

**For discussion on  
28 January 2019**

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

**Review of Duty Lawyer Fees**

**INTRODUCTION**

This paper briefs Members on the outcome of the review of duty lawyer fees.

**PROPOSAL**

2. The Government proposes to adjust duty lawyer fees upwards by 56.2% pursuant to a review to catch up with the increase in criminal legal aid fees for counsel (after discounting inflation adjustments<sup>1</sup>) since 1992, with a view to ensuring that neither the Duty Lawyer Service<sup>2</sup> (DLS) nor the Legal Aid Department (LAD) would have an unfair advantage in competing for the same pool of lawyers in the provision of their services. The Government also proposes that, as a longer-term arrangement for reviewing duty lawyer fees, a mechanism be put in place such that future reviews of criminal legal aid fees<sup>3</sup> would cover the review of duty lawyer fees, to which prosecution fees<sup>4</sup> also make reference, in the same exercise.

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<sup>1</sup> Inflation adjustments are discounted because general price movements have been taken into account in previous biennial reviews.

<sup>2</sup> DLS is a non-statutory organisation subvented by the Government. It is independently managed and administered jointly by the Hong Kong Bar Association (Bar Association) and the Law Society of Hong Kong (Law Society) through the Council of DLS. The DLS Council consists of four members nominated by Bar Association, four members nominated by Law Society, three lay members who are not in the legal profession and the Administrator of DLS.

<sup>3</sup> Fees payable to lawyers in private practice engaged to undertake litigation work in respect of criminal cases by LAD.

<sup>4</sup> Fees payable to lawyers in private practice engaged by the Department of Justice (DoJ) on a standard briefing-out basis to prosecute criminal cases on fiat.

## JUSTIFICATIONS

### Proposed Adjustments to Duty Lawyer Fees

#### *Overview*

3. Legal aid is available for representation in committal proceedings in the Magistrates' Courts (MC), civil and criminal proceedings in the District Court (DC) or courts at levels above in accordance with the Legal Aid Ordinance (Cap. 91) and the Legal Aid in Criminal Cases Rules (Cap. 221D). To complement the legal aid services provided by LAD, the Duty Lawyer Scheme, administered by DLS, provides legal representation to any defendant in the MC (except committal proceedings) where the interests of justice require, and without payment by the defendant in any such case if he/she does not have sufficient means to pay for it<sup>5</sup>. The Scheme also provides, either with the agreement or at the request of the Government, other forms of legal assistance and advice, including assigning lawyers to advise and represent defendants facing extradition and persons who are at risk of criminal prosecution as a result of giving incriminating evidence in Coroner's inquest. In 2017, a total of 23 742 persons received legal representation provided by 1 122 duty lawyers under the Duty Lawyer Scheme. Duty lawyer fees are the fees payable to duty lawyers engaged under the Duty Lawyer Scheme.

4. Pursuant to the report by the Government to the Legislative Council (LegCo) Finance Committee (FC) in October 1992, duty lawyer fees, together with prosecution fees and criminal legal aid fees, are subject to regular review on a biennial basis to take into account changes in Consumer Price Index (C) (CPI(C)) during the reference period. There was also a separate review in 1992, in which duty lawyer fees were adjusted, on a one-off basis, by 27%. In addition, a pre-trial preparation fee was also introduced to compensate duty lawyers for the time spent on preparation work for complex cases before trial. Duty lawyer fees have thereafter been revised on the basis of CPI(C) movements biennially. In 2017-18, the total amount of fees paid to duty lawyers was \$56.2 million.

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<sup>5</sup> Duty lawyer representation is offered to defendants charged with the Standard List of Offences (covering some 300 statutory and common law offences) on their first day of court appearance without any means testing. For defendants who wish to have legal representation for subsequent appearance, they are subject to a means test and the financial eligibility limit is currently set at a gross annual income of \$197,040. After passing the means test, applicants are required to pay one fixed handling charge of \$570 which is the only charge any defendant has to pay no matter how long the trial lasts.

5. The existing rates of the three categories of fees are set out in the table below –

<b>Fees categories</b>	<b>Existing rates</b>
(a) Whole-day fee (i.e. for 8 hours of work assumed)	\$7,300
(b) Half-day fee (i.e. for 4 hours of work assumed)	\$3,630
(c) Pre-trial preparation fee	\$880 per hour

#### *Reviews of Criminal Legal Aid Fees*

6. Since 1992 when duty lawyer fees were last reviewed, criminal legal aid fees for counsel have been increased by 56.2% (after discounting inflation adjustments based on the changes in CPI(C) from July 1992 to July 2016) following two reviews which were conducted in addition to the biennial reviews and implemented in 2012 and 2016 respectively. Both reviews for criminal legal aid fees implemented in 2012 and 2016 did not cover duty lawyer fees.

#### *Proposed Adjustments*

7. The Government proposes to maintain the current three categories of duty lawyer fees, namely whole-day fee, half-day fee and pre-trial preparation fee.

8. As noted in paragraph 6 above, with the two reviews in 2012 and 2016, criminal legal aid fees for counsel (after discounting inflation adjustments) have been increased by 56.2% since 1992. According to DLS and LAD, over 60% of the duty lawyers engaged under the Duty Lawyer Scheme and close to 90% of lawyers in private practice taking up criminal legal aid cases for LAD in the past three years were lawyers with ten years or above post-qualification experience. In this connection, DLS and LAD are competing for this same pool of experienced qualified lawyers in private practice. Having regard to the close resemblance of the nature of work undertaken by duty lawyers and counsel, the Government proposes to adjust duty lawyer fees upwards by the same percentage to catch up with the percentage increase in criminal legal aid fees for counsel, with a view to ensuring that neither DLS nor LAD would have an unfair advantage in competing for the same pool of lawyers in the provision of their services.

9. The proposed increases in duty lawyer fees<sup>6</sup> are set out in the table below –

<b>Fees categories</b>	<b>Existing rates</b>	<b>Revised rates<sup>7</sup> (adjusted upwards by 56.2%)</b>
(a) Whole-day fee	\$7,300	\$11,400
(b) Half-day fee	\$3,630	\$5,670
(c) Pre-trial preparation fee	\$880 per hour	\$1,370 per hour

### **Future Review of Duty Lawyer Fees**

10. The Government also proposes that, as a longer-term arrangement for reviewing duty lawyer fees (other than the biennial review), a mechanism be put in place such that future reviews of criminal legal aid fees would also cover both the duty lawyer fees and prosecution fees in the same exercise.

## **CONSULTATION**

11. The Government has set up a working group to conduct the review. Convened by the Home Affairs Bureau (which oversaw the legal aid portfolio prior to 1 July 2018), the Working Group comprises members nominated by the Bar Association, Law Society, DLS, DoJ and LAD. The proposal set out in this paper is supported by the Working Group. Moreover, the Bar Council of the Bar Association, the Council of the Law Society and the Council of DLS have indicated support for the recommendations of the Working Group.

## **FINANCIAL IMPLICATIONS**

12. The financial implications of the proposed increase in duty lawyer fees and the corresponding increase in prosecution fees are

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<sup>6</sup> DoJ makes reference to the same fee scale as duty lawyer fees when engaging lawyers in private practice on a standard briefing out basis to prosecute criminal cases in the MC in place of Court Prosecutors (CP) on fiat, with a view to ensuring that neither DLS nor DoJ would have an unfair advantage in competing for the same pool of lawyers. To maintain the necessary equality of arms, the scale fees for the prosecution of criminal cases on fiat in place of CP would be adjusted according to the corresponding upward adjustments to duty lawyer fees (i.e. by 56.2%).

<sup>7</sup> The revised rates are rounded to the nearest \$10.

estimated to be \$34.2 million and \$20.2 million per year respectively. The necessary provisions will be included in the 2019-20 draft Estimates to meet the costs of the proposal. DLS and DoJ will absorb the additional workload arising from the implementation of the proposal, if any.

## **WAY FORWARD**

13. The Government plans to implement the revised fees with effect from 1 April 2019. Adjustments to duty lawyer fees and prosecution fees will be made administratively by the Director of Administration<sup>8</sup>.

## **ADVICE SOUGHT**

14. Members are invited to note the outcome of the duty lawyer fees review as set out above.

**Chief Secretary for Administration's Office  
January 2019**

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<sup>8</sup> As reported to this Panel at the meeting on 27 November 2017 on the transfer of legal aid portfolio, adjustments to duty lawyer fees and prosecution fees would be made by the Director of Administration following the transfer of the legal aid portfolio to the Chief Secretary for Administration's Office (which took effect on 1 July 2018). In respect of the power to approve adjustments to duty lawyer fees and prosecution fees, it rests with the Controlling Officers concerned pursuant to the Public Finance Ordinance (Cap. 2). Regarding criminal legal aid fees, adjustments will continue to be approved by LegCo in accordance with the Criminal Procedure Ordinance (Cap. 221).