

**For information on  
26 February 2007**

**LegCo Panel on Administration of Justice and Legal Services**

**Review of Criminal Legal Aid Fees System**

**PURPOSE**

This paper reports on the progress of the review of the criminal legal aid fee system.

**BACKGROUND**

2. The Legal Aid Department (LAD) engages counsel and solicitors in the private practice as defence lawyers in criminal legal aid cases. The scale of fees payable to these assigned lawyers as well as the fee assessment mechanism are set out in the Legal Aid in Criminal Cases Rules (“the Rules”), a subsidiary legislation of the Criminal Procedure Ordinance. While legally the Rules only bind LAD, the Department of Justice (DoJ) adopts the same fee scale on an administrative basis in engaging its Prosecution counsel. Relevant extracts of the Rules are at Annex A.

3. The two legal professional bodies have called for a change in the criminal legal aid fee system. They note that the systems of DoJ and LAD have diverged over the years and in particular have expressed the following concerns –

- (a) LAD’s system cannot sufficiently reflect pre-trial preparation done because it is heavily tilted towards paying for days with court hearings;
- (b) LAD has little flexibility to pay higher fees even where the case so warrants, and
- (c) the arrangements for assigned lawyers to seek a raise in fees are rigid.

They consider that, compared with the relatively more flexible arrangements adopted by the DoJ, the current system is not conducive to the principle of equality of arms.

4. The Administration recognizes that there is indeed room for improvement in the current system. As the subject involves important policy and financial implications for legal aid services, the subject of quality of justice and possible read-across implications for the DoJ, the Administration Wing of the Office of the Chief Secretary and LAD have since March 2006 engaged stakeholders, namely, the Judiciary (represented by the Hon Mr Justice Stock JA), the Hong Kong Bar Association (represented by Mr Philip Dykes, S.C. and Ms Audrey Campbell-Moffat), the Law Society of Hong Kong (represented by Mr Stephen Hung and Mr Anthony Upham) and the DoJ, in a comprehensive review.

5. The Administration Wing has agreed with stakeholders to apply the following principles in taking forward the review –

- (a) general compatibility of the fee system with the prosecution fees regime. The review should not result in a further widening of the gap between the regimes under LAD and DoJ;
- (b) rectification of inconsistency between policy on payment to solicitors and counsel; and
- (c) reasonable and effective remuneration for legal aid lawyers within the remits of public affordability.

6. Submissions from the two legal professional bodies were reported to the Panel at its meeting in December 2005 (Annex A and B of CB(2)658/0506(02)).

## **PROGRESS**

7. Six meetings have so far been held since March 2006 and all stakeholders have contributed in positive and constructive ways. Different specific proposals were floated and discussed. At the meeting held on 15 December 2006, we reached broad consensus on the proposed structure of the criminal legal aid fee system that will operate on a

marked-brief basis.

8. The proposed fee structure is an overhaul of the current system. A summary table is at Annex B. The major improvements are set out below –

(A) Proper recognition for preparation or pre-trial work

9. Under the current system, solicitors and counsel alike are paid a “flat” fee for pre-trial preparation, irrespective of the hours put in. We accept that this does not fully recognize the preparation and effort put in pre-trial work.

10. Under the proposed system, pre-trial work will be remunerated according to the time required. In gist, for counsel, there will be a “brief fee” to cover the first day of pre-trial work and the first day of court hearing. A new “additional preparation fee” will be payable for each subsequent half day of pre-trial work and a “refresher fee” for each subsequent court hearing day. As for solicitors, there will be a “reading fee” to be payable every hour, depending on the volume of material to be read, a “preparation fee” for each stretch of hours (to be specified) of other pre-trial preparation, and a “court hearing day fee” for each court hearing day.

(B) Rationalisation of fee items

11. At present, where a conference has taken place among the assigned lawyers and the legally aided defendant, the counsel, but not the solicitor, is eligible for a “conference fee”. Under the proposed structure, conference fee will also be payable to solicitors.

12. Under the proposed system, there will also be transparent criteria for classification of cases where necessary and the applicable rates will be clearly set out. Also, the nomenclature of payment items will better reflect the different nature of work of counsel and solicitors.

(C) Enhanced transparency for the fee setting and re-determination basis

13. Under the current system, the fee payable to an assigned lawyer is assessed **after** the work is done and the case concluded. Under the proposed system, the classification of a particular case and hence the rates, as well as the required preparation time will be assessed

beforehand and marked on the brief when making the assignment. Also, lawyers will be allowed to view bundle **before** accepting assignments whenever circumstances permit, to facilitate their consideration. These measures will greatly enhance the transparency of the fee system.

14. At present, an increase in the fee payable is only allowed if the case is exceptionally lengthy or complex, in which case the assigned lawyer has to first apply to the court and granted with for certificates of exceptionalities **after** the trial. Under the proposed system, assigned lawyers may seek LAD's re-determination both during and at the end of the case. For transparency, the circumstances that may require re-determination will be set out. For instance, where there is voluminous amount of additional evidence provided by prosecution after the case is assigned; where research on special/peculiar legal issues that are not identified at the time of assignment is required; where the legally aided defendant withdraws legal aid or requests for re-assignment of lawyer, etc.

#### Payment for individual cases

15. The improvements mentioned in paragraphs 9 to 14 above will directly increase the payment for individual cases. The estimated increase in criminal legal aid expenditure arising from the proposed change in the fee structure is about 30%, or roughly \$30 million per annum, on the basis of current rates. The actual extent of increase may be more and will vary among cases, largely depending on how much pre-trial work the lawyers devoted to the case, and, in the case of solicitors, also the number of hours of conference taken place.

#### **WAY FORWARD**

16. While there is already a broad consensus on the fee structure, there are still some structural issues regarding payment to instructing solicitors and solicitor advocates that need to be worked out. We aim to iron out these outstanding issues as soon as possible. Meanwhile, we also need to settle the rates for the various payment items. We are mindful that in working out an improved criminal legal aid fee system, we have to balance the need to provide reasonable and effective remuneration to assigned lawyers, and the duty to be prudent in public money spending.

17. The details of the current fee system, including the structure and the rates, are set out in the Rules. As the proposed fee system will be an overhaul of the current one, the Rules will essentially have to be re-written. We will, in consultation with stakeholders, take the opportunity to consider whether there is room to streamline the level of details to be included in the Rules. Finance Committee's approval will then be sought and the Rules will be submitted to the Criminal Procedure Rules Committee for endorsement and Legislative Council (LegCo) for approval through a positive resolution.

Administration Wing  
Chief Secretary for Administration's Office

Legal Aid Department

February 2007

Chapter: 221D Title: LEGAL AID IN CRIMINAL Gazette Number: L.N. 174 of  
CASES RULES 2003  
Rule: 21 Heading: **Solicitor and counsel fees** Version Date: 04/07/2003

(1) The fees payable to a solicitor or counsel assigned under these rules to represent an aided person shall be determined by the Director having regard to the work actually and reasonably done and, subject to this rule, in accordance with the following- (L.N. 414 of 1981; L.N. 115 of 1985)

(a) to a solicitor assigned under a legal aid certificate in respect of proceedings in the Court of First Instance a fee of \$6790 and additionally if the trial is not concluded on the day on which it started, a daily fee of not less than \$830 and not exceeding \$4420 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 25 of 1998 s. 2; L.N. 174 of 2003)

(aa) to a solicitor assigned under an appeal aid certificate in respect of an appeal from the Court of First Instance to the Court of Appeal a fee of \$9160 and additionally if the appeal is not concluded on the day on which it started, a daily fee of not less than \$1150 and not exceeding \$5910 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 25 of 1998 s. 2; L.N. 174 of 2003)

(ab) to a solicitor assigned under an appeal aid certificate in respect of an appeal from the District Court to the Court of Appeal a fee of \$7330 and additionally if the appeal is not concluded on the day on which it started, a daily fee of not less than \$910 and not exceeding \$4760 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(b) to a solicitor assigned under a legal aid certificate in respect of proceedings in the District Court a fee of \$4840; and additionally, if the trial is not concluded on the day on which it started, a daily fee of not less than \$1160 and not exceeding \$2900 in respect of the second and every subsequent day; (L.N. 70 of 1973; L.N. 289 of 1979; L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(c) to a solicitor assigned under a legal aid certificate to act as advocate as well as instructing solicitor in respect of proceedings in the District Court a fee not exceeding \$16800 and additionally if the trial is not concluded on the day on which it started, a daily fee not exceeding \$9310 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(d) to counsel assigned under a legal aid certificate in respect of proceedings in the Court of First Instance a fee not exceeding \$20410 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additionally if the trial is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(da) to counsel assigned under an appeal aid certificate in respect of an appeal from the Court of First Instance to the Court of Appeal a fee not exceeding \$27210 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additionally if the appeal is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(db) to counsel assigned under an appeal aid certificate in respect of an appeal from the District Court to the Court of Appeal a fee not exceeding

\$21760 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additionally if the appeal is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(e) to counsel assigned under a legal aid certificate in respect of proceedings in the District Court, a fee not exceeding \$13600 or, in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances; and additionally, if the trial is not concluded on the day on which it started, a daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(f) to Senior Counsel assigned under a legal aid certificate in respect of proceedings in the Court of First Instance, District Court or an appeal aid certificate, fees for such consultations approved by the Director at such hourly rate as appears to the Director to be proper in the circumstances; (94 of 1997 s. 20; 25 of 1998 s. 2)

(g) to counsel, other than Senior Counsel, assigned under a legal aid certificate in respect of proceedings in the Court of First Instance, or an appeal aid certificate, fees for such conferences approved by the Director at such hourly rate, not exceeding \$1080 per hour, as appears to the Director to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(h) to counsel, other than Senior Counsel, assigned under a legal aid certificate in respect of proceedings in the District Court, fees for such conferences approved by the Director at such hourly rate, not exceeding \$880 per hour, as appears to the Director to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(i) to counsel and solicitors assigned under an appeal aid certificate in respect of appeals to, or applications for leave to appeal to, the Court of Final Appeal, such fees as appear to the Director to be proper in the circumstances; (L.N. 122 of 1982; 39 of 1999 s. 3)

(j) (Repealed L.N. 182 of 1993)

(k) to counsel and solicitors to whom an application or matter has been referred under rule 13A, such fees as appear to the Director to be proper in the circumstances; (L.N. 122 of 1982)

(l) to counsel or a solicitor assigned under a legal aid certificate to act as advocate in respect of a preliminary inquiry, a fee not exceeding \$8160 and additionally, if the inquiry is not concluded on the day on which it started, a daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(m) to a solicitor assigned under a legal aid certificate to instruct counsel in respect of committal proceedings (including a preliminary inquiry), a fee of \$2210 and additionally, if such proceedings are not concluded on the day on which they started, a daily fee not exceeding \$1810 in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(n) to counsel or a solicitor assigned under a legal aid certificate to act as advocate in committal proceedings otherwise than by way of a preliminary inquiry, a fee not exceeding \$8160 and additionally, if such proceedings are not concluded on the day on which they started, a daily fee not exceeding

\$4080 in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 87 of 1990; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(o) to counsel or a solicitor settling a notice of appeal, other than grounds of appeal settled under rule 9(a), such fee not exceeding \$2710 as appears to the Director to be proper in the circumstances; (L.N. 204 of 1984; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(p) to any lawyer engaged under rule 7(1A), such fees as appear to the Director to be proper in the circumstances. (L.N. 157 of 1986)

(2) If in the opinion of a judge before whom a trial or appeal is heard the case is of exceptional length or complexity, the judge may so certify and thereupon-

(a) the fee payable to counsel under paragraph (1)(d); and

(b) the fee payable to a solicitor under paragraph (1)(a),

may be increased by such amount as appears to the Director to be proper in the circumstances, and the daily fee provided for in paragraph (1)(a) or (d), as the case may be, may be increased proportionately. (L.N. 115 of 1985)

(3) If in the opinion of a District Judge before whom a trial is heard the case is of exceptional length or complexity, the judge may so certify and thereupon-

(a) the fee payable to counsel under paragraph (1)(e) or to a solicitor in respect of his advocacy under paragraph (1)(c); and

(b) the fee payable to a solicitor under paragraph (1)(b),

may be increased by such amount as appears to the Director to be proper in the circumstances, and the daily fee provided for in paragraph (1)(b), (c) or (e), as the case may be, may be increased proportionately. (L.N. 115 of 1985)

(4) In addition to the fees payable under paragraph (1), there shall be payable to a solicitor-

(a) expenses actually and reasonably incurred by himself and his clerk in travelling to or from the court and to and from any place visited for the purpose of preparing or conducting any trial or appeal; and

(b) any other out-of-pocket expenses actually and reasonably incurred.

(5) Where a solicitor or counsel (other than Senior Counsel) represents 2 or more accused persons or 2 or more appellants to whom he has been assigned by the Director and who are tried together or whose appeals are heard together- (94 of 1997 s. 20)

(a) the fee, including the daily fee, payable to a solicitor under paragraph (1)(a) or (b), may be increased by such amount as appears to the Director to be proper in the circumstances;

(b) the fee, including the daily fee, payable to-

(i) a solicitor under paragraph (1)(c) in respect of his advocacy;

(ii) counsel (other than Senior Counsel) under paragraph (1) (d) or (e), (94 of 1997 s. 20)

may be increased by 10% for each additional accused person or appellant so represented up to a maximum of 50% where 6 or more accused persons or appellants are so represented. (L.N. 414 of 1981)

(6) Where in the Court of First Instance counsel represents 2 or more appellants to whom he has been assigned by the Director and whose appeals are heard on the same day, there shall be payable to counsel, in respect of all the appeals, such fee in accordance with paragraph (1)(d) as appears to the Director to be proper in the circumstances. (L.N. 83 of 1987; L.N. 87 of 1990; 25 of 1998 s. 2)

(7) A claim for fees shall be submitted to the Director in such form and manner as he shall require. (L.N. 87 of 1990)

## SUMMARY OF PROPOSED CHANGES IN FEE STRUCTURE

The proposed criminal legal aid fee structure will bring about the following major improvements – (a) proper recognition for preparation or pre-trial work; (b) rationalisation of fee items; and (c) enhanced transparency for the fee setting and re-determination basis. A comparison is set out below.

### Fee Structure

	Types of fees payable	Existing Structure		Proposed Structure	
		Solicitor	Counsel and solicitor advocate	Solicitor	Counsel and solicitor advocate
1	Brief fee	= refresher fee for 2 days		Retitled as – - “Reading fee” payable on an hourly basis, to cover reading of bundle; and	Brief fee. To cover 1 <sup>st</sup> 8 hrs of preparation + 1 <sup>st</sup> day of court hearing
2	Additional preparation fee	x		- “Preparation fee”, to cover pre-trial preparation after reading <sup>1</sup> .	✓  (assessment: ½ day basis; re-determination : hourly basis)
3	Refresher fee	✓ (full day / half day / short)		Retitled as “court hearing day fee”. To cover 1 <sup>st</sup> day of court hearing and onward (full day basis)	Refresher fee. To cover 2 <sup>nd</sup> court hearing day and onward (full day basis)
4	Pre-trial review fee (per review)	✓		✓	
5	Mention hearing fee (per hearing)	✓		✓	
6	Conference fee (per hour)	x	✓	✓	✓
7	Uplift per defendant (10% increase to brief fee, refresher fee / court hearing day fee and other court attendance related fees for each additional aided client, up to a max of 50% where 6 or more aided clients are represented).	✓ (not for Magistrates Court)	✓ (not for Magistrates Court)	✓ (including Magistrates Court)	✓ (including Magistrates Court)

<sup>1</sup> To be paid for each stretch of hours to be specified.

**Operational: Assignment**

<b>Existing Structure</b>	<b>Proposed Structure</b>
<ul style="list-style-type: none"><li>- Legal Aid Department (LAD) verbally advises basic particulars of case.</li></ul>	<ul style="list-style-type: none"><li>- To facilitate lawyers' consideration and to enhance transparency, lawyers will be allowed to view bundle before accepting assignment, whenever circumstances permit. In any case, LAD will advise the lawyers particulars of the case verbally.</li></ul>

**Operational: Re-determination**

<b>Existing Structure</b>	<b>Proposed Structure</b>
<ul style="list-style-type: none"><li>- If the assigned lawyer considers that the case is of exceptional length or are exceptionally complex, they may, in accordance with the Legal Aid in Criminal Cases Rules, apply to court at the conclusion of the case and the court may so certify.</li><li>- With the certificates, (LAD) may pay additional fees to the lawyers.</li></ul>	<ul style="list-style-type: none"><li>- No need to apply to court for certificates of exceptionality.</li><li>- Re-determination allowed before the conclusion of the case.</li><li>- For transparency, circumstances that may require re-determination will be spelt out in more detail. For instance, where there is voluminous amount of additional evidence provided by prosecution after case is assigned; where research on special / peculiar legal issues that are not identified at the time of assignment is required; where the legally aided defendant withdraws legal aid or requests for re-assignment of lawyers, etc.</li></ul>