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## INFORMATION NOTE

### Conviction rates in selected places

#### 1. Background

1.1 The Prosecutions Division of the Department of Justice reported in its *Yearly Review of the Prosecutions Division 2008* that Hong Kong's conviction rates in the Court of First Instance and the District Court in 2008 were 94.8% and 92.6% respectively.<sup>1</sup> In the preface of a widely used law book, *Archbold Hong Kong 2010*, Clive Grossman SC expressed his concerns about the high conviction rates in Hong Kong, which he wrote as "probably approaching that of North Korea" and "an arrested person is statistically almost certain to face imprisonment"<sup>2</sup>. The Chief Justice described this remark as an "ill-considered and intemperate outburst" and "is totally unjustified and wholly misconceived".<sup>3</sup>

1.2 To facilitate discussion on the issue by the Panel on Administration of Justice and Legal Services, the Research and Library Services Division was requested to provide relevant information in other common law jurisdictions. In this connection, this note provides information relating to conviction rates and criminal legal aid in England and Wales of the United Kingdom, Canada<sup>4</sup> and Australia. These places are selected because they are common law jurisdictions and relevant statistics are available. In addition, Grossman's comment and feedback from the former Director of Public Prosecutions, as well as opinions of the Hong Kong legal profession and legal scholars on this issue are covered in this note.

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<sup>1</sup> Department of Justice (2009) p.102.

<sup>2</sup> Clive Grossman SC wrote in the preface that "any person who is arrested on a serious or relatively serious charge is almost certain to be convicted and since the convictions are in the District and High Courts, imprisonment is almost always the norm. Given the paucity of successful appeals (save for the Department of Justice's Review of Sentences) an arrested person is, statistically, almost certain to face imprisonment".

<sup>3</sup> *South China Morning Post*, 15 September 2009.

<sup>4</sup> Conviction statistics of Canada used in this note do not represent national total figures. They are figures released by the Public Prosecution Service of Canada. In Canada, there are prosecution authorities at both federal and provincial levels. The Public Prosecution Service of Canada is a federal government organization which is responsible for prosecuting offences under federal statutes in all the 10 provinces and three territories of Canada, and also offences under the Criminal Code in all the three territories of Canada.

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## 2. Conviction rates and related issues

### Breakdown of overall conviction rates

2.1 As shown in **Table 1**, in 2008, Hong Kong's overall conviction rates in the District Court and the Court of First Instance were 92.6% and 94.8% respectively, which were higher than those of the Crown Court in England and Wales (80.9%), Canada (69.4%) and the District Court and the Supreme Court in Australia (78.6%).

2.2 The former Director of Public Prosecutions, Grenville Cross SC, made the point that the figures quoted by Grossman for convictions in the Court of First Instance and the District Court were overall rates, covering both guilty and not guilty pleas.<sup>5</sup> In this connection, **Table 1** gives a breakdown of overall conviction rates. Taking out the number of guilty pleas, the conviction rates in 2008 in the District Court and the Court of First Instance in Hong Kong were 20.2% and 19.8% respectively, whereas the corresponding conviction rates in the three selected overseas jurisdictions were all below 9%.

2.3 **Table 1** also shows that the conviction rates of the District Court and the Court of First Instance in Hong Kong had been higher than those of the selected jurisdictions in the past three years. In particular, the conviction rate of the Court of First Instance in Hong Kong had been increasing: the overall conviction rate rose from 92.3% in 2006 to 94.8% in 2008, and the "convictions after trial"<sup>6</sup> increased from 17.2% in 2007 to 19.8% in 2008. As regards England and Wales and Australia, a downward trend in the "convictions after trial" had been observed in the past three years.

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<sup>5</sup> *South China Morning Post*, 15 September 2009.

<sup>6</sup> It refers to the proportion of cases in which the defendant pleads not guilty but is convicted after the evidence is heard.

**Table 1 – Overall conviction rates, guilty pleas and convictions after trial in the selected places and Hong Kong (in %)**

	Hong Kong <sup>(1) (2)</sup>		England and Wales Crown Court	Canada <sup>(3)</sup>	Australia District Court & Supreme Court <sup>(4)</sup>
	District Court	Court of First Instance			
<b>2006-2007</b>					
Overall conviction rates	91.8	92.3	77.3	Not comparable	79.1
Guilty pleas	65.5	68.3	68.1		69.9
Convictions after trial	26.3	24.0	9.2		8.8
<b>2007-2008</b>					
Overall conviction rates	90.5	93.4	79.3	Not comparable	78.9
Guilty pleas	69.5	76.2	71.4		69.7
Convictions after trial	21.0	17.2	7.9		8.2
<b>2008-2009</b>					
Overall conviction rates	92.6	94.8	80.9	69.4	78.6
Guilty pleas	72.4	75.0	73.2	61.8	68.7
Convictions after trial	20.2	19.8	7.7	7.6	8.2

Notes: (1) Statistics are in calendar year, which are figures in the years 2006 to 2008 respectively.

(2) Statistics are provided by the Department of Justice. According to the Department of Justice, these figures are calculated on a basis consistent with those of the selected places. Such calculation method is different from the one used in LC Paper No. CB(2)2613/08-09(01) that the Department submitted to the Panel on Administration of Justice and Legal Services in October 2009.

(3) The method of presenting statistics in 2008-2009 differs from the previous two years, making the figures not comparable.

(4) The total figures include a small number of "charges proven not further defined".

2.4 A legal scholar suggests that a comparison of conviction rates at different levels of courts and different types of crimes might be more revealing. In particular, one should look into the types and number of crimes that have been taken into consideration when compiling the overall conviction rate, as the final figure might be distorted because of conviction of a large number of petty crimes.<sup>7</sup>

2.5 Although breakdown of conviction rates into categories of offences is not available, **Table 2** includes conviction rates at different levels of courts. Unlike England and Wales and Australia where the overall conviction rates of the lower courts had been higher than those of the higher courts in the past three years, the opposite trend had been observed in Hong Kong: the conviction rate of the Magistrates' Court in Hong Kong had been lower than those of the higher courts in the past three years.

**Table 2 – Overall conviction rates at different levels of courts in the selected places<sup>(1)</sup> and Hong Kong (in %)**

	Hong Kong <sup>(2)</sup>			England and Wales		Australia	
	Magistrates' Court	District Court	Court of First Instance	Magistrates' Court	Crown Court	Magistrates' Court	District Court & Supreme Court
<b>2006-2007</b>	76.7	91.8	92.3	84.2	77.3	86.3	79.1
<b>2007-2008</b>	76.6	90.5	93.4	85.7	79.3	87.4	78.9
<b>2008-2009</b>	73.3	92.6	94.8	87.3	80.9	86.9	78.6

Notes: (1) Relevant figures for Canada are not available.

(2) Statistics are in calendar year, which are figures in the years 2006 to 2008 respectively.

<sup>7</sup> Email correspondence with Professor Johannes Chan, Dean of the Faculty of Law, the University of Hong Kong, 13 October 2009.

## Jury trials

2.6 Hong Kong's high conviction rate has also raised concern in the legal profession about the lack of jury trials in the District Court. Although the impartiality of judges sitting alone in the District Court has not been questioned, some lawyers in Hong Kong have asked for the extension of the jury system to the District Court.<sup>8</sup> The Hong Kong Bar Association and the Law Society of Hong Kong have also formed a specialist committee to consider the related issues.<sup>9</sup>

2.7 **Table 3** shows the conviction rates of jury and non-jury trials in the selected jurisdictions and Hong Kong. In all the selected jurisdictions and Hong Kong, the conviction rates of jury trials had been higher than those of non-jury trials in the past three years. Nevertheless, the conviction rate of jury trials in Hong Kong was higher (19.8% in 2008) than that of England and Wales (7.7%) and Australia (8.2%).

**Table 3 – Convictions rates of jury and non-jury trials in the selected places<sup>(1)</sup> and Hong Kong (in %)**

	Hong Kong <sup>(2) (3)</sup>			England and Wales		Australia	
	Non-jury trials		Jury trials (Court of First Instance)	Non-jury trials (Magistrates' Courts)	Jury trials (Crown Court)	Non-jury trials (Magistrates' Courts)	Jury trials (District Court & Supreme Court)
	Magistrates' Courts	District Courts					
<b>2006-2007</b>	34.9	26.3	24.0	3.5	9.2	6.2	8.8
<b>2007-2008</b>	32.6	21.0	17.2	3.8	7.9	5.8	8.2
<b>2008-2009</b>	31.3	20.2	19.8	3.6	7.7	6.1	8.2

Notes: (1) Relevant figures for Canada are not available.

(2) Statistics are in calendar year, which are figures in the years 2006 to 2008 respectively.

(3) Statistics are provided by the Department of Justice. See note (2) of Table 1.

<sup>8</sup> *South China Morning Post*, 5 October 2009. The issue has been discussed in the Legislative Council on several occasions. The most recent one was raised at the meeting of the Panel on Administration of Justice and Legal Services on 15 October 2009. Members agreed to include the subject on the Panel's list of outstanding items for discussion.

<sup>9</sup> Hong Kong Bar Association and Law Society of Hong Kong (2009).

2.8 Some commentaries suggest that since Hong Kong jurors have higher educational level, they may be more conservative and more likely to convict.<sup>10</sup> In Hong Kong, jurors are required to have "sufficient knowledge of the language of the court proceedings", but there is no such language proficiency requirement in the selected jurisdictions. Since English is the language of the court proceedings in most of the criminal trial cases in Hong Kong,<sup>11</sup> it is generally believed that Hong Kong jurors may have higher educational level than their counterparts in the selected jurisdictions. However, there is no scientific research supporting that jurors with higher educational level are more likely to convict.

### Criminal legal aid

2.9 The legal profession offers two plausible explanations for the high conviction rates in Hong Kong.<sup>12</sup> The first one is the lack of resources for criminal defence. The Government's low expenditure on criminal legal aid has long been a concern of the legal practitioners and community organizations in Hong Kong. They worry that the expenditure on criminal legal aid might be too low to do justice.<sup>13</sup> **Table 4** shows the criminal legal aid application statistics in the selected jurisdictions and Hong Kong in the past three years, and **Table 5** compares their criminal legal aid expenditures. It is noted that the criminal legal aid's grant rate and its expenditure per capita of Hong Kong had been compared unfavourably with the selected jurisdictions in the past three years.<sup>14</sup>

<sup>10</sup> Editorial, *South China Morning Post*, 19 September 2009; 陳文敏 (2009); Email correspondence with Professor Johannes Chan, 13 October 2009.

<sup>11</sup> The proportion of criminal trial cases in the Court of First Instance heard in English was 75.3% in 2007 and 76.2% in 2008 respectively, see Department of Justice (2009) p.105.

<sup>12</sup> Huen Wong, President of the Law Society of Hong Kong, cited from 《明報》· 2009年10月21日。

<sup>13</sup> 朱穎雪 (2009). The author is the representative of the Law Society of Hong Kong.

<sup>14</sup> According to the data released by the World Bank, in 2008, the gross domestic product PPP per capita of Hong Kong was the highest among the places under this study. Specifically, the gross domestic product PPP per capita, in international dollars, were 43,955 in Hong Kong, 39,078 in Canada, 38,784 in Australia, and 35,468 in the United Kingdom. Nevertheless, the amount of total legal aid expenditure per capita in these places in 2008-2009 was in the opposite ranking order: £38.2 (HK\$439.4) in England and Wales, AU\$24.6 (HK\$172.5) in Australia, CAN\$17.6 (HK\$132.0) in Canada, and HK\$61.4 in Hong Kong.

2.10 The lack of resources for criminal legal aid provision has aroused the concern of the legal profession. In particular, the legal aid fees for criminal cases have been criticized as being too low. The Hong Kong Bar Association has described the legal aid fees for criminal cases as "absurdly low and in some instances, derisory" and there are problems in the legal aid fees system.<sup>15</sup> The Law Society of Hong Kong has also enunciated its concern that the lack of resources for criminal legal aid provision might discourage experienced counsels from taking up criminal legal aid cases, and in the long run, it might discourage young practitioners from developing their career in criminal case practice and thus endangering the functioning of the whole legal system.<sup>16</sup> In January 2010, the Legal Aid Department reported that a broad consensus had been reached with the legal profession to increase the legal aid fees for criminal cases, and it had also planned to increase the criminal legal aid expenditure by about HK\$100 million.<sup>17</sup>

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<sup>15</sup> For instance, criminal legal aid fees are calculated in the first instance by reference to the level of the court in which representation is provided and not by the nature and complexity of the case, while the same situation does not pertain to fees for civil cases, see Legislative Council Secretariat (2009d).

<sup>16</sup> 朱穎雪 (2009).

<sup>17</sup> Legislative Council Secretariat (2010).

**Table 4 – Application statistics of criminal legal aid in the selected places<sup>(1)</sup> and Hong Kong**

	Hong Kong <sup>(2)</sup>	Canada	Australia
<b>2006-2007</b>			
Applications received	3 779	321 279	125 692
Applications approved	2 379	261 308	113 463
Grant rate	63.0%	81.3%	90.3%
<b>2007-2008</b>			
Applications received	3 765	320 777	130 253
Applications approved	2 492	265 275	119 305
Grant rate	66.2%	82.7%	91.6%
<b>2008-2009</b>			
Applications received	3 413	333 239	112 726
Applications approved	2 253	280 277	102 407
Grant rate	66.0%	84.1%	90.8%

Notes: (1) Figures for England and Wales are not included because comparable statistics are not available.

(2) Statistics are in calendar year, which are figures in the years 2006 to 2008 respectively.



**Table 5 – Criminal legal aid expenditure<sup>(1)</sup> in the selected places<sup>(2)</sup> and Hong Kong**

	Hong Kong	England and Wales	Canada
<b>2006-2007</b>			
Total population (in million)	6.9	53.7	32.6
Total expenditure (in million)	HK\$105.5	£1,195.7 (HK\$13,754.1)	CAN\$276.1 (HK\$2,070.2)
Expenditure per capita	HK\$15.3	£22.3 (HK\$256.5)	CAN\$8.5 (HK\$63.7)
Percentage of total legal aid expenditure	25.2%	62.1%	51.2%
<b>2007-2008</b>			
Total population (in million)	7.0	54.1	32.9
Total expenditure (in million)	HK\$97.2	£1,140.2 (HK\$13,115.7)	CAN\$282.1 (HK\$2,115.2)
Expenditure per capita	HK\$13.9	£21.1 (HK\$242.7)	CAN\$8.6 (HK\$64.5)
Percentage of total legal aid expenditure	22.7%	61.7%	52.3%
<b>2008-2009</b>			
Total population (in million)	7.0	54.4	33.3
Total expenditure (in million)	HK\$82.8	£1,162.9 (HK\$13,376.8)	CAN\$306.2 (HK\$2,295.9)
Expenditure per capita	HK\$11.8	£21.4 (HK\$246.2)	CAN\$9.2 (HK\$69.0)
Percentage of total legal aid expenditure	19.3%	56.0%	52.2%

Notes: (1) In calculating the criminal legal aid expenditure, the administrative/employment costs of legal aid provision and the costs of duty lawyer services are excluded.

(2) Figures for Australia are not included because criminal legal aid expenditure cannot be distinguished from the total amount.

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## Other opinions

2.11 The second explanation for the high conviction rates in Hong Kong as suggested by the Hong Kong legal profession is that the Department of Justice prosecutes only with overwhelming evidence, and its rate of success is therefore high. Some legal scholars also opine that reference to conviction rates alone is not enough. One should look into the number of cases being screened out. If a lot of cases are being screened out and only strong cases are prosecuted, then a high conviction rate is expected.<sup>18</sup> The former Director of Public Prosecutions concurs that "reasonable conviction rates are a pointer to the fact that only the cases which should be prosecuted are being prosecuted".<sup>19</sup>

2.12 A legal scholar considers that it would be more revealing to compare the conviction rates in unrepresented as opposed to represented cases and the experience of the counsels in represented cases.<sup>20</sup> In particular, to what extent inexperienced defence lawyers have contributed to Hong Kong's high conviction rate is an issue of concern. However, no data is available in this respect.

2.13 The legal scholar also considers that procedural and evidential rules may influence the conviction rates. For instance, the use of reverse onus clauses<sup>21</sup> is more prevalent in Hong Kong.<sup>22</sup> Another factor that may be of importance is the rule on hearsay evidence. The system in Hong Kong still relies heavily on oral testimony, which is dependent on the availability of witnesses.<sup>23</sup> In this regard, it is much easier for witnesses in Hong Kong to go to the court and give evidence because Hong Kong is a small place, but it might cause a problem for witnesses in other jurisdictions to travel over a large territory to give evidence in court.

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<sup>18</sup> Simon Young, Director of the Centre for Comparative and Public Law, the University of Hong Kong, cited from *South China Morning Post*, 15 September 2009; Telephone correspondence with Eric T. M. Cheung, Assistant Professor in the Department of Professional Legal Education, the University of Hong Kong, 9 October 2009. Studying the conviction rate in Japan, Ramseyer & Rasmusen (2001) suggested an explanation of the high conviction rates in Japan. They said that understaffed prosecutors would present judges with the most obviously guilty defendants. Another study by Rasmusen, Raghav & Ramseyer (2009) on the conviction rates in Japan and the United States also made similar observations.

<sup>19</sup> *South China Morning Post*, 15 September 2009.

<sup>20</sup> 陳文敏 (2009); Email correspondence with Professor Johannes Chan, 13 October 2009.

<sup>21</sup> A reverse onus clause is a provision that shifts the burden of proof onto the defendant in a criminal offence. This is a kind of exception to the normal rule that a defendant is presumed to be innocent until he or she is proved guilty and it is the duty of the prosecution to prove its case.

<sup>22</sup> Email correspondence with Professor Johannes Chan, 13 October 2009.

<sup>23</sup> Ibid.

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