APPENDIX 1

John Mullick
5th Floor, Nine Queen's Road, Hong Kong

Miss Joyce Wong,
Director of Practitioners Affairs,
The Law Society,
3rd Floor, Wing On House,
71, Des Voeux Road,
Hong Kong.

4th December 2002

Dear Miss Wong,

Re: Legal Aid Reform – (Criminal Cases).

I am a member of the Bar Association's Special Committee on Legal Aid Reform. We have been holding several meetings, usually at monthly intervals, to consider ways and measures to improve the legal aid system in both civil and criminal litigation. I believe that contact has been made between Alan Leong, our Chairman, and Patrick Moss on the issue. We have also appeared before a Committee of Legco, which is very much concerned to reform certain aspects of legal aid.

My principal concern on our Committee is to deal with legal aid in criminal proceedings. To this end I have written a paper, which has been endorsed by the Special Committee. The Special Committee also considers it to be sensible for both professions to adopt a 'joint' approach' to the problems of legal aid in criminal proceedings. We are not principally concerned in raising the level of fees, but rather to restructure the system itself, so that it can made fairer and better able to meet the aspirations of the public and the legal professions.

I would be very grateful if you could arrange to have my paper placed before your Criminal Law and Procedure Committee for its next meeting, which I understand is to be held on the 6th January 2003.

I you have any queries please contact me at your earliest convenience. On our part we would like to place our proposals for reform in criminal legal aid before the Criminal Procedure Rules Committee, which is chaired by the Chief Justice.

Telephone: 2521 6338 email: johnmullick@johnmullick.biz.com.hk Fax: 2868 4194

I am the nominated member for the Bar on that Committee. I would be grateful if you be so kind as to advise me who the Law Society's representative is, so that I may communicate directly with him/her.

If we can get everything in place, I would like to be able to requisition a meeting of the Criminal Procedure Rules Committee sometime in the Spring of next year.

I enclose a copy of my paper.

Yours sincerely,

John Mullick.

Enclosure: One (1).

LEGAL AID IN CRIMINAL CASES.

A PAPER.

(The subject of this Paper is the operation of legal aid in criminal litigation, in so far as it affects members of the Bar Association).

1. *INTRODUCTION.*

1.1 From the 1950s until 1970, legal aid in criminal litigation was provided by the judiciary on an *ad hoc* basis. An indigent accused or appellant could apply to the trial or an appeal judge for legal representation, the cost of which would be funded by the Registrar of the Supreme Court. Between 1967 and 1970, legal aid in both civil and criminal litigation was administered through the agency of the judiciary. The first administrator was a district court judge. This was not intended to be a permanent arrangement. In 1971, the Legal Aid Department, ("LAD"), was created, with its own Director. The **Legal Aid Ordinance, Cap. 91**, ("LAO"), had already been promulgated in 1966, it came into force at the beginning of 1967. The purpose of this Ordinance was and always has been to *"make provision for the granting of legal aid in civil actions to persons of limited means and for purposes incidental thereto or connected therewith"*.

1.2 In 1969 the **Criminal Procedure Ordinance, Cap. 221**, ("CPO"), was amended to introduce section 9A. This provision enabled the Criminal Procedure Rules Committee, ("Rules Committee"), to make rules providing for the granting and administration of legal aid in the criminal courts. These rules were given the name of **Legal Aid in Criminal Cases Rules, Cap. 221**, ("The Rules"). The Rules came into force on the 1st January 1970.

1.3 Though there is no statutory provision to this effect, the Judiciary relieved itself of the responsibility of administering criminal legal aid. Instead, The Rules invest the management and administration of criminal legal aid in the DLA. The funding of legal aid fees in criminal litigation is an item in the budget of the LAD. Whereas, according to section 9A(2) of the CPO, the expenses of legal aid granted under The Rules *'shall be met from moneys provided by the Legislative Council"*. In a real sense the DLA acts as the agent of the Judiciary, when disbursing fees and costs to legal practitioners in legally aided criminal litigation. On the other hand, The Rules can be re-cast, amended or otherwise altered by The Committee with the approval of the Legislative Council.

1.4 The Rules Committee, has a complement of eight persons, chaired by the Chief Justice. The Rules Committee include representatives from both the Bar and the Law Society, as well as the Judiciary and the LAD. At the present time, the writer is the Bar's representative. In their form and substance The Rules have changed little during the last thirty years. The system, whereby legal aid is granted in criminal litigation is hermetic: it is entirely self-contained.

2. *THE RULES.*

2.1 These Rules invest the DLA with a number of functions and duties. Some of which are relevant to the subject matter of this Paper. They are listed below:

(i) Rule 3: the DLA is required to "prepare and maintain separate panels of counsel and solicitors".

[Note - by Rule 3(3) counsel or solicitor may restrict the number and type of assignments he is willing to undertake in a given year. The DLA must make an entry to this effect on the appropriate panel. There is no provision in these Rules, or elsewhere, which suggests that the DLA can, unilaterally, restrict the number of assignments he may make to a counsel or solicitor. This is a practice, which the LAD has introduced in recent years. The legitimacy of this policy is questionable.]

(ii) Rule 3(4): the DLA may not include the name of a counsel or solicitor if he is satisfied that good reason exists to exclude him from the Panel.

(iii) Rule 5: an application for legal aid shall be made to the DLA.

(iv) Rule 6: the DLA shall be responsible for determining whether or not a person is entitled to receive legal aid and, if necessary, on what terms, (such as the payment of a financial contribution).

(v) Rule 7: if the DLA is satisfied that a person should have legal aid, the DLA shall grant him a legal aid certificate.

(vi) Rule 21(1): *"Solicitor and counsel fees"*. (This rule has been the cause of more dissatisfaction to the legal profession than any other).

(a) By this Rule the DLA is invested with the responsibility to assess and make payment of fees to counsel and solicitors for *"the work actually and reasonably done...."*

[*Note: The effect of this phrase/formula, which was borrowed from the Legal Aid Act of 1968 (UK), has been used by the LAD to justify paying less or nothing for 'lost days', aborted hearings owing to cancellation of a fixture, days lost because of pleas being accepted by the court and where the prosecution has been withdrawn. No pre-trial payments of fees can be made. Other examples can be provided of the deleterious effect of these words. This phrase is the grounding principle upon which legal aid fees are paid in criminal litigation. It has created inflexibility and rigidity in the thinking of the LAD. However, during the last 15 years or so, in the United Kingdom, a number of reforms have been introduced to mitigate the more adverse effects of this formula.*]

(b) The provisions enabling the DLA to make payment of fees in civil litigation are much simpler, and perhaps fairer. That is, by sections 20 and 20A of the LAO, the DLA will pay fees, in the absence of agreement, on taxation by a taxing master.

(c) The quantum of what the solicitor or counsel will be paid in civil litigation will be decided by the taxing master, acting in accordance with the principles and scales contained in Order 62 of the Rules of the High Court. There is a right of appeal, should the solicitor or counsel be dissatisfied with the quantum of taxation.

(d) It should not be forgotten that though the assessment and payment of fees in criminal litigation is delegated to the DLA, the setting of maximum levels of fees is not. Moreover the DLA has no authority to create his own fee structure, he is no more than one member of the Rules Committee, which is required by statute to provide for the payment of fees to solicitors and counsel. In fact there is nothing in section 9A, of the CPO to suggest upon what basis or bases the quantum of fees should be assessed. The "maximum fee" payment system has prevailed from the very beginning.

(g) On every occasion the exercise has proved to be fruitless. The Finance Branch fiat ruled. The maximum fee level, apparently tied to the prospective rate of inflation. The argument, that fees paid for criminal legal aid work had always been inadequate has been acknowledged by the LAD, though not by the Administration. As far as the writer is aware, no direct approach was ever made to the Rules Committee by the Bar. It was effectively by-passed. At the same time, it should be recognized that if a direct approach had been made, the Rules Committee might well have had to refer the matter to the DLA or another government agency for their responses and input. That being so, it still remains the statutory duty of the Rules Committee to make the decision and then refer it to LEGCO for approval.

(h) There should exist the opportunity for debate within the Rules Committee as to what adjustment, if any should be made to legal fees and costs. What is more important, perhaps, is to recognize that the time has come to question the whole basis upon which legal aid fees in criminal litigation are assessed and paid. It is the responsibility of the Rules Committee to make the decision not the DLA or the Administration.

(vii) Rule 21(1) sub-rules (a) to (p): sets out a table of maximum fees, which can be paid for any given piece of work as referred to therein.

(e) It is the understanding of the writer that the Rules Committee, for many years, has played little if any part in the setting of fee and cost levels. Over the last decade (that is until 1997), there had been "Biennial Reviews" of fees. This is an exercise, which has been entirely managed by the Administration. The maximum fee levels were adjusted upwards on a percentage basis, which was linked to the Consumer Price Index (B). The last general review was in 1997. In 1998 fees for High Court trials and Appeals were reviewed. Fees, in real terms, have not risen for twenty years. The net effect of this historical process is that the level of fees paid for criminal legal aid work has progressively fallen behind those, which are paid for privately funded work.

(f) It seems that these index-linked adjustments are calculated by the Finance Branch, in cooperation with the DLA and the Secretary of Administration. The relevant provisions of Rule 21(1) are then amended and placed before the Finance Committee of LEGCO for its formal approval. The Rules Committee has not, for many years, played any meaningful role in this process. Yet, the Rules Committee is not entirely to blame for this situation. During the last ten years or more, the Bar has drawn up submissions, to be made to the Finance Branch and the LAD for an appropriate upward adjustment of fees. Sometimes, more radical proposals had been made.

(a) Not all work performed by a lawyer in the conduct of a trial or appeal is catered for by these sub-rules. For example, no fee can be paid for preparation work or reading work, or advising on evidence, or the drafting of skeleton arguments and the like. The answer often given by the LAD to such complaints is that 'it is all allowed for in the brief fee'. With respect this is simply not correct. For example, the same brief fee would be paid for a like case, (such as murder), irrespective of whether or not the trial papers, accompanying the brief are 100 or 1000 pages. Like observations can be made for appeal work. The maximum fee payable for drafting Perfected Grounds of Appeal is HK$2830. Low as it is, this fee makes no allowance for reading and research. In fact, criminal appeals are so poorly paid that few senior junior counsel are willing to undertake the work. In recent years, the responsibilities of counsel, in presenting and conducting criminal appeals, have been enlarged. He is required to present detailed grounds and to provide written submissions for the appeal. No allowance for this additional work is provided for in the sub-rules. At the same time, there is no guarantee that appeal counsel will conduct the appeal. It is not unusual for the lay client to "go private" before the appeal is heard. The DLA will not pay his brief fee or the work done in preparing the written submissions. All that appeal counsel is 'entitled' to receive, according to the sub-rules, is the fee for settling the Perfected Grounds of Appeal.

(b) These sub-rules, in keeping with many other provisions of the Rules, are quite primitive and do not fit well into an increasingly sophisticated system of criminal litigation. In fact the sub-rules are rigid and inflexible in their application.

(c) The quantum of any fee paid, as stated in the sub-rules, is what *"appears to the Director to be proper in the circumstances"*. Thus all fees for criminal legal aid work must be assessed after the work has been done. Counsel will accept a brief without having more than a sketchy idea of how much he will be paid. The DLA has never revealed how and on what 'principles' or criteria a fee is assessed. Some years ago, the then DLA did provide a table to the Bar Association, which in broad terms set out bands of the maximum fees, which would be paid, according to the nature and seriousness of the case. In other words, the maximum fee paid for a robbery would be less than that paid for a murder. Regard was also paid to seniority of counsel. This, albeit pallid, attempt at openness has not been repeated. The process and principles/policy, governing the assessment of fees is shrouded in mystery. In modern jargon, the process lacks transparency. For example, in recent years, refresher fees have been cut back. Quite often the full refresher will not be paid, on the ground that the proceedings only occupied part of a day, irrespective of the reason why the hearing went short.

(d) Until about three years ago counsel would receive a full refresher for the Pre-Trial Review, (PTR). This no longer applies. There appears to have been a decision made by the DLA, in recent times, to the effect that fees for PTRs should not exceed 80% of the daily refresher. This fee, it is claimed, is paid for preparation. If that be the case,: why cut it down? It is noted that there is no provision in The Rules to permit the DLA to pay a fee for the PTR.

(e) In fact, for trial work, the fees presently paid are often less than what would have been received 3 years ago. It is probable, that the LAD, like other government departments, has had to cut back on its expenditure, in keeping with the Administration's policy of retrenchment.

(f) Other than requesting the DLA to reconsider his assessment, there is no appeal. This absence of any objective reconsideration of fees assessed has particular relevance to those cases where the trial judge or appeal court has granted a certificate of *"exceptional length or complexity"*. This is because when a certificate is granted there is no maximum limit to the fees, which can be paid by the LAD.

(viii) Rule 21(2) and (3): these sub-rules allows a trial or appeal judge if, in his 'opinion', the case *"is of exceptional length or complexity"* to issue a certificate to this effect. It is likely that this provision was introduced as a concession to the generally held view that fees paid for criminal litigation were inadequate.

(a) It is submitted a judge should not be placed in the position to influence the fee paid to the advocate. Such a situation is fraught with danger. The judge is being placed in the position of deciding what fees should be paid to advocate. This should not be his function.

(b) Different judges have differing views of what is meant by the phrase *'exceptional complexity'*. A judge may not be aware of the full extent of the work done by the advocate/lawyer. He may not be aware that a trial has been shortened by the efforts of the advocate in out of court preparation and negotiation. Some judges apply a very restricted interpretation of this phrase; others take a broader and more flexible view. An element of the unknown is introduced into the equation: the process assumes the character of a lottery.

(c) It is the considered opinion of the writer that the phrase *"exceptional length"* is virtually meaningless.

(d) If a trial is set down for a given length of time, it may often overrun. At the Pre-Trial Review the judge will ask counsel for their estimate of the potential length of the trial. Counsel will do their best to assist the judge. Unfortunately, many unforeseen factors may intervene during the trial; more evidence may be introduced, the client may change his instructions, thus prolonging the duration of the trial. It is the recent experience of trial counsel that judges have become more reluctant to certify that a trial is of exceptional length. The response to an application by counsel is that as he gave the judge an estimate of the likely duration of the trial he only has himself to blame for the overrun. Another factor, which may now have a much greater influence on the mind of the trial judge, is the policy of 'case management'. Judges are now under pressure to ensure that 'no time is wasted' in trials.

(e) At one time, there appears to have been an unspoken rule that if a trial were to run for more than 25 days, this would be sufficient qualification for a certificate of length. This no longer applies, (if it ever did). There are no discernable principles as to what is meant by *'exceptional length'*. Very often a long trial may also be complex. Thus a certificate of complexity would subsume one of length.

(f) Though theses sub-rules allow for an increase in the brief fee and the refresher when a certificate has been granted, it appears now to be the practice of the LAD to enhance the brief fee only. This is contrary to the former practice and ignores sub-rules 21(2)(b) and (3)(b). Thus it would appear that the approach of the fee assessor is to place emphasis on pre-trial preparation than on the trial itself. This change of approach was unannounced and generally serves to reduce the overall fee paid in complex trials. The longer the trial runs the less effect does the enhancement have on the total fee assessed.

(g) The writer believes that serious consideration should be given to questioning the efficacy of these two sub-rules. Should they be retained? If it is the intention to look at the Rules with new eyes there should be no place for these sub-rules. The complexity of a case should be known to an experienced lawyer, (legal aid counsel), from the outset. This is not to overlook the rare occasions when a case can be become more complex during the course of the trial.

(h) The enhancement of fees should be considered by the DLA, without the intervention of the judge. A refusal to enhance, or an inadequate enhancement, can be rectified if trial counsel and solicitors had the right to have their fees taxed by a taxing master.

[Note: In England and Wales, counsel's fees are taxed by the 'appropriate officer' or the registrar of the court. The advocate has the right to have the taxation of his fees 'reconsidered'. The refusal to reconsider the fee can be appealed from to a 'costs judge'].

(i) Then again the formula used in these sub-rules, as elsewhere, is what appears to the DLA to be proper. We need to consider what the word "proper" means in the context of legal aid fees and costs. It is clear that the use of this word is deliberate. It might be useful if the DLA were to be asked to give to the legal profession his understanding of what this word means. Should his understanding take account of such extraneous factors as budgetary concerns? A fair construction of the word "proper" in the context of The Rules should be synonymous with 'reasonable'.

> [*Note: It is likely that the word "proper" in The Rules was borrowed from earlier legislation, and it may owe its origin to the old RSC Order 65 rule 27, (England and Wales), where the phrase "necessary or proper " was used. In Francis v Francis [1955] All E. R. 836, @ 840, Sachs J. concluded that 'necessary or proper' and 'proper' has always been construed as 'reasonably incurred'. He then went on thus:* "Indeed 'reasonable', 'proper' and 'reasonable and proper' are obviously interchangeable expressions in the context under consideration and all include something beyond what is meant by 'necessary'." *In other words, it is submitted that 'proper' means 'reasonable', in the context of The Rules. It is to be noted that the word 'proper' is no longer to be found in Order 62 of the High Court Rules. Indeed, this word is little used in modern legislation.*]

(ix) Senior Counsel: Rule 21 allows the DLA to instruct leading counsel. No maximum is stated for the fees to be paid to Senior Counsel. The rate of fees to be paid is subject to the application of the formula *"as appears to the Director to be proper in the circumstances"*. It is a matter for negotiation. No doubt some leading counsel are better at negotiation, or have more persuasive clerks than others. What fee will be charged is open-ended; there is no limit, subject only to such claims for fees, which would not be acceptable to the notional taxing master.

(a) Whatever fee may be paid to Senior Counsel, it cannot be doubted that it will be several times more than the fee paid to junior counsel; comparing like with like. Very often junior counsel, in trials and appeals, when instructed by the DLA, are opposed by leading counsel, appearing for the Government. It is commonplace for senior juniors to take on work, which in other jurisdictions would be conducted by leading counsel. It is rare for leading counsel to be instructed by the DLA to conduct a criminal trial or an appeal. It is too expensive. There seems to be no logical reason why a scale of fees, appropriate to leading counsel cannot be introduced. The present system, only serves to make it prohibitively expensive to instruct leading counsel. Unfortunately, it is a fact of life that very few leading counsel now make them selves available for legally aided criminal trials and appeals. The question, which must be addressed, is whether there should be such a wide disparity in the fees paid. It is submitted that the Bar should consider supporting the proposition that fees for leading counsel, in legally aided criminal litigation should be specific and tabulated in a published scale, as is the case in the United Kingdom. Another aspect of this discussion is that leading counsel has effectively priced himself out of the market. There is public disquiet over the level of fees presently charged by leading counsel in Hong Kong. In the United Kingdom, the Office of Fair Trading has recently published a report, in which it asks the Bar to justify; (a) why there should be 'silks' system and; (b) if the system can be justified, why should leading counsel be paid so much more than a senior junior counsel.

3. Appeals to the Court of Final Appeal, (CFA).

Rule 21(1)(i) provides for the payment of fees to counsel conducting an application for leave to appeal and the appeal proper in the CFA. This provision first came into existence in 1982. It is the writer's experience, (1986), that his fee was taxed in the office of the Privy Council. However, it is now the practice that all fees for this type of work would be assessed "in-house".

3.1 The DLA is required to pay *"such fees as appears to the Director to be proper in the circumstances."* Thus there is no allowance for taxation. It places complete discretion in the Director. As far as the writer is aware, the LAD has never published a scale of what fees it should pay for work done.

3.2. The basis for the assessment of fees seems to be highly variable and problematical. Sometimes, the fee assessed is simply a percentage uplift of the fees paid for an appeal in the Court of Appeal. Sometimes the hourly-rate method is employed. At present, the hourly-rate is arbitrarily fixed at HK$1130. There is no authority for the setting of this rate. It seems that someone in the DLA decided that this should be the hourly rate, probably by analogy to the maximum hourly rate paid for conferences with the aided client. There are no specifics: it is all very much rule of thumb. It is now nearly four years since the CFA commenced its work. It would appear to be the case that the DLA prefers to let sleeping dogs lie. Or is it simply a desire to keep all the reins in his hands? However, the explanation could be more prosaic: inertia.

3.3 The present situation is wholly unsatisfactory; it must be remedied. Unfortunately, despite some informal suggestions made by the writer in

1996, the LAD has done nothing. This matter has never been raised in the Rules Committee* There should be taxation for such work, by the Registrar of the CFA. This is so in civil appeals. The writer has direct experience of the difficulties in persuading the DLA the pay a 'proper' fee for the work done. For example, the drafting of the Case, let alone the Notice of Motion can be a very complex and time-consuming exercise. It is not without significance that the LAD makes much greater use of juniors in the CFA than it did pre-1997. In those days the DLA, almost exclusively, instructed leading counsel to advise on the merits of an appeal to the Privy Council. It was rare for junior counsel to be solely instructed to conduct such appeals. It is now commonplace in Hong Kong for juniors on the merits and to conduct the appeal proper. In the United Kingdom, legal aid funded appeals to the House of Lords are taxed by the appropriate officer of that tribunal.

4. OTHER ANOMALIES OR INADEQUACIES OF THE RULES.

4.1 A number of anomalies have been created by the inadequacy of the Rules to accommodate the fast moving changes in the administration of the criminal law. As the years pass these anomalies become more obvious and must cause increasing concern. It is with regret that note must be taken of the inability or unwillingness of successive DLAs to address this problem. Again, this lack of response to meet changing circumstances can be put down to inertia. Some of these anomalies are listed below in this Paper; the list is not exhaustive.

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* *It is submitted that the Rules Committee could create a scale of fees and/or taxation principles for CFA work: see Rule 21(1)(i).*

4.2 To put the issue in context, the principal anomalies and inadequacies of the Rules can be described as follows, (they are in addition to those already mentioned):

- No **pre-trial** payment is made for research and reading under The Rules. Payment must wait until the conclusion of the trial. Indeed, there is no provision in the Rules, which allows for any payment for such work, unless a "certificate" is obtained after the trial is concluded. Even then the issuance of a certificate is problematical, it must rest on the "opinion" of the trial judge. It would not be sufficient for counsel to receive advance assurances from the LAD, (which are never given), or the judge, which though encouraging, leaves the last word with the DLA: to assess what he considers to be the appropriate fee.

- If current practice is anything to go by, such preparatory work will not be assessed as a separate item. In a large and complex fraud, which may involve perusing several dozens of box files of documents, taking several weeks to absorb; advising on evidence; and many conferences, not only with the lay client, but with accountants and other experts, nothing can be allowed, until after the conclusion of the trial. The trial may not commence for several months. If there is no certificate, there will be no payment for reading or research or even preparing schedules, PTR statements and general preparation. Payment will be confined to fees for conferences and the PTR hearing and the trial itself. As already mentioned, the quantum of what counsel may receive is left at large. It rests entirely on a post-case assessment, the bases of which are not revealed to him or to anyone else outside the DLA.

- Though this example may be regarded as exceptional, it is by no means out of line with many other cases. In a many-handed trial, (many defendants, for the uninitiated), the quantity of paper can be enormous. In the United Kingdom, there is now what is called "Evidence Uplift", which allows payment for reading the trial papers at so much a page.

  [*Note: In a recent case, which was handled by the writer, the total number of pages of written material came to about 4000. Trial counsel did not even consider making an application for a reading fee, (which can be given in a fiat prosecution), for the obvious reason that The Rules do not allow for such payment. Moreover, experienced counsel did not even consider making an application for a certificate, because he did not believe the case to be 'exceptionally complex'.*]

- No provision is made in the Rules for what have been called "*cracked trials*". A "cracked trial" is one where the proceedings have been brought to a premature end, either before or after the trial has commenced because, generally, (not exclusively), a plea has been accepted or the prosecution has decided not to proceed with the case. In Hong Kong, all that counsel will be paid for is the work "*actually and reasonably done*". This gives the lie to the assertion, often made by the LAD, that the brief fee in part, is payment for preparation. By way of an aside, it is submitted that the word "*reasonably*" does not sit well with a situation, where counsel has lost several days of work and his diary has been compromised, without financial recompense. He receives no payment for lost days. It could be argued that the effect of The Rules, as presently framed, might well encourage the advocate to refrain from sufficiently preparing his case; or to advise his client not to enter a suitable plea; or not to negotiate for a "deal" with the prosecution; or even to 'drag' on the case. There is no incentive in The Rules to

induce the advocate to resolve the issues in a trial more expeditiously.

- No provision is made in The Rules to recompense the advocate, when he has been obliged to return his brief, or the trial cannot commence on the due date, for example, because (a) the lay client has withdrawn his instructions, or (b) his present case has overrun, or (c) the court is not available, or (d) he or his opponent, or the lay client is indisposed, or (e) the lay client has absconded, or even (f) a vital prosecution witness is not immediately available. The list of such adventitious events is endless.

- In such circumstances all the advocate will receive is payment for what he has done, not for what he has lost. In the United Kingdom, there has been some attempt to adjust the legal system to deal with such situations. In Hong Kong the advocate receives no payment for 'lost days'.

4.3 It is submitted that the appropriate body, to which these anomalies and inadequacies – (and any others which may occur to members) - should be addressed, is the Rules Committee.

5. THE "SCOTT" REPORT.

In 1985, the Chief Secretary set up an internal Working Party of the Administration under the chairmanship of Mr. Allan Scott, then Deputy Chief Secretary. The ensuing report of the Working Party came to be known as the "Scott" Report.

5.1 In Chapter VI of the Report, an examination was made of the structure and of the level of fees then paid for criminal legal aid work. In paragraphs 6.4 to 6.12 of Chapter 6 of the Report the Working Party examined the level of fees and, what it termed the *"inadequacies of the criminal legal aid system"*. The Report, in paragraph 6.8, summarised the major criticisms made of the system by the legal profession.

5.2 In particular, reference was made in the Report to three areas of complaint. Firstly, (and most obviously), the fees paid were too low, secondly, there was a lack of any appeal regime against the assessment of fees made by the DLA and, thirdly, the payment of fees was too heavily weighted in favour of court attendance. There was thus a disincentive to conduct adequate preparatory work. None of these complaints has been remedied to date. The authors of the Report, make this statement, at the end of paragraph 68: *"There can be little doubt that time spent properly in preparation can substantially reduce time taken during the trial, and expenditure reduced as a result."*

5.3 In paragraph 6.9 the Report refers to a suggestion that advocates should be paid on an hourly rate, and that he/she should be paid during necessary adjournments. Such a system would encourage skilled advocates to increase their productivity. In Paragraph 6.10 the authors of the Report expressed the view that the criminal legal aid fee structure requires reform, so as to, *"to remedy the inadequacies of the existing system"*. It was suggested that there should be greater flexibility in deciding the fee level and there should be provision for properly remunerating the advocate for preparatory work.

5.4 In paragraph 6.11 it is recommended that there should be a *"procedure for taxation by a Taxation Master of fees claimed by Counsel or Solicitor dissatisfied by an assessment made by the Director of Legal Aid"*. In paragraph 6.12, the authors of the Report note that these matters were not *"specifically"* within the terms of reference of the Working Party. On the other hand it was recommended that they should be referred to the "Advisory Committee on Legal Aid", when it was set up.

5.5 This Advisory Committee was never set up, nor was the Legal Aid Commission: both recommended reforms of the legal aid service made by the Working Party. In fact, save for some marginal tinkering, none of the major proposals of the Working Party ever saw the light of day. One suggestion, in so far as it concerns the assessment of criminal legal aid fees, seems to have been taken on board by the LAD. And that was the need for a more comprehensive case report form, (see paragraph 6.10), which was designed to assist the person responsible for assessing the fees to be better informed as to the work done. Counsel now has extra work to do without it making the slightest difference to the quantum of his fees. (*Should the LAD suggest otherwise, the DLA can be asked to give examples of any increase he may have paid to counsel, because his Report Form was more comprehensive than another, who was in the same case, and doing the same work).* This proposed reform was intended to accompany other reforms suggested in the same paragraph. This is a classical example of a government department picking and choosing those recommendations, which it considers will cause the least expense and inconvenience to itself, thus ignoring the real underlying purpose for setting up the Working Party in the first place.

5.6 What is ironical is that the Working Party was the creation of the Administration of the day; all its members were civil servants, or employed by the Government. The then DLA was a senior member of the Working Party. There appears to have been no registered dissent/s to the Report. Despite such a weighty provenance, the Report had little if any impact on the Administration. In this regard it must be understood that the Administration believes that the legal aid service needs no or very marginal improvement. The recommendations of the Legal Aid Services Council, that the LAD should be independent of Government, were dismissed out of hand in 1999, despite incurring considerable expenditure in commissioning an independent firm of consultants to make a detailed report on the subject. The Bar should be prepared to receive an immediate negative response from the Administration and the DLA to any proposal for reform of the LAD or its practices.

6. BUDGET AND FINANCIAL IMPLICATIONS.

6.1 In very broad terms, any reform to the present system will cost money. It might therefore, be useful to make a brief examination of how much the legal aid system does cost the taxpayer, and would reforms impose an unnecessarily high extra burden on the tax-payer. It is the submission of the writer, which is supported by government statistics that, in real terms, the cost of criminal legal aid has actually fallen during the last 5 years. It is likely that the budget for the provision of criminal legal in the financial year 2001/2002 will be less than the previous financial year.

6.2 To give an historical perspective to this subject, in 1984 the budget for the Legal Aid department was $80 million, allowing for the claw back of costs received by the LAD in its civil litigation, the net cost to the public for legal aid was $60 million. Of this sum $31.5 million was attributable to "departmental expense", (salaries of the LAD staff).

6.3 In 1994/95, the gross total bill for the provision of legal aid in Hong Kong was $376.835 million, (deducting from this sum the item 'costs recovered' and aided persons contributions), the net total was just over $300 million. In the year, 1998/99 the gross total was $741.676 million, (less costs and contributions), the net figure was $485.144. During the same period, departmental expenses, including salaries, increased from $124.766 million in 1994/95 to $211.106 million in 1998/99. In the same six years, the costs, (solicitors and counsel), of criminal legal aid, remained static; on average, about $130 million per annum.

6.4 The approved provision total costs for the LAD for the year 2000-2001, (including salary and departmental expenses: which is $232.425 million), is $951.208. From this figure should be deducted the LAD estimate of revenue, $300 million. The actual revenue could be more and the total costs less. There is a natural tendency for government departments to emphasise costs and diminish potential revenue when creating its budget and seeking financial provision from the Treasury. The total financial provision for criminal legal aid for the same year was $143.400 million. However, it is highly probable that when the figures come in after 1st April 2001, the expenditure on criminal legal aid will be less than this figure and less than the previous year. So far, that is up to the 31st December 2000, only $53.112 million had been disbursed under this heading.

6.5 To summarise: it can be demonstrated that the cost of criminal legal aid to the taxpayer, has fallen during the last 7 years. At the same time, the cost of running the LAD has increased substantially. It should be noted that "departmental expenses" do not include office rent and pensions.

6.6 It is the writer's belief, that without any incremental increase in fees during the next two years, there will be a palpable reduction in criminal legal aid cost expenditure.

7. THE TIME FOR ACTION.

7.1 It is the writer's opinion that the time is right for a radical re-think of the structure and operation of legal aid in criminal litigation. At the present time, the number of counsel on the Panel is 483. This is a substantial number. Two complementary market forces are causing much difficulty for criminal law practitioner. On the one hand there are many more advocates available for work and on the other hand there is less work to go around. The LAD finds itself in a *buyers' market*. Thus it will claim that the present system "serves us well", and should not be altered. Moreover, the DLA can truthfully contend that there are more than enough advocates around to do the work for the fees offered and paid.

7.2 With respect, the Bar Association might consider concentrating its attention on reforming the system rather than focussing too much on the level of fees. If some of the reforms, suggested in this Paper were to be implemented, there is likely to be a meaningful increase in income.

7.3 The writer has received a memorandum, dated the 16th March 2001, from the Hong Kong Bar Association. In particular, reference is made to paragraph 4 thereof. It would seem that the Bar is already moving towards the idea that there should be a general overhaul of the system. However, with profound respect, the reforms proposed in the memorandum appear to amount to no more than mere tinkering with the problem.

7.4 The idea of *marked briefs* has been around for a long time, and has never been acceptable to the Administration. It is unlikely to result in increased fees, though it would give the advocate the opportunity to know what he will be paid, before the trial commences. Counsel on the Panel, are obliged to accept a legal aid brief, if he is available, irrespective of the brief fee. If a similar regime, to that which operates in the United Kingdom, were introduced in Hong Kong, with appropriate adjustments, this might remove the need for marked briefs. For the reasons, which have been given, the writer agrees that the judge should be excluded from having any influence on the level of fees to be paid to counsel.

John Mullick
20.iv.2001.

To:

The Chairman of the Bar Association, Hong Kong.

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Solicitors & Notaries
Agents for Trade Marks, Designs and Patent.
祿得基 何福康 律師行

Partners:
Christopher Knight 祿得基律師
B.A.(Hons)
Notary Public

Consultants:
Ferdinand F.H. Ho 何福康律師
B.Sc.(Hons), Dip.Ed., Dip. M.S., M.B.A., Dip. Ch. Law
(Not Ordinarily Resident in Hong Kong.)

Wong Kam Chuen 黃錦泉律師
B.A.(Hons), LL. B. (Hons)

Assistant Solicitors:
Margaret Y.F. Chan 陳綺芬律師
M.B.A., LL. B. (Hons)

Lincoln S.Y. Ho 何善恩律師
B.A.(Hons), Dip. Ch. Law

Josephine Au Yeung 歐陽淑祝律師
LL. B. (Hons)

Your Ref.:
Our Ref.:

Date: 6th May 2003

Mr. John Mullick, Esq.
Barrister-at-law
Room 501A,
9 Queen's Road Central,
Hong Kong.

BY FAX & BY POST
(2868 4194)

Dear John,

Review of Criminal Legal Aid

I have read your paper once more on Legal Aid in Criminal Cases. I agree with the points you have made.

I would make the following comments from the point of view of solicitors involved in legally aided criminal cases :

CRIMINAL TRIALS

The Legal Aid in Criminal Cases Rules made under the Criminal Procedure Ordinance only make provision for a brief and refresher fee; with no account given to the number of hours actually spent in preparation prior to the first date of trial. The maximum amount that a solicitor can be paid is fixed by law; irrespective of the number of hours that have been properly spent in preparing the case for court. This amount is presently HK$7,100; for the brief fee to cover all preparation and the first day of trial. For the second and subsequent days of trial, the fee will range between HK$870 and HK$4,620. The Director of Legal Aid has no discretion to pay more than these maximum amounts even though he may think this is justified because of the amount of work carried out for an accused person.

10th Floor, Ritz Building, 625 Nathan Road, Kowloon, Hong Kong.
香港九龍彌敦道六二五號麗斯大廈十樓
Document Exchange No. 文件交匯編號：DX-535003 Mongkok 1
Telephone 電話 : 2332 5773, 2780 5287
Facsimile 圖文傳真 : 2770 1331, 2782 5525 & 2626 9054

It is a fallacy to say that preparation work is properly provided for in the brief fee. It is not. Cases vary enormously in the time required to prepare for trial. The maximum scale fee for preparing a trial that will last for two months is the same as for a trial that will last two days.

The nature of the work required to prepare a case for trial has evolved since the present system of remuneration was introduced. The police and the ICAC now make far greater use of video recorded evidence. Interviews under caution are now more likely than not to be recorded on video, as are constructions of events at the scenes of crimes. The police now routinely record events they are policing when they suspect trouble might occur. The Immigration Department murder and arson case is an example of this.

Reviewing video taped evidence takes much longer than reading a witness statement of someone present at the event. A three hour video tape will take three hours to examine; at least on a first viewing. It may have to be viewed again for several times. And yet the present system makes no allowance for the time a solicitor spends doing this necessary work.

The system also penalises shortening trials by agreeing evidence. It penalises the solicitor who advises a client to plead guilty in cases where the prosecution evidence is strong. The practitioner will not be compensated for the preparation work other than being paid a brief fee for the first day of trial.

The only circumstances where the Legal Aid Department is given a discretion to go beyond the statutory maximum fees is where the trial judge grants a certificate confirming that the case was one of either exceptional length or exceptional complexity, or both.

This is, however, a highly unsatisfactory system :

- There is no discretion to pay fees for preparation work, but only to increase the fee for the first day of trial and the daily fee for subsequent trial days.
- It does not cover the vast majority of cases but only exceptional cases. Therefore in most cases no proper allowance can be given for the amount of preparation work properly carried out.

- Judges tend to assess complexity by examining how complex were the legal issues raised in court during the trial. However, a relatively straightforward case in terms of the law may involve the instructing solicitor interviewing a great number of witnesses, visiting the scene of the crime or obtaining opinions from expert witnesses; none of which will usually be sufficient to persuade the trial judge that the case was of exceptional complexity.
- Judges often have no idea how much preparation work has had to be undertaken to make the case ready for trial. He will not examine a solicitor's preparation file before making a decision on whether to grant a Certificate. Nor indeed would this be a desirable practice.
- Where Judges have granted certificates of both length and complexity, the Legal Aid Department has adopted the practice of paying solicitors on "Brief Fee" for the first day which is twice the amount of the maximum fee regardless of how much preparation work has been done but then paying less than the maximum amount for the second and every subsequent day of trial.

The situation is worse when solicitors are requested by the Legal Aid Department, acting on behalf of the Secretary for the Civil Service, to represent government servants, such as police officers, facing criminal charges to be heard in the magistrates' courts. A Magistrate has no power to grant a certificate of complexity. In all of these cases the matter is serious, because in the event of a conviction, the officer would lose his reputation, his career and his pension rights. Practitioners often spend many hours preparing a defence which is never properly reflected in the Brief fee.

In many cases preparation for trial cannot be responsibly delegated by the solicitor assigned to act. Failure to modify the existing system of payment will encourage cases to be assigned to inexperienced solicitors or even worse to members of staff who are not legally qualified. This cannot be in the interests of legally aided clients.

It may be argued that if solicitors are unhappy about the fees payable, they should not accept Legal Aid cases. However, in the vast majority of cases the solicitor assigned will know practicably nothing about the case when requested to the act. It would neither be practicable nor in an accused persons interest, for solicitors to insist on seeing the case papers first before accepting instructions.

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CRIMINAL APPEALS

The same criticisms apply to legally aided criminal appeals. In addition the Rules do not provide any framework for fees for appeals to the Court of Final Appeal. They provide for simply " ... such fees as appear to the Director to be proper in the circumstances". There is no appeal from the Directors of Legal Aid's decision.

CONCLUSION

The system which decides remuneration in civil legal aid cases should be extended to cover criminal cases. Solicitors acting in legal aid matters should be paid at an hourly rate appropriate their experience. If the Legal Aid Department considers the fees claimed by the solicitor to be excessive, then the matter should be decided by the Registrar, in a taxation hearing, with the solicitor having to justify the amount claimed.

Remuneration should be on the basis of work actually and properly carried out. If standards are to be maintained, the present system must be changed.

Kevin Steel and I would welcome the opportunity to meet with the representatives of the Bar to try and form a united front in this matter. Please note however that the views expressed in this letter are my own and the stance to be adopted by the Law Society would have to be approved by the Council.

Yours truly,

Christopher Knight
KNIGHT & HO

CK/cw
c.c. Mr. Kevin Steel
and
Ms. Christine Chu
Law Society of Hong Kong