(1) Work actually and reasonably done by lawyers should be paid. This principle is set out in LACCRs, but has not been given full effect in implementation. The Rules stipulate specific rates which are regarded to be low by the legal profession.

While the Court may grant certificates of exceptional complexity and/or of exceptional length upon application by legal aid lawyers, and thus allow the Director of Legal Aid (DLA) to award a top-up fee, this is not entirely satisfactory because the judge may not see all work done by the lawyers and may refuse the application even if it is supported by the DLA.

(2) The Rules were made some decades ago. As Hong Kong has grown from a small community to an international city, from a trading economy to a sophisticated commercial centre, and with the increase in complexity in jurisprudence, these Rules are no longer able to cope with the realities of today. There is therefore a need to review the Rules overall. The Rules seem to assume all cases can be prepared with ease and in a relatively short time. That might have been a fair assumption several decades ago. Today with greater complexity of cases the assumption is not justified; some criminal cases require days and sometimes weeks to prepare.

(3) The principle of equality of arms should be upheld in the court process. Information provided by the profession suggests that there is a great deal of room for improvement in that the fees and the fee structure between prosecution and legal aid defence are not balanced, and the support in kind to the prosecution, e.g. through the bureaucracy of the Administration outweighs the resources of the defence. For instance, LAD is subject to the rigidity of LACCRs while the Department of Justice (D of J) has much greater flexibility. While LAD is bound to pay fees according to LACCRs, the D of J adopts the same scale of fees to outside practitioners on an administrative basis. D of J may pay "reading in" refreshers to practitioners for cases requiring more preparation time than as required in ordinary cases.

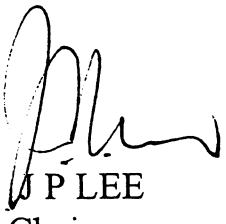
(4) It appears that the Rules Committee rarely meets and there is a need for the work of the Committee to be more transparent to those who are concerned, including the legal profession.

(5) Proper preparation and representation of a case can cut costs for all parties concerned, e.g. the prosecution, the court, and the defence. For example, the remuneration system should be revised to encourage thorough pre-trial preparation of case. As it currently stands, LACCRs do not provide sufficient remuneration for lengthy preparation required by judges and practice directions, especially in complex cases such as those involving commercial fraud.

(6) The Rules should be reviewed to allow for greater fairness and flexibility. The current arrangement of brief fee, refresher, and certificate of complexity or of exceptional length may hamper rather than facilitate adequate representation for the defendant.

We will be happy to offer further views in the course of the review and look forward to be kept posted of developments.

Yours sincerely,



J P LEE
Chairman

c.c. The Hon Margaret NG
Chairman of the Legislative Council Panel on
Administration of Justice and Legal Services

JPL/rc