

[Draft]

**Minutes of the Sixth Meeting
Review of Criminal Legal Aid Fee System
5:30 pm on 21 December 2006
Room 501, CGO Main Wing**

PRESENT

Miss Elizabeth Tse
Director of Administration (Convenor)

The Hon Mr Justice Stock
Representative of the Judiciary

Mr Benjamin Cheung
Director of Legal Aid

Ms Evena Chan
Senior Assistant Director of Public Prosecutions

Mr Philip Dykes S.C.
Hong Kong Bar Association

Ms Audrey Campbell-Moffat
Hong Kong Bar Association

Mr Stephen Hung
The Law Society of Hong Kong

Mr Anthony Upham
The Law Society of Hong Kong

IN ATTENDANCE

Miss Shirley Yuen
Deputy Director of Administration

Mrs Alice Cheung
Assistant Director of Administration

Ms Alice Chung
Assistant Director of Legal Aid

Mr Thomas Kwong
Assistant Director of Legal Aid

Miss Leonie Lee
Assistant Secretary (Administration)

The Convenor welcomed the new member, Mr Stephen Hung, who had replaced Mr Christopher Knight as one of the representatives of the Law Society.

2. Subject to the following amendments, the revised minutes tabled were agreed and confirmed -

4th sentence of paragraph 12

'If refresher fees are to be paid on a full day basis only, judges will have to be notified of the change.'

3. The Convenor recapped the progress of the review. Following the last meeting held on 10 November at which the Administration's revised proposal was discussed, the Law Society further submitted a proposed fee structure with suggested rates and the Bar Association submitted for the Administration's reference the rates of barristers in private cases. The Convenor hoped that the meeting could reach a consensus on points of principle. A paper on the Administration's comments on the Law Society's proposed fee structure was tabled and the Convenor suggested going through the paper.

(a) Reading Fee

3. The Convenor expressed that the Administration had no objection in principle to paying reading fee as a separate item. Nonetheless, it was uncertain whether payment by number of pages was appropriate. A system under which the Legal Aid Department (LAD) went through the content to assess the number of hours needed seemed more appropriate, as it would take into account the nature of the documents in question. In any case, the proposed 50 pages as one hour's work seemed to be on the low side. For instance, Western Australia regarded every 90 pages as one hour's work.

4. Mr Justice Stock observed that using the number of pages as the unit for calculation of fees might not be appropriate. For instance, the length of the documents might vary according to its format. Ms Evena Chan echoed that some material such as transcript of video interview with no admission could be read briefly.

5. On the other hand, Mr Hung explained that calculation based on number of pages was a more objective assessment. In this way, there would be no need to take into account the difference in reading time between fast and slow readers. This could avoid possible abuse.

6. Ms Chan said that when the Department of Justice (DOJ)

assigned out marked brief for District Court cases, it estimated the preparation time required by examining the content of the case.

7. Ms Alice Chung followed that when assigning out cases, LAD also read through each case, though it might not be as thorough as DOJ, and got preliminary instructions from aided persons in order to ascertain the length of trial.

8. The Convenor reiterated that the Administration did not object in principle to having a separate item to remunerate reading time but would appreciate it if the Law Society would consider observations from other stakeholders mentioned above. The choice would be between having reading time assessed by LAD or calculated by number of pages, where 90 pages should amount to one hour's reading. After considering the two options, Mr Hung agreed to the adoption of the latter.

(b) Banding System

9. The Convenor expressed that there were indeed no material difference between the Administration's proposal and the Law Society's proposal. Both were a banding system except that the former was on 4-hour bands while for the latter, 10-hour bands. Ms Chung elaborated that a 4-hour band was operationally more flexible and administratively easier for LAD to manage since LAD had been using a half-day block.

10. Mr Hung explained that the rationale of the proposal was to bar a direct jump from Band 1 (i.e. up to 10 hours) to the next band; only those who reach 15 hours of preparation would warrant a higher band. Mr Anthony Upham further explained that such banding system would not reward slow and/or careless solicitors as they would not receive a higher fee by simply preparing for a few more hours. Moreover, the 10-hour band was intended to streamline administration. The Convenor noted that a balance must be struck between an equitable and an efficient system. In view of the different opinions raised, she invited the Law Society to consider this item further.

(c) Conference Fee

11. The Convenor explained that the Administration's proposal was to pay conference fee (between counsel, solicitors and client) based on the number of hours actually incurred, since it would be practically difficult to estimate the number of conference hours required at the time of assignment. With the further clarification, Mr Hung agreed with the Administration's proposal that conference fee should be paid on the actual number of hours spent.

(d) Difference in the rates between Court of First Instance (CFI) and District Court (DC) cases

12. The Convenor invited the Law Society to explain its suggestion that no distinction in the rates between High Court and District Court should be made. Mr Upham reasoned that some cases could be tried in either DC or CFI, there was no significant difference between the cases tried in the two Courts in terms of preparation time, and administration costs could be saved without the distinction.

13. Ms Chung expressed reservation in removing the demarcation on the level of court as the majority of cases in CFI were more complicated than those in DC. There would also be significant cost implications if rates in the two Courts were not differentiated. Mr Cheung acknowledged that there were cases that could be tried in both Courts, but it was clear that cases in CFI in general required lawyers with more experience. Ms Audrey Campbell-Moffat observed that while there might be many overlaps in cases of the two Courts, it might well be true that for legal aid cases, CFI cases were in general more complicated than DC cases. For example, while there were many commercial fraud cases at DC, they were mostly privately funded.

14. Mr Justice Stock was concerned that if the demarcation in rates between the two Courts were to be removed, the representing lawyer of a serious crime that is tried at CFI might be much less experienced than that of an offence tried at DC which carried less penalty. As such, defendants' interest might be put at stake. In view of the different opinions raised, Mr Hung agreed that the Law Society would further consider this issue.

(e) Rates for first day of court hearing should be higher than that for subsequent days

15. Ms Chung commented that there was no justification for higher rates for first day of court hearing because preparation work other than attendance in court would already be reflected in the preparation fee under the proposed structure.

16. Mr Hung responded that the objective of the proposal was to give incentive for instructing solicitor to personally attend the first day of court hearing. Mr Philip Dykes agreed that the first day of court hearing was important and would be helpful to have the presence of the instructing solicitor. Mr Justice Stock concurred that unnecessary expenses would arise if things went wrong in the first day and the court hearing was adjourned. Ms Campbell-Moffat recognized that the Law Society's proposal of an enhanced rate was to encourage solicitor to

attend court, rather than to request extra payment to reflect preparation.

17. Mr Hung stressed that the Law Society did not simply look for a redistribution of existing fund. In response, the Convenor reiterated that the Administration intended to improve the current system and had no intention to make this a cost neutral exercise. For example, preparation would be remunerated depending on the time put in. This was absent in the current system. However, given that preparation work had been reflected in other item, the Convenor indicated that the Administration might have difficulties in acceding to higher rates for first day of court hearing. She suggested that the Law Society should further consider this proposal. The Administration would also further consider.

(f) Re-determination after the conclusion of case

18. Mr Upham said that the proposed system should accommodate the worst-case scenario such as when new material was discovered at the conclusion of the case. On the other hand, he reminded LAD to have a closer monitoring and control of the solicitors who should, as stated in the Code of Conduct, shoulder additional duties when acting under a legal aid certificate. The Convenor clarified that the Administration's proposal was indeed not materially different from what the Law Society wished. Our objective was to ensure that re-determination of fees should be sought as soon as possible. Ms Chung supplemented that the proposal was to avoid situations where lawyers sought a re-determination of fees after the case was closed when it could have been done earlier. If matters warranting re-determination of fees arose, say, at the last day of trial, LAD would of course be reasonable, as long as the assigned lawyer sought re-determination as soon as possible.

19. The Convenor noted that in Administration's proposal, the circumstances under which re-determination of fees upon request by practitioners were set out. Suggestions to elaborate the circumstances or to make the list more comprehensive were most welcome.

(g) Rates should be specified for Court of Final Appeal (CFA) cases as in trial cases

20. Ms Chung explained that at present, fees for CFA cases were negotiated on a case-by-case basis but LAD had no difficulty in accepting the proposal. Mr Dykes remarked that the Rules had not been amended to reflect the establishment of CFA in 1997. The opportunity should now be taken to prescribe rates for CFA as well. The Convenor concluded that Administration had no objection in acceding to the suggestion.

(h) Same fee structure for solicitor advocate and instructing solicitors

21. Ms Chung maintained that the nature of work of solicitor acting as advocate was very similar to counsel. Therefore the fee structure of counsel should apply, meaning that cases would be further classified according to their nature and complexity. Mr Upham responded that the situation of solicitor advocate was different from counsel because the latter would not have to do the instructing solicitor's work, while the former had to do all the work from scratch.

22. Ms Chung said that the Administration had acknowledged the difference and therefore at present, fee rates for solicitor advocates were higher than that for counsel. The same should be true under the proposed system. Mr Upham agreed to further consider.

(i) Return of papers

23. Mr Upham pointed out that Law Society's code of conduct had stipulated the circumstances that allow solicitors to return of papers. Circumstances include, for example, the client had absconded, or there were conflict of interest issues. Ms Chung clarified that under the Administration's proposal, where the solicitor returned papers because the aided person withdrew legal aid, requested to re-assign lawyer, or had absconded, preparation time actually and reasonably incurred by the solicitors would be paid. The situation where fees would not be paid would be confined to very limited situations, such as when the lawyers suddenly became unavailable because of his other cases, or when the lawyer did not report a conflict of interest within a reasonable time. She did not envisage that this would happen often.

24. Mr Hung appreciated the clarification and supplemented that future cases involving irresponsible solicitors should be referred to the Law Society.

(i) Taxation

25. Mr Upham saw taxation, or the proposed joint tribunal, as a 'safety valve' that would be used rarely but would be beneficial to LAD. A joint tribunal was also cheaper and less formal when compared to taxation. Mr Hung said that one less costly alternative was to use mediation, which required no additional work but simply invited a mediator to go through the bundles. Nevertheless, Mr Dykes opined that allowing a private non-legal third party to have a say in such affairs did not seem appropriate.

26. The Convenor reiterated that the notable improvements of the proposed system over the present one should be allowed to be tested before any sweeping conclusions are to be drawn that they would not work and that an ultimate resort to a system of taxation would be needed.

Overall

27. Mr Hung remarked that, the Law Society not only wished to see an overhaul of the present system, but also an increase of fees, though it appreciated that there might not be immediate pay rise. The Law Society would like to the government to undertake to engage the Law Society in the discussion of the revision of rates. He supplemented that a 30% increase in pay arising from structural change, as now suggested, could not satisfy its members.

28. The Convenor pointed out that the exercise should be approached in a pragmatic perspective, and that the Administration must know what the revised structure was before being able to work out the rates and cost implications. She referred to the illustration of the proposed fee system tabled in the last meeting, and noted that in one of the cases, the fees payable doubled. Mrs Alice Cheung supplemented that the 30% increase was only a rough estimated based on the annual expenditure of criminal legal aid fee. This was not a cap, the actual increase in individual cases and hence in the annual expenditure might be much more, depending on the actual amount of time spent on preparation; and LAD would have to accept the financial consequences once the structure was put in place. The Convenor added that there was a biennial review in place to adjust the fee scale.

WAY FORWARD

29. The Convenor concluded that agreement was reached on issues concerning reading fee, conference fee, re-determination, specified rates for CFA cases, and return of paper. The Convenor invited the Law Society to consider the outstanding matters regarding the structure as discussed at this meeting and revert to the Administration as soon as possible. The Administration would proceed to consider the rates.

30. The Convenor further said that the Administration would circulate for members' comments a draft report to reflect the current status of the review for the meeting of the Administration of Justice and Legal Service Panel in the first quarter of 2007. On the status of the review, members agreed that as far as the structure was concerned, a broad consensus had been achieved. The Convenor said she would proceed to draft the report on this basis.