

Legislative Council
Panel on Administration of Justice and Legal Services

Review of Solicitors' Hourly Rates

PURPOSE

The purpose of this paper is to inform Members of the latest progress of the review of the solicitors' hourly rates ("SHRs") being undertaken by the Judiciary.

BACKGROUND

(A) Setting Up of A Working Party

2. In December 2013, Members were informed by the Judiciary Administration via LC Paper No. CB(4)267/13-14(01) (**Annex**) that:

- (a) a review of the SHRs for the purpose of taxation on a party and party basis would be conducted by the Judiciary; and
- (b) a Working Party on Review of Solicitors' Hourly Rates for Party and Party Taxation ("the Working Party") would be set up to oversee the review and make recommendations on the matter.

3. The Working Party was set up in January 2014 to take the matter forward.

(B) Recapitulation of Some Essential Background Information

4. For Members' ease of reference, it may be useful to recapitulate what is meant by "taxation of costs on a party and party basis":

- (a) At the conclusion of a court case, the Court would normally award costs to the winning party. "Taxation of costs" by a taxing master will be required if the litigating parties cannot reach agreement on the quantum of costs;

- (b) Unless otherwise ordered by the Court, the taxing master will tax the costs claimed by the winning party on a "party and party basis". For taxation on a party and party basis, a winning party is entitled to recover all such costs as are necessary or proper for the attainment of justice or for enforcing or defending the rights of such party whose costs are being taxed; and
- (c) It should be noted that one of the main components of costs to be taxed is the solicitors' costs.

5. Bearing the above in mind, it is important to note that on the one hand, the SHRs, for the purpose of assessing solicitors' costs incurred by litigants during court proceedings, reflect in general the rates which taxing masters consider being appropriate and reasonable for engaging solicitors of comparable experience in such proceedings. They however do not necessarily reflect the actual costs being charged by the solicitors for service rendered in litigation. On the other hand, the taxing masters are not bound by such SHRs in taxation of costs. Each taxation application will be considered on its own merit and the taxing masters, in exercising their judicial discretions, may make such adjustments as they see fit.

PROGRESS OF WORK OF THE WORKING PARTY

6. The Working Party has been deliberating on the broad context under which the review of the SHRs should be conducted and considered. The Working Party considers that the issues as set out under paragraphs 7 to 19 are relevant for this purpose.

(A) Recoverability Gap

7. There can always be a recoverability gap between the actual costs incurred by the Receiving Party and the taxed costs such party recovers from the Paying Party (see paragraphs 4 and 5 above). In particular, it is relevant to note the following:

- (a) For taxation on a party and party basis, costs are recoverable only if they were "necessary or proper for the attainment of justice or for enforcing or defending the rights of [the

Receiving Party]” as is prescribed under Order 62, rule 28(2) of the Rules of the High Court, Cap. 4A;

- (b) As mandated by Order 62, rule 5(1)(aa) of Cap 4A, the court in exercising its discretion as to costs shall take into account proportionality as one of the underlying objectives set out in Order 1A, rule 1(c). In short, only proportionate costs are recoverable by the Receiving Party from the Paying Party; and
- (c) It should therefore be recognised that the costs to be allowed would not equate with the costs actually incurred by the Receiving Party.

8 In this review, the challenge is how to ensure that the recoverability gap is a reasonable one, having regard to the fact that the level of SHRs is one of the obvious factors that may impact on the extent of the recoverability gap. It is important to bear in the mind that any adjustments in the level of SHRs must be made having regard to the relevant legislative provisions.

(B) Access to Justice

9. The SHRs are taken to generally refer to the reasonable hourly rates in respect of reasonably competent solicitors/fee earners in different bands of seniority that are allowable on party and party taxation. As such, they do not prescribe or seek to prescribe the charge out rates solicitors/fee earners actually adopt in charging their clients for service rendered in litigation. Firms are still left to make their free choices having regard to the specific circumstances of the case, the requirements of the clients and the prevailing market conditions.

10. In the review, the challenge is how to ensure that access to justice would be enhanced, or would not be obstructed or denied, having regard to the fact that the level of SHRs may have an impact on the level of legal costs to be incurred in litigation. For example, if SHRs are set at too high a level, this may increase the legal costs and the affordability of those who need legal services would unavoidably be affected. Or if the SHRs are set at an unrealistically low level, winning parties would likely feel aggrieved at not being able to recover what they think they should be entitled to and equally this may be seen as a disincentive to access to

justice. It is important to bear in mind that after all, any adjustments in the level of SHRs must be made having regard to the overriding consideration of public interest.

(C) Impact on Law Firms

11. Hong Kong is a very small and concentrated jurisdiction. All along, a single set of SHRs applies to all law firms, irrespective of their size, location, whether it has a general or specialized litigation practice, or whether it has any international linkage.

12. In this regard, any adjustment to the SHRs must take into account the general profile of the solicitor profession and the characteristics of the legal services market. Whilst it is necessary to bear in mind the position of the large/medium firms, small firms which make up a large proportion of the legal practice should not be overlooked.

13. In the review, the challenge is how to take into account the overall position of the solicitor profession into account, and assess the impact of any adjustments in the level of SHRs on different types of firms and practices. It is important to bear in mind that the overall assessments must be considered by all types of firms and practitioners as being objective, fair and balanced.

(D) Impact on Legal Aid

14. If the legally aided person is the Paying Party, the costs that he has to pay to the Receiving Party will come out of the public funds. Further, if the legally aided person is the Receiving Party, he will be required to repay the Director of Legal Aid (“DLA”) costs and expenses paid by the DLA on his behalf which are not recoverable from the opposite party as a result of the statutory first charge imposed in favour of the DLA. Any changes in the costs between the parties as a result of any adjustments of the level of SHRs would have an impact on the legal aid funding. Public funding and access to justice would be involved.

15. In the review, the challenge is to assess how the adjustments to the level of SHRs may impact on legal aid, and how such impact may in turn has further impact on the access to justice to litigants with lesser means.

(E) Competitiveness of Hong Kong in Dispute Resolution

16. The adoption of a reasonable set of SHRs will certainly help Hong Kong to maintain its competitive position in dispute resolution.

17. In the review, the challenge is to assess how the adjustments of the level of SHRs may either enhance or hamper Hong Kong's competitiveness in dispute resolution.

(F) Sustainability

18. It is envisaged that it would be advisable to review the SHRs regularly in the future. To promote consistency and lessen the burden of future reviews, a principled and sustainable approach has to be constructed for future revisions.

19. In the review, the challenge is how a principled and sustainable approach could be devised, instead of tackling the matter as an ad hoc or one off exercise to address any immediate concerns as raised.

APPROACH ADOPTED TO THE REVIEW

20. Given the various considerations above and the possible ramifications the review may have on the overall public interest in access to justice and on the different stakeholders in the community, the Working Party considers that any review of the SHRs should be objective and a structured approach should be adopted to tackle the matter. In this regard, the Working Party agrees that an independent consultant should be engaged to conduct an objective and comprehensive study to examine the subject and to make recommendations for the Working Party's consideration.

21. The Working Party has decided that a two-stage approach would be adopted for the consultancy study as follows:

- (a) **Stage 1** – The first stage of the consultancy study would be to ascertain what should in the first instance be the proper approach for examining the subject. A consultant would be engaged to submit proposals on the approach and

methodology for conducting the review and the mechanism for setting the SHRs; and

- (b) **Stage 2** – Subject to the endorsement of the Working Party and the approval of the Chief Justice on the proposals in the first stage, the second stage would be the implementation of the said proposals. Another consultant would be commissioned to work out, as part of the review, a new set of SHRs based on the methodology and mechanism endorsed in the first stage.

CURRENT POSITION

22. A consultant has been engaged to undertake the first stage of the consultancy study (“the Consultancy”). Under the Consultancy, the consultant is required to perform the following tasks:

- (a) Recommend an approach for the review, including but not limited to, the measurement of SHRs for the High Court and the District Court, the composition of SHRs and the factors that have to be taken into account in reviewing and revising the rates, and the weighting of each factor, if applicable. In making the recommendation, the consultant would collect and analyse data and information obtained from relevant stakeholders;
- (b) Propose the methodology for the above recommended approach, including the methodology for the collection and analysis of data, be it a survey, by use of a model firm, panel consultation or any other option, or a combination of some or all of them, with detailed deliberations and supporting rationale as well as cost implication;
- (c) Propose the mechanism for setting the SHRs in accordance with the above recommended approach;
- (d) Consider the desirability of having a regular review of the SHRs and if so, how and the proposed frequency of the regular review; and

- (e) Propose an assignment brief that would be suitable for use should the recommended approach, methodology and mechanism be implemented, which should include the approach and methodology for the collection and analysis of data for working out a new set of SHRs in the second stage of the study.

23. In performing the tasks mentioned above, the consultant is required to take into account the following:

- (a) legislation regarding taxation on a party and party basis;
- (b) the views of major stakeholders which would include law firms of different sizes; the Judiciary's Judges and Judicial Officers and staff responsible for taxing matters; and other related Government departments or organisations such as the Legal Aid Department, the Department of Justice, the Official Receiver's Office, the Law Society of Hong Kong, the Bar Association, the Consumer Council and the Law Costs Draftsman Association;
- (c) the relevant experience of other common law jurisdictions on the subject including that of England, Scotland, Australia, New Zealand and Singapore;
- (d) the reports previously submitted by the Law Society to the Judiciary for the purpose of proposing revisions to the hourly rates; and
- (e) changes in legal practices, financial and market conditions since 1997 (including inflation rates) and the factors mentioned in paragraphs 7 to 19 above.

24. It is expected that stage 1 of the study will be completed around mid 2015 and stage 2 will start immediately afterwards. It is hoped that the Working Party will make final recommendations to the Chief Justice by the end of 2015 or early 2016.

CONCLUSION

25. Members are invited to note the contents of this paper.

Judiciary Administration
April 2015

For Information

**Legislative Council
Panel on Administration of Justice and Legal Services**

Review of Solicitors' Hourly Rates

Purpose

This paper seeks to provide information on the following:

- (a) the background to the conducting of a review of the solicitors' hourly rates for the purpose of taxation on a party and party basis ("SHR") by the Judiciary; and
- (b) the setting up of a Working Party on Review of SHRs for Party and Party Taxation to oversee the review and make recommendations on the matter.

Background

2. At the conclusion of a court case, the Court would normally award costs to the winning party. Taxation of costs by a taxing master will be required if the litigating parties cannot reach agreement on the quantum of costs. Unless otherwise ordered by the Court, the taxing master will tax the costs claimed by the winning party on a "party and party basis". For taxation on a party and party basis, a winning party is entitled to recover all such costs as are necessary or proper for the attainment of justice or for enforcing or defending the rights of such party whose costs are being taxed. The SHRs, for the purpose of assessing costs incurred by litigants during court proceedings, reflect in general the rates which taxing masters consider to be appropriate and reasonable for engaging solicitors of comparable experience in such proceedings. The taxing masters are, however, not bound by such SHRs. Each taxation application will be considered on its own merits.

3. The SHRs were last revised in 1997. The Law Society of Hong Kong has recently commissioned a review of the SHRs and its consultant's report recommends, amongst others, that (i) the SHRs be raised to better reflect the current market conditions; and (ii) annual adjustments be made

to the revised SHRs in accordance with an inflation linked index. This is the first time the Law Society has tendered suggestions on SHRs to the Judiciary since they were last revised in 1997.

4. Having regard to the importance and nature of the subject and taking into account the possible ramifications such matter may have on the access to justice and different stakeholders of the community, the Chief Justice has come to a view that the best way forward is for him to appoint a Working Party to study the matter.

Working Party on Review of SHRs for Party and Party Taxation

5. The Working Party on Review of SHRs for Party and Party Taxation (“the Working Party”) will be tasked to:

- (a) make recommendations to the Chief Justice on how a comprehensive and evidence-based review of the SHRs for the purpose of taxation on a party and party basis should be conducted;
- (b) subject to the Chief Justice’s acceptance in principle of the recommendations on the review mechanism at (a) above, conduct such review of the SHRs with a view to making recommendations to the Chief Justice on (i) whether any adjustments of SHRs are appropriate; and (ii) any other related matters; and
- (c) make recommendations to the Chief Justice on whether regular review of the SHRs should be conducted, and if so, how.

6. To be chaired by the Hon Mr Justice Poon, Judge of the Court of First Instance of the High Court, the Working Party will comprise seven other Judges and Judicial Officers; a member of the Bar Association of Hong Kong; two members of the Law Society of Hong Kong; representatives from the Department of Justice, the Legal Aid Department and the Official Receiver’s Office; Professor Chan Ka-lok (who is currently the Acting Dean of Business and Management of The Hong Kong University of Science and Technology); Mr Eric Cheung Tat-ming (who is currently the Principal Lecturer in the Faculty of Law of The University of Hong Kong); Ms Gilly Wong (who is currently the Chief Executive of the Consumer Council); Mr Stephen Yau How-boa, SBS, JP

(who is currently the Chief Executive of the International Social Service Hong Kong Branch); and Mr Anthony Yeung Kwok-ki, JP (who is the senior partner of a management consultancy firm). The details are set out at the **Annex**.

7. The appointment of the Working Party will initially be for a term of two years. It will commence work in January 2014. An Advisory Group will also be formed to assist the Working Party in the carrying out of a survey for the review exercise.

8. The current plan is that :

- (a) The Working Party would make recommendations to the Chief Justice on how a comprehensive and evidence-based review of the SHRs should be conducted by the first half of 2014;
- (b) Subject to the Chief Justice's approval, the Working Party would commission and conduct the survey by early 2015; and
- (c) The Working Party would make final recommendations to the Chief Justice by the latter half of 2015.

Advice Sought

9. Members are invited to note the contents of this paper.

Judiciary Administration
December 2013

**Working Party on Review of Solicitors' Hourly Rates
for Party and Party Taxation**

Membership List

- Chairman : Hon Mr Justice Jeremy Poon,
Court of First Instance of the High Court
- Members : Hon Madam Justice Queeny Au Yeung,
Court of First Instance of the High Court
- Deputy High Court Judge Marlene Ng,
Court of First Instance of the High Court
- Registrar Lung Kim-wan, the High Court
- Master Andy Ho, Deputy Registrar, the High Court
- Registrar Simon Kwang, Court of Final Appeal
- HH Judge Tony Poon, Chief District Judge, District Court
- Deputy District Judge Simon Lui, District Court
- Mr Colin Wright, Hong Kong Bar Association
- Mr Denis Brock, The Law Society of Hong Kong
- Mr Amirali Nasir, The Law Society of Hong Kong
- Mr Clifford Tavares, Department of Justice's representative
- Ms Juliana Chan, Legal Aid Department's representative
- Ms Fiona Lee, Official Receiver's Office's representative
- Professor Chan Ka-lok
- Mr Eric Cheung Tat-ming
- Ms Gilly Wong
- Mr Stephen Yau How-boa, SBS, JP
- Mr Anthony Yeung Kwok-ki, JP