

Legislative Council
Panel on Administration of Justice and Legal Services

Review of Solicitors' Hourly Rates – An Update

Purpose

This paper informs Members of the latest progress of the review of the solicitors' hourly rates for party and party taxation ("SHRs") being conducted by the Judiciary.

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 an 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", i.e. 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.

3. One of the main components of costs to be taxed is the solicitors' costs. For the purpose of assessing solicitors' costs incurred by litigants during court proceedings, SHRs reflect in general the rates which taxing masters consider to be appropriate and reasonable for engaging solicitors of comparable experience in such proceedings. They do not necessarily reflect the actual costs charged by the solicitors for service rendered in litigation. The taxing masters are not bound by such SHRs. Each taxation application will be considered on its own merits. The taxing masters, in exercising their judicial discretions, may make such adjustments as they see fit.

4. The current SHRs were last revised in 1997. The Law Society of Hong Kong ("the Law Society") commissioned a review of the

SHRs and provided the report to the Judiciary in May 2013¹. Its consultant's report recommended, amongst others, that (i) the SHRs be raised by 35% to 55% to better reflect the market conditions at the time; and (ii) periodic adjustments be made to the revised SHRs in accordance with an inflation linked formula measuring wages, property costs and other professional services costs adjustments.

Appointment of the Working Party by the Chief Justice

5. The Judiciary notes that solicitors' costs constitute a major component of civil litigation cost. Any adjustments of the SHRs, being an integral element of solicitors' costs, would not only affect the interests of the solicitors, their clients and the other parties to the proceedings, but would also have an impact on the interests of other stakeholders of the civil justice system and civil litigation cost generally. The past practice of fixing the SHRs which involved proposals initiated by the Law Society and consultation with the Registrar of the High Court, while expedient, may not be able to adequately address all the possible ramifications arising from any adjustments of the SHRs.

6. The public interest underpinning the review of the SHRs transcends the immediate interests of the parties appearing before the court in taxation. There is a need to ensure that the civil justice system is affordable and that the constitutional right to access to court will not be undermined by exorbitant costs. Therefore, the Judiciary took the view that a body with a sufficiently wide membership representing the different interests of major stakeholders should be established to study the matter closely. As a result, the Chief Justice decided in end 2013 to set up a Working Party on the Review of Solicitors' Hourly Rates for Party and Party Taxation ("the Working Party") to look into the matter.

7. The Working Party is chaired by a Justice of Appeal of the High Court and comprises seven other Judges and Judicial Officers; a member of the Bar Association of Hong Kong; two members of the Law Society of Hong Kong²; representatives from the Department of Justice ("DOJ"), the Legal Aid Department ("LAD") and the Official Receiver's Office ("ORO") of the Government; two academics including one from

¹ KPMG's 1st Report.

² One of the nominated members came from a large solicitor practice and the other one from a small to medium practice.

the legal field; the Chief Executive of the Consumer Council; and two other individual members including one from the management consultancy field. Details are set out at **Annex A**.

8. The Working Party is 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 would be appropriate; and (ii) any other related matters; and
 - (c) make recommendations to the Chief Justice on whether regular reviews of the SHRs should be conducted, and if so, how.

9. Since its establishment in early 2014, the Working Party had deliberated on the broad context in which the review should be conducted, and considered that issues such as recoverability gap, access to justice, impact on law firms, impact on legal aid, competitiveness of Hong Kong in dispute resolution and sustainability were relevant for this purpose. Taking into consideration the implications of a review of SHRs on overall public interest in access to justice and on different stakeholders in the community, the Working Party decided to engage an independent consultant to conduct an objective and comprehensive study to examine the subject and that a two-stage approach³ would be adopted. An

³ The two stages of the Study would comprise the following :

- (i) Stage 1 – A consultant would be engaged to study the issue and to submit proposals on the approach and methodology for conducting the review and the mechanism for setting the SHRs.
- (ii) Stage 2 – Subject to the endorsement of the Working Party and the approval of the Chief Justice on the proposals made in the Stage 1 Study, another consultant would be commissioned to implement the proposals based on the endorsed methodology and mechanism.

independent consultant was engaged in early 2015 to carry out the Stage 1 Study. An Advisory Group was also established to provide support to the Working Party (“the Advisory Group”)⁴. The membership list of the Advisory Group is at **Annex B**.

The Stage 1 Consultancy Study

10. The Consultant engaged to undertake the Stage 1 Consultancy Study had undertaken the following tasks :

- (a) reviewed relevant literature from stakeholders, public and professional bodies and reports⁵ provided by the Law Society;
- (b) referred to practices in other common law jurisdictions, including England and Wales, Scotland, Australia, New Zealand and Singapore, through published literature of relevant overseas organisations;
- (c) held focus group discussions and/or interviews with relevant stakeholders, legal practitioners, legal professional bodies, consumer organisations and industry users;
- (d) interviewed both legal practitioners and industry users to collect feedback on the subject;
- (e) collected statistical data on the operation and economics of the legal services sector from the Census and Statistics Department of the Government, the Law Society and legal practitioners for hypothetical calculations and illustrative purpose; and

⁴ The Advisory Group of the Working Party provides advice on how a comprehensive and evidence-based survey should be conducted in relation to the review of SHRs; and provides guidance on the preparation for and conduct of a survey, including its methodology, the analyses derived from the findings and the preparation of the survey report.

⁵ Including KPMG’s 1st Report provided by the Law Society to the Judiciary, and a second report, also prepared by KPMG, provided to the Judiciary by the Law Society in December 2015 (“KPMG’s 2nd Report”), commenting on the Consultant’s proposed approach and methodology after the Consultant had submitted an interim report to the Advisory Group (see paragraphs 12 - 13).

- (f) proposed an approach for establishing a new set of SHRs (paragraph 11 below).

11. In the light of the requirement that the Study should propose an evidence-based approach and methodology for conducting reviews of SHRs on a regular basis, the Consultant's main proposals included :

- (a) a market survey should be conducted to identify the effective market rates for civil litigation services, to be calculated as the weighted average of the rates for different sizes of solicitor practices;
- (b) an internal group of the Judiciary should be tasked to convert the effective market rates to SHRs, taking into account a host of factors:
 - (i) recoverability gap (by referencing the recoverability rate obtained through the market survey);
 - (ii) access to justice;
 - (iii) the Court should always have control over costs ;
 - (iv) impact on law firms;
 - (v) impact on legal aid;
 - (vi) competitiveness of Hong Kong as a dispute resolution centre; and
 - (vii) affordability and acceptability;
- (c) the SHRs should be updated regularly every four years based on the Composite Consumer Price Index ("CCPI"), being simple, readily available and easily understood. Another major review should be conducted on the approach and methodology after three rounds of such regular updating; and
- (d) the market survey should have a high target response rate in order to have sufficient and representative statistical data for analysis. An alternative approach is to determine the SHRs by linking the SHRs to the CCPI in the event that the market survey failed to attain sufficient and meaningful data for analysis due to a low response rate.

Views from the Law Society

12. The Law Society had, in the course of the Stage 1 Study, expressed reservation on the approach and methodology proposed by the Consultant and submitted the KPMG's 2nd Report to the Working Party in December 2015. The Law Society had also written to the Judiciary in mid-2016 reiterating their position on the matter.

13. In gist, the Law Society had argued that, given the commercial sensitivity, there was doubt as to whether the law firms would be prepared to disclose the average rate actually charged as suggested in the Consultant's proposed market survey. While acknowledging the importance of safeguarding access to justice, the Law Society maintained that recoverability should be the most important and relevant factor in determining SHRs. The Law Society took the view that issues of affordability, acceptability and access to justice should be the subject of a separate broad based inquiry into litigation costs and should have little or nothing to do with the calculation of SHRs. It also maintained that its proposal on the index-linked formula measuring wages, property costs and other professional services costs adjustments was an appropriate approach for periodic adjustments to SHRs.

Recommended Approach and Methodology for Reviewing SHRs

Factors Taken into Consideration

14. In the course of its deliberations, the Working Party had taken into account the findings and proposals of the Consultant, views and recommendations of the Advisory Group and relevant stakeholders, including those of the Law Society, and all other relevant considerations. The matters that the Working Party took note of and considered include the following:

- (a) there was a view, primarily of certain members from the legal profession, that recoverability gap governed access to justice by potential litigating parties and it should be the focus and the main critical factor in determining SHRs as stipulated in the KPMG's 2nd Report;

- (b) however, in line with the general principles guiding the Review, other factors affecting access to justice insofar as costs were concerned, such as affordability and acceptability, were also relevant;
- (c) indeed, the SHRs have a wider societal impact in that there is a public interest to ensure an affordable and equal opportunity for access to justice. That is why the court had always had control over costs, principally by way of taxation. Therefore, as proposed by the Consultant, the provisional rates should be adjusted by an internal group of the Judiciary having regard to qualitative factors such as affordability and acceptability;
- (d) the concept of affordability entails the provision of legal service at levels of fees which the public generally regarded as acceptable. The current legal profession is dominated by small and medium sized law firms (“SMPs”). The LAD is also a major player. They are the major providers of legal service in Hong Kong. How they charge their fees has an impact on the provision of legal service to the public at large. Since SHRs have an impact on how they charge their fees, the impact SHRs may have on the SMPs and the legal aid is a relevant factor in the exercise of determining the SHRs;
- (e) the SHRs were also relevant to other stakeholders for other purposes, including the LAD of the Government which used these rates for paying their solicitors on legal aid cases, and for solicitors of receiving parties⁶. The SHRs also provided a reference to the DOJ and ORO of the Government for their outsourced legal services. Consideration of public funding and access to justice would be involved;

⁶ 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.

- (f) there was also concern from the consumer perspective that any increase in SHRs would lead to a rise in charge-out rates, thus discouraging consumers from seeking legal redress;
- (g) as mandated by the Working Party's terms of reference, a comprehensive and evidence-based review of the SHRs has to be conducted. The Consultant therefore proposed a reasonably high target response rate for the market survey in order to gather sufficient statistical data for a credible and reliable analysis. However, there was concern that the overall response to a market survey might be low because detailed and sensitive commercial information were required from the respondents. Full support and cooperation from the profession is required;
- (h) in exploring an alternative to determining the SHRs in the event that the market survey failed to attain sufficient data for analysis due to a low response rate, the Consultant had studied different options but, after carefully balancing the availability of data and ease of application, concluded that linking of adjustment of SHRs to an inflation index of CCPI, a well established inflation index in Hong Kong which is easily understood and readily available soon after the year end, is the most feasible fallback option; and
- (i) there would be a requirement of regular updating and review of the SHRs so that the rates would remain updated amid changing market circumstances. However, if the SHRs were to be updated too frequently, it would complicate the taxation process and entail very high administrative efforts and costs.

15. After thorough deliberation and careful consideration, the Working Party has concluded its Report for the Stage 1 Study. Major recommendations on the approach and methodology for reviewing the SHRs as presented in the Report are set out at paragraphs 16 to 20 below.

Market Survey

16. To provide a baseline for establishing the SHRs, a market survey should be conducted to collect information from local solicitor practices of different sizes in respect of their effective charge-out rates for fee earners with different post-qualification experience for civil litigation services and the recovery rates for litigants during the reference period. This is intended to identify the effective market rates for civil litigation services and would be calculated as the weighted average of the rates for different sizes of solicitor practices.

Conversion of market rates to provisional rates

17. In addition to a stratified sample by practice sizes, the effective market rates would be weighted using the number of persons engaged in different sizes of the solicitor practices as weighting factors. The weighted average rates would be converted into a set of provisional rates by applying a recovery rate also derived from the survey.

Conversion of Provisional Rates to SHRs

18. The final determination of the SHRs should remain a matter for judicial decision. Therefore, the provisional rates at paragraph 17 above should be adjusted by an internal group of the Judiciary comprising judges and judicial officers, who have substantive experience in costs and taxation at all levels of courts, after taking into account those factors, such as access to justice, which are consistent with the principles guiding the review before a final set of SHRs is established.

Regular Review Mechanism

19. There should be a regular review mechanism comprising regular updating of the SHRs every four years having regard to the inflation index as measured by the readily available CCPI and a major review on the approach and methodology to be conducted after three rounds of such regular updating. The internal group of the Judiciary would also be responsible for monitoring the implementation of the regular reviews of the SHRs and initiating any future adjustment.

Alternatives in lieu of market survey

20. The survey to be conducted under Stage 2 of the study would aim to achieve a response from at least 160 to 200 solicitor practices⁷. In case the market survey fails to attain sufficient data for analysis, the alternative approach of linking the adjustment of SHRs to the inflation index of CCPI would be adopted.

Next Step

21. The Chief Justice has in early February 2017 approved the Working Party's Stage 1 Report. The Working Party has taken immediate steps to take forward the market survey under the Stage 2 Study. A service provider will be selected in accordance with the established procurement procedures. It is envisaged that the Working Party will make its final recommendations to the Chief Justice by the end of 2017.

Conclusion

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

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⁷ As at 2013, there were over 960 solicitor establishments in Hong Kong. An overall sampling fraction of about 20% means a sample size of about 200 to 250 establishments and a target response rate of 80% or higher means at least 160 to 200 practices.

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

Membership List

Chairman : Hon Mr Justice Jeremy Poon, JA
Court of Appeal 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

Deputy High Court Judge Tony Poon,
Court of First Instance of the High Court

Registrar Lung Kim-wan, the High Court

Registrar Simon Kwang, Court of Final Appeal

Master Andy Ho, the High Court

Registrar 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

* Professor Chan Ka-lok

* Mr Eric Cheung Tat-ming

* Ms Gilly Wong, Consumer Council

* Mr Stephen Yau How-boa, SBS, JP

* Mr Anthony Yeung Kwok-ki, JP

Ms Jenny Fung, representative of Department of Justice

Ms Ophelia Lok, representative of Official Receiver's Office

Ms Doris Lui, representative of Legal Aid Department

* [Appointment was made in personal capacity.](#)

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

Membership List

- Chairman : Hon Mr Justice Jeremy Poon, JA
Court of Appeal of the High Court
- Members : Deputy High Court Judge Marlene Ng,
Court of First Instance of the High Court
Registrar Lung Kim-wan, the High Court
Registrar Simon Kwang, Court of Final Appeal
Master Andy Ho, the High Court
Registrar 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
 - * Ms Lucia Lau, Consumer Council
Ms Jenny Fung, representative of Department of Justice
Ms Ophelia Lok, representative of Official Receiver's Office
Ms Doris Lui, representative of Legal Aid Department
Mr Osbert Wang, representative of Census and Statistics Department
- * [Appointment was made in personal capacity.](#)