

CHRI 2018

MICRO STUDY ON THE
PAYMENT OF
LEGAL AID
LAWYERS



CHRI

Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in
the countries of the Commonwealth



Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-profit, non-partisan, international non-governmental organisation working in the area of human rights. In 1987, several Commonwealth professional associations founded CHRI, since there was little focus on human rights within the association of 53 nations although the Commonwealth provided member countries the basis of shared common laws.

Through its reports and periodic investigations, CHRI continually draws attention to the progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, the United Nations Human Rights Council members, the media and civil society. It works on and collaborates around public education programmes, policy dialogues, comparative research, advocacy and networking on the issues of Access to Information and Access to Justice.

CHRI's seeks to promote adherence to the Universal Declaration of Human Rights, the Commonwealth Harare Principles and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in the Commonwealth.

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Sanjoy Hazarika, International Director

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CHRI Headquarters, New Delhi
55A, Third Floor
Siddharth Chambers
Kalu Sarai, New Delhi 110 017
India
Tel: +91 11 4318 0200
Fax: +91 11 2686 4688
E-mail: info@humanrightsinitiative.org

CHRI London
Room No. 219
School of Advanced Study
South Block, Senate House
Malet Street
London WC1E 7HU
United Kingdom
E-mail: london@humanrightsinitiative.org

CHRI Africa, Accra
House No.9, Samora Machel Street
Asylum Down
Opposite Beverly Hills Hotel
Near Trust Towers
Accra, Ghana
Tel/Fax: +233 302 971170
Email: chriafrika@humanrightsinitiative.org

www.humanrightsinitiative.org

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Written by

AMRITA PAUL

Edited by

DEEPAN KUMAR SARKAR & MADHURIMA DHANUKA

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INTRODUCTION

A common perception about the legal aid system in India is that it fails to succeed due to the lackadaisical attitude of the lawyers. However, to examine this notion, it is necessary to analyse any possible reasons leading to such attitudes among legal aid lawyers¹. This necessitates further examination, which intends to shed light on factors that influence legal aid lawyers and document problems related to payment of panel lawyers working with the district legal services authorities in West Bengal. The findings reported in this study are based on interviews with 22 lawyers from five districts in West Bengal.

BACKGROUND AND CONTEXT

Access to justice is fundamental to a person's right to life and personal liberty as conferred by Article 21 of the Constitution of India. However, this access, despite being guaranteed by law, is not enjoyed uniformly by all of India's population. Large sections of Indians belong to low-income groups and are financially incapable of affording anything over and above bare necessities. Access to the courts of law and competent legal services is significantly expensive and beyond the reach of the majority of India's population.

While India's affluent minority access to legal services by hiring competent, expensive lawyers, and well-networked law firms, its poorer majority, with its limited financial resources can only afford relatively inexpensive but less competent individual lawyers or avail free legal aid services made available within the statutory framework of the Legal Services Authority's Act, 1987.

Prior to 1987, India did not have a uniform statutory framework for providing access to legal services to the large parts of the population that could not bear high litigation costs. In recognition of the salutary principle that the right to legal representation is an essential element of a fair, humane, efficient criminal justice system, the 1973 Expert Committee on Legal Aid, titled "Processual Justice to the People" recommended the establishment of a statutory framework to provide legal aid to those with economic or other disabilities. The Committee discussed the futility of the court-centric litigative aid to the poor and marginalized sections, and recommended a series of alternative strategies.

Subsequently, by the Constitution (42nd Amendment) Act, 1976, Article 39A was inserted in Part IV of the Constitution of India which enjoined upon the State to, inter alia, secure equal justice and provide free legal aid by way of suitable legislation or in any other way. Thereafter, the Legal Services Authorities Act, 1987 ("LSA Act") was enacted by Parliament which set up permanent

¹ A legal aid lawyer here refers to those lawyers empanelled under the District Legal Services Authorities as per existing laws and regulations under the Legal Services Authorities Act 1987. In this context, the term includes panel, retainer, jail visiting and remand lawyers.

multi-tiered statutory bodies for the sole purpose of promoting and providing legal aid services to anyone in need.

Being the foundation for enjoyment of other rights, including the right to a fair trial, access to justice also acts as a safeguard that ensures fundamental fairness and public trust in the criminal justice process.² For those unable to afford a lawyer, the ‘right to free legal aid’³ at the state’s cost is crucial.⁴ The LSA Act provides for legal aid services through the National Legal Services Authority, Supreme Court Legal Services Committee, the State Legal Services Authorities, the High Court Legal Services Committees, the District Legal Services Authorities and the Taluk Legal Services Committees. Each such authority or committee, as the case may be, maintains a panel of legal aid lawyers entrusted with cases of legal aid applicants. However, despite the existence of a well-defined statutory framework, the legal aid delivery system continues to face structural challenges that impede the efficient functioning of legal aid lawyers.

The issue of the payment of legal aid lawyers was also mentioned in CHRI’s *‘Hope Behind Bars? – Status Report on Legal Aid for Persons in Custody’*.⁵ The report, based on right to information response from 29 states, identified policy and implementation gaps in the legal aid system and recommended ways to improve legal aid delivery, particularly for individuals in jail. The study, in particular, highlights the problem with the usual practice of paying panel lawyers their fees in two installments: one at the outset of the case and the next at the conclusion of the case. It also suggests that because of the long duration of most cases, these lawyers remain unpaid (or underpaid) which might act as a disincentive for them to continue working to their full capacities.

One of the key structural challenges, thus, lies in the process of making payments to panel lawyers for their services. Our interaction with lawyers too reflects that there are serious concerns and disappointments among them which impacts their efficiency.

At this point, it is important to note that the efficiency (or the lack thereof) of legal aid lawyers is a factor in the assessment of the quality of legal aid services in India. Thus, any constructive evaluation of the implementation of legal aid services would necessarily have to consider issues pertaining to quality, functioning, efficiency and challenges facing legal aid lawyers as its pivot.

² United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

³ Article 22(1) – No person who is arrested shall be detained in custody without being informed of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

⁴ Article 39A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

⁵ <http://www.humanrightsinitiative.org/publication/hope-behind-bars-status-report-on-legal-aid-for-persons-in-custody>.

METHODOLOGY

This micro-survey was conducted with 22 lawyers from five districts of West Bengal: North 24 Parganas, South 24 Parganas, Howrah, Murshidabad and Kolkata, between February 2016 and April 2016. The interactions with lawyers were based on the semi-structured interview methods, where some questions were specific and others were more loosely structured and conversational. Their answers were documented for further analysis and evaluation. These interviews offered an insight into the lawyers' perspective on the prevailing payment system, reporting mechanisms, and the promptness and effectiveness of the delivery of legal aid services.

BEHIND THE SCENES:

GRIEVANCES OF LEGAL AID LAWYERS

This chapter details the impediments and challenges that legal aid lawyers face in work. The NALSA Regulations 2010, followed by the Standard Operating Procedures on Representation of Persons in Custody 2016, places certain responsibilities on legal aid lawyers; these include:

1. Inform, within three days of the date of each hearing, the DLSA Secretary about the next date of hearing and purpose.
2. Visit prisons at least twice every week.
3. Regularly interact with inmates, especially new inmates, to find whether they are represented. If they are not, inform inmates about their right to legal aid and subsequently, if it comes to their notice that an undertrial is not being represented by a lawyer, inform the DLSA so that one can be appointed.
4. Communicate to the DLSA Secretary cases where bail applications have to be filed on behalf of inmates or where bail orders have been issued but bail bonds could not be furnished due to various reasons.

Additionally, legal aid lawyers are further classified into retainer, remand and jail-visiting lawyers. Each is assigned a specific set of responsibilities and duties under various regulations periodically issued by NALSA.

In this context, it is pertinent to understand the process of legal aid application, assignment and delivery, which include the following steps:

- a. The person in need or applicant for legal aid approaches the concerned person, who can be a paralegal volunteer, front office representative, or legal aid clinic representative either verbally or by way of a written application, seeking assistance of a legal aid lawyer.
- b. In the case of prisoners, a prison officer, Welfare Officer or a representative of the prison legal aid clinic makes an application seeking the appointment of a legal aid lawyer from the DLSA Secretary of the concerned district on behalf of the inmate.
- c. Thereafter, the DLSA sends the applicant a letter stating the appointment of a legal aid lawyer. If the applicant is an inmate, the letter is sent to the Correctional Home.
- d. Upon assignment, the legal aid lawyer is duty-bound to visit or at least effectively communicate with their client, interpret the case and then receive the client's instructions.

The current schedule used for the calculation of fees of legal aid lawyers in West Bengal was framed in 2007, and this would in all probability not be in line with current earning capacities, inflation rates and the average cost of living.

Proposed Payment Schedule for Advocates

(This is in effect from 01.06.2007)

Panel Lawyers

Category 'A' More than 10 years of practice

Category 'B' 3 – 10 years

Category 'A'

a) Daily fees for hearing Rs. 650/-

b) Drafting fees Rs. 170/-

Category 'B'

a) Daily fees for hearing Rs. 450/-

b) Drafting fees Rs. 100/-

N.B. 1) Fees for bail and anticipatory bail and other short matters – not more than two daily appearance fees will be paid.

2) Fees are payable on effective hearing only.

3) No fees shall be payable for presentation of plaint or petition or Memo. Appeal, if no hearing is necessary.

4) No fees shall be payable for filing Hazira only or dates of adjournment or no effective hearing is made.

5) Consultation and opinion for once for each case

Category 'A' Advocates – Rs. 200/-

Category 'B' Advocates – Rs. 150/-

6) Incidental costs like stamps, power Actual cost
Identification etc

Typing charges will be given at recognized
Rates of the Typists Assn. on production of
Voucher and a copy of the entire petition

Actual cost on production
of voucher but not exceeding
Rs. 4/- per original sheet &
Rs. 2/- per each impression.

7) Searching costNot exceeding Rs. 200/- on
Submission of the report in detail.

8) Incidental cost: Stamp, Powers, Papers, Punching etc.....Actual cost

No conveyance charge shall be paid for attending the Tribunals, etc.

Sd/-
(Mir Dara Sheko)
Member Secretary
State Legal Services Authority, West Bengal

This can also be inferred from the NALSA's recommended minimum fee structure, as mentioned before.

RECOMMENDATION OF NALSA ABOUT MINIMUM FEE PAYABLE TO THE PANEL LAWYERS BY SLSAs

“A. High Court

1. Drafting of substantive pleading such as Writ Petition, Counter Affidavit, Memo of Appeal, Revision, Reply, Rejoinder, Replication- Rs.1500/-.
11. Drafting of Miscellaneous applications such as stay, bail, direction, exemption etc. - Rs500/- per application subject to maximum of Rs.1,000/- for all applications.
111. Appearance - Rs.1,000/- per effective hearing and Rs.750/- for non-effective hearing subject to maximum of Rs.10,000/- (per case).

B. Subordinate Courts at all levels including Tribunals

1. Drafting of substantive pleading such as Suit, Matrimonial Proceedings such as Divorce, Maintenance, Custody, Restitution etc., Succession, Probate, Memo of Appeal, Revision, Written Statement, Reply, Rejoinder, Replication etc. - Rs.1,200/-.
11. Drafting of Miscellaneous applications such as stay, bail, direction, exemption etc. - Rs.400/- per application subject to maximum of Rs.800/- for all applications.
111. Appearance - Rs.750/- per effective hearing and Rs. 500/- for non-effective hearing subject to a maximum of Rs.7,500/- (per case).

* It is also recommended that the fee structure should be reconsidered by NALSA and All State Legal Services Authorities every three years.”

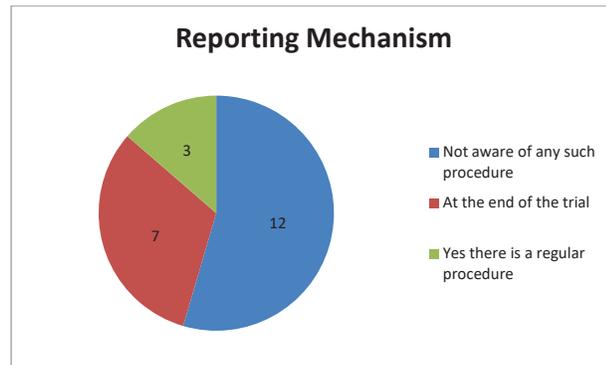
Thus, it can be reasonably argued that the current fee structure for legal aid lawyers is not commensurate with the payment schedule adopted by the legal services authorities. Our interactions with the legal aid lawyers also strongly indicates that this gap is a primary impediment in the efficacy of the system. The following sections document the findings of the interviews and an assessment of the challenges faced by these lawyers.

FINDINGS FROM THE INTERACTIONS WITH LAWYERS

Several concerns were highlighted during CHRI’s interactions with legal aid lawyers, a majority of which indicate deficits in the procedure for claiming payments.

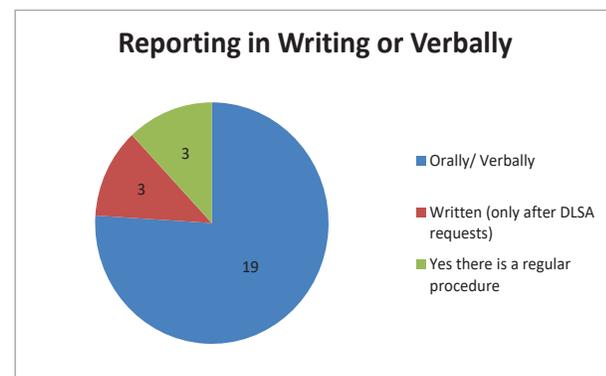
I. Lack of knowledge of reporting procedures:

12 lawyers acknowledged their absence of knowledge on reporting procedures in legal aid cases. They had thus not been submitting regular reports to the secretary of the district legal services authority, the sub-divisional legal services committee or their client. Further, the few lawyers who *were* aware of the need to report, said that they would wait to do this until the conclusion of the trial. Since the conclusion of cases may take a long time, both the client and the legal services authority end up not having any information about the cases being handled by the lawyers.



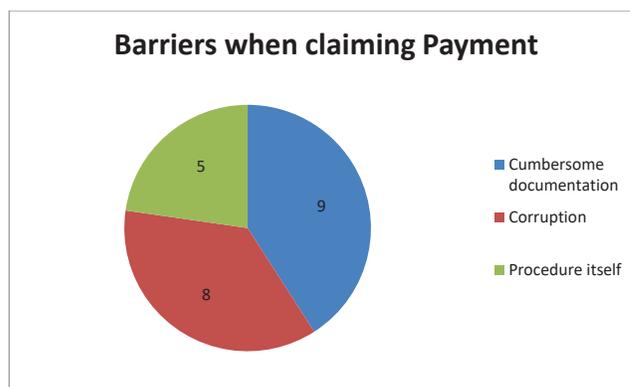
II. Emphasis on oral rather than written reporting:

19 lawyers spoke in support of oral or verbal reporting and considered it sufficient as a means to update both the legal services authority and the client. They said they submitted written reports only if they received a request from the legal services authority. This is a departure from the procedures that are to be followed by the monitoring committees mandated to be set up in each legal services authority as per NALSA (Free and Competent Legal Services Regulations, 2010).

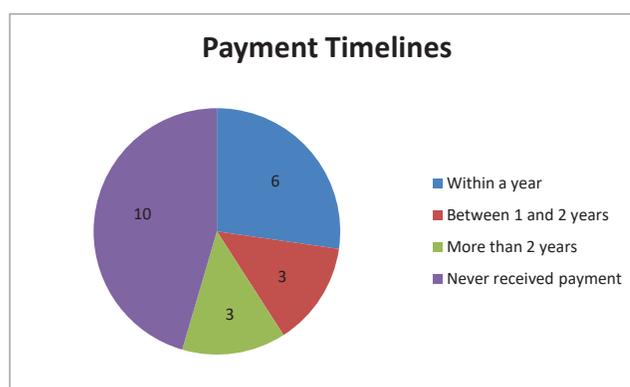


III. **Tedious procedures for reporting:** The lawyers also said that the prevalent practice of having to submit various kinds of documents after every appearance, including the countersigning of the same in the prescribed document by the presiding judicial officer, then obtaining a counter-receipt for costs borne, pose practical and logistical problems for them.

All the interviewed legal aid lawyers were aware that existing regulations mandate that a work register be maintained to document all cases undertaken by them. This register is to be duly signed by the presiding magistrate after each hearing. Some lawyers found this to be a nuisance and alleged that they have to pay bribes to get the appearance charts countersigned. Due to long delays in the completion of cases, bills and receipts can get overlooked, or due to work pressures, they may find it difficult to regularly hand over bills and documents. All the lawyers interviewed, thus, expressed their inability to submit the documentation expected by the legal services authority and found it logistically cumbersome.



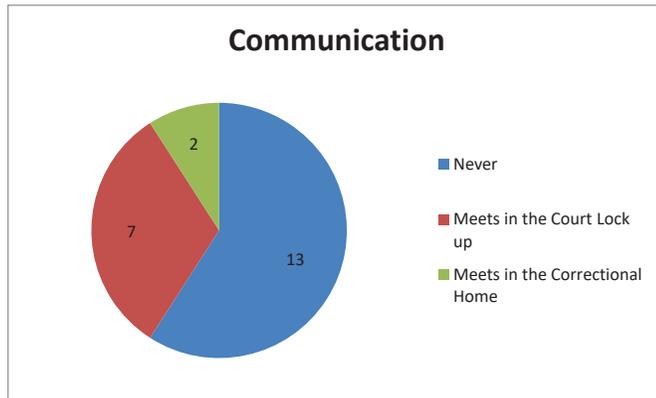
IV. **Delay in payment:** 10 lawyers said that they had never received any payment for their services, while six said they got it after a year or two. Thus, the time taken to remit payment was a major concern expressed by the lawyers. The interactions suggested that such inordinate delays have a major effect on the lawyers' loss of interest and motivation for taking up legal aid cases. Lawyers who were new to the panel also expressed growing apprehensions about continuing this work. The lack of incentive, thus, appears to have a crippling effect on their performance, since the law as a profession is their sole source of livelihood. Some lawyers even suggested that due to such delay and the cumbersome procedures associated with legal aid work, they have stopped making claims or taking on more cases.



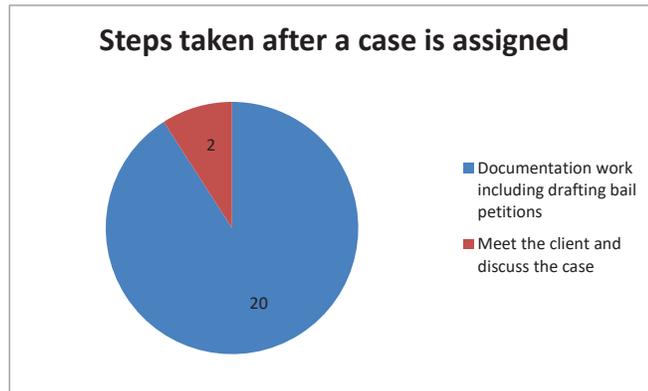
It is a known fact that Indian courts are plagued by an enormous backlog of cases, most of which takes years to be disposed of. Payments to lawyers need to be made at regular intervals since the current practice dictates that they cannot even raise invoices till a matter is finally disposed of – which can take years, sometimes decades! Stalling payments till the completion of a case, therefore, is impractical and should be subject to revision.

V. Lack of communication with clients:

One of the primary duties of a lawyer is to meet their clients regularly. However, 13 lawyers said that they have never communicated with their clients at all. Seven said that they met them either in the court lock-up before or after the case is heard by the Magistrate, while only two lawyers said that they visited their clients in prison.

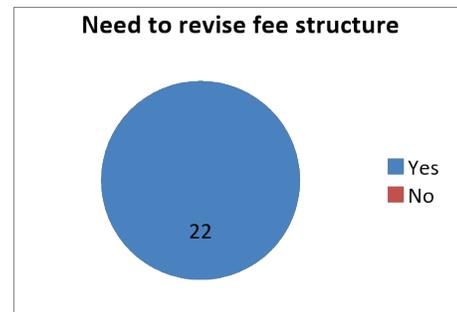


Meeting the client to discuss the facts of the case is one of the first and most important steps after accepting a brief, but this is clearly frequently skipped in legal aid matters. Most lawyers claimed that they had initiated documentation work, but only two said that they had first met with the client to discuss

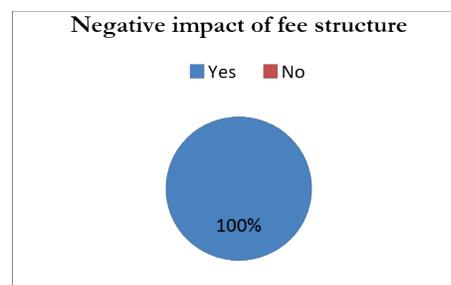


the case. This communication gap creates a void between the legal aid lawyer and the client -- which is a recipe for ineffective representation for the already under-represented and vulnerable.

VI. Need for revision of fee structure: The lawyers unanimously agreed that the fee structure for providing legal aid needed to be revised as it was not realistic in terms of the costs they were forced to incur in representing the cases assigned to them. These costs were often overlooked by the legal services authorities, they



said. This existing fee structure was negatively impacting their work, and the motivation they felt to take up more legal aid cases. There is little incentive for them to continue because of the low rates of payment, which have been the same, unrevised, for the decade.



LEGAL SERVICE OR AID

There is an urgent need to address all the issues mentioned in the CHRI team’s interactions with the 22 legal aid lawyers. The delay in payments, fee structure and tedious procedures all seem to negatively impact the work undertaken by legal aid lawyers. In the absence of appropriate financial incentives, effective representation in legal aid cases is difficult. While philosophical aims and ideals about the importance of quality representation for the vulnerable can be drawn upon to impress upon legal aid lawyers, such altruistic claims are not sustainable without also implementing changes in the ground realities of the lives of these lawyers.

When a person avails legal aid services, he is provided legal services free of charge. However, the lawyer taking up the case is paid by the legal services authority. Therefore, legal aid lawyers render services not merely as an altruistic endeavor but as a professional service for the payment of a fee. This fee may be smaller than what they would receive for other non-legal aid cases, but should still be enough to cover all case-related expenses -- such as the payment of processing fees, witnesses expenses and all other administrative charges incurred in connection with the case – while also providing financial incentive for the lawyers.

The motivation of a legal aid lawyer can be understood by referring to two theories: The **‘professional social interest theory’** holds that certain expert workers are altruistic, motivated not by profit but by client service and values such as rule of law and equality. The other **‘incentive theory’** stipulates that motivation shifts with emphasis from internal “pushes” to external “pulls.” In other words, the same professionals can be motivated by the desire for incentive rather than a pure desire for selfless service.

A lawyer is not any different from any other professional. Even though the profession of law includes an element of social engineering, there appears to be no evidence to demonstrate or conclude that monetary incentive is any less a motivating factor for them than it is for any other professional. For a lawyer too, their profession is his only source of livelihood and self-sustenance.

CONCLUSION & SUGGESTIONS

The interaction summarized in this report – despite its small sample size -- raises some pertinent issues. The challenges described by these 22 legal aid lawyers can be broadly divided into three parts; the first is the problem of the cumbersome processes for settling of payments, the second concerns the lawyer-client relationship, and the last is centered around the quantum of fees.

Feedback from the lawyers suggested that the present payment system is more an impediment to the efficient delivery of services rather than a facilitator. Cases often take years to reach completion, and therefore, as mentioned earlier, the present practice of maintaining bills from the inception of the lawyers involvement in a case till its final disposal is viewed as a burden by the lawyer. Instead of having their dues cleared at regular intervals, lawyers are forced to wait for long durations.

This uncertain and prolonged payment process results in a decrease in enthusiasm and efficiency, as the lawyers cease to feel responsible and offer the degree of diligence they would to other private matters in which they are better paid.

However, the biggest victim in this process is the client -- and in the long run, the legal aid system itself. A lack of faith in the competency of legal aid lawyers impacts the confidence of clients with the system. This makes people wary of availing legal aid and thus, forces them to pay substantial money to touts offering cheap -- and often fraudulent -- services. People might also have to undergo great financial hardships to make out-of-pocket payments by resorting to selling property or valuable to be able to afford private lawyers. All this impacts the realization of the right to equal opportunity before the law, and equal access to justice for all.

Yet, all is not lost, and given the evolution of the legal aid system in India over the past few years, steps can be taken to fix this situation by placing more emphasis on incentivizing the work of lawyers and taking into account their interests. Here are some suggestions that can be considered by legal services authorities:

STATE LEGAL SERVICES AUTHORITY MAY

- Revise the current payment structure to include costs towards drafting of substantive pleadings, miscellaneous applications and appearance for hearings (both effective and non-effective) at High Courts and subordinate courts. Also include a provision for providing conveyance fees to enable lawyers to meet their clients confined in prisons or remote areas. While revising the existing pay structure, SLSA may take note of the NALSA Minimum fees range and Government Resolution Regarding Fee Structure of Advocates. (Resolution No - LAC10982177D, Dated 14/03/2017)
- Revise the intervals at which payments are made to lawyers. Instead of adopting a two-tier approach, where a lawyer is payed only upon assignment and then after the completion

of a case, payments should be made either after every hearing, or every three months.

- Develop a web portal and mobile application to streamline the process of reporting of case updates by lawyers, submission of receipts towards payments and the regular transfer of payments .

DISTRICT LEGAL SERVICES AUTHORITY MAY

- Develop a standard reporting mechanism for reporting by lawyers after each date of production, hearing, and corresponding comments. This mechanism must be simple and easy to complete, so it doesn't burden the lawyers further.
- Assign a paralegal to each court to lessen the reporting burden currently placed on the lawyers. The paralegal's duty would include updating records after each court hearing, a register of which can be made available in the front office of the legal services authority.
- Circulate duty notes and checklists of dos and don'ts for lawyers, and checklists of services included under free legal aid, which can be provided to both lawyers and clients.
- Place a register in court where the judicial officer can mark the appearance of the lawyer after the hearing. This would remove opportunity for corruption or manipulation.

CHRI PROGRAMMES

CHRI believes that the Commonwealth and its member countries must be held to high standards and functional mechanisms for accountability and participation. This is essential for human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. It focuses on research, publications, workshops, analysis, mobilisation, dissemination and advocacy and informs the following principal programmes:

1. Access to Justice (ATJ)

* **Police Reforms:** In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In East Africa and Ghana, CHRI examines police accountability and political interference.

* We are preparing to add a portfolio on anti-discrimination on the basis of colour, appearance and gender.

* **Prison Reforms:** CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting failures of the legal system that result in overcrowding and unacceptably long pre-trial detention and prison overstay, we engage in interventions and advocacy for legal aid and policy changes to revive prison oversight systems. Attention to these areas can bring improvements to the administration of prisons and conditions of justice.

2. Access to Information

CHRI is acknowledged as a key organisation working on the promotion of Access to Information. It encourages countries to pass and implement effective Right to Information laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana, and more recently, Kenya. In Ghana, CHRI is the Secretariat for the RTI civil society coalition. We regularly critique new legislation and intervene to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. We have experience of working in hostile environments as well as culturally varied jurisdictions; these enable us to bring valuable insights into countries seeking to evolve new laws on right to information. In Ghana, for instance, it has been promoting knowledge about the value of Access to Information and to campaign for the introduction of an effective law.

* **South Asia Media Defender's Network (SAMDEN)**

CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia, especially in rural areas. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media

professionals who have experienced discrimination and intimidation, SAMDEN is developing an interactive website platform to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with the Right to Information movements and activists.

3. International Advocacy and Programming

CHRI monitors the compliance of Commonwealth member states with human rights obligations and advocates around human rights exigencies where such obligations are breached. CHRI strategically engages with regional and international bodies including the Commonwealth Secretariat, Ministerial Action Group, the UN and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for and monitoring the Commonwealth reform, reviewing promised by Commonwealth members at the UN Human Rights Council, and the Universal Periodic Review. We advocate for the protection of human rights defenders and civil society spaces and monitor the performance of National Human Rights Institutions in the Commonwealth while pressing for their strengthening.



Commonwealth Human Rights Initiative

55A, Third Floor, Siddharth Chambers, Kalu Sarai
New Delhi 110 017, India

Tel: +91 11 4318 0200; Fax: +91 11 2686 4688
E-mail: info@humanrightsinitiative.org