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 Criminal
 CSO/ADM/CR 7/3221/89(03)

30 August 2004

BY FAX (25015779) AND BY POST

 Mr. Chan Yum-min, James
 Government Secretariat
 Room 1211,
 Central Government Offices
 (West Wing),
 Lower Albert Road,
 Hong Kong.

Dear Mr. Chan,

REVIEW OF CRIMINAL LEGAL AID FEES, PROSECUTION FEES AND DUTY LAWYER FEES

Thank you for your letter dated 9 July 2004 proposing to effect a 4.4% reduction in the above fees following the decrease in the Consumer Price Index ("CPI") for the previous 2 years.

The Society noted the proposal with grave concern and would like to put on record its strong objection to the proposed reduction in fees.

Whilst the Prosecution Fees and the Duty Lawyer Fees are both based on the Criminal Legal Aid Fees prescribed in Rule 21 of the Legal Aid in Criminal Rules ("the Rules"), practitioners doing criminal legal aid cases have, for a long time, expressed discontent about the criminal legal aid remuneration system. Government's latest proposal to cut fees in line with the CPI will thus make it increasingly difficult for practitioners to apply proper professional standards in carrying out criminal legal aid assignments.

To highlight the major deficiency of the system, we would point out that the Rules provide for solicitors to be paid in the same manner as a barrister by: a brief fee and daily refreshers. However, under the Rules, barristers are also paid for conferences at an hourly rate (see Rule 21(1)(f), (g) and (h)). There are no similar provisions for solicitors. Yet the main task of an instructing solicitor is to prepare a case for trial. This requires the solicitor to have conferences with the barrister, and most importantly, with the client, to get proper instructions.

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Cases vary enormously in how much preparation work is needed. The maximum brief makes no provision for the amount of preparation work the solicitor has properly done.

This is not only unfair, it works against professional standards. Practitioners understand that in criminal cases, clients' interests are served by:

- thorough preparation including reading all the case papers and "unused material"
- advising the client to plead Guilty when the prosecution evidence is overwhelming
- agreeing non-controversial evidence so as to present the defence case as clearly as possible

Logically, however, the only way that many cases could be made financially worthwhile would be: to do little or no preparation, to encourage the client to plead Not Guilty, and to refuse to agree evidence so as to extend the length of the trial.

You can see from the above that solicitors who do fulfill their professional duties are already left with no compensation for their efforts. Accordingly, a further reduction in fees resulting in exceptionally low fee levels would discourage solicitors, particularly the more experienced ones, from accepting cases.

A counter-argument may be that if you don't like the fees, don't accept the case. However, solicitors will know very little about a case when they are offered an assignment. The amount of preparation that will be required will be unknown.

All illustration of how the present system is illogical is when a case is prepared for trial, and at the last moment the defendant pleads Guilty. The solicitor who has prepared the case for a Not Guilty plea is paid no more than if the case had been prepared for a plea of Guilty. When the fixed fee is divided by the hours spent in preparation; the solicitor can end up being paid at ridiculously low rates.

There are further objections to the system, such as:

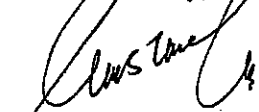
- the system is inflexible with the maximum amount that a solicitor can be paid being fixed by law. Irrespective of the number of hours that have been properly spent in preparing the case for court, the Director of Legal Aid has no discretion to increase fees over the maximum limit even though he may think this is justified.
- there is a general lack of right to lawyers to appeal against any assessment of costs

The Committee has indeed set up its internal Working Party to conduct an in-depth review of the system. Short of reviewing the system, the Society objects to the piecemeal review of fees based purely on the movement of the CPI over the previous years; particularly when the economy is seen to be recovering. The most recent two-year period had the very exceptional effect of SARS depressing the index. Further, the extended period of deflation has now come to an end this year, which means that prices generally, which will be reflected in rents and office overheads for solicitors, will be rising. This current adjustment thus seems to be at the bottom of the price levels. If at present the system is at crisis point, that will be exacerbated as prices rise but fees stay fixed at the lowest point of the index.

We note in this regard that it has not been a tradition for the Government to follow the CPI trend in every fee review. In the 1998 review, despite a recorded increase of 10% in the CPI(C) for the reference period, the Government did not make any upward adjustment to fees in view of the worsening economic climate and market condition at the time of review. In the 2000 review, despite the CPI(C) having decreased by 8.8% for the reference period, as this more or less offset the CPI(C) increase accumulated in the previous reference period, the Administration chose to freeze the fee levels. Given that the fee level has already been adjusted downward by 4.3% in the last review exercise and in view of the recovering economy, it does not seem to be justifiable for the Government to just follow the CPI to request for a fee reduction at this stage.

In the light of what we have said above, we would urge the Government to seriously reconsider its proposal on fee reduction. We look forward to receiving your comments and shall be pleased to meet with you to explain our position, if you consider this to be helpful.

Yours sincerely,



Christine W. S. Chu

Assistant Director of Practitioners Affairs

c.c.: Mr. Michael Lintern-Smith, President
The Finance Committee, LegCo
The LegCo Panel on Administration of Justice and Legal Services
Mr. Andrew Bruce, c/o the Hong Kong Bar Association



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(received on 6 Sept. 2004)
 30 August 2004

Mr. James Chan Yum-min
 for the Director of Administration
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Post-it® Fax Note 7671		Date 6/9	# of pages 4
To Ms. Christina Che	From Rani Korman	Co. HKBA	Phone # 2869 0210
Co./Dept.	Phone #	Fax # 2869 0387	Fax # for your record

Dear Mr. Chan,

**Re : Response to the proposal to reduce Legal Aid fees
 and fees paid by the Department of Justice
 in connection with criminal proceedings**

On 9 July 2004, you wrote to the Hong Kong Bar Association informing us that it is proposed to reduce fees paid by the Director of Legal Aid to Council in relation to the conduct of criminal proceedings and by the Department of Justice for prosecutions on Fiat. The amount of the proposed reduction is 4.4%. You invited our comments.

In substance, your letter puts forward two justifications for the proposed reduction. The first one is that over the last two years the consumer price index known as CPI(C) has gone down by an average of

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4.4%. The second justification put forward is that neither the Director of Legal Aid nor the Department of Justice believes that they will have any difficulty retaining counsel at these reduced rates.

The first justification put forward is seriously flawed. The first and most obvious point to make is that what is proposed is that fees from a point of time in the near future and for an indefinite time will be fixed by reference to economic data which reflects an average of one of the consumer price indices over the past two years. This carries with it the unstated assumption that economic conditions will remain approximately the same in the future. Recent movements in the consumer price indices of Hong Kong, including but not limited to CPI(C), would demonstrate that we are certainly in for a return to inflationary economic conditions. A fair reading of recent reports on this topic would seem to suggest that the Government actually welcomes this.

Even assuming that CPI(C) was a proper way to determine changes in fees paid by the Director of Legal Aid or the Department of Justice, the reality is that just as the cost of living is going up it is proposed that fees will be going down. There is no guarantee, as recent changes in the levels of fees paid by the Director of Legal Aid and the Department of Justice demonstrate, that CPI(C) will be used for increases in fees. The evidence demonstrates that changes in fee levels over the past 10 or 15 years and changes in levels of inflation do not always coincide.

Further, whatever value that the use of CPI(C) as a guide to the payment of salaries of counsel in the Department of Justice may be, it is most assuredly not a very good indicator in relation to the determination of fees of those in private practice. Using CPI(C) overlooks the fact that barristers in private practice are, unlike their colleagues in the Department of Justice, engaged in a business and while

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it might be fair to use a consumer price index as an assessment of net income, it is wholly unfair and makes little economic sense as a determinant of the total income of a barrister who accepts instructions to conduct criminal proceedings from the Director of Legal Aid or from the Department of Justice. It ignores the facts that barristers have to pay the wages of staff and pay rent for Chambers. Barristers are required to practise from Chambers under the rules of the Bar. They are not permitted to practise from their home.

Presumably as inflation returns, other services that barristers use will doubtless go up in price. Barristers are already seeing substantial pressure for upward movements in rent. Second, recent seminars on wage costs would suggest that employers are gearing themselves up for increases in wages in 2004 of the order of 5%. Services and utilities will doubtless follow this movement too. In short, you are proposing a decrease in part of many counsel's gross fees at a time when the cost of earning those fees is going up.

The substantive effect of your proposal has nothing to do with simply adjusting income according to prices. The substantive effect will be to reduce the real income of barristers. This is unacceptable especially at a time when many of my colleagues are finding the economic aspects of legal practice very difficult.

The second justification advanced in your letter is also unjustified. We make the point that even if it is true that in terms of retaining counsel who is *technically* qualified to accept instructions either from the Director of Legal Aid or the Department of Justice, there is a real risk that the quality of counsel thus retained will be diminished. As a Bar Association, leaving aside the narrow interests of our members in retaining or increasing levels of fees, we have an interest in ensuring that counsel retained for both the prosecution and the defence are of an appropriate standard for the case in which they are retained. This is true

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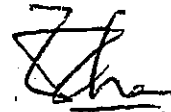
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in relation to both the prosecution and defence of criminal proceedings. We assume - or at least sincerely hope - that you share the concern for quality of representation. If you do share that concern there is every reason to carefully revisit what you propose.

In relation to those counsel instructed by the Director of Legal Aid, it is important that you do not overlook the guarantees of equality before the law and the right to counsel which are provided both under the Basic Law and the International Covenant on Civil and Political Rights. If we are right in our view that there is a real risk in the diminution of quality of counsel who are prepared to accept instructions from the Director of Legal Aid, then well established principles of equality of arms and the quality of justice are put at risk. The danger is that in serious and complex cases that inexperienced counsel will be appointed and the implications for the advancement of Justice are obvious for all to see.

On behalf of the Hong Kong Bar Association, I urge you to reconsider this ill-advised proposal.

Yours sincerely,



Edward Chan, SC
Chairman