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Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 19 December 2016**

**Biennial review of criminal legal aid fees, prosecution fees and
duty lawyer fees**

Purpose

This paper provides background information and a brief account of the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on the biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees (collectively referred to as "the Fees").

Background

Prescribed level of fees

2. The Legal Aid Department ("LAD") engages counsel and solicitors in private practice as defence lawyers in criminal legal aid cases. The scale of fees payable to these lawyers as well as the fee assessment mechanism are prescribed in Rule 21 of the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) ("LACCR"), subsidiary legislation of the Criminal Procedure Ordinance (Cap. 221). While legally the scale of fees only binds LAD, the Department of Justice ("DoJ") adopts the same fee scale on an administrative basis in engaging lawyers in private practice to prosecute in criminal cases on behalf of the Government, with a view to ensuring that neither LAD nor DoJ would have any advantage in competing for lawyers. For the same reason, fees for duty lawyers providing legal representation under the Duty Lawyer Scheme¹ are also based on the brief fee payable by DoJ to engage counsel to appear in the Magistrates' Courts as

¹ The Duty Lawyer Scheme of the Duty Lawyer Service was established in 1979 to supplement the legal aid services provided by the Legal Aid Department under the Legal Aid Ordinance (Cap. 91). The Duty Lawyer Scheme provides legal representation to eligible defendants who appear in Magistrates' Courts, Juvenile Courts and Coroners' Courts.

prosecuting counsel.

The biennial review mechanism

3. Pursuant to the decision of the Legislative Council ("LegCo") Finance Committee ("FC") in October 1992, the Fees are subject to review by the Administration on a biennial basis. FC also delegated in June 2003 the authority to approve future adjustments to the Fees to the Administration, provided that the extent of adjustment is no greater than the movement of the Consumer Price Index (C) ("CPI (C)") during the reference period. In conducting the biennial reviews, the Government takes into account mainly inflation/deflation during the reference period and whether there has been difficulty in engaging the services of counsel and solicitors.

4. The last biennial review was conducted in 2014, and the Fees had been raised by 7.7% in accordance with the movement in CPI (C) during the reference period from July 2012 to July 2014. The following table summarizes the adjustment to the Fees in the past six reviews –

Year	Adjustment	CPI(C) Movement
2004 review	Nil	-4.4%
2006 review	Nil	+3.4%
2008 review	+8.3%	+8.3%
2010 review	+1.6%	+1.6%
2012 review	+9.3%	+9.3%
2014 review	+7.7%	+7.7%

Past discussions of the Panel

Review on the criminal legal aid fees system

5. In response to the call for change by the two legal professional bodies, the Administration had reviewed the criminal legal aid fees system and had discussed the relevant issues with the Panel at various meetings held between December 2005 and February 2016. In its paper to the Panel in December 2010 [LC Paper No. CB(2)638/10-11 (01)], the Administration advised that it had reached an agreement with the two legal professional bodies on the review of the criminal legal aid fee structure and the fee level. The payment structure of the criminal legal aid fees system would be enhanced with the introduction of a "marked brief system". Members noted that the Administration was working on the legislative amendments to reflect the agreed changes, as follows -

(a) Preparation or pre-trial work

Under the current system, solicitors and counsel are paid a "flat" fee for pre-trial preparation, irrespective of the time spent. Under the proposed system, pre-trial work will be remunerated according to the time required.

(b) Rationalization of fee items

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 on an hourly basis.

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

At present, 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. Assigned lawyers will be allowed to view the bundle before accepting assignments whenever circumstances permit. Such measures are designed to enhance the transparency of the fee system.

(d) New fees for solicitors

For instructing solicitors, the revised rates (simplified as hourly rate) will be enhanced to \$620, \$730 and \$990 for District Court, Court of First Instance and Court of Appeal respectively.

6. Members were briefed on 19 April 2011 about the progress of legislative amendments on the criminal legal aid fees system. Members noted that the Administration was in the course of drafting the Legal Aid in Criminal Cases (Amendment) Rules 2011 to amend:

- (a) Rule 4 of LACCR, with a view to expanding the scope of legal aid in criminal cases so that legal aid could be granted in cases to be heard in the Court of Appeal and the Court of Final Appeal which did not involve a conviction; and

- (b) Rule 21 of LACCR, with a view to improving the payment structure of the criminal legal aid fees system. This was to be achieved by the introduction of additional items of remuneration for work done by counsel and solicitor in criminal legal aid work and by setting the fee level for solicitors acting as instructing solicitors.

7. Both members and the Law Society of Hong Kong ("the Law Society") urged the Administration to expedite the drafting of the legislative amendments to implement the new fee structure and the revised rates so that criminal legal aid lawyers could benefit from the improved remuneration under the revised system as soon as possible. They also urged the Administration to put in place a mechanism on conducting regular reviews, say every two years, in future. The Administration agreed to review the fee rates generally after two years apart from the biennial review based on CPI (C).

8. The Secretary for Home Affairs moved a motion at the Council meeting of 29 February 2012 for positive vetting of the Legal Aid in Criminal Cases (Amendment) Rules 2012 to effect the legislative amendments mentioned in paragraph 6 above. The motion was agreed to by the Council. The Legal Aid in Criminal Cases (Amendment) Rules 2012 came into operation on 9 March 2012.

9. The Home Affairs Bureau set up a Working Group in March 2014 to review the rates of criminal legal aid fees as pledged. Members of the Working Group included representatives from the Hong Kong Bar Association ("the Bar Association"), the Law Society, as well as government representatives from LAD and DoJ. The Working Group reckoned that there was a general need to revisit the criminal legal aid fee rates to ensure that assigned solicitors and counsel in private practice were properly remunerated. The Working Group completed the review in mid-2015, and made the following recommendations: (i) to increase the criminal legal aid fees by the following percentages, viz: 50% for counsel; 25% for instructing solicitors; and 40% for solicitors acting as both advocate and instructing solicitor in the District Court; and (ii) to introduce a new category of criminal legal aid fees for High Court cases for Solicitor Advocates with higher rights of audience. The proposed increases of criminal legal aid fees were inclusive of a 7.7% increase required under the prevailing practice to reflect the accumulated change in the CPI (C) recorded between July 2012 and July 2014. The proposed maximum fees for different categories of criminal litigation work at various levels of Court were set out in **Appendix I**.

10. At the meeting on 22 February 2016, the Panel received a briefing from the Administration on the Government's proposal to amend the Schedule to the

LACCR with a view to increasing the criminal legal aid fees as mentioned in paragraph 9 above. Members in general supported the proposal. The Bar Association welcomed the Government's proposed increase of criminal legal aid fees, and hoped that in future, the difference between criminal and civil legal aid fees would be further reduced, so that the criminal side of the profession would no longer be perceived as unattractive for young counsel.

11. In response to a member's enquiry as to whether the proposed increase in criminal legal aid fees would attract more young lawyers to take up criminal legal aid work, the Administration advised that the proposed increase was to bring the remuneration for criminal legal aid lawyers to a more reasonable level and enable defendants to have better access to more experienced criminal lawyers and criminal justice for the defence of liberty. In the long run, with more legal talents attracted to the criminal law field, there would be a larger pool of experienced and well-qualified criminal law practitioners from which the Judiciary could source for appointment as judges. A member hoped that the Administration would continue to enhance criminal legal aid fees so as to attract young lawyers to take up criminal legal cases and retain experienced lawyers to stay on the Legal Aid Panel.

12. The Legal Aid in Criminal Cases (Amendment) Rules 2016, which sought to adjust the criminal legal aid fees in accordance with the recommendations made by the Working Group, was approved by LegCo at the Council meeting of 22 June 2016 and came into operation on 14 November 2016.

Latest developments

13. The Administration will brief the Panel on the outcome of 2016 biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees at its meeting scheduled for 19 December 2016.

Relevant papers

14. A list of the relevant papers available on the LegCo website is in **Appendix II**.

Appendix I

Comparison of Current and Proposed Criminal Legal Aid Fees (Current fees in force since 29 November 2013)

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
1. Magistrates' Courts		
(a) <u>Counsel or solicitor acting as advocate in committal proceedings</u>		
(i) Brief ¹	9,800	14,700
(ii) Refresher ²	4,890 per day	7,340 per day
(b) <u>Counsel or solicitor acting as advocate in preliminary inquiry</u>		
(i) Brief ¹	9,800	14,700
(ii) Refresher ²	4,900 per day	7,350 per day
(c) <u>Instructing solicitor in committal proceedings (including preliminary inquiry)</u>		
(i) Brief ¹	2,640	3,300
(ii) Refresher ²	2,170 per day	2,710 per day
2. District Court ("DC")		
(a) <u>Counsel</u>		
(i) Preparation ³	8,160	12,240
(ii) Additional preparation	4,210 per 4-hour unit	6,320 per 4-hour unit
(iii) Court hearing	8,160 per day	12,240 per day
(iv) Conference	1,040 per hour	1,560 per hour

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
(b) <u>Instructing solicitor</u>		
(i) Reading	670 per hour	840 per hour
(ii) Preparation	2,740 per 4-hour unit	3,430 per 4-hour unit
(iii) Court hearing	5,490 per day	6,860 per day
(iv) Conference	670 per hour	840 per hour
(c) <u>Solicitor acting as both advocate and instructing solicitor</u>		
(i) Preparation ³	10,095	14,130
(ii) Additional preparation	5,030 per 4-hour unit	7,040 per 4-hour unit
(iii) First day Court hearing	10,095 per day	14,130 per day
(iv) Refresher ⁴	11,190 per day	15,670 per day
(d) <u>Attendance at DC (other than for the trial, plea or sentence)</u>		
	At a rate that appears to the Director of Legal Aid ("DLA") to be reasonable and proper	At a rate that appears to DLA to be reasonable and proper

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
3. Court of First Instance (“CFI”)		
(a) <u>Counsel</u>		
(i) Preparation ³	12,260	18,390
(ii) Additional preparation	5,140 per 4-hour unit	7,710 per 4-hour unit
(iii) Court hearing	12,260 per day	18,390 per day
(iv) Conference	1,270 per hour	1,910 per hour
(b) <u>Solicitor advocate with higher rights of audience (“HRA”) acting as both advocate and instructing solicitor</u>		
(i) Preparation ³	-	21,240
(ii) Additional preparation	-	8,600 per 4-hour unit
(iii) First day Court hearing	-	21,240 per day
(iv) Refresher ⁴	-	23,540 per day
(c) <u>Instructing solicitor</u>		
(i) Reading	800 per hour	1,000 per hour
(ii) Preparation	3,230 per 4-hour unit	4,040 per 4-hour unit
(iii) Court hearing	6,480 per day	8,100 per day
(iv) Conference	800	1,000

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
	per hour	per hour
(d) <u>Attendance at CFI (other than for the trial, plea or sentence)</u>	At a rate that appears to DLA to be reasonable and proper	At a rate that appears to DLA to be reasonable and proper

4. Appeals from a magistrate to CFI

Rates for counsel and solicitors (including new rates for solicitor advocates with HRA) are the same as those applicable to proceedings in CFI as set out in (3) above.

5. Appeals to the Court of Appeal (CA)

(a) Counsel (appeals from magistrates⁵ or CFI)

(i) Preparation ³	16,350	24,530
(ii) Additional preparation	5,140 per 4-hour unit	7,710 per 4-hour unit
(iii) Court hearing	16,350 per day	24,530 per day
(iv) Conference	1,270 per hour	1,910 per hour

(b) Counsel (appeals from DC)

(i) Preparation ³	13,070	19,610
(ii) Additional preparation	5,140 per 4-hour unit	7,710 per 4-hour unit
(iii) Court hearing	13,070 per day	19,610 per day
(iv) Conference	1,270 per hour	1,910 per hour

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
(c) <u>Solicitor advocate with HRA acting as both advocate and instructing solicitor (appeals from magistrates⁵ or CFI)</u>		
(i) Preparation ³	-	28,320
(ii) Additional preparation	-	8,600 per 4-hour unit
(iii) First day Court hearing	-	28,320 per day
(iv) Refresher ⁴	-	31,400 per day
(d) <u>Solicitor advocate with HRA acting as both advocate and instructing solicitor (appeals from DC)</u>		
(i) Preparation ³	-	22,640
(ii) Additional preparation	-	8,600 per 4-hour unit
(iii) First day Court hearing	-	22,640 per day
(iv) Refresher ⁴	-	25,100 per day
(e) <u>Instructing solicitor</u>		
(i) Reading	1,090 per hour	1,360 per hour
(ii) Preparation	4,390 per 4-hour unit	5,490 per 4-hour unit
(iii) Court hearing	8,780 per day	10,980 per day
(iv) Conference	1,090	1,360

Fee item	Current maximum fee (\$)	Proposed maximum fee (\$)
	per hour	per hour
(f) <u>Attendance at CA (other than for the appeal hearing)</u>	At a rate that appears to DLA to be reasonable and proper	At a rate that appears to DLA to be reasonable and proper
(g) <u>Counsel or solicitor settling notice of appeal⁶</u>	3,240	4,860

6. Appeals (or applications for leave to appeal) to the Court of Final Appeal

<u>Counsel and solicitor</u>	Fees that appear to DLA to be reasonable and proper	Fees that appear to DLA to be reasonable and proper
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7. Proceedings in DC or CFI or appeals

<u>Senior Counsel</u>	Fees at an hourly rate that appears to DLA to be reasonable and proper	Fees at an hourly rate that appears to DLA to be reasonable and proper
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Remark: All figures rounded to the nearest \$10.

¹ Covering preparation (regardless of duration) and the first day of attendance in Court.

² For additional day(s) of attendance in Court subsequent to the first day as covered under the Brief fee.

³ Covering the first eight hours of preparation.

⁴ For additional day(s) of attendance in Court subsequent to the first day of Court hearing.

⁵ In respect of an appeal, or any point in an appeal, reserved to be argued before CA under section 118 of the Magistrates Ordinance (Cap. 227).

⁶ That is, for preparing the notice of appeal for filing with the Court.

**Relevant papers on biennial review of criminal legal aid fees,
prosecution fees and duty lawyer fees**

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services ("AJLS Panel")	27.10.2003 (Item IV)	Agenda Minutes
Legislative Council	11.5.2005	Official Record of Proceedings Pages 14 - 20 (Oral question)
AJLS Panel	--	CB(2)1588/04-05(01)
	--	CB(2)2268/04-05(01)
	--	CB(2)260/05-06(01) CB(2)260/05-06(02)
	15.12.2005 (Item VI)	Agenda Minutes
	--	CB(2)2058/05-06(01)
	--	CB(2)563/06-07(01)
	26.2.2007 (Item IV)	Agenda Minutes
	25.6.2007 (Item V)	Agenda Minutes
	25.2.2008 (Item IV)	Agenda Minutes
	20.10.2008 (Item I)	Agenda Minutes
	16.12.2008 (Item V)	Agenda Minutes

Committee	Date of meeting	Paper
AJLS Panel	--	CB(2)1439/08-09(01)
	22.6.2009 (Item V)	Agenda Minutes
	25.1.2010 (Item VI)	Agenda Minutes
	--	CB(2)638/10-11(01)
	19.4.2011 (Item IV)	Agenda Minutes
	--	CB(4)849/12-13(01)
	22.2.2016 (Item IV)	Agenda Minutes

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