

**Submission of the Hong Kong Bar Association
on the Biennial Review of
Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees**

Introduction

1. By a letter dated 28th June 2013 from the Home Affairs Bureau ("HAB"), the Hong Kong Bar Association ("HKBA") is informed that the 2012 Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fee has been completed and it is recommended that the various fees be increased by 9.3% along with inflation up to July 2012.

2. The structural defects in the review mechanism have still not been rectified. The perennial problems of inadequately low fees for legally aided criminal cases have not been addressed. As a result of inadequate fees, complex and difficult cases which would otherwise justify the use of more senior and experienced counsel, have been handled by less experienced counsel which is not conducive to the proper administration of justice.

3. This submission identifies some sources of the problem and defects in the system of review of fees and demonstrates that this is just another example of the Legal Aid Department (as a government department) becoming moribund and not responding to needs and not providing adequate access to justice.

Defects of the Review Mechanism

Undue Delay - Adjustment Substantially Lagging Behind Inflation

4. The Biennial Review takes into account inflation in accordance with Consumer Price Index (C), which is a mechanical exercise. No consideration is given to the adequacy of base figures in light of societal and economic changes and other relevant factors such as the very substantial increases in rent, labour costs and

other overheads, which are way above that reflected in the Consumer Price Indices.

5. The Biennial Review 2012 is late and falling behind inflation. The figures are supposed to adjust for inflation as of July 2012 (over July 2010). Without prejudice to the HKBA's submission on the structural defects of the review mechanism hereinafter, this is a very simple adjustment. Therefore, there is no reason for this to be delayed from July 2012 to June 2013.
6. It is already October 2013 and chances are that the proposed adjustment will not take effect until the end of 2013 at the earliest (i.e. 1 1/2 years out of date before they even come into effect).
7. Based on the current figures for inflation, by December 2013, inflation would have increased by at least another 4.3% (i.e. actual figures year-on-year of August 2013 over August 2012). **HKBA therefore proposes that in order to catch up, the adjustment should be at least 13.6% (i.e. 9.3% + 4.3%)** at this stage so that the figure is less out of date when it starts.
8. More importantly, subject to ratification of the institutional problems identified hereinbelow, **a mechanism for timely increase should be put in place to avoid undue delay in future.**

Inadequacy of the Base Figures Not Addressed

9. The proposed adjustment of 9.3% is only on account of inflation and nothing else. No consideration whatsoever is given for the fact that the base rate (of un-stated origin) is manifestly and unreasonably low.
10. Hence, the remuneration for members of the Bar undertaking legally aided criminal work is falling more and more behind that of lawyers in Government

employment and members of the judiciary of comparable standing. By way of example and illustration in 1975:

- (a) the basic salary of a Legal Aid Officer was about \$3,500 per month plus gratuity and now it is over \$50,000, a 14-times increase.
- (b) the salary of the Director of Legal Aid was \$13,000 per month, similar to a District Court Judge, which must now be in excess of \$150,000 or more, a 10-times increase.
- (c) Geoffrey Briggs CJ was on \$24,000 per month and Ma CJ is now on a salary of \$340,000, again a 14-times increase.

11. Using the foregoing figures as a yardstick, Legal Aid murder briefs in 1975 were \$10,000 and refresher \$5,000 and now they are basically standing at \$22,000 and \$11,000 respectively, a mere increase by a factor of 2 over the same period since 1975. The disparity in the remuneration is phenomenal and self-evident. The disparity will be further accentuated if one is to take into account:

- (a) the housing and many other benefits (such as pension) enjoyed by lawyers in Government employment and members of the judiciary; and
- (b) the fact that members of the Bar undertaking legally aided work also have to pay out of their earnings chambers' fees and overheads, which are increasing at rates over and above the measures of Consumer Price Index (C).

12. In the same vein, the concerns arising from the unreasonably low rates and the disparity of fees paid by Legal Aid Department (LAD) *vis-a-vis* the Department of Justice (DoJ) are highlighted in the letter of the Law Society of 26th July 2013 to HAB. Hence, their enquiry as to the base rate.

13. The disparity identified above cannot be justified. The foreseeable consequence of below market rates is that less experienced counsel are taking up the work with the risk of adverse consequences. Some cases have led to judicial criticism over the years. The public interest in providing appropriately experienced representation for serious or difficult LAD cases is compromised by providing fees, which are far too low.

Double Standards

14. Further, the Government as a purchaser of legal services appears to have double standards.
 - (a) When engaging members of the Private Bar to provide services in ordinary cases, such as prosecutions and most LAD defence cases, which can often be for very serious and difficult criminal matters requiring experienced practitioners, the Government pays rates well below that of experienced private practitioners.
 - (b) This may be partly because, with public funds being used for both prosecution and defence, there is usually no issue as to which side is paying the legal costs, and Government has no special financial exposure and its own political interests are not at stake in such ordinary cases.
 - (c) However, when purchasing legal services for cases where the Government's own financial or political interests or priorities are at stake, the Government pays market rates to engage the most experienced practitioners.
 - (d) There is hence a marked contrast in standards, or double standards, between cases of public interest, which are paid low fees, but cases of Government interest, which are paid appropriate market rate fees.

15. The result is that the LAD does not get the services of appropriately experienced criminal law practitioners, which are needed to deliver access to justice with equality of representation to ensure and enhance fairness in proceedings before the courts.
16. This inequality in the deployment of public resources is borne out by observation previously made by the HKBA (in its submission for the establishment of an Independent Legal Aid Authority dated 22nd June 2012) as to the declining trend of the LAD budget. Long ago, the LAD and DoJ (formerly the Attorney General's Chambers) used to be about equal in terms of total budget.
17. This observation is echoed by the Law Society in its letter to HAB (dated 26th July 2013), which is a substantial piece of work, showing that:
 - (a) the "Expenditure on Criminal Legal Aid" has remained at about \$100m a year (without any significant increase for 5 years); and
 - (b) in contrast, in the Prosecution Division alone of the DoJ, the budget has increased from \$353.80m (2007) to \$491.5m (2012), i.e. \$137.7m or 39% over 5 years.
18. The HAB has not yet replied to this letter from Law Society on the disparity in the use of public monies to purchase legal services between the prosecution and the defence.

Inadequate Legal Aid for Criminal Appeal - A reflection of the Outdated and Inadequate Legal Aid Fees

19. The Law Society's letter dated 18th July 2013 leading to the LAD's reply dated 23rd August 2013 reveal some sources of the problems, when analyzed together

with the current Practice Direction 4.2 "Criminal Appeals to the Court of Appeal" dated 31st December 1988 ("PD 4.2").

20. In a recent article entitled "*Is Lack of Legal Aid Inhibiting Delivery of Effective Justice?*" published in South China Morning Post on 10th September 2013, the author, Professor Simon Young Ngai-man of Hong Kong University, refers to statements made by two different Courts of Appeal in November 2012 and May 2013, where Legal Aid was refused on the merits notwithstanding that it was obviously required and justified.
21. The inadequacy of Legal Aid for Criminal Appeal is also the sentiment expressed by members of the Criminal Bar. In reviewing the fees for legally aided criminal appeals, the HAB and LAD (as illustrated in its reply to the Law Society) seem to have lost sight of the changes in practice and the increasing demands in terms of time and duties imposed on counsel representing the legally aided defendant in criminal appeals.
22. According to the Annexes to the letter from HAB to the HKBA (dated 28th June 2013), for cases before the Court of First Instance, a daily refresher fee is not more than \$11,220 (Item 7(b) in the Schedule to the Legal Aid in Criminal Cases Rules, Cap. 221D) with an hourly rate of \$1,170 (Rule 21(8)(c)(ii) of Cap. 221D).
23. In its reply to the Law Society, much reliance is placed by LAD on Rule 9 of the Cap. 221D, which states as follows:

"9. It shall be the duty of solicitor or counsel assigned to an accused person under these rules—

- (a) if the accused person is convicted, to give a certificate to the Director as to whether or not in his opinion the accused person has reasonable grounds for an appeal against his conviction or*

sentence or both and, if so, settling those grounds; and (L.N. 204 of 1984)".

24. No fee is provided in Cap. 221D for the work required and expected of trial counsel under Rule 9. However, what is contemplated therein is the issuing of a *proforma* certificate and, where appropriate, the preliminary grounds of appeal. It is nothing elaborate.
25. In any case, as a matter of tradition of the Bar, the trial counsel is required to see the defendant after conviction (Paragraph 158 of the Bar Code). No doubt, this will be the opportunity to render initial advice on appeal and, where appropriate, to note the concerns of the convicted defendant.
26. In contrast, in Paragraph 1.2 of LAD's reply, it is stated "*it is not generally necessary to interview the Applicant to obtain his views prior to reaching an independent view of the merits of an intended appeal*". This remarkable omission would further reduce the chances of access to justice in drafting grounds of appeal, albeit preliminary, and assessing merits. The defendant would have listened to the evidence and may well have valuable information to contribute towards formulation of the grounds of appeal.
27. **These un-paid initial steps, comprising certificate and preliminary grounds, fall far short of the further work required to prepare a criminal appeal now required under PD 4.2.** The relevant provisions of PD 4.2 read as follows:

PART II – PROCEDURE

4. Initial Grounds

Where there are "reasonable" grounds of appeal, the solicitor or counsel who was present at the trial, if instructed, should give advice on the prospects of an appeal.

He should be in a position to formulate "initial grounds" immediately after the conclusion of the case and without waiting for the transcript of the evidence, of the summing-up or of the reasons for verdict or sentence and to advise the

applicant on the filing of the required notice. These grounds are termed “initial grounds” in contrast with “perfected grounds” and should be signed by the drafter and accompany the notice of application for leave to appeal.

...

5. Where solicitor or counsel settles grounds of appeal, it is his duty to ensure that-

- (a)(i) grounds are only put forward where he has satisfied himself that they are arguable; it is not his duty to put forward grounds merely because the appellant wishes him to do so;
- (ii) grounds are not put forward unless they are “reasonable”, that is, they afford some real chance of success;
- (iii) grounds are not put forward unless they are supportable by oral argument and are particularised; and
- (iv) the grounds put forward are settled with care and accuracy.

...

7. Perfected Grounds

(a) Perfected grounds of appeal should contain in respect of each ground:

- (i) the references by page number and letter, if applicable, to all relevant passages in the transcript;
- (ii) the reference to any authority on which counsel intends to rely; and
- (iii) clear identification of any document referred to by exhibit number or otherwise.

(b) Perfected grounds should consolidate all the grounds of appeal in one document. If it is found necessary to amend or vary perfected grounds, then a further document to be entitled “amended perfected grounds” should be filed in

substitution for the original and with the amendments or variations underlined in red. This document will then constitute the grounds of appeal to be argued at the hearing.

28. It is immediately apparent that PD 4.2 provides for a more elaborate set of procedures for criminal appeal over and above what is required under Rule 9 of Cap. 221D.
29. It is incorrect for LAD (at Para. 1.1 of its Reply to Law Society) to assert that under PD 4.2. (Para. 4) trial counsel is "*obliged*" to advise the client on the prospects of appeal at the conclusion of a case and to file a notice of appeal with initial grounds (see the words "*if instructed*" in PD 4.2 at Para. 4).
30. **In contrast to Rule 9, PD 4.2 contemplates a situation more in tune with modern practice, where a proper advice on the merits of appeal and initial grounds of appeal are expected to be prepared upon proper instructions, which connotes proper and separate remuneration.**
31. **However, no fee is provided in the Schedule to Cap. 221D for counsel undertaking the detailed steps required in PD 4.2.** There is only Item 20 in the Schedule to Cap. 221D for counsel "*under an appeal aid certificate settling a notice of appeal, other than grounds of appeal settled under rule 9(a)*" for a fixed fee not exceeding \$2,970.
32. Unfortunately, the practice and expectation of LAD is to lump together the procedure under Rule 9 and PD 4.2 and therefore counsel is not remunerated for the more onerous tasks required under PD 4.2. As a result, relatively inexperienced counsel doing the trial, as part and parcel of a cut price trial package, and without any further instruction, is expected to advise on the merits of appeal and set out the initial or basic grounds at the end of the trial.

33. **No instruction and no payment are at the heart of the problems for appeals.** Since the Certificate with preliminary grounds (furnished by counsel for free under Rule 9) are so heavily relied upon by LAD and vital for assessing the merits and grant of Legal Aid on appeal, if such are not adequately instructed nor remunerated, one sees the potential sources of the problems for many appeals (see Reply of LAD to the Law Society at Paras. 1.2 and 3.1).
34. It seems PD 4.2 regards the preliminary grounds furnished by trial counsel as only "*Initial Grounds*". However, much depends on the quality of such Initial Grounds. It sets the tone of the subsequent proceedings and, in some cases, may even determine whether the defendant would be given access to the court transcripts.
35. **Limited availability of transcripts and payment for work on transcripts.** The reliance placed by LAD on the Judgment of Silke VP in R. v. Fu Yan (Criminal Appeal No. 490 of 1991) is misplaced. The sentiment expressed by the learned Vice President was to emphasize the judicious use of court transcripts, particularly where public resource is involved. It is not authority for the proposition that as a starting point, no resort or reliance should be made to the court transcript for preparing the Perfected Grounds or Amended Perfected Grounds required under Para. 6 of the PD (see 1.1 and 1.4 of LAD's Reply to Law Society).
36. Thus judicious use must be made of transcripts where, as in many cases, counsel need to have access to the transcript in order to ensure that the grounds of appeal are arguable as required by Paragraph 5 of PD 4.2. In practice, LAD treats the \$2,979 provided in Item 20 in the Schedule to Cap. 221D to cover the preparation of the "*Perfected Grounds*" and "*Amended Perfected Grounds*" contemplated in Para. 6 of the PD 4.2 as part of the "Notice of Appeal".
37. Even at the derisory hourly rate of \$1,170, the sum of \$2,979 for settling the Notice of Appeal (inclusive of Perfected Grounds and Amended Perfect Grounds)

would mean only 2.5 hours of work. This is not sufficient time even for the most experienced counsel.

38. Further, as a matter of practice, LAD will not pay for the time required to go through the relevant parts of the transcript of evidence, which are essential in most cases and required for the purpose of making cross-references in the Perfected Grounds (under Paragraph 5 of PD 4.2).
39. **In summary, one can see how legally aided criminal appeals are so handicapped and prejudiced by a mixture of outdated Rules, non-payment for the vital Initial Grounds, drafting being handicapped by lack of documents, and then Perfected Grounds not being adequately remunerated.**
40. The concerns expressed by judges of the Court of Appeal as regard the inadequacy of legal aid are not isolated incidents. The reliance by LAD (at Paragraph 2.2 of the Reply to the Law Society) on figures from DoJ that only 19% of appeals are being allowed is self-serving and circular. The figure may well be low because LAD assigned practitioners are missing good grounds of appeal, probably because of the fundamentally defective system of legal aid for criminal appeals.
41. The lack of increase in the Expenditure on Criminal Legal Aid over 5 years illustrates the low level of fees paid and the natural consequence of relatively low level of experience required by LAD in the provision of such legal services.
42. The LAD (at Paragraph 2.1 of the Reply to the Law Society) states the figure of 3,888 applications covers both trial and appeals. Information needed to assess the quality of the services given for appeals was not provided. For example:
 - (a) How many of the 3888 were applicants for appeal?

- (b) How many were granted certificates?
 - (c) How many were granted certificates after various forms of appeal or outside help?
 - (d) How many decided to not accept the legal aid and become unrepresented?
43. The HKBA is of the view the increasing number of unrepresented appellants in criminal cases is a result of the cumulative defects in the criminal legal aid system as identified above.

The Way Forward - An Independent Legal Aid Authority

44. For the last 2 decades, the HKBA and the Law Society along with many other stakeholders have advocated for the establishment of Independent Legal Aid Authority. The recent Letter from the HAB (dated 11th September 2013) enclosing their information paper to the Administration of Justice and Legal Services Panel of the Legislative Council demonstrates and confirms that the Legal Aid Budget is capped *de facto*.
45. Financial accountability for an Independent Legal Aid Authority, similar to that now in place, and a budget with safeguards for uncapping in appropriate cases, as currently exists, deals with old Government concerns about independence. There is no valid reason for the delay in establishing an Independent Legal Aid Authority.
46. The shortcomings of the criminal legal aid systems as identified hereinabove, characterized by low fees and disparity in the quality of representation, are persisting and will not be improved by the Biennial Review only on account of inflation.

47. The time is ripe for a major overhaul of the criminal legal aid system. It is better done under the charter of a newly established Independent Legal Aid Authority. In the meantime, the Legal Aid Services Council is invited to impress upon the HAB and LAD to get on with the much needed improvements.

Hong Kong Bar Association

21st October 2013

