

## Review of Criminal Legal Aid Fees System

1. The following is the Law Society’s preliminary views on fees adjustments and other issues pertinent to the biennial review of Criminal Legal Aid.

*A. Adjustments to criminal legal aid rates*

2. The Criminal Law and Procedure Committee of the Law Society (“the Committee”) suggests that in this biennial criminal legal aid rates, the primary focus should be on the rates of criminal legal aid.

*(a) Criminal vs Civil Rates*

3. Currently the criminal legal aid rates are set out in the *Legal Aid in Criminal Cases Rules Cap 221D*. The Rules were amended lately in November 2013.

4. Notwithstanding the latest revision, the criminal legal aid rates are still very much lower than that for the civil legal aid.

5. By way of illustration, under Cap 221D,

Item Nos in Part 2 of Schedule	Matters	Rates allowed
1	Solicitor assigned under a legal aid certificate to act as an instructing solicitor in respect of proceedings in the <i>Court of First Instance</i>	A fee for conferences with counsel (including time for travelling to and from conference venues and waiting time) approved by the Director at the rate of <b>\$800 per hour</b>
5	Solicitor assigned under a legal aid certificate to act as an instructing solicitor in respect of proceedings in the <i>District Court</i>	A fee for conferences with counsel (including time for travelling to and from conference venues and waiting time) approved by the Director of Legal Aid at the rate of <b>\$670 per hour.</b>

6. Compare the above to the range of hourly rates allowed by the Court for civil litigation - these rates which could be found on the Law Society Circular No. 08-213 are summarized in the table below

July 1997 to date

No. of Years of Practice	High Court (HK\$)	District court (HK\$)
Newly admitted	from 1,600 to 2,000	from 1,066 to 1,280
2 – 4 years	from 2,000 to 2,500	from 1,350 to 1,650
5 – 6 years	from 2,400 to 3,000	from 1,600 to 2,000
7 – 8 years	from 2,900 to 3,500	from 1,900 to 2,300
over 10 years	from 3,200 to 4,000	from 2,100 to 2,600
Trainee Solicitor	from 1,066 to 1,300	from 700 to 860
Litigation clerk	from 800 to 1,000	from 533 to 660
Law Costs Draftsman	1,600	1,600

7. Notably, the hourly rates offered to the criminal legal aid solicitors on the above quoted situations are comparable only to *litigation clerks* for civil matter and are lower than *semi-professional (Law Costs Draftsmen)*.
8. The huge discrepancy in the two set of rates is obvious and worrying.
9. Financially speaking, the criminal legal aid rates are not attractive at all:
  - a. The current set of rates in effect provides a disincentive and drives away solicitors who would otherwise agree to take on criminal legal aid cases. In particular, those who have several years of post qualification experience are not interested in taking on criminal legal aid assignments at all.
  - b. With a low budget, solicitors assigned on criminal legal aid necessarily have to delegate their work to law clerks and semi-qualified personnel. Important tasks such as interviewing defendants, drafting and preparing statements etc are now often handled by unqualified people. The standard of preparation of a defence' case could be improved if these work could be taken up by trained legal professionals.
  - c. The above stands unfavourably to the Prosecution where they have virtually unlimited budgetary and personnel resources in preparing and prosecuting cases.
  - d. The heavy reliance on law clerks and untrained professionals serves to entrench the notorious system of “si-yee” (師爺) or agents who could be farming out cases to solicitors. They on some occasions could be unethical touts.

- e. The lack of financial incentives to attract and/or retain experienced criminal practitioners is drying up the pool of talents from which the Judiciary could tap into for recruitment to the Bench. Members of the Committee have already received comments from the Bench that there has been a dearth of competent criminal practitioners for judiciary recruitment.

*(b) Worldwide Trend?*

10. There has been a suggestion that there is a worldwide trend that civil legal aid rates *must necessarily* be higher than the criminal legal aid rates.
11. The Committee does not agree to this suggestion and has surveyed a few jurisdictions, which shows that contrary to the above assertion, there are jurisdictions where criminal legal aid rates are comparable or even higher than that of the civil legal aid rates.

	<b>Countries</b>	<b>Criminal vs Civil Legal Aid Rates</b>	<b>Remarks</b>
1.	Ontario, Canada	No differentiation on rates is in effect made between civil legal aid and criminal legal aid practitioners.	See <i>Legal Aid Ontario: Tariff and billing handbook (2012 Nov edition)</i>
2.	England & Wales	Without a direct item-by-item comparison, the legal aid London rates for civil matters and for criminal rates are not very much dissimilar from each other.	See <i>the Criminal Legal Aid (Remuneration) Regulations 2013, Schedule 4</i> and <i>The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Tables 7 - 10</i>
3.	New South Wales, Australia	The civil and criminal legal aid rates in NSW are differently evaluated. On hourly rates per se, however, the criminal and the civil rates are comparable.	See the related website <sup>1</sup>
4.	State of Washington,	It is not possible to compare the two systems, as the two are operating on a	

<sup>1</sup> <http://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/state-matters/civil-matters-practitioners-fees> and <http://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/state-matters/criminal-matters-counsel>

	Countries	Criminal vs Civil Legal Aid Rates	Remarks
	USA	different basis. There are also more than one legal aid service providers. Nevertheless on those info provided, a criminal lawyer on legal aid could earn more than that doing civil work.	
5.	Malaysia	It seems not too easy to make a comparison, but according to the Bar CEO of their Council, in Malaysia the criminal legal aid rates are not substantially lower than the civil rates. In fact they are comparable or maybe even higher.	

12. Apart from the above survey, in the interest of justice,

- a. there is no answer to the question as to why a claim for e.g. work place compensation, deserves more funding from the government, but not the personal freedom or liberty;
- b. there is also no justification that the criminal legal work is or is perceived as a lesser paid work; and
- c. is it also under consideration that the Judges, members of the Department of Justice and Legal Aid Officers who work in the field of criminal law should be paid less than those who undertake civil law? The Committee can only assume not, as the work is equally challenging, and also because of the same reasons of fairness as set out in this submission.

13. In terms of government finance, there should not be any non-formidable budgetary difficulties, as the Legal Aid Department has repeatedly and consistently been emphasising that there is no cap on legal aid budget.

*(c) Comparison to CPI*

14. The Committee reckons that in the past, discussions on and adjustments to the criminal legal aid have too conveniently been linked up to annual adjustments to CPI indices. This linking has been unfortunate, as

- a. the adjustment in CPI indices does not address the very basic question that the base rates for the criminal legal aid are derisory; and

- b. conceptually and fundamentally, it is wrong to hook up fluctuation in the prices of a designated basket of goods and services to the costs of criminal legal services. The various CPIs are compiled based on the expenditure patterns of different households, and the expenditure weights for compiling the CPI series are derived based on the household expenditure patterns obtained from the Household Expenditure Survey conducted in the respective periods<sup>2</sup>. It is absurd to think that criminal legal services is an item in the household expenditure, or that such service would be weighed upon in household expenditure “*patterns*” (!) When there is *no basis* to feature criminal legal services in the CPI, it is misleading and also prejudicial to use CPI as a benchmark to adjust the criminal legal aid rates.

15. If the adjustments for some reasons have to be linked up to surveys by the Government, then the results of other surveys should be considered on top of, or in lieu of, the CPI fluctuations. These surveys should include the relevant surveys in wages and earnings, as well as rentals. All these affect the operating costs of a law firm and should be considered *in toto* in any adjustment in the criminal legal aid rates.

**16. The Committee asks that in this and the future biennial reviews, the review should be delinked from the CPI adjustment, unless**

- a. **the criminal legal aid rates and the civil legal aid rates have been harmonized, AND**
- b. **there is a proper foundation to link up the review to the other and various surveys by the Census and Statistics Department.**

*(d) Proposed adjustments*

17. It is acknowledged that criminal legal aid is structured in a manner which is not similar to that of the civil legal aid rates. Nevertheless, the difference in structure in the remuneration should not be a bar to the revamp on assessment of the criminal legal aid. The overall aim to put the two sets of legal aid rates on par.

**18. The Committee asks that criminal legal aid should be assessed at rates comparable to the civil legal aid rates.**

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<sup>2</sup> See the “concepts and methods” in various monthly reports on CPI, published by the Census and Statistics Department. E.g. <http://www.statistics.gov.hk/pub/B10600012014MM06B0100.pdf> .

19. **The Committee understands that the revamp takes time. Given that the very low base rate now in force for the criminal legal aid, and the time to be taken to review the above, the Committee seeks to have a 50% increase of the base rates of criminal legal aid in the current review.**
20. The above suggested increase is only an *interim response*, and is without prejudice to, the Committee's request that the criminal legal aid rates should be on par with that of the civil rates.

*(e) Rates for Criminal Appeal and Solicitor-Advocates*

21. In the course of the review of the above, the Committee asks the Government to also consider and to review
- a. the rates in appeal cases and in the Court of Final Appeal,
  - b. the rates applicable to solicitor-advocates practising in criminal jurisdiction, and
  - c. the practice that at present, a solicitor would not be entitled to charge a conference with client held at a detention centre, unless he or she is accompanied by a barrister. There is no rationale or justification for this practice. Such practice should be discontinued forthwith.

*B. Other Issues*

22. The Committee repeats that the current biennial review should be de-linked from fiat and Duty Lawyers Scheme. This is because the work nature of fiat is very different from that of the legal aid cases, as a lot of investigation work have been carried out by the OC case. Duty Lawyers Scheme on the other hand has its own system of remuneration.

*C. Way forward and time tabling.*

23. The Committee asks that a meeting is to be convened in October 2014, in order to finalize the recommendations and be put forward to the Legal Aid Services Council and the LegCo AJLS panel.

**5 September 2014**