

**Extract from minutes of meeting on
Panel on Administration of Justice and Legal Services on 26 February 2007**

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IV. Criminal legal aid fees system

(LC Paper No. CB(2)1127/06-07(01) - Background brief prepared by the LegCo Secretariat on "Criminal legal aid fees system"

LC Paper No. CB(2)1127/06-07(02) - Paper provided by the Administration on "Review of criminal legal fees system"

LC Paper No. CB(2)1127/06-07(03) - Paper provided by the Law Society on "Review of criminal legal aid fees"

LC Paper No. CB(2)1127/06-07(04) - Draft minutes provided by the Law Society of a meeting held between the Administration and the legal professional bodies on 21 December 2006

LC Paper No. CB(2)1127/06-07(05) - Letter dated 16 February 2007 from the Law Society to the Administration)

Briefing by the Administration

8. Director of Administration (D of Adm) said that details of the progress of the review of the criminal legal aid fee system were set out in the Administration's paper. The Administration had reached broad consensus with the two legal professional bodies on the proposed structure for criminal legal aid fees. The proposed structure would bring about substantial improvements, i.e. proper recognition for preparation or pre-trial work, rationalisation of fee items, and enhanced transparency for the fee setting and re-determination basis. Making reference to Annex B to the Administration's paper, D of Adm took members through the types of payment items under the existing and proposed fee structure. She said that the estimated increase in criminal legal aid expenditure arising from the proposed change in the fee structure based on past experience was about 30%, or roughly \$30 million per annum, on the basis of current rates. There were still some outstanding issues regarding the payment structure in respect of instructing solicitors and solicitor advocates that needed to be worked out with the Law Society.

Views of deputations

9. Mr Stephen HUNG Wan-shun, Chairman of the Criminal Law and Procedure Committee of the Law Society of Hong Kong, said that the Law Society had held six meetings with the Administration since March 2006 and had accepted a number of proposals to improve the structure of the criminal legal aid fee system. He expressed particular concern on the following issues which remained outstanding pending

further discussion with the Administration -

(a) Rates for various payment items

The Law Society hoped that the proposed fee structure would bring about reasonable remuneration for legal aid lawyers. Although the Administration held the view that it had no difficulties in engaging suitable private legal practitioners as legal aid lawyers at the current rates, the question remained whether better service could be provided to defendants. Some law firms had refused to take up criminal legal aid cases because of the meagre amount paid by the LAD under the current system, while some law firms had taken up the work on a charity basis. In its submission to the Panel, the Law Society had attached in the Appendix two cases to illustrate the inadequate remuneration payable to solicitors for preparatory work. In the first case, the total costs amounted to \$164,920 for 84 hours of work. However, the amount of fees paid by the LAD was merely \$15,846. Discounting the fees for trainee solicitors who assisted in the case, the solicitor who had over 10 years of legal experience was paid at \$720.27 per hour only. In the second case, the lawyer was paid \$18,110.60 for 153 hours of work, which was equivalent to a legal service charge of \$118.30 per hour only. Mr HUNG pointed out that even with an overall increase of 30% in criminal legal aid fees, the remuneration for assigned lawyers was still unreasonable. The Law Society hoped that the Administration would consider increasing the overall criminal legal aid expenditure after the review, and would undertake to discuss with the Law Society the fee rates for the various payment items under the criminal legal aid fee system. He stressed that the proposed fee system should recognise the role and responsibilities of assigned lawyers and provide reasonable remuneration to reflect the work done; and

(b) Taxation

The Law Society could not accept that the DLA was the final arbitrator on fee disputes, having regard to the principle of natural justice. It insisted that taxation was the best way to resolve disputes on criminal legal aid fees. Alternatively, the jurisdiction of the "Legal Aid Review Committee" (a committee established under section 26A(1) of the Legal Aid Ordinance (Cap. 91)) could be expanded or a statutory body should be set up to adjudicate on fee disputes.

10. Mr Michael VIDLER, Member of the Criminal Law and Procedure Committee of the Law Society, said that it was important that the review of the criminal legal aid system would take into account the needs of the future. The present judicial and criminal justice system were established in the 1970's. The quality of police investigations and the complexity of crimes had changed significantly since then. It was necessary for accused persons to be properly represented at different stages, i.e.

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during the investigation stage, after being charged and before the trial. Mr VIDLER added that accused persons should also be legally represented at police stations.

11. Mr Philip DYKES of the Hong Kong Bar Association said that the Bar Association was in general content with the proposed criminal legal aid fee structure. The concerns of the Bar Association regarding brief fee and refresher fee had been addressed. As a matter of legal policy, the Bar Association agreed with the Law Society on the following -

- (a) taxation was a fair way to resolve disputes on criminal legal aid fees. The civil legal aid system also adopted such a system;
- (b) there should be no distinction in the rates between Court of First Instance (CFI) and District Court (DC) cases. It was a well-known fact that some DC cases could be extremely complex, and some CFI cases could be factually and legally simple; and
- (c) the Administration should be mindful that the proposed fee system would have a knock-on effect on the way fees were calculated by the Department of Justice and the Duty Lawyer Scheme.

12. In response to the two legal professional bodies, D of Adm made the following clarifications -

- (a) the increase of 30% in legal aid expenditure arising from the proposed system, or roughly \$30 million per annum, was only a rough estimate based on the annual expenditure of criminal legal aid fee which was \$100 million. It was not a cap; the actual extent of increase could be more and would vary from case to case, largely depending on the actual amount of time spent on preparation. Take the example of the present brief fee payable to a solicitor at a flat rate of \$6,790 for pre-trial preparation of a CFI case, under the proposed system the solicitor would be paid a "reading fee" to be payable on an hourly basis (i.e. 90 pages should amount to one hour's reading) and a "preparation fee" to cover pre-trial preparation payable on a four-hour basis. The fees payable to a solicitor for a case involving 60 hours of preparatory work could be as much as \$25,000 under the proposed fee structure, which was way above the overall increase of 30%; and
- (b) under the current system, the fee payable to an assigned lawyer was assessed after the work was done and the case concluded. Under the proposed system, the classification of a particular case and hence their rates, as well as the required preparation time would be assessed beforehand and marked on the brief when making the assignment. Lawyers would also be allowed to view the bundle before accepting assignments to facilitate their consideration. In addition, assigned lawyers could seek the LAD's re-determination of fees both during and

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at the end of the case. Under the circumstances, the Administration did not see the need for a taxation system for resolving disputes on criminal legal aid fees.

Discussion with members

13. Mr Martin LEE said that an increase of 30% in criminal legal aid expenditure was not a significant improvement to the existing fee system, given that many lawyers at present took up criminal legal aid work on a charitable or pro bono basis. He asked whether it was the mindset of the Administration that lawyers undertaking criminal legal aid work should receive less than the market rates. Mr LEE concurred with the Law Society that there was a conflict of interest for the DLA to adjudicate on fee disputes between assigned lawyers and the LAD.

14. D of Adm reiterated that the overall increase of 30% was not meant to be the cap for any individual payment items under the proposed fee structure. The market rates for lawyers varied, depending on their experience and seniority. At present, the LAD had not encountered difficulties in engaging suitable private legal practitioners to take up criminal legal aid cases on the basis of the current rates. Despite this, the Administration recognised the need to improve the current system to provide reasonable remuneration to assigned lawyers and hence the proposed fee structure.

15. Mr Stephen HUNG said that at present, a solicitor with over 10 years of experience would charge at \$3,000 to \$4,000 per hour. The Law Society was willing to make concessions and did not ask for lawyers in undertaking criminal legal aid work to be paid at the market rates. However, a mere 30% increase in, for example, the exiting brief fee would not be acceptable. In his view, the Administration had to increase the expenditure for criminal legal aid substantially. He added that higher fees would encourage more experienced lawyers to take up legal aid cases and this would in turn benefit the defendants.

16. Ms Audrey EU said that the fee system for criminal legal aid should be comparable to that for civil legal aid, and she raised two points in this regard. First, she asked why the fee rates for the various payment items under the proposed structure of the criminal legal aid fee system had yet to be finalised, as the stakeholders had already reached broad consensus on the proposed structure. Secondly, she did not understand why the Administration had ruled out a taxation system for criminal legal aid fees, which was also adopted for civil legal aid fees. According to her experience, there were very few disputes on civil legal aid fees which needed to be resolved by taxation. She would expect the same for criminal legal aid fees.

17. D of Adm explained that the Administration needed to reach an agreement with the stakeholders on the proposed fee structure for criminal legal aid before proceeding to discussing the rates for specific payment items under the new structure. Different rates would be set for brief fee, refresher fee, pre-trial fee, mention hearing fee, conference fee, etc. She assured the Panel that the Administration would work out

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the rates for payment items for discussion with the stakeholders. As regards taxation for criminal legal aid fees, D of Adm said that for the civil legal aid system, the LAD and assigned lawyer had no prior agreement on the fees; hence taxation at the end would be appropriate. On the other hand, under a marked brief system, fees were agreed beforehand. As such, taxation would not be necessary. In any case, the notable improvements of the proposed system over the present one should be allowed to be tested before concluding that they would not work and that a system of taxation was needed. She informed members that in the course of deliberating the subject, Mr Justice STOCK had expressed concern about the resource implications of a taxation system on the Judiciary.

Admin

18. In response to the Chairman, Mr Stephen HUNG said that the Law Society had no strong view as to whether a court or other statutory bodies should be the one to adjudicate on fee disputes of criminal legal aid, as long as the DLA was not the final arbitrator. The Law Society had once suggested the use of mediators to resolve fee disputes, which was considered to be a less costly alternative. Nevertheless, Mr DYKES had pointed out that allowing a private non-legal third party to have a say in legal aid expenditure did not seem appropriate. The Law Society had subsequently suggested that the jurisdiction of the "Legal Aid Review Committee" could be expanded to adjudicate fee disputes. The Chairman requested the Administration to seek the view of the Legal Aid Services Council, which advised the Government on legal aid policy, on the suggestion of the Law Society and give a response to the Panel at the next meeting.

19. Ms Miriam LAU said that the proposed fee structure was more reasonable than the current one. She did not consider that lawyers handling criminal legal aid cases should be paid at the market rates, as this was not the case for those handling civil legal aid cases. Ms LAU pointed out that civil legal aid fees were either paid at fixed or variable rates. In the latter case, the assigned lawyer would bill the LAD and the two parties would negotiate and agree on the amount payable. As a result, not many civil legal aid fee disputes were settled by taxation. Ms LAU asked whether the Administration would propose a set of standard rates for various payment items for the proposed fee system, or different rates having regard to the seniority of the lawyers as in the case of civil legal aid. She was of the view that the seniority of the lawyers should be considered in setting the rates.

20. D of Adm said that the fee rates for various payment items for criminal legal aid would take into account the level of court involved and the classification of the cases such as the complexity and the length of the cases. The fee system would follow the one adopted by the Department of Justice in engaging lawyers in private practice to prosecute in criminal cases on behalf of the Government. As regards whether seniority would be one of the factors in determining the rates, D of Adm said that stakeholders had been consulted and they generally agreed that this factor should not be introduced into the fee system to keep it simple. DLA supplemented that the LAD would take into account the background and experience of a lawyer when assigning a criminal legal aid case.

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21. Mr James TO said that experienced lawyers would not be attracted to handle criminal legal aid cases because of the existing fee system. His observation was that with less experienced lawyers taking up criminal legal aid cases, the conviction rate of the prosecution would be much higher. Hence, to provide reasonable remuneration for legal aid lawyers would be conducive to the principles of access to justice and equality of arms.

22. D of Adm responded that the DOJ and LAD used similar fee rates and that legal aid applicants were allowed to nominate their legal representatives under the current system. In working out an improved criminal legal aid fee system, the Administration had to balance the need to provide reasonable and effective remuneration to assigned lawyers, and the duty to be prudent in public money spending. In response to the Chairman, D of Adm said that the existing fee system for criminal legal aid was introduced in 1992 and the current rates came into effect in 2003.

23. Referring to paragraphs 20 and 22 of the submission of the Law Society, Mr James TO said that suspects should be able to communicate and to consult privately with his lawyer at any stage of investigation. Mr TO further said that the Administration should review whether legal aid should be provided to suspects, in particular those involved in serious crimes, so that they could seek legal advice and representation at the stage of arrest and interrogation.

24. In response to the Chairman, D of Adm responded that the issue of legal representation raised by Mr TO and Mr VIDLEY had not been raised for discussion during the review of the criminal legal aid fee system. The issue should be followed up in separate forum. The Administration aimed to complete its consultation with stakeholders on the outstanding issues, including the rates under the proposed system, before summer. The Administration would report progress to the Panel in due course.

Clerk

25. To facilitate the Panel to consider whether another meeting should be held before the end of the session, the Chairman said that the Clerk would write to the Administration enquiring about progress of the review in May/June 2007.

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