

Extract from the Official Record of Proceedings of the Council Meeting  
on 11 May 2005 on the oral question on  
“Amendments to Legal Aid in Criminal Cases Rules”  
raised by Hon Margaret NG

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~~SECRETARY FOR HOME AFFAIRS (in Cantonese): Madam President, we can certainly consider holding an open competition. However, sometimes an open competition may not be the best way to initiate this project as it may delay or even postpone the development of the entire project.~~

**PRESIDENT** (in Cantonese): Second question.

**Amendments to Legal Aid in Criminal Cases Rules**

2. **MS MARGARET NG:** *Madam President, there is no provision in the Legal Aid in Criminal Cases Rules which authorizes the Director of Legal Aid to pay fee, other than a fixed brief fee, to the counsel in criminal cases for his work in preparing for a trial or an appeal, irrespective of how much work he has done. In his speech at the Opening of the Legal Year 2005, the Chairman of the Hong Kong Bar Association (the Bar) pointed out that the rules governing counsel fees in criminal legal aid cases were outmoded and would not attract enough barristers to practise criminal law. As thorough preparation may save a great deal of court time and is in the public interest, will the Government inform this Council whether it plans to amend existing legislation to make provisions for appropriate payment for preparation work undertaken by counsel in criminal legal aid cases; if so, of the details of the plan; if not, the reasons for this?*

**CHIEF SECRETARY FOR ADMINISTRATION:** Madam President, at present, the Legal Aid in Criminal Cases Rules prescribe the maximum fees payable to counsel and solicitors for undertaking criminal litigation work for the Legal Aid Department (LAD). It has long been the Administration's policy to review the fees on a biennial basis, to take account of changes in consumer prices and other related factors. We last adjusted the fees in the middle of 2003

following approval by the Finance Committee and a resolution passed by the Legislative Council.

The Honourable Member refers in her question to remuneration for preparation work undertaken by the defence counsel in particular. Before I address the specific question, let me briefly explain the criminal legal aid fee system enshrined in the Legal Aid in Criminal Cases Rules, as applied to both defence counsel and defence solicitors.

According to the Rules, the Director of Legal Aid pays to an assigned defence counsel, and solicitor for that matter, a "brief fee", generally equivalent to two days' court fee, to cover the preparation work undertaken by the counsel and his attendance for the first day of trial of the criminal case. From the second day of trial onwards, the assigned counsel receives a *per diem* court fee or "refresher fee", calculated as a fixed rate at half the brief fee.

Notwithstanding the prescription of the brief fee in the Rules, if the counsel considers that the assigned criminal case is exceptionally long or complex, he may, in accordance with the Rules, apply to the Court and the Court may so certify. With the certificate issued by the Court, the Director of Legal Aid is empowered to increase the fees payable to the counsel by such amount which the Director considers proper in the circumstances.

The Administration keeps an open mind to proposals which may further improve the cost-effectiveness of the criminal legal aid fee system. Indeed, in the context of the Finance Committee's approval of the last fee adjustments in mid-2003, the Bar and The Law Society of Hong Kong (The Law Society) stated that they would study the fee system and put forward a joint submission with improvement proposals. The Administration undertook to consider the joint submission when it is available. In the event, the Bar wrote to the Administration last month on a number of matters, including its views on the remuneration for the preparation work undertaken by the defence counsel. We will examine these views together with those which The Law Society will provide us, as part of the Administration's comprehensive review of the criminal legal aid fee system.

**MS MARGARET NG** (in Cantonese): *Madam President, the adjustment mentioned by the Chief Secretary for Administration is in fact made according to*

*the consumer price index, the rate of which is very small, only a few percentage points, and it can also be increased or decreased. It was said in the fourth paragraph of the main reply that if the case was exceptional, the counsel would have to make his own application. According to existing legislation, the normal fee ceiling is only \$13,600. No matter how many case-related documents the counsel has to read, he cannot charge additional fees. As regards service of notice for appeal, even though the counsel may have read a lot of documents, summarized everything and saved court time, the normal fee ceiling is only \$2,710 — even if the Director of Legal Aid wishes to give the counsel more, this normal ceiling cannot be altered. My supplementary question is: Has the Government considered revising these normal ceilings? My question is really about time spent. Would the Chief Secretary for Administration revise the normal fees for legal aid with the same efficiency as he is presently trying to boost the remuneration of the Chief Executive? Would he accomplish this task with the same efficiency, before his term as the Chief Executive for Administration expires?*

**CHIEF SECRETARY FOR ADMINISTRATION** (in Cantonese): At present, fees payable to counsels are approved by the Legislative Council and the Finance Committee. In arriving at the amounts, we have applied the fees charged by counsels with the same experience in handling such cases for the general public as the standard. In addition, we have also applied the principle of prudent financial management. Just as I said earlier, we would make adjustments according to market condition on a biennial basis. Of course, these adjustments must be compatible with market changes and cannot deviate from them completely. Besides, we also have to consider a number of other factors. If such fees cannot attract sufficient counsels to join the list of counsels of the LAD, we then would have to review but for the time being, we have not discovered any problem. Notwithstanding this, I have made it very clear in the main reply earlier that we would keep an open mind. If the Bar or The Law Society considers that there are specific problems which we must handle, we should of course critically examine if there are any problems with the system.

I have also said earlier that if a certain case requires a long preparation period, or requires the counsel to read a lot of documents, I think the Court would make special arrangements. Just as I said earlier, if the counsel tells the Court that he has to spend much time on preparation and do a lot of preparation work, there should be special treatment under such circumstances. If the Court

is also convinced that much time is needed and the case is complicated, the LAD would make special arrangements and pay additional fees.

I believe the Government has to strike a balance between deploying resources of the LAD and encouraging counsels to participate in this scheme. With regard to the present system, I think it is feasible. However, just as I said earlier, we would keep an open mind. Besides, I can assure Ms Margaret NG that if the Bar and The Law Society think that there are particular problems in this respect and give us their opinions, we would handle them as soon as possible. I said earlier that I had received the opinions of the Bar one month ago, and I also hope to have the opinions of The Law Society so that we could address this issue soon.

**MS AUDREY EU** (in Cantonese): *Madam President, may I ask the Chief Secretary if he agrees that the better and more thoroughly we do our preparation, the shorter the hearing time will be? Ms Margaret NG earlier asked about appeal. Most of the times, before lodging an appeal, a counsel has to refer to trial records — this may mean the records for 20 or 30 days. Even if he is only talking about obtaining the faired records of the hearings, several hundred thousand dollars have to be spent — this sum is paid to the Court and not charged by the counsel. Having studied all the documents, the counsel understands the reason for appeal and he has to write it on the notice for appeal. This process may take the counsel several days, but the fee for preparing the appeal notice is only \$2,710. Therefore, may I ask the Chief Secretary if he agrees that this is not a matter of making adjustments in accordance with consumer prices, but rather a matter of the structure itself? That is, does he agree that there is a shortcoming with the formula stipulated by existing legislation: regardless of how much effort we have put into the preparation, everything has been provided by law, thus the cart is put before the horse which is not cost-effective?*

**CHIEF SECRETARY FOR ADMINISTRATION** (in Cantonese): I think Ms Audrey EU has a point there. We would examine if the system has to be refined. If this can shorten the Court's hearing time and save government spending in this respect, I am sure we can consider this. I would pay special attention to this, and study the issue further with colleagues of the LAD.

**MR RONNY TONG** (in Cantonese): *Madam President, I would like to raise a supplementary question on the fourth paragraph of the main reply. In the fourth paragraph, the Chief Secretary said that the Court is empowered to increase the fee payable, but does the Chief Secretary in fact know that upon receiving a case, there is no way for the counsel to be sure that the Court will definitely accept his application? Besides, even if the Court approves the application, it is only asking the Director of Legal Aid to handle the application; it is still unknown as to how the application will be handled. On the contrary, if the counsel is working for the prosecution, these shackles would not exist. Therefore, we can see that the prosecution and the defence may be receiving different treatment, and this may have a direct impact on quality. May I ask the Chief Secretary here if he would consider lifting these rigid stipulations and fee ceilings which are out of touch with the reality, and switch to using the time spent as the criterion in determining the fees payable to counsels? I hope the Chief Secretary can say whether he would consider changing this criterion, unlike the present practice where, regardless of the complexity of the cases, a rigid amount is prescribed as fee payable to the counsel no matter he has to work for three weeks or two days. I hope the Chief Secretary can consider using the time spent as the criterion for calculating fees.*

**CHIEF SECRETARY FOR ADMINISTRATION** (in Cantonese): This argument has been put forward many times. Just as I said earlier, the present brief fee is calculated on the basis of two working days. Generally speaking, everybody seems to be happy with it. Granting special circumstances and the counsel feels that the fee is not enough, I have said that the Court can issue certificates to handle it with flexibility, and the LAD will adjust the fee for the preparation period in accordance with the certificate. Judging from the records I have seen, if the LAD receives such certificates issued by the Court, approval will be given under normal circumstances, and the LAD also has clear guidelines on this.

If counsels with the LAD consider that preparation work will really take a long time, they should point it out to the Court. However, in order to safeguard the expenditure of taxpayers in legal aid, the authorities will lay down some criteria on the premise that discretion would not be exercised too frequently. I think there are advantages to this. At present, generally speaking, our criterion is to calculate the initial brief fee on the basis of two working days. I have said

earlier that if for a certain case, the difference is too big, I hope individual counsel would point it out. I think this is also a fair way to handle the matter. However, if we have to handle it in another way, I believe we have to take a look at the relevant expenses and whether this would result in higher administrative cost. This is a matter with the system. In this regard, I said earlier that the Bar had given us some opinions a month ago. Although I have not read those opinions and do not know whether this point is included, I very much believe that they have included it. If so, we will study this further to see if adjustments can be made.

**MR LI KWOK-YING** (in Cantonese): *Madam President, I am very glad to hear the Chief Secretary say earlier that he would keep an open mind in handling this and I welcome him saying so. Ms Margaret NG's main question is mainly about fees for counsels but the few colleagues who have asked supplementary questions earlier seem to have made a mistake, thinking that it is only looking at counsel fees. However, we all know that at present, the judicial system is made up of barristers and solicitors, and the philosophy behind this is when the two different kinds of lawyers are handling the same case, it is hoped that the objective factor will not come in, so that the lawyers can accurately grasp the information and enforce the law impartially. If this is the reason, we all know that when barristers handle complicated cases and have relatively spent more time, the same applies to solicitors. Therefore, if barristers can charge according to the time they have spent on the cases, may I ask the Chief Secretary if the same applies to solicitors too?*

**CHIEF SECRETARY FOR ADMINISTRATION** (in Cantonese): Madam President, I have said that we are waiting for solicitors to give us their opinions in this regard. If The Law Society considers that adjustments are necessary, I would consider them. However, we do have a common goal with the Legislative Council, that is, to ensure the proper spending of public money. If there is a way which is fair, and which can improve the entire legal aid system to the satisfaction of every party, I will definitely strike a balance.

**MR CHIM PUI-CHUNG** (in Cantonese): *Madam President, may I ask the Chief Secretary if it is required by law that barristers or solicitors must take up*

*cases of the LAD? If not, this is something which they take upon themselves voluntarily. The reason for lawyers to serve society in this way is perhaps they have made more than enough money from the fees they charge in handling other cases. Therefore, may I ask the Chief Secretary if barristers are required to take up cases of the LAD? If not, this is a matter of free will.*

**CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese):** There is no mandatory obligation.

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