

**THE LAW SOCIETY OF HONG KONG**

**RESULTS OF THE SURVEY ON  
CRIMINAL LEGAL AID REMUNERATION SYSTEM**

Report of the Assistant Director of Practitioners Affairs

[February 2005]

**INDEX**

	<u>Page</u>
<b>1. The Report</b>	
A. Background	1
B. Response Rate	1
C. Data about the Responding Firms	1 - 3
D. Satisfaction with the Existing Criminal Legal Aid Remuneration System	4
E. Problem with the Present System	5
F. Problematic Cases	6
G. Giving up of Criminal Legal Aid Work	7 - 8
H. Support for a Complete Review of the Present System	8
I. Suggested Ways to Improve the Present System	8
J. Summary	8 - 9
<b>2. Appendices</b>	
Appendix A - Sample Letter to all Firms with a Questionnaire enclosed	10 - 14
Appendix B - Data of Criminal Legal Aid Assignments to Responding Firms	15 - 18
Appendix C - Examples provided by Firms on the Low Pay under the Present System	19 - 73
Appendix D - Suggestions to Improve the Present System	74 - 80

## RESULTS OF SURVEY ON CRIMINAL LEGAL AID REMUNERATION SYSTEM

### A. Background

1. The Criminal Law and Procedure Committee ("the Committee") has considered the way forward with its review of the criminal legal aid remuneration system in December 2004 and resolved to invite the President to liaise with the Chief Justice (as the Chairman of the Rules Committee set up under the Criminal Procedure Ordinance)<sup>1</sup> to urge for an overall review of the system.
2. To facilitate the President's approach upon the Chief Justice, the Committee intends to formulate a paper outlining the problems with the existing system and to support the paper by examples of (a) cases with very low fees paid to solicitors despite consideration preparatory work being conducted; and (b) firms giving up legal aid work because of low fees. In this regard, the Committee has further resolved to first conduct a survey among the general membership to canvass their views on and experiences with the existing system.

### B. Response Rate

3. Pursuant to the Committee's decisions, a total of 675 questionnaires were issued to firms<sup>2</sup> on 28 December 2004 imposing a response deadline of 31 January 2005. 133 responses were received with a response rate of about 19.7% of firms. Appendix A is a sample letter to all firms with the enclosed questionnaire.
4. According to the information available, these 133 firms have 1117 members<sup>3</sup> accounting for at least 24.8% of the total 4500 members practising in these firms. This is quite good for a survey conducted by the Law Society, considering that not all firms engage in criminal law practice.

### C. Data about the Responding Firms

5. The majority (about 87%) of the responding firms confirmed that criminal law work forms part of their firms' practice. 18 firms stated that criminal law work is not part of their firm's practice. It is however interesting to note that one of these 18 firms then went on to confirm in the questionnaire that they have one solicitor on the Legal Aid Panel ("LA Panel") who has received criminal legal aid

<sup>1</sup> or more appropriately the Chief Judge of the High Court upon the enactment of the Statute Law (Miscellaneous Provisions) Bill 2005 which proposes, inter alia, the transfer of the chairmanship of the Rules Committee established under the Criminal Procedure Ordinance from the Chief Justice to the Chief Judge of the High Court

<sup>2</sup> The questionnaire was only issued to firms but not in-house members

<sup>3</sup> This figure has not taken into account the number of members in 16 firms which have returned the questionnaire on an anonymous basis

assignments for the past 2 years. For the purpose of the present analysis, we shall regard this firm as a firm with criminal law practice in this paper making the total number of firms with and without criminal law practice to be as follows:

<b>Criminal law work forms part of the firm's practice</b>	<b>No. of firms</b>
Yes	116
No	17

6. Of the 116 firms that have criminal law as part of their practice, the percentage that criminal work accounts for the total work of the firms varies. Most (83%) responses are from firms with less than 25% of the firm's work being criminal law work with only less than 3% with criminal law practice being the major work of the firms. The following gives a better idea on the amount of criminal law work of the responding firms:

<b>% of work of the firm being criminal law work</b>	<b>No. of Firms responding</b>	<b>% of Responding Firms with Criminal Law Practice</b>
10% or less	71	61%
11 - 25%	26	22%
26 - 50%	11	10%
Over 50%	3	2.6%
No answer given	5	4.4%

7. 88% of the firms with criminal law practice (i.e. 102 firms) confirmed they have solicitors on the LA Panel to undertake criminal legal aid work. The number of solicitors on the LA Panel in these responding firms are as follows:

<b>No. of solicitors in the firm being on the LA Panel to undertake criminal legal aid work</b>	<b>No. of Firms</b>
Nil	14
1	50
2	25
3	15
4	5
5	3
6	1
No answer given	3

- 8 Of the 102 firms that have solicitors on the LA Panel to undertake criminal legal aid work, 91 firms (i.e. 89%) were assigned criminal legal aid work for the past 2 years leaving 11 firms with no assignment at all. The number of assignments to these 91 firms for the past 2 years varies. The data in **Appendix B** are analyzed respectively according to the number of assignments per firm and solicitor and the types of assignments in question.
9. 11 firms with solicitors on the LA Panel have not been assigned any criminal legal aid work for the past 2 years. Most of them indicated they did not know the reason for the lack of assignments. Of the reasons given in the questionnaire form, only one firm have chosen "*unappealing credentials*" as the reason for their lack of assignments. 2 firms have put forward similar reasons as "*solicitor on the Legal Aid Panel only recently joined the firm for 8 months*" and "*new firm and newly qualified staff*". One firm believed that this has something to do with their previous complaints against the present DLA (when he was Deputy DLA). Another firm (with 3 solicitors on the LA Panel) remarked that for some unknown reasons, solicitors in their firm have never been assigned to criminal works since the date of their enlistment on the panel (August 1988) and that their firm has also never received any criminal legal and assignment since the date of our commencement of business in August 1997. The following are the responses to question 5 of the questionnaire:

Reasons for no Assignments	No. of Firms
Previous refusal to take up Legal Aid Assignments	0
Unappealing Credentials	1
Previous Complaint by Aided Persons	0
Others	10

10. A summary of the data of the 133 responding firms appears below:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Number of Firms	17	14	11	91	133
			Sub-total 102		
		Subtotal : 116			

**D. Satisfaction with the Existing Criminal Legal Aid Remuneration System**

- 11 89% (i.e. 104) of the 116 firms with criminal law practice indicated they are **not** satisfied with the existing criminal legal aid remuneration system. Of the 12 firms which have indicated otherwise, 7 firms did not give any view. These 7 firms include 6 which do not have solicitors on the LA Panel and one with a solicitor on the LA panel but did not receive any criminal legal aid assignments for the past 2 years.
12. 5 firms confirmed they are satisfied with the present system. These are one firm with no solicitor on the LA Panel and 4 firms with solicitors on the LA Panel. The following gives some data about these 4 firms:

	Firm A	Firm B	Firm C	Firm D
<b>% of firm's work being criminal law work</b>	2%	5 – 10%	10%	2 to 3 cases per year
<b>No. of solicitor on LA Panel</b>	1	1	1	1
<b>No. of criminal LA assignments for the past 2 years</b>	2 Court of First Instance trials	10 plea and sentence cases in the District Court	Nil	Nil

13. Notwithstanding their satisfaction with the system, it is observed that 2 of these 5 firms (including the one with no solicitor on the LA Panel and Firm D above) nevertheless confirmed their support in Question 14 to the proposal for the Law Society to seek for a complete review of the system.
14. To complete the picture, the views of the 17 firms with no criminal law practice are as follows:

Satisfied with the System?	No. of Firms
Yes	1
No	4
No answer given	12

**E. Problems with the Present System**

15. 105 firms have indicated under question 7 what they considered to be the problems with the present system. The details of these 105 firms are as follows:

Firms	No. of Firms
Criminal law not being part of firm's practice	4
<u>Criminal law being part of firms' practice</u>	
• firms with no solicitor on LA Panel	6
• firms with solicitors on LA Panel but with no assignments for the past 2 years	7
• firms with solicitors on LA Panel and received assignments for the past 2 years	88
	<u>101</u>

16. The answers given by these 105 firms are summarized in the following table:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Failure to remunerate pre-trial preparation work	4	6	6	87	103
Inability to increase fees over the maximum limits fixed by law even if warranted by the circumstances of the case	4	3	6	59	72
Lack of right for solicitors to appeal against any assessments of costs	3	2	5	37	47
Others	0	0	1	3	4

17. Problems advanced by the firms apart from those specified in question 7 of the Questionnaire are:
- works have been assigned to only a small circle of solicitors' firms and not on rotation basis
  - instructing solicitor's involvement in pre-trial conference is not counted
  - unreasonably low fees as prescribed by the LA Department (2 firms)
  - rigid application or archaic rules failing to recognize and reward specialty

**F. Problematic Cases**

18. 45 firms indicated under Question 8 that they could provide examples of cases with very low fees paid to their solicitors despite considerable preparatory work being conducted. These are all firms with solicitors on the LA Panel and received criminal legal aid assignments for the past 2 years. However, only 40 firms actually proceeded to give some comments or real life examples, which are being reproduced in their original format in **Appendix C**.
19. In answer to Question 9, only one firm indicated that they have come across criminal appeals which they believe were brought about because of inadequate preparation by LA assigned lawyers. The firm has solicitors on the LA Panel with assignments received for the past 2 years. Unfortunately, it did not give any details of the cases in question.
20. In answer to Question 10, 12 firms indicated that they have come across cases for which they think a certificate of exceptional length or complexity under Rule 21(2) and (3) of the Legal Aid in Criminal Cases Rules should have been granted by the Judge but refused. All these 12 firms have solicitors on the LA Panel but one of them does not receive any criminal legal aid assignments for the past 2 years. .
21. When further asked under Question 11 what the difficulties are in obtaining a certificate under Rule 21(2) and (2), 8 of these 12 firms gave the following remarks:
- there is no clear definition of "*exceptional length or complexity*"
  - arbitrary refusal by judge
  - trial judge not easily convinced that a certificate ought to be issued and/or not fully aware of long preparatory work
  - Judge views only the complexity of legal issues involved in trial, not work solicitor is required to do
  - the Judge believed, despite indication from the LA Department itself to the contrary, the case was simple
  - whilst the background and the case are very complicated but are well prepared by the solicitors, when the case is brought to the Judge, the Judge would think that the case is not so complicated.
  - in one case, the defendant sought to adduce in evidence of lots of Chinese documents for which English translations are required. Certificate was not available
  - objection by the LA Department
- It seems from the above that the major problem encountered is the difficulty to convince the Judge of the "*complexity*" of the case.

**G. Giving Up of Criminal Legal Aid Work**

22. 18 firms indicated under Question 12 that their solicitors have given up criminal legal aid work because of dissatisfaction with the remuneration system, totalling about 24 solicitors. The composition of these 18 firms are as follows:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Firms with solicitors giving up criminal legal aid work	1	3	nil	14	18

23. 57 firms confirmed under Question 13 that their solicitors would consider giving up criminal legal aid work in case there should be further reduction in the maximum fee levels prescribed under Rule 21 of the Legal Aid in Criminal Cases Rules. According to the information provided by these firms<sup>1</sup>, this would mean that at least 70 solicitors would be considering giving up criminal legal aid work. The composition of these 57 firms is provided in the following chart. It should be noted however that the figure includes 3 firms with no solicitor on the LA Panel:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Firms with solicitors intending to give up criminal legal aid work	1	2	4	50	57

24. Some of the firms indicating either that solicitors in their firms have not given up or are not considering giving up criminal legal aid work made various remarks which are summarized below:
- because of the bad economy, they need to bear with the system for survival and being paid less is better than none
  - they wish to remain on the LA Panel:

<sup>1</sup> 14 firms have not specified the number of solicitors in their firms considering giving up legal aid work in case of reduction in fees



- (a) in order to keep up with the experience hoping that there will be a change in the near future
- (b) as criminal cases are amongst the majority of time spent by or available to the firms, they would not mind to take up though priority may not be given
- legal aid is considered to be part of public service

**H. Support for a Complete Review of the Present System**

25. The majority being 88% of the responding firms supports the move by the Law Society to seek for a complete review of the criminal legal aid remuneration system. Only 2 firms stated they did not support such move. These are firms being satisfied with the present system. The following chart provides more details of the responses received:

Move by the Society to seek for a complete review of the criminal legal aid remuneration system	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Support	9	9	10	89	117
Not support	0	0	1	1	2
No answer given or N/A	8	5	0	1	14
<b>Total</b>	<b>17</b>	<b>14</b>	<b>11</b>	<b>90</b>	<b>133</b>

**I. Suggested Ways to Improve the Present System**

26. 53 firms have put forward suggestions to improve the present system. These are being reproduced in their original format in **Appendix D**.

**J. Summary**

27. In summary, a survey met with a response rate of at least about 25% of the total membership indicates that of those responding:

- (a) the majority is not satisfied with the present system
- (b) the majority considers failure to remunerate pre-trial preparation work as the major problem of the present system
- (c) only one firm has come across criminal appeals which they believe were brought about because of inadequate preparation by the LA assigned lawyers

- (d) 12 firms have come across cases for which they think a certificate of exceptional length or complexity should have been granted by the Judge but refused. The major problem encountered appears to be the difficulty to convince the Judge of the "*complexity*" of the case
- (e) 24 solicitors have given up criminal legal aid work because of dissatisfaction with the present system and at least 70 more would consider doing so if the fee levels are to be further reduced.
- (f) the majority supports the Law Society seeking for a complete overhaul of the present system.

**Prepared by:**  
**Christine W. S. Chu**  
**Assistant Director of Practitioners Affairs**  
**The Law Society of Hong Kong**

**15 February 2005**

## APPENDIX A

### Sample Letter to All Firms with a Questionnaire enclosed

Dear Senior Partner / Sole Proprietor,

#### QUESTIONNAIRE ON CRIMINAL LEGAL AID REMUNERATION SYSTEM

The Society's Criminal Law and Procedure Committee is conducting a review on the criminal legal aid remuneration system.

Section 9 of the Criminal Procedure Ordinance, Cap. 221 empowers the Criminal Procedure Rules Committee, of which the Chief Justice is the Chairman, to make rules and orders regulating the practice and procedure under that Ordinance.

The Rules Committee prescribes the Legal Aid in Criminal Cases Rules. Rule 21 governs the costs payable to lawyers in legal aid assignments in criminal cases and provides a set of maximum fees, which can be paid for any given piece of work referred therein. Both the Department of Justice and the Duty Lawyer Service adopt the same basis on remuneration for the lawyers they instruct in criminal cases.

The present remuneration system dates back to the 1970's when the Legal Aid Department will invariably act as the instructing solicitor to instruct barristers to represent defendants in the majority of criminal cases. Only in very rare instances would the case be assigned to private firm of solicitors. However, as the volume of legal aid cases grew, the Department increasingly instructed private firms of solicitors to prepare the defence. The system seeks to remunerate solicitors on a similar basis as barristers instructed by the Legal Aid Department: a brief fee for the first date of trial and a smaller refresher fee for each subsequent day in court. However, the maximum fees for solicitors are set at much lower levels than barristers and the latter is also additionally remunerated for attending conferences with clients when solicitors are not.

Our main objections to Rule 21 are:

- the system fails to properly remunerate solicitors for their preparation work, such as reading the case papers, interviewing and taking instructions from defendants, attending conferences with barristers, etc.
- the system is inflexible with the maximum amount that a solicitor can be paid being fixed by law, leaving the Director of Legal Aid with no discretion to award any fees over the maximum limit, even though he may think this is justified, unless the judge should certify the case to be one of exceptional length or complexity.
- a general lack of right to lawyers to appeal against any assessment of costs

Over the years, the Administration has conducted "*biennial* reviews" of the maximum fees set out in Rule 21 by making reference to changes in the Consumer Price Index. The fee levels were adjusted downward by 4.3% in July 2003 and the Administration is presently seeking a further downward adjustment of 4.4% to take effect some time in 2005.

We do not support the proposed reduction in fees. Instead of the piecemeal review, we consider a complete review of the whole fee system is necessary. The current system was designed to deal with 30 years old practice and procedures. Many anomalies have become apparent.

We are considering making appropriate representations to the Chief Justice for a complete overhaul of the system, and information on members' experience with the existing criminal legal aid remuneration system will be very helpful in enabling us to formulate proposals to press our case.

**We invite you to spare some time to complete and return the attached Questionnaire by 31 January 2005. Even though criminal law may not be an area of your firm's practice, your assistance will still be relevant as it will enable us to interpret the data, namely, that some firms are not interested in taking up criminal law because the fees are too low or because it is not an area of practice for the firm.**

We appreciate that you may regard the requested data to be sensitive information of the firm and would like to assure that any information received by us will be treated in the strictest confidence. **Alternatively, you may choose to return the attached questionnaire on an anonymous basis. However, if you do so, please only return the hard copy of the attached questionnaire to ensure that any information received by us will not be duplicated.**

We look forward to hearing from you.

Yours faithfully,

Christine W. S. Chu  
Assistant Director of Practitioners Affairs

Encl.

## Questionnaire on Criminal Legal Aid Remuneration System

To: Ms. Christine Chu [Fax No. 28450387]  
Assistant Director of Practitioners Affairs

1. Does criminal law form part of your firm's practice?  
 Yes. Please specify %: \_\_\_\_\_  
 No
  
2. Are any solicitors in your firm enlisted on the Legal Aid Panel to undertake criminal legal aid work?  
 Yes. Please specify no: \_\_\_\_\_  
 No
  
3. If yes, has any solicitor in your firm been assigned criminal legal aid work for the past 2 years?  
 Yes  
 No
  
4. If yes, what is the respective number of cases assigned to solicitors in your firm in the following area(s) of criminal legal aid work for the past 2 years?  

	<u>No. of Cases</u> <u>Assigned</u>
<input type="checkbox"/> Committal Proceedings (as solicitor advocate)	
<input type="checkbox"/> Committal Proceedings (as instructing solicitor)	
<input type="checkbox"/> District Court Proceedings (as solicitor advocate)	
<input type="checkbox"/> District Court Proceedings (as instructing solicitor)	
<input type="checkbox"/> Court of First Instance Trials	
<input type="checkbox"/> Magistrate's Court Appeals	
<input type="checkbox"/> District Court Appeals.	
<input type="checkbox"/> Court of First Instance Appeals	
<input type="checkbox"/> Court of Final Appeals	
<input type="checkbox"/> Others	

5. If your answer to Question 3 is no, what do you think are the reasons for the lack of criminal legal aid assignments to your firm?

- previous refusal of taking up assignments by legal aid.
- unappealing credentials
- previous complaint by aided persons
- others. Please specify\*.

6. Are you satisfied with the present criminal legal aid remuneration system prescribed in Rule 21 of the Legal Aid in Criminal Cases Rules?

- Yes
- No

7. If not, what do you think are the problems with the present system?

- failure to remunerate pre-trial preparation work
- inability to increase fees over the maximum limits fixed by law even if warranted by the circumstances of the case
- lack of right for solicitors to appeal against any assessment of costs
- Others. Please specify\*.

8. Can you provide useful examples of cases with very low fees paid to solicitors of your firm despite considerable preparatory work being conducted?

- Yes. Please give details of the cases in a separate sheet
- No

9. Have you come across any criminal appeals which you believe were brought about because of inadequate preparation by Legal Aid assigned lawyers?

- Yes. Please give details of the cases on a separate sheet
- No

\* Please use a separate sheet if insufficient space is provided here

10. Have you come across any cases for which you think a certificate of exceptional length or complexity under Rule 21(2) and (3) of the Legal Aid in Criminal Cases Rules should have been granted by the Judge but refused?

- Yes.  
 No

11. If yes, what are the difficulties in obtaining a certificate under Rule 21(2) and (3)?\*

12. Has any solicitor in your firm ever given up criminal legal aid work because of dissatisfaction with the remuneration system?

- Yes. Please specify no: \_\_\_\_\_  
 No

13. Will any solicitors in your firm consider giving up criminal legal aid work in case there should be further reduction in the maximum fee levels prescribed under Rule 21 of the Legal Aid in Criminal Cases Rules?

- Yes. Please specify no: \_\_\_\_\_  
 No. Any particular reasons? Please specify\*

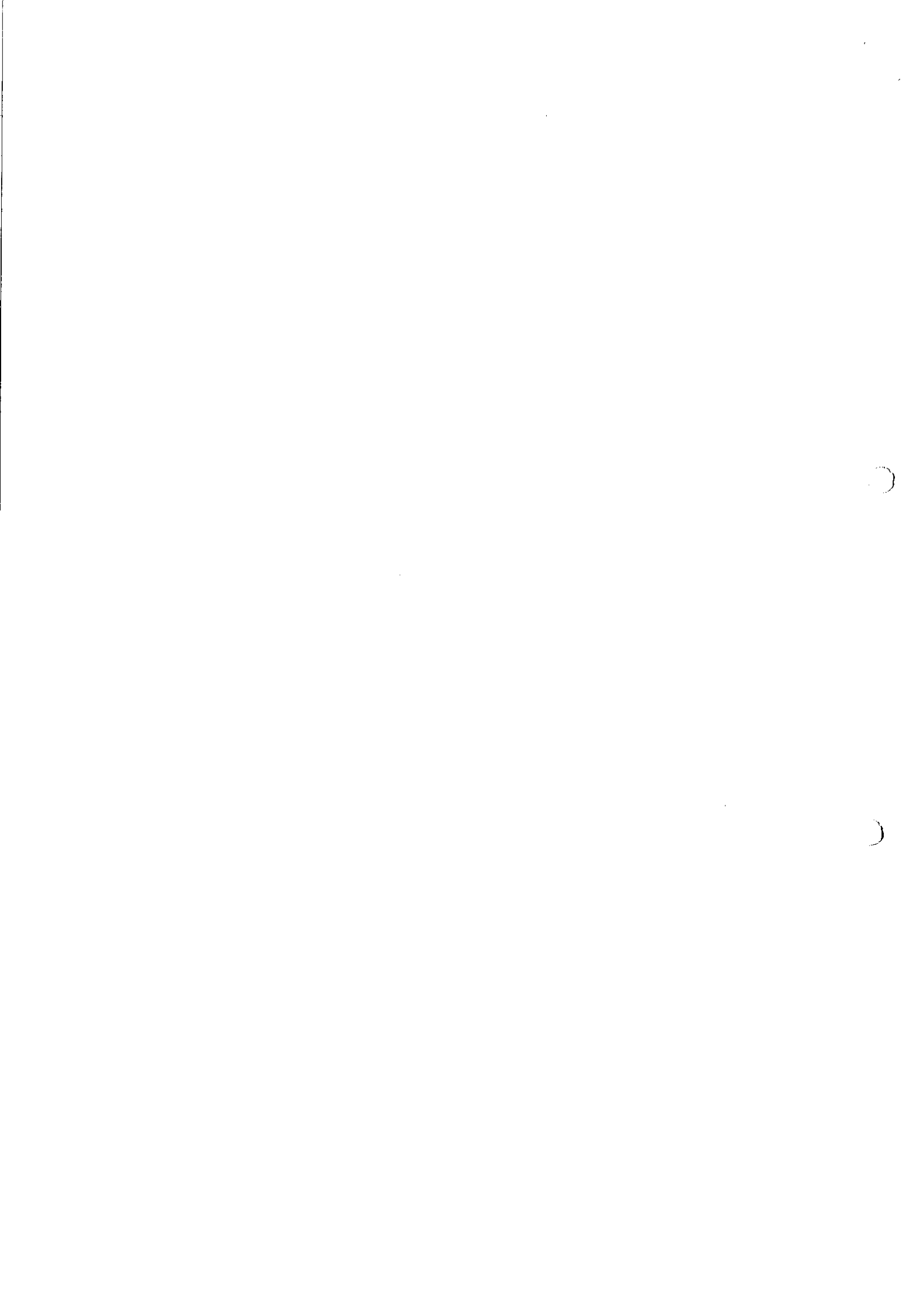
14. Do you support the move by the Law Society to seek for a complete review of the criminal legal aid remuneration system?

- Yes  
 No

15. In what way(s) do you suggest the present system should be reformed?\*

\_\_\_\_\_  
[Name of the firm]

\* Please use a separate sheet if insufficient space is provided





## APPENDIX B

### Data about Criminal Legal Aid Assignments to Responding Firms

*Chart I – Assignment to “Firms”*

No. of criminal legal aid assignments to the firm for the last 2 years	No. of firms	No. of solicitors in those firms in the middle column on the LA Panel
Not specify	6	
1	9	1-2
2	6	1-5
3	7	1-4
4	6	1-3
5	4	1-3
6	6	1-3
7	1	6
8	4	1-2
9	3	1-2
10	5	1-4
11	1	1
12	2	1-2
13	1	1
14	2	1-4
15	3	1-3
16	2	1
17	5	1-3
20	5	1-5
21	3	2-3
22	1	2
26	1	1
27	1	3
30	1	2
31	1	3
35	2	4-5
39	1	2
48	1	2
58	1	4

*Chart II – Assignments per “Solicitor”<sup>1</sup>*

No. of criminal legal aid assignments per solicitor		No. of solicitors		% of solicitors with legal aid assignments
1 – 5	around 1	36	96	61%
	around 2	13		
	around 3	11		
	around 4	26		
	around 5	10		
6-10	6	5	38	24%
	7	11		
	around 8	5		
	around 9	7		
	10	10		
11-15	11	3	14	19%
	12	1		
	13	1		
	around 14	5		
	15	4		
16-26	16	2	9	6%
	17	2		
	around 20	3		
	24	1		
	26	1		

<sup>1</sup> These data are obtained based on the assumption that the total number of assignments to each firm are being averaged out among their solicitors on the LA Panel

*Chart III –Types of Cases Assigned*

<b>Types of Cases</b>	<b>No. of Cases Assigned</b>	<b>No. of Firms</b>	<b>No. of solicitors on LA Panel in such firms</b>
Committal Proceedings (as solicitor advocate)	1	4	1 - 2
	2	2	3
	3	1	2
	4	1	3
	5	1	2
	19	1	4
Committal Proceedings (as instructing solicitor)	1	1	1
	2	2	3 & 5
	3	3	2 - 3
	5	2	1 & 2
	10	2	2 & 4
District Court Proceedings (as solicitor advocate)	1	4	1 - 2
	2	4	1 - 4
	3	2	2
	4	3	2 - 3
	5	3	1 - 3
	6	3	1 - 4
	7	1	1
	8	2	1
	10	7	1 - 3
	11	2	3 & 5
	12	2	2 & 3
	13	1	1
	14	1	2
	15	2	1 & 2
	16	1	5
	20	3	1 & 4
26	1	2	
District Court Proceedings (as instructing solicitor)	1	8	1 - 3
	2	11	1 - 3
	3	8	1 - 3
	4	8	1 - 5
	5	11	1 - 4
	6	4	1 - 3
	7	3	3 - 6
	8	4	1 - 2
	9	3	1 - 4
	10	2	1 & 2
	12	1	4
	14	1	5
	15	1	2
	30	2	2

<b>Types of Cases</b>	<b>No. of Cases Assigned</b>	<b>No. of Firms</b>	<b>No. of solicitors on LA Panel in such firms</b>
Court of First Instance Trials	1	17	1 - 4
	2	6	1 - 2
	3	7	1 - 3
	4	2	3
	5	4	2 - 3
	6	1	3
	7	1	5
	8	1	1
	10	1	4
	11	1	3
	Magistrate's Court Appeals	1	5
2		1	4
3		1	3
4		1	2
District Court Appeals	1	6	1 - 3
	2	1	Not specify
	3	1	1
Court of First Instance Appeals	1	10	1 - 3
	2	3	1 - 3
	3	2	2 & 5
Court of Final Appeals	1	2	3
	4	1	4
	5	1	3
Others (e.g. bail applications)	1	3	1 - 3
	2-3	1	1
	3	1	1
	5	1	3
	13	1	4

## **APPENDIX C**

Examples provided by Firms on the Low Pay under the Present System

[This document is confidential and regrettably cannot be provided.]



## APPENDIX D

### Suggested Ways to Improve the Present System

#### A. *Suggestions by Firms with no Criminal Law Practice*

Firm 1: to bring in line with civil legal aid rates (at least) and to enable assigned solicitors to charge similar rates to barristers

Firm 2: I refer to my nominal replies to the attached questionnaire as sent with your letter of 28<sup>th</sup> December. As a Sole Practitioner with no assistants I do not conduct, and never have conducted, any litigation, either civil or criminal, and at my age I regard it as inappropriate that I should consider starting now.

Based entirely upon the statements in your letter 28<sup>th</sup> December, I support the move by the Law Society to seek a complete review of the criminal legal aid remuneration system, but I have some qualifications to that support, which suggest that wider review might be more appropriate.

First, while I support the principle that parties to court proceedings, whether civil or criminal, should be entitled to legal representation, in practice public funds available for that purpose cannot be treated as unlimited. As is patently the case with publicly funded medical treatment, it is simply not possible to provide to all who want them the best services that could be provided at any price. Accordingly very difficult decisions have to be made, first by Government and the Legislative Council in setting and approving budgets for healthcare and legal representation (and similarly for other public expenditures), and secondly, and probably with more sensitivity to human hardship, by the administrative staff deciding on the application of available funds. The private sector, and in this case the Law Society, must appreciate the financial limitations of the public sector, even if the Law Society feels justified in representing that the legal aid application should be a larger slice of the available total of public sector funding. I am not sure whether a Law Society campaign at this time would gain a lot of public sympathy.

Further on the allocation of public funds, while it is easy to feel sensitive about the potential loss of liberty of a criminal accused, and to believe that therefore criminal defence representation should be given priority, I venture to question whether and how far the community at large would support that priority. It seems to be an acknowledged and established fact that in civil litigation the richer party has a huge advantage in relation to the actual outcome, regardless of the legal merits. Because of that the wealth, livelihood, and sometimes health of a party to civil litigation may be irrevocably damaged, regardless of the merits of his case, and I think that very often a party with a sound legal case has to be advised that he is in practice unable to bring it or

defend it because he is not eligible for legal aid and cannot otherwise afford the costs.

However, while in one sense the comments in my last paragraph suggest that if one part of the legal aid system is to be reviewed then all parts of it should be reviewed, my comments in the previous paragraph suggest that more fundamental steps are necessary to try to ensure that adequate legal representation is available on a wider basis for litigants and potential litigants generally.

On that, the most obvious priority for attention appears to be the drive to increase the accessibility of justice by simplifying the processes of the administration of justice. While not practicing in the area, I am aware that quite extensive steps have been taken over recent years, but I suspect that considerably more is always possible.

Next, although partly related to the same point, I wonder as an objective observer whether the allocation of public funds made available for the administration of justice (including the judiciary, the justice department and legal aid) always represents the best interests of the community. As two examples of that:

- i) Is the expenditure of huge amounts of public funds on the conduct of prosecutions for commercial crimes well managed and justified? In several cases over the last 20 years or so it appears that the conduct of government or of the government case in these matters has been open to material criticism and has been directly responsible for massive escalation of expenditure on the cases. How much better value to the community as a whole could have been achieved by allocating to more routine legal aid cases at least the excess expenditure attributable to mishandling of the matters within Government? If the Law Society shares that concern, surely it is a very relevant point to make to Government.
- ii) Just as is applicable in most other areas of community life, where things have to be done as well as they can be done within an available budget, is there a way in which the courts could contribute by adoption of short form processes designed to fit the budget of a party who does not have unlimited resources? That would not necessarily be limited to legal aid cases, but to focus on those for the purpose of this letter, if the Legal Aid Department decides for instance that the maximum legal aid amount available for a given case is \$50,000, then could there not be procedural rules by which the length of written and/or oral submission is rationed to both parties on a basis calculated within the available fees, with the explicit understanding that the judge will enforce the set limits and that the judge or jury will make the best decision practicable on the case as presented by each party with the allotted time? (There might be a



qualification that the judge would be entitled to refer the matter back to Legal Aid for reconsideration if he felt that the complexity of the case justified that.)

Combining those two examples, I believe that Government, the judiciary and the professions should co-operate in achieving a better balance between economic reality and ideals of justice. I further believe that that might often result in fairer trials, as the more powerful party would lose its built in advantage and time-wasting would be eliminated.

In a different direction related to the availability of legal services, I put forward a memory from fairly extensive experience of working in France and with French lawyers about 30 years ago. Following the same spirit of community service as I believe is incorporated in the international baccalaureate, all French lawyers were required to give their services to the community, I think for one or two days each year. There was probably an upper age limit, but even senior partners were subject to the requirement, though there were available arrangements for a firm to reallocate the aggregate number of days of service required between its qualified staff; I conceptualise that that would actually have been of mutual benefit, as it could allow a lawyer to be available on a pro-bono basis for a case lasting several days. I believe also that there were arrangements whereby for instance those lawyers who for one reason or another were not suited to representing clients in court contributed their services in other types of "duty lawyer" service. While I admire the significant number of lawyers here who give their time to various duty lawyer and other free advisory plans, it occurs to me that making such contributions obligatory could be expected to provide a material additional pool of legal representation for criminal defendants, and thus to ease the pressure on legal aid funding, as well as to provide useful experience. As a supplemental observation, if there was also introduced a requirement that some CPE attendance in the early years after qualification should be in workshop training in civil or criminal representation, that might be a further advantage in several directions.

I appreciate that most or all of my above suggestions are likely at first reading to be regarded as completely impractical or inappropriate. However, occasionally the objective views of someone not involved in the detail of a problem may have merit, however far fetched those views appear at first. I dare to hope that that might apply in this instance.

**B. *Suggestions by Firms with Criminal Law Practice but no solicitor on the LA Panel***

Firm 3: to increase the fee level for solicitors so that the quality can be retained

Firm 4: solicitors should be remunerated according to the time spent by them

**C. *Suggestions by Firms with solicitor on the LA Panel but with no Criminal Legal Aid Assignment for the Past 2 years***

Firm 5: There should be a fair distribution of work base on competence, experience and standing of the assigned solicitor.

Firm 6: Each solicitor with 5 years' post admission upon application should be qualified as panel solicitors. Time charge of not less than HK\$2,000 per hour should be paid to the handling solicitor for his attendance.

Firm 7: The present system should be reformed so that eventually, solicitors and barristers shall be remunerated on the same terms and conditions as I do not see there will be any difference between solicitors and barristers if they are assigned the same job by the Legal Aid Department. The present system amounts to discrimination against solicitors.

Firm 8: criminal legal aid works should be assigned to all law firms on a rotation basis, same as the Duty Lawyers Scheme.

**D. *Suggestions by Firms with solicitor on the LA Panel and with Criminal Legal Aid Assignment for the Past 2 years***

Firm 9: pre-trial preparation should be appropriately remunerated.

Firm 10: Pre-trial preparation work should be appropriately remunerated

Firm 11: pre-trial preparation work should be assessed and remunerated

Firm 12: pre-trial preparation work (including conferences and legal visit) should be remunerated

Firm 13:

- remuneration on preparatory work plus attendance to court
- remuneration on legal visit and taking instructions.

Firm 14: there should be fees payable to legal visits and conference.

Firm 15: The present remuneration system for solicitors should be reviewed. Actual hours of work spent by instructing solicitors in the preparation for trial should be remunerated.

Firm 16: The present system should be reformed so that instructing solicitors are paid a reasonable hourly rate for all necessary preparation work prior to trial. The brief and refresher system is antiquated outdated and unfair to solicitors.

Firm 17: Solicitors should be rewarded for work done. The system needs to be reformed. In the meantime, as an interim measure, they should at least be paid for conferences just as Counsel are paid

Firm 18: the fee should reflect the solicitor's effort on the case.

Firm 19: The fees should reflect more closely on the works and responsibility assumed.

Firm 20: to pay according to the work done for the time and effort spent in particular, not necessarily on the result achieved.

Firm 21:

- sufficient fees be payable for pre-trial preparation works for instructing solicitors, in particular, when the aided person is in custody.
- the standards and rules in assigning criminal cases should be more transparent.

Firm 22: We consider out of court attendances should be paid as it can involve situation where a lot of preparation works are done and in the end the aided person plea guilty to the charges leaving only one or two days of court hearing

Firm 23: all the time so spent by the instructing solicitor must be paid, to be taxed and/or assessed if not agreed

Firm 24: simply allow fees for consultation time with clients and witnesses. As per barrister allowances

Firm 25: Instructing Solicitors should be paid more adequately and realistically to ensure they are able to provide sufficient time and service to the aided Defendant

Firm 26: pre-trial preparation work should be reasonably remunerated.

Firm 27: provide different range (i.e. no of hours of work) to remunerate pre-trial preparation work.

Firm 28: subject to justifications, the preparatory work should be allowed or solicitor should be remunerated as counsel

Firm 29: such as use hour rate, but on a fixed rate/hour

Firm 30: we suggest the present system should be reformed to the fees of Solicitor be awarded on hourly basis

Firm 31: either hourly with a cap or a scale for each stage of preparation.

Firm 32: remuneration on hourly basis

- Firm 33: A time scale basis with a cap on the hourly rate of the assigned solicitor
- Firm 34: time charge
- Firm 35: Time costs incurred basis with taxation by Legal Aid Department with a right of appeal to Master of High Court or District Court on a de novo basis.
- Firm 36: pay solicitors for same way as Counsel are paid i.e. pay for their conferences with aid persons.
- Firm 37:
- barristers and solicitors to enjoy equal pay for equal work
  - Instructing solicitors to be remunerated at reasonable scale or time spent basis.
- Firm 38: The simplest way would be to apply the fees scale of Counsel to assigned solicitors so that pre-trial preparation works are remunerated.
- Firm 39: there should be fair distribution to various solicitors.
- Firm 40:
- Monitoring the number of assignment to the solicitors on panel
  - reviewing the maximum limit of Rule 21
  - Allowing costs to be taxed by the court, if so required.
- Firm 41: A complete review of Rule 21 there should equality in treatment between solicitors and barristers on remuneration.
- Firm 42:
- solicitor advocates should be remunerated on the same basis as barristers
  - there should be more flexibility to allow fees to reflect the amount of work done by way of preparation.
- Firm 43: fees should be increased to a reasonable level
- Firm 44: increase fee
- Firm 45: fees should be upward adjusted according to the solicitor's seniority. Instructing solicitors should be remunerated for pre-trial preparatory work if justified. Instructing solicitors should be remunerated for court attendance
- Firm 46:
- sparing distribution, not only on number of cases but on complexity as well.
  - paid for legal visits and conference with Defendant and/or Counsel
- Firm 47: solicitors are to be paid at hourly rate say \$800 - \$1200 for pre-trial preparation depending on the post qualification experience and such costs be subject to taxation.

Firm 48: increase the remuneration to a level which is compatible with the remuneration private practice.

Firm 49: As suggested, we would like to review the maximum fees to be assessed on a time basis so that the costs as awarded will be justified

Firm 50: The attitude must be changed. Judges think solicitors do not deserve to earn a reasonable fee

Firm 51: Discretionary power should be given to the Director of Legal Aid to award costs in merited circumstances

Firm 52: at least cover disbursement like traveling, photocopying etc.

Firm 53: Please refer to the letter from John Ku as per Firm 40 in Appendix C

