

**For discussion
on 22 May 2017**

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

Prosecution Work in the Magistracy : Direction for the Future

Introduction

This paper seeks to report to Members on the outcome of the consultation conducted by the Government on the future development of prosecution work in the Magistracy, and the approach that the Government intends to adopt in taking the matter forward.

Background

2. The Court Prosecutor (“CP”) Grade was first created in 1976 as a pilot scheme to take over prosecution work in the Magistrates’ Court from police inspectors, and was eventually made permanent in 1979. A brief summary of the development of the CP Grade over the years and the current staff establishment at different ranks are set out in **Annex A to Attachment**.

3. A review of the CP system was conducted in 2007/08 taking into account the views then expressed in different quarters including the two legal professional bodies¹. The following principles in handling matters regarding the CP Grade were announced by Department of Justice (“DoJ”) in July 2008:

- The bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term.
- The standards of prosecution must be maintained.
- Although the costs of prosecuting cannot be determinative of the issue, the impact of prosecuting upon the public purse cannot be ignored.
- DoJ has a role to play in assisting junior barristers to develop, but this is ancillary to its primary duty of upholding the standards of prosecution.

¹ The Hong Kong Bar Association and the Law Society of Hong Kong.

- The position of the current CPs must be respected.

4. Based on the consensus with the two legal professional bodies that the duties of new CP recruits would be restricted unless they were legally qualified², and after consulting the Administration of Justice and Legal Services Panel (“AJLS Panel”) of the Legislative Council (“LegCo”), a recruitment exercise for the CP Grade was held in 2008/09 on this basis. A total of 13 CPs (“Batch 19 CPs”) were recruited in the exercise. Since 2008/09, there has not been any further recruitment of CP.³

5. When the matter of prosecutions in the Magistracies was discussed at the AJLS Panel in 2008, DoJ indicated that it would review the CP system. In view of the considerable time that has lapsed and the changes that we have faced since 2008, DoJ finds it appropriate and necessary to review the situation so as to see if any steps should be taken to further improve the system. The outcome of our review and preliminary recommendations are set out in our Consultation Paper published on 1 June 2016 which aimed at facilitating comments and discussions⁴. (A copy of the Consultation Paper issued is at **Attachment**; the paragraph numbers

² Unless legally qualified, the new recruits would, after training, generally concentrate on general court and administrative duties, i.e., –

- Case management and administration
- Traffic courts
- Plea courts
- Miscellaneous hearings, including remands, bail applications, pre-trial reviews and hawking and littering cases
- Liaison work with law enforcement agencies, victims, witnesses and court staff

³ Our experience in respect of the new CPs recruited in 2008/09 is that the existing restrictions to the work of “non-legally qualified” new recruits have imposed significant limitations to the manpower deployment of the CP Grade. More importantly, many of the 13 Batch 19 CPs (who could only conduct a limited class of cases) have gradually left the service for the reasons set out in paragraph 7(a) of the Consultation Paper. Under these circumstances and having considered the overall picture, we consider it more desirable to work out the long-term future of the CP Grade after a review before conducting further recruitment, lest the problems arising from the restricted duties of Batch 19 CPs will perpetuate. In the interim, we instruct fiat counsel to conduct prosecution work in place of CPs where there is such a need.

⁴ Apart from posting the paper onto DoJ’s website, we also sent copies of the Consultation Paper to relevant stakeholders, including –

- Members of the CP Grade
- The Hong Kong Bar Association
- The Law Society of Hong Kong
- The Chief Justice
- The Chief Magistrate
- The Duty Lawyer Service
- Hong Kong Federation of Women Lawyers
- The Small and Medium Law Firms Association of Hong Kong
- The then Chairman (Hon Martin LIAO Cheung Kong, SBS, JP) and Deputy Chairman (Hon Dennis KWOK) of the AJLS Panel of LegCo

quoted in the ensuing parts of this paper are references to the Consultation Paper.)

6. In gist, it is proposed in the Consultation Paper that:
- (a) the CP Grade should be retained on a long-term basis (paragraph 16);
 - (b) the cases to be handled by CPs should be rationalized, with the formulation of a List of “Scheduled Duties” which are to be taken up by Government Counsel (“GC”) and fiat counsel, while legally qualified CPs may also take up such cases under certain circumstances (paragraphs 23 to 26);
 - (c) involvement of GC in duties at the magistracy level should be enhanced (paragraphs 27 to 32) by posting one Senior Government Counsel (“SGC”) to each Magistracy⁵, while existing important functions of Senior Court Prosecutor I (“SCP I”) in case management (including: (i) follow up on the need for prosecution by counsel (in-house or fiat⁶) as advised by advising counsel and (ii) screen and vet cases taken forward directly by the Police for cases requiring prosecution by counsel or to which the Prosecutions Division Headquarters should be alerted) should continue;
 - (d) four Senior Court Prosecutor II (“SCP II”) posts are to be created to rationalize the ranking of CP Grade posts so that the relevant teams can be appropriately equipped to handle their existing and anticipated workload (paragraph 33);
 - (e) existing training and development arrangements for prosecutors of DoJ (including current measures to assist CPs to obtain legal qualifications (paragraph 34 and footnote 17) and training courses for members of GC and CP grade (paragraph 34)) should continue while CPs will also continue to provide support to new counsel joining fiat lists; and

⁵ In case there is operational need, legally qualified CP Grade officers can also take up these posts on short-term acting not exceeding six months (paragraph 32).

⁶ DoJ maintains two briefing-out lists for the magistracy level. The first list is the Magistrates’ Court “B” List (‘MC “B” List’), which comprises outside fiat counsel who prosecute magistracy cases in place of CPs. The second list is the Magistrates’ Court “A” List (‘MC “A” List’), which comprises outside fiat counsel who prosecute magistracy cases in place of GC.

- (f) if the new system is found to be satisfactory and appropriate, and if operational needs arise, we can consider resuming the recruitment of new CPs on the basis of the new system, and for this, resources for at least 10 CP posts will be reserved (sufficient for 11 on current showing) (paragraph 35).

7. The key considerations behind the above proposal are as follows:

- (a) the good quality of prosecution at the magistracy level must be steadfastly maintained, and the proposed measures would further enhance the quality of prosecution work at the magistracy level, and are in the best interest of the criminal justice system as a whole (paragraph 12);
- (b) the CP Grade is a highly experienced and professional team and the contribution that all CPs have made towards the administration of the criminal justice system has been immense and should be properly and duly recognized. It is hence important for the Grade to be treated with respect and dignity, and the welfare, promotion prospects and morale properly looked after (paragraph 13);
- (c) the principles announced in July 2008 (see paragraph 3 above), in particular that “the bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term”, remain relevant (paragraph 14);
- (d) given the substantial case volume with a high proportion of them being legally less complicated and relatively straightforward in nature⁷, it is neither cost-effective nor practical for all these cases to be handled by legally qualified persons. Nor are such cases the type of work which legally qualified persons may find professionally challenging enough to take up on a long-term basis. For effective case management and proper administration of criminal justice, there should be a rational and flexible distribution of cases between (i) those that

⁷ Relevant statistics are as follows:

- Annual number of cases handled at the magistracy level by CPs or fiat counsel in lieu stands at around 170 000 in recent years
- Number of court days involved is around 14 000 to 15 000 days / year
- Number of defendants involved in contested trials in the Magistrates’ Courts each year is about 7 000 to 8 000 in recent years, with about 50% of them eventually pleading guilty for the offence(s) charged

can appropriately be handled by CPs and (ii) “the bulk of prosecutions” that should be handled by the legally qualified (in-house or fiat counsel or legally qualified CPs) (paragraphs 16 to 17);

- (e) internal case management work undertaken by CPs is important and by nature cannot be briefed out (nor should such work be handled by GC). To maintain CPs’ proficiency in handling their duties in case administration, it is necessary for CPs to be exposed to a full range of cases handled at the magistracy level (either in handling trial or providing support to counsel) (paragraph 18); and
- (f) an appropriately-sized team of experienced and professional CPs is highly necessary in providing the essential assistance and guidance to newly qualified lawyers to allow them to gradually learn their skills in handling magistracy cases (paragraph 19).

8. DoJ has also taken into account the following developments in the handling of prosecution work at the magistracy level after the 2008/09 CP recruitment exercise, which point to the operational need to maintain an appropriately-sized team of professional and career CPs undertaking prosecution and related work at the magistracy level, in order to handle the growing number of magistracy cases in a satisfactory manner:

- (a) the total number of court days at the magistracy level has been rising steadily⁸, but both the number and percentage of cases handled by CPs were on a downward trend since 2012, with a percentage of only about 65% (or around 9 500 to 10 000 court days) in the recent few years (paragraph 6);
- (b) there was a reduction in the number of CP Grade officers being available to handle court work due to natural and unexpected wastage of the CP Grade (paragraph 7). The number of CP vacancies at end 2016 is 28, as compared to only 19 in mid 2014. For the Batch 19 CP recruited in 2008/09, only three (out of 13) are still remaining in service;
- (c) outside fiat counsel cannot completely replace CPs as a highly experienced and steady team providing effective prosecutions

⁸ The total number of court days at the magistracy level has been rising steadily from 15 516 in 2008 to the level of 17 199 in 2015, while cases for handling by CP / MC “B” List counsel amount to around 14 000 to 15 000 court days annually.

service at the magistracy level for the reason that : (i) over 60% of MC “B” List counsel have stayed in the list for only a short duration (five years or less) as newly qualified fiat counsel on the MC “B” List will be “promoted” over time to the higher-level briefing-out list(s) at the magistracy level (or even higher court levels) if they have demonstrated good performance while others may lose interest in doing prosecution work and drop out from the briefing-out list; (ii) while fiat counsel is a very helpful source of supplementary workforce in taking up court work when CPs are not available, they cannot completely replace the CPs who are extremely familiar with the court proceedings (and thus are able to take forward cases in an expeditious and effective manner, which is necessary to cope with the high speed at which proceedings are taken forward in the Magistrates’ Courts); and (iii) fiat counsel who are briefed to prosecute on daily or case-by-case basis cannot possibly undertake administrative duties performed by CPs⁹, which are important and indispensable for the smooth disposal of cases in the Magistrates’ Courts (paragraph 9).

9. Apart from the operational considerations set out above, we note that CPs have shown concerns regarding their future career prospect since it remains unclear as to how (and if so, when) the objective of “the bulk of prosecutions being conducted by the legally qualified” (being one of the principles announced in July 2008, as stated in paragraph 3 above) will be achieved. Such concerns on the part of CPs are totally understandable. A clearer policy on the most appropriate way forward for the conduct of prosecutions in the Magistrates’ Courts, and hence the future of the CP Grade, is required for DoJ to plan ahead on how the staffing requirements of the prosecution teams are to be met, as well as to address the reasonable concerns of the CP Grade regarding its future career prospects.

⁹ Including (but not limited to) the following : distribution of court work among the prosecutors and fiat counsel; vetting the case files and liaising with the case officers for additional witnesses, clarification on the ambiguities of the case or conducting further investigation on the unclear issues etc.; handling various requests from the defence; liaising with the staff of Judiciary on the case management; correspondence with the Judiciary on matters relevant to the case (e.g. adjournment, decision to withdraw the cases or offer no evidence etc.); consideration of review on the court decisions or providing inputs to seek legal advice on certain issues of the case; maintaining regular contact with the Headquarters and providing necessary information to the counsel of DoJ; handling complaints.

Comments received

10. Comments on the Consultation Paper were received from the two legal professional bodies, the Duty Lawyer Service and the Judiciary. The following key observations were conveyed in the responses:

- (a) Generally speaking, prosecution work should be conducted by legally qualified persons.
- (b) The two legal professional bodies and the Judiciary generally support the proposed deployment of SGC to the Magistrates' Courts.
- (c) The two legal professional bodies also called for the enhanced engagement of fiat counsel for the prosecution of magistracy cases. Moreover, the Bar Association advised that it would set up a sub-committee tasked with criminal trial advocacy training and hoped to work with the Hong Kong Advocacy Training Council in providing appropriate training to young barristers.
- (d) The Hong Kong Bar Association and the Duty Lawyer Service find it undesirable that CPs were not bound by any code of conduct of any professional bodies but are only answerable to DoJ alone. That said, neither of the two bodies suggested that the CP Grade was devoid of the appropriate standards required for prosecuting before a Magistrate. The Bar in fact specifically observed that experience has demonstrated the opposite. The concern expressed is hence an in-principle rather than actual one.

11. We have also had discussions with members of the CP Grade on the findings and recommendations set out in the Consultation Paper. Views collected from the CP Grade can be summarized as follows:

- (a) One unanimous view among all CPs is that additional SCP II posts in the Grade should be created.
- (b) Most of them preferred to have SGC posted in the Magistracies, but there were different opinions as to the number of SGC and the functions to be performed by them in the operation of the Magistracy. Some preferred to have seven (i.e. one SGC in each Magistracy) while others suggested three. Some considered that the SGC should only assume an advisory role, while others suggested that the SGC

should take up the prosecution of complicated cases and provide instructions or advice on any *ad hoc* or urgent matters on the spot.

- (c) There were mixed views regarding the proposed “Scheduled Duties”. Some raised no objection to the proposed list of such duties and found it proper to be handled by special fiat counsel or in-house counsel. However, a number of them were of the view that taking away such duties from CPs would undermine the value and function of CPs; besides, without the chance of handling the “Scheduled Duties”, the CPs of the next generation would not have adequate opportunity to acquire sufficient experience from work so as to discharge the responsibilities fully. To allow more flexibility, some suggested that the “Scheduled Duties” List should be reformulated in a more general manner, instead of listing out the specific offences in a rigid manner.
- (d) Some respondents had doubts regarding the viability for PD to rely on MC “B” List fiat counsel to provide stable and quality prosecution service in the Magistracies. They were of the view that the ideal teams would be GCs or CPs.
- (e) A number of respondents expressed doubts as to whether there would be many young job-seekers who would be prepared to take CPs as their life career rather than a stop-over.

Analysis

“The bulk of prosecutions ought ideally be conducted by the legally qualified”

12. We have considered the comments received with reference to the fundamental principles set out in paragraph 7 above. We in particular note that point (a) (on the need to maintain the good quality of prosecution at the magistracy level) is positively shared by the Judiciary and the Hong Kong Bar Association, while the two legal professional bodies also agreed with point (b) (regarding the contribution of all CPs towards the administration of the criminal justice system). Further, we also note the two legal professional bodies’ views and position regarding the principle that “the bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term”.

13. We certainly appreciate the natural preference of the legal professional bodies in the engagement of legally qualified personnel (in

particular outside counsel) in taking up prosecution work in the Magistracy. However, for the reasons set out in paragraphs 7 and 8 above, this is neither an effective way to handle work at the magistracy level nor does it necessarily guarantee prosecution quality and efficiency that is more favourable than that currently offered by members of the CP Grade at the magistracy level. In particular:

- (a) Given the substantial case volume with a high proportion of cases being legally less complicated and relatively straightforward in nature, it is neither cost-effective nor practical for all these cases to be handled by legally qualified persons. Moreover, it would not be the type of work which legally qualified persons may find, from the perspective of continuous career development, professionally challenging enough to take up on a long-term basis. This is particularly so as their professional seniority and experience progress. Indeed, over 60% of MC “B” List counsel have stayed in the list for only a short duration (five years or less).
- (b) Unlike the CPs as a team of career prosecutors specializing in prosecution work at the magistracy level, outside fiat counsel naturally do not have the same level of requisite skills and professional knowledge for handling such work in an expeditious and effective manner, which is absolutely necessary given the high speed at which proceedings are taken forward in the Magistrates’ Courts. Such skills and knowledge are acquired by CP through their specialization in prosecution work at the magistracy level and handling such cases on a day-in-day-out basis.
- (c) Fiat counsel who are briefed to prosecute on daily or case-by-case basis cannot possibly undertake administrative duties performed by CPs, which are important and indispensable for the smooth disposal of cases in the Magistrates’ Courts.
- (d) GC Grade officers are also not an appropriate substitute for CPs in the handling of magistracy cases (be that in terms of prosecution or case management work): that they are fully occupied with their other work aside, as a matter of principle, GC Grade officers specialize in handling more complicated cases which should not be handled by CPs. While we can in theory assign more junior GC Grade officers to handle prosecution of magistracy cases, in the interest of their skills and career development, there is a limit as to the duration for

which each officer should concentrate on such work, which is relatively straightforward. Without the continuous experience of handling such cases on a day-in-day-out basis, it is simply operationally not possible for GC to handle such work in a manner as expeditious and effective as CPs.

14. In view of the above and having duly considered all the views and observations received during the consultation, it remains the view of DoJ that to handle the growing number of magistracy cases in a satisfactory manner, there is a clear operational need to maintain an appropriately-sized team of professional and career CPs undertaking prosecution and related work at the magistracy level. It is believed that the comprehensive package of proposed measures set out in paragraph 6 above, designed with the principles set out in paragraph 7 above in mind, can indeed further enhance the quality of prosecution work at the magistracy level, and are in the best interest of the criminal justice system as a whole. In particular, the proposed adjustments to the duties of the CP Grade through the establishment of an appropriate “Scheduled Duties” List and taking out such cases from the duties of all CP Grade members, together with the enhanced involvement of GC in duties at the magistracy level, would bring us one big step closer to the achievement of the previously agreed principle that “the bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term”.

Anticipated further developments

15. While we consider the proposed measures should be the best direction in our handling of prosecution in the Magistracies in future, one of the key factors affecting the viability of the proposed measures is whether we can recruit good quality new CPs and retain them in the Grade having regard to the adjusted new duties (comment received from the CP Grade under paragraph 11(e) is relevant). If recruitment exercise(s) in line with our proposed arrangement could not yield a crop of new CPs of a reasonable size to address our manpower need on a long term basis, then we would naturally have to re-consider the measures so as to meet our needs¹⁰.

16. It is also relevant to note the latest development in the mix of cases handled at the magistracy level: since the hand down of the judgment of the case *HKSAR v Ngo Van Nam & Anor*, CACC 418/2014 & 327/2015¹¹

¹⁰ Including possible changes to entry qualifications and/or structure of the CP Grade.

¹¹ The previous general practice in sentencing was that an applicant would be afforded a full one-third discount from the starting point for sentence, if a plea of guilty be tendered up to and

in September 2016, there has been a substantial increase in the applications for adjournment for the defence to peruse papers before advising their clients on the pleas. In respect of such applications, instead of simply adjourning the cases for mention, some of the Principal Magistrates would, so as not to waste the mention hearings, order that pre-trial reviews (PTR) be held during the next mention hearings should not-guilty pleas be entered. As far as the deployment of prosecutors is concerned, more SCP IIs or experienced CPs have been deployed to cope with the increased workload in the plea courts, which on the other hand would reduce their opportunity to take up trials. More fiat counsel have been instructed to prosecute in the side courts in substitution of the CPs.

17. Two other effects of the aforesaid judgment have also emerged. The first one is the speedy fixing of trials. For the relatively simple cases, the date of trial may be fixed as early as two weeks after the not-guilty plea is entered. The short notice inevitably gives rise to various administrative or logistical issues to all parties concerned. The second one is that the volume of cases in which the pleas are changed from ones of not guilty when arraigned to ones of guilty on the day set for trial has significantly decreased. This tendency has the potential effect of affecting the number of trials that can be set down for each court day, and the choice of CPs or fiat counsel to be assigned or instructed for such cases.

18. Notwithstanding the change in plea tendency of defendants and hence the distribution in the number of different types of hearings handled by the courts (i.e. increase in workload of plea courts and reduction in the number of contested trials) as currently observed, given the relatively short time that has elapsed since the judgment in question was

until the first day of trial. The judgment of the case *HKSAR v Ngo Van Nam & Anor* reviews that practice and provides for a revised practice.

In the revised practice, the principle that the utilitarian value of a guilty plea is greater the earlier it is given is reflected. For cases in the Magistracies, the opportunity to secure a one-third discount from the starting point occurs when the defendant is asked to tender a plea to the charge; if trial dates are fixed that opportunity is lost. If the defendant indicates before the first day of trial that he wishes to plead guilty, the discount to be afforded lies between 25% and 20% of the starting point for sentence. For pleas of guilty made on the first day of trial, the appropriate discount is 20% from the starting point for sentence. For pleas of guilty made during the trial itself (after the first day of trial), the discount would usually be less than 20%. The actual discount will reflect the circumstances in which the plea was tendered. The Magistrate will have regard to the time at which the indication was given and all other relevant circumstances.

The following principles remain the same for all cases: (i) the court will retain an overriding discretion in sentencing and (ii) the court's practice of not having regard to the strength of the prosecution case in determining the discount to be afforded for a plea of guilty.

handed down, we envisage that it would take some time before the full effects of the change in sentencing discount policy for guilty pleas on the case distribution in the courts can be seen. Such effect will likely have a real impact on the distribution of cases that should appropriately be handled by different types of prosecutors operating in the Magistrates' Courts (i.e. CPs, fiat counsel in place of CPs, GC and fiat counsel in place of GC). It would only be prudent and responsible for us to come to a long term policy regarding the handling of prosecution work in the Magistrates' Courts after the full and permanent effect of the new sentencing discount policy becomes clear.

Way ahead

19. Taking into account these possible developments ahead, we consider that instead of taking our current proposal as the definitive, long term policy in the handling of prosecution work in the Magistracy, there are merits and justifications for us to take forward the changes proposed in the Consultation Paper as interim adjustments to the system, and for us to revisit the best way forward further in time. The proposed measures will be a useful step in achieving the agreed long-term objective that the bulk of prosecutions ought ideally be conducted by the legally qualified. In particular:

- (a) The rationalization of the cases to be handled by CPs through the adoption of a "Scheduled Duties" List would have the immediate effect of having appropriate cases be taken up by the legally qualified. Although the scope of "Non-scheduled Duties" will be wider than the "limited duties" currently assigned to new CPs without legal qualifications, they do not amount to a full range of prosecutorial duties, and will be applicable not only for new recruits¹² but also serving CPs, while the "Scheduled Duties" will be handled by GC or fiat counsel. This measure will help better ensure that appropriate duties (the bulk of prosecutions) will be handled by legally qualified prosecutors, at the same time allowing for

¹² It was originally proposed in the Consultation Paper (see paragraph 6(f) above) that we would resume the recruitment of new CPs if the new system was found to be satisfactory and appropriate. However, as reflected in views received during the consultation, a key factor affecting the viability of the new system is whether we can recruit good quality new CPs and retain them in the Grade having regard to the adjusted new duties (paragraph 15 above refers). On this basis, and taking into account the vacancy situation of the CP Grade (about 30% at end 2016, as set out in paragraph 8(b) above), our current view is that a more practicable approach is to take early actions to recruit new CPs based on the new system, so that we would be in a position to duly assess the viability of the new system and make an informed decision on the longer term way forward at an appropriate point in time.

better flexibility in the duties that CPs can take up (with the actual cases to be taken up by individual officers to be determined by reference to their experience and ability).

- (b) There will also be enhanced involvement of GC in duties at the magistracy level through posting one SGC to each Magistrates' Court for taking charge of the overall management of the prosecution team and the conduct of prosecution work, and providing quick, on-the-ground advice to staff of the CP Grade. Within the confine of the limitation set by the "Scheduled Duties" List, SGC in charge of each Magistracy will also be allowed the flexibility to assign prosecution duties to CP Grade members according to the experience, ability and performance of individual officers. This is a positive, proactive step in enhancing the handling of prosecution of magistracy cases by the legally qualified.

20. To take forward the proposed measures, we will, based on the principles set out in the Consultation Paper and comments received, work out the implementation details, including:

- (a) adjustments to the "Scheduled Duties" List to make the description of the "Scheduled Duties" more general, taking into account comments received from some CPs during the consultation (see paragraph 11(c) above), so as to allow for more flexibility in the assignment of cases to CP Grade members;
- (b) to work out the timetable under which SGC are to be posted to the Magistrates' Courts, taking into account the availability of suitable candidates for such postings and the need to allow for smooth integration of the SGC into the set-up of the prosecution teams in the Magistracies. Our tentative plan is for a first batch of SGC (no more than three) to join the prosecution teams in the Magistracies in 2017/18;
- (c) to work out the detailed mandate and duty list of the SGC (vis-à-vis the duty / scope of work of the SCP Is currently heading the CP teams and also the GC team in PD Headquarters), so that the SGC can operate in such a manner that would best enable him/her to enhance the efficiency of prosecution work as well as court proceedings generally in the Magistracies; and

- (d) to take forward the procedures required for the recruitment of new CPs who will be subject to the new “Scheduled Duties” List, with a view to commencing the recruitment in around 2017/18.

Other proposals covered in the Consultation Paper

21. Changes to the handling of prosecution work in the Magistrates’ Courts aside, the Consultation Paper (paragraph 33) also mentions rationalization required regarding the ranking of CP Grade posts to meet new and existing operational challenges of the CP teams in the Magistrates’ Courts. To date, two new posts have already been created in the CP teams in the new West Kowloon Magistracy to cope with the additional number of courts in operation as well as the additional closed-circuit television (CCTV) court room to handle cases involving vulnerable witnesses. As for the proposed creation of an additional SCP II each in the Prosecutions Office at Kowloon City Magistracy and Fanling Magistracy, we will closely keep in view the workload of these two teams and create the proposed posts at a suitable juncture so that they can be better equipped to handle the current and upcoming workload.

22. As regards the measures to encourage CPs to obtain legal qualifications (paragraph 34) so as to develop a pool of legally-trained CPs who could seek career advancement either through progressing through the ranks in the CP Grade or joining the GC Grade, we will continue with them in the interim. We will review them when we next revisit the prosecutions in the Magistrates’ Courts so as to tie in with any new policy / measures for the handling of prosecution work in the Magistracy as well as the management of the CP Grade.

Other issues covered in the responses to the Consultation Paper

23. Apart from the key issues mentioned above, in the responses to the Consultation Paper received, a number of other issues were also raised in respect of how the handling of magistracy cases could be improved. We will also follow up on them in the manner set out below:

- (a) In the response of the Bar Association, there were suggestions regarding the adjustment of allocation or handling of cases under the two briefing out lists for magistracy cases¹³. It was

¹³ See footnote 6 above. There has been roughly a two-fold increase in both the number and percentage of court days at the magistracy level handled by MC “B” List fiat lawyers in place of CPs (from 2 184 court days (or 14%) in 2008 to 5 585 court days (or about 32%) in 2015), while the number of court days for MC “A” List counsel in place of GC has also been

also suggested that the current system and timeline of case file delivery to fiat counsel should be reviewed. We would consider how best to take forward these suggestions in consultation with the two legal professional bodies.

- (b) In the comments of the Judiciary, the desirability to have a legally qualified prosecutor, in particular where the defendant is not legally represented was mentioned. In this regard, while our CPs are currently providing the court with the necessary support in making decisions on a well-informed and well-argued basis in cases handled by the CP teams, we appreciate the rationale of the Judiciary for such cases to be handled by legally qualified persons. Taking into account the fact that the bulk of non-legally represented cases are not controversial (e.g. common assault, fighting in public place, street gambling, careless driving, failing to comply with traffic signs etc.), for proper deployment of resources, instead of putting all non-contested cases in the “Scheduled Duties list” for handling by legally qualified prosecutors, SCP Is will make assessment on each non-legally presented case to be handled by the CP team (having regard to the background and facts, any potential legal issues involved, conduct of the defendants (especially in court) and indication from the court etc.) to decide whether such cases should be prosecuted by counsel.

As regards the comments on the need for transfer of cases handled by CP to legally qualified prosecutors due to limitations in the types of cases they can cover, hence resulting in cases delayed with costs wasted, they may indeed occur when some ad hoc matters arise during the trial (e.g. argument raised unexpectedly by the defence on human right issues, or some important legal issues arise in the course of the trial), in which case the SCP Is of the team concerned would alert PD headquarters and seek instructions for an adjournment for allocation of counsel to handle. While no statistics were kept on the frequency of such cases, we understand that they were currently very small in number. That said, we appreciate the concern of the Judiciary, which merits even closer attention under the future “Scheduled Duties” List arrangements where the limitations to the types of cases that CPs can handle are more stringent than is the case currently. In planning the

increasing steadily (from 995 court days (or 6%) in 2008 to 1 537.5 court days (or about 9%) in 2015).

future arrangements, we will carefully look into the issue and finetune the arrangements for the allocation of cases so that such incidents can continue to be minimized in future.

- (c) In some of the responses (from the Bar Association and the Duty Lawyer Service), it was pointed out that CPs were not bound by the professional codes of any professional bodies but answerable to DoJ alone, and this was comparatively unsatisfactory and might jeopardize the quality of prosecutorial decision-making. However, the Bar also categorically pointed out that it was not to say that the Bar considered that the CP Grade was devoid of the appropriate standards required for prosecuting before a Magistrate, and that experience demonstrated the opposite. In this regard, we should point out that currently, the CPs are already subject to the Prosecution Code (in addition to the close monitoring by DoJ), and hence it is untrue that they are not bound by any professional codes. However, we would also bear in mind this observation and reconsider the need to introduce another professional code specifically applicable to the CP Grade when we further consider the longer term arrangement for the Grade.

Department of Justice
May 2017

**Consultation Paper:
Prosecution Works in the Magistracy:
Direction for the Future**

**Department of Justice
June 2016**

This Consultation Paper is prepared by the Prosecutions Division of the Department of Justice. The views and recommendations included in this Consultation Paper are published with a view to facilitating comments and discussions. They do not represent the final views of the Department of Justice.

The Department of Justice invites comments on the matters raised in this Consultation Paper by 1 August 2016. All correspondence (marked “Prosecution Works in the Magistracy: Direction for the Future”) should be addressed to:

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It may be helpful for the Department of Justice, either in discussion with others or in any subsequent documents, to be able to refer to comments submitted in response to this Consultation Paper. Any request to treat all or any part of a response in confidence will be fully respected. However, it will be assumed that the response is not intended to be confidential if no such express request is made.

Anyone who responds to this Consultation Paper may be acknowledged by name in subsequent document(s) or report(s). If an acknowledgement is not desired, please expressly say so in your response.

The information, statistics and figures contained in this Consultation Paper are, unless otherwise specified, accurate up to 20 May 2016.

Introduction

This consultation paper sets out the provisional conclusions and recommendations of an internal review conducted by the Department of Justice (“DoJ”) on the handling of prosecution works at the Magistrates’ Courts, including issues concerning the future arrangement for the Court Prosecutor (“CP”) Grade. The aim of the review is to consider if there is any need, and if so, how to adjust the distribution and handling of cases so that the demand for prosecution service at the magistracy level, current and future, can be better met. When conducting the said internal review, the initial views of CP Grade officers have been sought. Informal discussions had also been held with relevant stakeholders. However, the views and recommendations set out below are provisional only. By this consultation paper, DoJ invites views and comments from all the relevant stakeholders so that the conclusions and recommendations can be finalized.

Background

2. The CP Grade has a long history. It was first created in 1976 as a pilot scheme to take over the prosecution works in the Magistrates’ Court from police inspectors, and was eventually made permanent in 1979. A brief summary of the development of the CP Grade over the years and the current staff establishment at different ranks are set out in **Annex A**.

3. A review of the CP system was conducted in 2007 / 08 taking into account the views then expressed in different quarters including the two legal professional bodies¹. The following principles in handling matters regarding the CP Grade were announced by DoJ in July 2008:

- The bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term.
- The standards of prosecution must be maintained.
- Although the costs of prosecuting cannot be determinative of the issue, the impact of prosecuting upon the public purse cannot be ignored.
- DoJ has a role to play in assisting junior barristers to develop, but this is ancillary to its primary duty of upholding the standards of prosecution.
- The position of the current CPs must be respected.

¹ The Hong Kong Bar Association and the Law Society of Hong Kong.

4. Based on the consensus with the two legal professional bodies that the duties of new CP recruits would be restricted unless they were legally qualified², and after consulting the Administration of Justice and Legal Services Panel (“AJLS Panel”) of the Legislative Council (“LegCo”), a recruitment exercise for the CP Grade was held in 2008 / 09 on this basis. A total of 13 CPs (Batch 19 CPs) were recruited in the exercise. Since then, there has not been any further recruitment of CP.³

5. When the matter of prosecutions in the Magistracies was discussed at the AJLS Panel in 2008, DoJ indicated that it would review the CP system. In view of the considerable time that has lapsed and the changes that we have faced since 2008, DoJ finds it appropriate and necessary to review the situation so as to see if any steps should be taken to further improve the system.

Developments in the handling of prosecution work at the magistracy level after the 2008 / 09 CP recruitment exercise

Increase in the number of court days at the magistracy level

6. After the last CP recruitment exercise in 2008 / 09, the total number of court days at the magistracy level has been rising steadily – from 15 516 in 2008 to the level of 17 199 in 2015, with the number of court days for cases that should be handled by CPs or fiat in lieu being around 14 000 to 15 000 a year. While the percentage being handled by CPs stood at over 70% (or about

² Unless legally qualified, the new recruits would, after training, generally concentrate on general court and administrative duties, i.e., –

- Case management and administration
- Traffic courts
- Plea courts
- Miscellaneous hearings, including remands, bail applications, pre-trial reviews and hawking and littering cases
- Liaison work with law enforcement agencies, victims, witnesses and court staff

³ Our experience in respect of the new CPs recruited in 2008 / 09 is that the existing restrictions to the work of “non-legally qualified” new recruits have imposed considerable limitations to the manpower deployment of the CP Grade. Moreover, many of the 13 Batch 19 CPs (who could only conduct a limited class of cases) have gradually left the service for various reasons. (Paragraph 7(a) is relevant.) Under the circumstances, we consider it more desirable to work out the long-term future of the CP Grade after a review (see paragraph 5) before conducting further recruitment, lest the problems arising from the restricted duties of Batch 19 CPs will perpetuate. In the interim, we instruct fiat counsel to conduct prosecution work in place of CPs where there is such a need.

12 000 court days) in the earlier years (from 2009 to 2011), both the number and percentage were on a downward trend since 2012, with a percentage of only about 65% (or around 9 500 to 10 000 court days) in the recent few years.

Manpower of the CP Grade

7. The reduction in both the number and percentage of court days handled by the CP Grade was not due to the ability or competence of CP Grade officers. Instead, it was largely due to the reduction in CP Grade officers being available to handle court work for the following reasons:

- (a) Many of the 13 Batch 19 CPs (who could only conduct a limited class of cases) have left the service for various reasons. Apart from those who joined the legal profession after acquiring full legal qualification, some felt that they were unable to develop their skills fully, or found no job satisfaction as the work was monotonous due to the limitation of duties (mainly involving traffic cases or summonses). Some were also worried that their long term prospect in the Grade would be very limited due to the constraints in the court duties, whilst others found the court work very stressful.
- (b) As at 29 February 2016, only four of the Batch 19 CPs remain in service (including one on full-pay study leave undertaking the Postgraduate Certificate in Laws (“PCLL”) programme and one of them on no-pay study leave serving his pupillage with a view to becoming fully legally qualified). Hence, only two from the Batch 19 CPs (who are already fully legally qualified) are in actual operation.
- (c) Between 2008 and 2015, 14 CPs at different ranks (three Chief CPs (CCPs), three Senior CP (SCP) Is, six SCP IIs and two CPs) left the service on retirement⁴.
- (d) In the same period, six CPs at different ranks (including three SCP IIs and three CPs), on top of nine from the Batch 19 CPs, resigned from the Grade or were transferred to other Grades. Out of these officers who have left the Grade, about half were fully legally qualified (as barrister or solicitor). Some of them joined the Government Counsel (“GC”) Grade (two), some were appointed as Magistrates (two) and some joined private practice (two). A table showing the changes in

⁴ Including those proceeded on pre-retirement leave.

strength and vacancy position of the CP Grade since 2008 is at **Annex B**.

8. It is expected that the vacancy position of the CP Grade will further worsen in 2016 with one additional Batch 19 CP having tendered resignation and will leave the service in July, and a few other officers proceeding on pre-retirement leave – including two SCP IIs (in April and November) and one CP (in August) – bringing the anticipated vacancy for the CP Grade to 30 at the end of 2016, against a total establishment of 102.

The supply of fiat counsel to handle magistracy work in place of CPs

9. DoJ maintains two briefing-out lists for the magistracy level. The first list is the Magistrates' Court "B" List ('MC "B" List'), which comprises outside fiat counsel who prosecute magistracy cases in place of CPs. The second list is the Magistrates' Court "A" List ('MC "A" List'), which comprises outside fiat counsel who prosecute magistracy cases in place of GC. At first glance, it may appear that a straightforward solution to address the increase in workload at the magistracy level and the reduction in manpower of the CP grade is to increase the engagement of fiat counsel on the MC "B" List to handle the court days that CPs cannot take up⁵. As a matter of fact, there has been roughly a two-fold increase in both the number and percentage of court days at the magistracy level handled by fiat lawyers in place of CPs (from 2 184 court days (or 14%) in 2008 to 5 585 court days (or about 32%) in 2015)⁶. However, it is neither appropriate nor desirable for DoJ, as a responsible prosecution authority which seeks to provide a high standard of prosecution service at the magistracy level, to adopt this as a long-term solution to address the manpower issue. The reasons can be summarized as follows:

- (a) While we have worked with the two legal professional bodies to enhance the training for newly qualified lawyers interested in taking

⁵ GC Grade officers are not an appropriate substitute for CPs in the handling of magistracy cases : that they are fully occupied with their other work aside, as a matter of principle, GC Grade officers specialise in handling more complicated cases which should not be handled by CPs.

⁶ The need to increase the engagement of fiat lawyers in place of CP over the years is due to : (a) the overall increase in the number of court days in the Magistrates' Courts that should be undertaken by CPs (from 13 983 days in 2008 to 15 059 days in 2015); (b) the reduction in the strength of the CP Grade over the years (from 91 bodies in end 2008 to 76 bodies in end 2015); and (c) the increase in case preparation days for CPs starting from 2012 (from one day per week to three days every two weeks), and hence a reduction in actual court days that could be taken up by CPs.

up prosecution work⁷, outside fiat counsel cannot completely replace CPs as a highly experienced and steady team providing effective prosecutions service at the magistracy level. This is because most of the cases handled by CPs can be perceived as relatively straightforward and fiat counsel would rarely choose to handle this type of work as their professional seniority and experience progress. For those newly qualified fiat counsel on the MC “B” List who handle these cases, they will be “promoted” over time to the higher-level briefing out list(s) at the magistracy level (or even higher court levels) if they have demonstrated good performance. Others may for whatever reasons lose interest in doing prosecution work and drop out from the briefing-out list. Hence, over 60% of MC “B” List counsel have stayed in the list for only a short duration (five years or less), as shown in the figures set out below :

Years on the MC “B” List	Number of counsel (as at 31.3.2016)
Over 9 years	29
Over 5 years to 9 years	89
Over 2 years to 5 years	66
1 to 2 years	66
Less than 1 year	59
TOTAL	309

- (b) Due to the large number of cases handled at the magistracy level, the speed at which proceedings are taken forward in the Magistrates’ Courts is high. While fiat counsel is a very helpful source of supplementary workforce in taking up court work when CPs are not available, they cannot completely replace the CPs as a

⁷ Since February 2011, we have been jointly organising a Joint Training Programme with the Hong Kong Bar Association and the Law Society of Hong Kong on a biannual basis, for newly qualified lawyers in private practice who wish to undertake fiat prosecution work. The Programme aims to provide training to lawyers with less than five years’ post qualification experience. It comprises a one-day lecture-cum-workshop training and, subject to satisfactory performance at the one-day training, a continuous two-week Magistrates’ Courts attachment during which participants prosecute cases under the supervision of serving prosecutors. The average number of participants of the programme is around 100 each year and over 70% of them (excluding mono-lingual participants) joined the subsequent two-week attachment. For monolingual participants, they will be briefed when there are suitable cases. During the two-week attachment, participants were assessed on their suitability for inclusion on the Prosecutions Division MC Fiat Counsel List for dealing with routine cases in the place of CPs (i.e. MC “B” List). The average number of such participants who were finally included on the MC “B” List is over 70%.

team of career prosecutors specializing in prosecution work at the magistracy level. Through hands-on experience, CPs build up the requisite skills and professional knowledge for handling such work and are extremely familiar with the court proceedings, and thus are able to take forward cases in an expeditious and effective manner.

- (c) In addition to court work, CPs also perform a substantial amount of administrative duties⁸ which are important and indispensable for the smooth disposal of cases in the Magistrates' Courts. In this regard, it is pertinent to note that: (1) a large percentage of the cases prosecuted in the Magistrates' Courts are brought directly by law enforcement agencies (mostly the Police) pursuant to delegated authorities; (2) in respect of these cases, legal advice from the Prosecutions Division of DoJ has not been sought (and in respect of a lot of them, will never be sought). The system as it now stands mainly relies on CPs to vet and screen those cases for issues, inadequacies, need for legal advice from the headquarters, etc. Further, CPs need to liaise with the relevant law enforcement agencies so as to ensure that the prosecutions would be properly conducted. These are very important functions which CPs discharge. Fiat counsel who are briefed to prosecute on daily or case-by-case basis cannot possibly undertake such duties.
- (d) Merely increasing the engagement of fiat counsel also cannot address the issues concerning the long term policy towards the CP grade, including the morale issues which the grade faces as a result of the uncertainties of its future (see paragraph 7(a) above).

10. Taking into account the above considerations, it is apparent that in order to handle the growing number of magistracy cases in a satisfactory manner, there is an operational need to maintain an appropriately-sized team of professional and career CPs undertaking prosecution and related works at the magistracy level. Unfortunately, the current manpower situation of the CP Grade – with only four (to be further reduced to three) of the 13 recruits

⁸ Including (but not limited to) the following : distribution of court work among the prosecutors and fiat counsel; vetting the case files and liaising with the case officers for additional witnesses, clarification on the ambiguities of the case or conducting further investigation on the unclear issues etc.; handling various requests from the defence; liaising with the staff of Judiciary on the case management; correspondence with the Judiciary on matters relevant to the case (e.g. adjournment, decision to withdraw the cases or offer no evidence etc.); consideration of review on the court decisions or providing inputs to seek legal advice on certain issues of the case; maintaining regular contact with the headquarters and providing necessary information to the counsel of DOJ; handling complaints.

from the last recruitment exercise in 2008 / 09 remaining in service and the vacancy position of the Grade reaching 30 by the end of 2016 – is not conducive to achieving this aim. Moreover, CPs have shown concerns regarding their future career prospect since it remains unclear as to how (and if so, when) the objective of “the bulk of prosecutions being conducted by the legally qualified” (being one of the principles announced in July 2008, as stated in paragraph 3 above) will be achieved. Such concerns, in our view, are not unreasonable and should be properly addressed.

11. There is an imminent need for DoJ to address these issues of manpower and grade management as another 10 CPs will be leaving the service on normal retirement during the period from 2017 to 2021. Without a clear policy on the most appropriate way forward for the conduct of prosecutions in the Magistrates’ Courts and hence the future of the CP Grade, it would be difficult for DoJ to plan ahead on how the staffing requirements of the prosecution teams are to be met (e.g. whether to recruit new CPs, to involve more GC in the prosecution works in the Magistrates’ Courts or to brief out more to fiat counsel).

Factors to consider

The good quality of prosecution

12. It is common consensus that the rule of law is a core value of the Hong Kong community. Criminal prosecutions, including those in the Magistrates’ Courts, play a pivotal role in maintaining the rule of law. Accordingly, the first and foremost consideration is that the good quality of prosecution at the magistracy level (as in any other levels) must be steadfastly maintained. This consideration is paramount and should never be compromised. It is believed that the proposed measures discussed below can indeed further enhance the quality of prosecution works at the magistracy level, and are in the best interest of the criminal justice system as a whole.

The current team of CP officers

13. The current team of CP officers is a highly experienced and professional one. The contribution that all CPs have made towards the administration of our criminal justice system has been immense. Such contribution should be properly and duly recognized. Hence, CPs deserved

and have to be treated with respect and dignity, and their welfare, promotion prospects and morale properly looked after.

The principles announced in July 2008

14. The principles announced in July 2008 (as set out in paragraph 3 above) remain relevant. The measures proposed below are designed with those principles in mind, and are believed to be consistent with the principle that *“the bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term”*.

Number of cases, and nature of duties, at the magistracy level

15. The annual number of cases handled at the magistracy level by CPs or fiat counsel in lieu stands at around 170 000 in recent years (but slightly decreased to around 150 000 cases in 2015), and the number of court days involved is around 14 000 to 15 000 days / year. The number of defendants involved in contested trials in the Magistrates’ Courts each year is about 7 000 to 8 000 in recent years, with about 50% of them eventually pleading guilty for the offence(s) charged.

16. Given the substantial case volume with a high proportion of them being relatively straightforward in nature, it is neither cost-effective⁹ nor practical for all these cases to be handled by legally qualified persons. This is because to ensure the effective handling of the vast number of cases, it is essential that there is in place a team of effective prosecutors who regularly station at the Magistrates’ Courts and are highly familiar with the operational details and rules. As explained in paragraph 9(b) above, such prosecutors can only be trained up in-house and given the opportunity to build up their experience by prosecuting in the court on a day-in-day-out basis. The type of cases handled at the magistracy level can be perceived as relatively straightforward, and it would not be the type of works which legally qualified persons would like to take up on a long-term basis. Further, as has been explained in paragraph 9(c) above, there are important duties which outside fiat counsel simply cannot discharge. Instead of doing away with the CP

⁹ Whilst the expression “cost-effective” is used, we stress that DoJ does not consider prosecution works purely from the economic angle. As noted in paragraph 3 above, one of the principles announced in July 2008 is that “(a)lthough the costs of prosecuting cannot be determinative of the issue, the impact of prosecuting upon the public purse cannot be ignored”. DoJ takes the view that this principle remains relevant.

Grade, it would be more desirable from the perspectives of effective case management and proper administration of criminal justice, to have a permanent team of lay prosecutors but supplemented by lawyers from within the Department and outside. This will be the ideal mix for the prosecution team at the magistracy level.

17. In order to ensure the viability of this mix of prosecutors, it is important to have a rational and flexible distribution of cases between those that can appropriately be handled by lay prosecutors (CPs) and the *bulk* that should be handled by the legally qualified (in-house or fiat counsel or legally qualified CPs), so that, on the one hand, all magistracy cases will be properly handled while, on the other, room will be provided for lay prosecutors to have a worthwhile career. This can be achieved through:

- (a) replacing the existing restrictive list of duties that CPs without full legal qualifications can undertake (see footnote 2)¹⁰, by a list of cases that must be handled by the legally qualified (“Scheduled Duties”);
- (b) the timely and proper identification of other cases that should be handled by lawyers; and
- (c) enhancement of availability and timeliness of guidance to be provided to CPs in the field.

The handling of administrative duties by CPs

18. As mentioned in paragraph 9(c) above, there are a vast volume of daily administrative duties undertaken by the team of CPs which are important to maintain the high quality of prosecutions service in the magistracies. These duties involve internal case management work which cannot be briefed out to fiat counsel for obvious reasons. The proposed measures therefore will have to be able to maintain CPs’ proficiency in handling such duties. It is envisaged that for cases on the “Scheduled Duties” list, CPs can continue to provide support to the GC or fiat counsel concerned so that CPs can acquire or enhance their knowledge necessary for the handling administratively of all cases (in particular case assignment).

¹⁰ Experience and feedbacks from CPs show that the duties contained in this restrictive list of duties may be unduly narrow and limited. Job satisfaction enjoyed by those CPs who are affected has been low, contributing towards the low retention rate of the Batch 19 CPs. The duty restriction is also not applicable across the board, thereby giving rise to acute fairness and administrative issues.

The provision of training to newly-qualified counsel in handling magistracy cases

19. For the healthy and sustainable development of the legal profession as a whole, it is very important to provide the necessary assistance to newly qualified in-house and outside counsel in taking up prosecution duties at the magistracy level. As one of the principles announced in July 2008, DoJ has a role to play in assisting junior barristers to develop skills to handle prosecution works, even though this role is ancillary to its primary duty of upholding the quality of prosecution. Given the speed at which proceedings are taken forward in the Magistrates' Courts (see paragraph 9(b) above), on top of work relating to the actual handling of cases, an appropriately-sized team of experienced and professional CPs is also highly necessary in providing the essential assistance and guidance to newly qualified lawyers to allow them to gradually learn their skills in handling magistracy cases.

Proposed measures

20. Having regard to the considerations discussed above, we would like to propose a number of measures to improve the handling of prosecution of magistracy cases. It is believed that the implementation of these measures can also address the issues identified above including those currently faced by the CP Grade.

Retention of the CP Grade

21. We propose, with the modifications and rationalization discussed below, that the CP Grade be retained on a long term basis. Given the factors considered above, we see no justification in either scrapping or grandfathering out the CP Grade. Instead, we believe that the contribution made by the CP Grade should be properly and appropriately recognized.

Rationalization of the cases to be handled by CPs

22. As set out in paragraph 4 above, the duties of those CPs recruited in 2008 / 09, unless they are legally qualified, have been limited to those on a specified list (see footnote 2). This "screen in" approach is restrictive and inflexible, which puts the duties of CPs in a straitjacket and does not allow room for them to develop and exert their ability fully. While achieving the

aim of limiting the types of cases that CPs can handle (thus reserving them to the legally qualified), this is not conducive to the broader and positive aim of maintaining high quality and yet effective prosecutions service at the magistracy level. As experience gained since 2009 has shown, this policy would be self-defeating over time. Indeed, some of the Batch 19 CPs felt that the development of their skills and career had been unduly constrained thereby. This sentiment cannot be ignored and indeed was the reason for the departure of some of the CPs from that batch as known to us (see paragraph 7(a) above).

23. To address this problem, we propose an alternative approach to the classification of duties to be handled by CPs. Instead of the “screen in” approach currently adopted, we consider it more desirable to work out a list of relatively more difficult duties that should be removed from the responsibilities of CPs (not only for new recruits but also serving CPs)¹¹. This can allow for better flexibility in the duties that CPs can take up (with the actual cases to be taken up by individual officers to be determined by reference to their experience and ability), while better ensuring that appropriate duties (the *bulk* of prosecutions) will be handled by legally qualified prosecutors. CPs (including new recruits) can thus be exposed to an appropriately wide range of cases, instead of general court and administrative duties as those applicable to the Batch 19 CPs (see footnote 2), so that they could grow in the job and have the initiative to stay and develop in the CP Grade. As for the “Scheduled Duties”, while the actual prosecution work will be handled by GC or fiat counsel, CPs can still be required to be involved by providing support to the GC or fiat counsel concerned so that they can handle the cases more effectively. This way, CPs can continue to be exposed to all types of cases, scheduled or otherwise. This is important in order to maintain a strong team of veteran prosecutors ready to handle all prosecutorial duties (administrative or otherwise) detailed above. As a side

¹¹ Based on the rationale that “Scheduled Duties” can be taken up by the legally qualified, members of the CP Grade who are legally qualified can, as a matter of principle, take up the prosecution work for such cases. In the actual assignment of cases, we, as a general rule on parity ground, will not assign “Scheduled Duties” cases to CPs even if they are legally qualified unless for exigencies of service and on an ad hoc / urgent basis (e.g. sudden emergence of “offering assistance” cases involving “Scheduled Duties” or evolvement of a “Non-scheduled Duties” case into a “Scheduled Duties” case in the course of trial due to unexpected case development, and it is not possible for the Senior Government Counsel stationing in the magistracy concerned (see paragraph 31) or the headquarters to provide assistance). Moreover, if individual legally qualified CPs are interested and capable, they can also request to be assigned “Scheduled Duties” cases on a regular basis to enhance their exposure. The proposed arrangement set out in paragraphs 22 to 26 should be seen in this light. As for the exact arrangements, they are to be worked out at a later stage.

benefit, with the maintenance of a comparable volume and variety of cases to be handled by the CP Grade, its existing structure can be maintained.

24. In the furtherance of this approach, we have reviewed the types of cases conducted before the Magistrates' Courts and prepared a list of "Scheduled Duties" (see **Annex C**) that should be removed from the duties of CPs. The list covers: (a) a broad category of cases by the nature of which should be handled by the legally qualified (Part A); and (b) specific offences or types of offences the complexity of which require the handling by qualified lawyers (Part B). All CPs will be relieved from the actual prosecution of these cases, which are to be undertaken by GC or fiat counsel instead, but will still be required to provide support to the GC or fiat counsel concerned on a need basis. "Non-scheduled Duties" will continue to be undertaken and shared by all CPs and lawyers on the MC "B" List.¹²

25. The scope of "Non-scheduled Duties" will be considerably wider than the "limited duties" currently assigned to new CPs without legal qualifications, but not amounting to a full range of prosecutorial duties. By screening out these wide range of relatively more complex cases from the purview of CPs, we can better ensure that cases that should be prosecuted by the legally qualified (with the support of CPs, where necessary) will be so handled, while providing more room for CPs to develop their skills and expertise in dealing with magistracy cases and be better trained to take up higher responsibilities within the CP Grade in time through exposure to a fuller range of prosecution works. The existing policy of "the bulk of prosecutions ought ideally be conducted by the legally qualified" will thus remain generally unchanged and indeed achieved, while the existing "limitations in duties" for CPs without legal qualifications will be relaxed and made applicable to all CPs across-the-board.

26. The list of "Scheduled Duties" can and will be subject to review and adjustment from time to time so as to ensure that the duties in question can

¹² This notwithstanding, the introduction of the new "Scheduled Duties" concept will nevertheless necessitate a review of current distribution of duties among fiat counsel on the MC "A" and MC "B" Lists (see paragraph 9 above) as well as their mode of engagement (e.g. case-based, duration-based) to ensure that "Scheduled Duties" cases can be assigned to fiat counsel of the appropriate class and handled in the most efficient manner. We will take this forward in consultation with the two legal professional bodies. Subject to consultation, our preliminary thinking is that the "Scheduled Duties" by nature would be more suited to be undertaken principally by lawyers on the MC "A" List.

match the then prevailing requirement of the community¹³. CPs will remain as the mainstay of the prosecution teams in handling trials of Non-scheduled cases, case management, and discharging administrative duties.

Enhanced involvement of GC in duties at the magistracy level

27. Currently, for reasons explained in paragraph 9(c) above, not all prosecutions before the Magistrates' Court have been subject to prior legal advice.

28. In respect of those cases which have been, and if advising counsel are, having considered the nature and complication of the issues involved, of the view that the cases should be prosecuted by counsel (in-house or fiat), the advising counsel will so state in the legal advice. The SCP Is stationing at the Magistrates' Courts responsible for case assignment will take note of such instructions and will, after plea, refer the cases to the headquarters for assignment of appropriate prosecuting counsel.

29. For cases which are taken to court directly by law enforcement agencies (such as the Police), the SCP Is in each Magistrates' Court are required to screen and vet the case files. For cases which SCP Is believe, for reasons of complexity, sensitivity or seniority of the defence counsel, should be handled by counsel, they will alert the headquarters to arrange for counsel. SCP Is are also relied upon to identify during the vetting process any issues which they believe should be referred to the headquarters for advice or other action.

30. In addition to the above arrangements, if questions arise in the course of any prosecution, CPs will also immediately report them to senior CP Grade officers or counsel of the headquarters for instructions or legal advice to ensure proper handling of the case concerned.

31. Notwithstanding the above arrangements which have proven effective over the years, we see scope for improvement through enhancing the involvement of GC. In this regard, it is proposed to post one Senior Government Counsel ("SGC") to each Magistrates' Court for taking charge of

¹³ As a start, we propose to review the "Scheduled Duties" List one year after implementing the measure discussed herein. At that review, we will revisit the question as to whether the List should be reviewed on an annual basis, biennial or otherwise.

the overall management of the prosecution team and the conduct of prosecution work, and providing quick, on-the-ground advice to staff of the CP Grade. Within the confine of the limitation set by the “Scheduled Duties” List, SGC in charge of each Magistracy will also be allowed the flexibility to assign prosecution duties to CP Grade members according to the experience, ability and performance of individual officers.

32. To take the proposal forward, the staffing of GC within the Prosecutions Division would need to be enhanced through deployment of resources¹⁴. It is proposed that one SGC would be designated for each of the seven Magistrates’ Courts¹⁵ to: (a) handle Scheduled Duties; (b) provide on-the-ground advice and guidance to CPs on a need basis; and (c) assist in the handling of Non-scheduled Duties on an ad hoc basis (say when fiat counsel are not readily available). SCP Is will continue to discharge their administrative and case assignment duties, but may if necessary seek the advice and guidance of the SGC. If legally qualified CP Grade officers are available and willing, they can fill such SGC posts by short-term acting appointments not exceeding six months on each occasion to meet operational need, while the CP Grade post(s) at promotion rank(s) so vacated (if applicable) can be filled by CP(s) at lower rank(s), thus creating additional acting opportunities for CPs.

Rationalization of the ranking of CP Grade posts

33. To complement the introduction of members of the GC grade into the prosecution teams, we have also reviewed the types (and complexity) of cases currently handled by officers at CP rank, as well as the workload at SCP II level. Currently, there are 31 SCP IIs posted in different magistracies. However, over the years, the cases at the magistracy level have increased in both number and complexity. The existing number of SCP IIs is not able to absorb all complicated cases. It is thus not uncommon that some of those cases are taken up by CPs at the junior rank (but who otherwise are experienced and capable). That is unfair to the CPs at the junior rank, a lot of whom are deemed suitable for promotion to SCP II, who have been

¹⁴ Including using part of the resources of the 30 anticipated vacant CP posts by end 2016, plus the redeployment of three SGC posts from the headquarters. (This proposal will not affect the number of existing promotion posts of the CP Grade.)

¹⁵ Six of the seven Magistrates’ Courts have one prosecution team, while Kowloon City Magistrates’ Court (or the West Kowloon Magistrates’ Court, after its opening later in 2016 (see paragraph 33(a) below)) has two prosecution teams. Taking into account resources considerations, we will only post one SGC to this court (similar to the arrangement for the other courts).

discharging those duties meant to be discharged by SCP II, but yet cannot be promoted due to lack of promotion prospect. We envisage that with the implementation of the proposed “Scheduled Duties”, there should be a reduction in the number of complicated cases. But taking into account those anticipated developments in court arrangements as set out below, we still see a need to create four SCP II posts (using part of the resources from the currently vacant CP posts) so as to rationalize the job duties and address the unfairness discussed above :

- (a) The Tsuen Wan Magistracy will be relocated to the new West Kowloon Law Courts Building in December 2016 and be renamed as the West Kowloon Magistrates’ Courts. By then, as indicated by the Judiciary, the court work among the existing magistracies will be adjusted and re-distributed¹⁶. While in theory it will not lead to a change in the number of cases to be handled, it is expected that the number of courts that will be in operation will increase and an additional closed-circuit television (CCTV) court room will also be provided at the new West Kowloon Magistrates’ Courts to handle cases involving vulnerable witnesses. In line with the established practice for CCTV cases to be handled at the SCP II level (given the greater complexity of the handling procedures and hence more skillful and experienced prosecutors required), it is proposed that an additional SCP II should be created to handle this duty specifically. Moreover, with an increase in the number of court rooms, the waiting time for pleading-not-guilty (PNG) cases (including some complicated ones) will be reduced, and the number of cases that needs to be handled at the same time will increase. Thus, a second SCP II will also be required in the West Kowloon Magistrates’ Courts to cope with the intensified court duties.
- (b) Currently, there are two teams of prosecution staff in the Prosecutions Office at Kowloon City (KC) Magistracy – KC Team (A)

¹⁶ In gist –

- (a) The Tsuen Wan Magistracy (eight courts) will be closed.
- (b) The new West Kowloon Magistrates’ Courts, with about 13 court rooms for magistracy cases in operation, will take over all cases from the Tsuen Wan Magistracy, and some cases from Kwun Tong and Kowloon City Magistracies.
- (c) While there will be a change in the Police Districts from which the cases that they will be handling will come, the number of court rooms in the Kwun Tong (eight) and Shatin (eight) Magistracies will remain unchanged.
- (d) The number of court rooms in the Kowloon City Magistracy will remain at around the same number (11) after the opening of the West Kowloon Magistrates’ Court.
- (e) There is no change to the operation of the Eastern, Tuen Mun and Fanling Magistracies.

and KC Team (B). Together they serve 11 court rooms. Under our original plan, the existing members of KC Team (B) (sufficient to support five court rooms) will be transferred and become members of West Kowloon Team (A). As for the court rooms in the Kowloon City Magistracy, our original thinking was that the number of court rooms to be operating in the Magistracy will also be reduced from 11 to 6, and hence the prosecution-related duties could be managed by the original KC Team (A) (with the capacity to service about six court rooms). With the latest understanding (see footnote 16) that all 11 court rooms in the Kowloon City Magistracy will remain in operation after the opening of the West Kowloon Magistrates' Courts, the existing members of KC Team (A) will need to support the prosecution service for the 11 court rooms. Therefore, we consider that there is a strong need to create at least one additional SCP II in the team to provide necessary manpower to support the prosecution work in the court.

- (c) While there is no change to the number of Police districts covered or the current number of courts in operation in the Fanling Magistracy after the opening of the West Kowloon Magistrates' Courts in end 2016, the workload of the Fanling Magistracy has in fact increased substantially in recent years for the following reasons : (i) most of the customs and excise cases involving smuggling, offences involving dutiable commodities or false trademarks etc. are dealt with in this court due to its geographical location, and cases of these nature are increasingly complicated in nature; (ii) in the recent years, there has been a surge of "powdered formula" cases and 90% of these cases are heard in this Magistracy, with an average of no less than 20 such cases being brought up to the court by way of charge sheet and summons on each working day; and (iii) the number of court rooms in operation at the Fanling Magistracy has recently increased from six to seven since February 2015, with the capacity to expand to eight if necessary. Taking these factors into account, there is practical need to provide for one additional SCP II in this Magistracy so that this court can be better equipped to handle its current and upcoming workload.

Other additional measures : training and development

34. To complement the above-mentioned measures, DoJ will continue to play an active role in further enhancing the professional standard of different

parties conducting prosecutions in the magistracies. In this regard, we will continue to encourage CPs to obtain legal qualifications¹⁷ so as to develop a pool of legally-trained CPs who could seek career advancement either through progressing through the ranks in the CP Grade or joining the GC Grade. We will also continue to arrange training courses for in-house prosecutors from the GC and CP Grades. Moreover, with the proposed rationalization of the duties and hence the strengthening of the CP team, the team can be in a better position to provide support and guidance to new lawyers joining our fiat list for magistracy cases, in particular those who join the joint training programme which we will continue to organize with the two legal professional bodies.

Measures for further consideration

35. Once the measures proposed above are implemented, we will closely monitor the changes in the number of cases (or number of court days) handled by GCs, CPs and fiat counsel under the MC “A” and MC “B” lists. If the new system is found to be satisfactory and appropriate, and if it is proven that there is indeed operational need having regard to the number of cases required to be handled by CPs, we can consider resuming the recruitment of new CPs on that basis. In this regard, we will reserve resources (from the existing vacant CP posts) for the recruitment of at least 10 new CPs, so that a new round of recruitment can be started expeditiously should the need arise. Moreover, we will also keep in view the total briefing out expenditure at the magistracy level, and in case the increase in expenditure for MC “A” List cases cannot be absorbed by the reduction in expenditure for MC “B” List cases (or the briefing out resources of the Prosecutions Division generally), additional resources would be sought through the normal resources allocation arrangement.

¹⁷ Current measures to assist CPs to obtain legal qualifications include the following :

- Grade members can enrol in part-time study of Bachelor of Laws or equivalent legal programmes in their spare time. The management is supportive to their study by suitable adjustment to their court duties and allowing them to take long vacation to prepare for examinations. Reimbursement of fees for the study is also granted to eligible officers each year.
- Full pay study leave is granted to grade members who wish to pursue PCLL qualification, subject to the undertaking of serving in the Department for three years upon completion of the course.
- Grade members with PCLL qualification will be granted no pay leave to enable them to join the Legal Trainee Scheme (if accepted) organized by the Department since 1993 for local students obtaining that qualification.
- Legally qualified grade members may be appointed to act as GC (on administrative convenience basis) to enable them to broaden their horizon in prosecution work.

We will continue to implement these measures, plus any other appropriate new measures that we may come up with in future.

Consultation

36. As noted above, DoJ wishes to consult all relevant stakeholders on the proposals set out above. DoJ therefore invites views from the relevant stakeholders, and would be grateful if such views can be sent to DoJ as stated at the beginning of this consultation paper.

Prosecutions Division
Department of Justice
June 2016

**Background Information on the History and Development of
the Court Prosecutor (CP) Grade**

- The Grade, created in 1976 as pilot scheme to take over the prosecution work in the Magistrates' Courts from police inspectors, was made permanent in 1979.
- In his 1993 report, the Director of Audit expressed concern over the substantial amount of prosecution work briefed out to private counsel at a substantially higher cost than if the work was carried out by CPs, and recommended improving the career prospect of the Grade. The structure of the Grade was thus expanded with the approval of Finance Committee of the Legislative Council.
- The establishment of the Grade as at end December 2015 is as follows –

	Pay Scale (Master Pay Scale)	Existing Establishment	No. of Posts filled
Chief CP (CCP)	40 - 44	2	1
Senior CP (SCP) I	34 - 39	8	7
SCP II	28 - 33	31	28
CP	13 - 27	61	40
Total	-	102	76

- Similar to the case of a number of common law jurisdictions which engage lay prosecutors for cases at the lower level of courts, legal or degree qualification is not the entry requirement for the CP Grade. However, many CPs recruits are already degree holder or even have legal qualifications, while many others have attained legal qualifications on their own accord after joining the Grade¹. Some legally-qualified CPs sought career progression through joining the Government Counsel Grade or the Judiciary (as magistrates), while other stayed in the Grade.

* * * * *

¹ As at 29 February 2016, out of 76 serving CP members, six are fully legally qualified (who have already served pupillage or undergone solicitor traineeship) and they are eligible to apply for practising certificates. Moreover, two CPs have been called to Bar and five CPs have completed Postgraduate Certificate in Laws (PCLL) programme, and these seven CPs, subject to satisfaction of other qualifications (like pupillage or solicitor traineeship), will also be eligible to apply for practising certificates. These 13 CPs account for 17% of serving CPs. Moreover, 25 CPs completed Bachelor of Laws/Common Professional Examination (LLB/CPE), while one other officer is currently pursuing LLB qualification.

**Changes in strength^{Note} and vacancy position of
the Court Prosecutor (CP) Grade since 2008**

	Establishment	2008 (as at end Dec)		2009 (as at end Dec)		2010 (as at end Dec)		2011 (as at end Dec)		2012 (as at end Dec)		2013 (as at end Dec)		2014 (as at end Dec)		2015 (as at end Dec)		2016 (projection as at end Dec)	
		Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy	Strength	Vacancy
CCP	2	2	-	2	-	1	1	2	-	2	-	2	-	2	-	1	1	2	0
SCPI	8	8	-	7	1	7	1	7	1	8	-	7	1	7	1	7	1	7	1
SCPII	31	30	1	31	-	32	-1	31	-	28	3	29	2	28	3	28	3	27	4
CP	61	51	10	61	-	57	4	54	7	49	12	45	16	44	17	40	21	36	25
Total	102	91	11	101	1	97	5	94	8	87	15	83	19	81	21	76	26	72	30

Note:

- 1) Officers on final / pre-retirement leave were excluded from the strength
- 2) The figures as at the end of December 2016 have not reflected the following possible promotions:-
 - One SCP II and two CPs are acting as SCP I and SCP II respectively for six months with effect from 11.1.2016 with a view to substantive promotion.

**Proposed list of Scheduled Duties at the Magistrates' Court level
to be handled by Counsel (in-house or on fiat) instead of
Court Prosecutors (CPs) (or fiat counsel in place of CPs)**

A. Cases the nature of which are complicated and should be prosecuted by counsel

1. Cases involving difficult legal argument, such as stay of proceedings, argument on human rights and related issues, argument on breach of articles in Basic Law, and other technical legal argument etc.
2. Cases involving legal knowledge of specific area of law other than criminal law
3. Cases arguing burden of proof and/or standard of proof
4. Cases arguing whether the offence in question is of strict liability
5. Cases likely attracting significant media interest
6. Cases involving policy issue or impact on public interest
7. Cases involving public figures as defendant or prosecution witness
8. Closed-circuit Television (CCTV) trial cases involving mentally incapacitated persons as defendant or prosecution witness
9. Cases involving evidence of technical nature and requiring technical knowledge
10. Cases involving significant expert prosecution witness or defence witness giving evidence on a major disputed issue
11. Cases involving application for a victim giving evidence behind a screen
12. Cases involving very serious juvenile offences, such as rape etc.
13. Cases involving significant issues which have not been argued before and can be regarded as a test case
14. Cases defended by Senior Counsel or a handful of very difficult defence counsel

B. Offences of moderate or serious complexity¹

15. Complicated theft related offences under the Theft Ordinance including deception, fraud, false accounting etc.
16. Complicated conspiracy offences such as conspiracy to defraud and conspiracy to pervert the course of public justice etc.

¹ One of the current duties of CPs is "observing and assessing fiat lawyers". We have carefully assessed whether this task should continue to be performed by CPs, taking into account the fact that most of whom are not fully legally qualified. Given the substantial number of fiat lawyers prosecuting at the magistracy level (about 250 on the "A" list and 320 on the "B" list), there is practical need for CPs to continue to handle this task to facilitate the PD Selection Board Meeting held every year to determine the counsel's suitability to confirm to the list or to be promoted to higher fiat lists. And given the fact that this duty mainly involves gathering information on the performance of the fiat lawyers, we consider it appropriate to continue to be handled by CPs, with guidance from Senior Government Counsel to be posted to the magistracy concerned, if required. That said, to further enhance the arrangement, we will also consider only engaging SCP Is and more experienced SCP IIs to conduct the observations.

17. Access to computer with criminal or dishonest intent
18. Bookmaking
19. Bribery offences and other related offences investigated by ICAC
20. Carrying on money lending business without a licence
21. Cheating in gambling
22. Child pornography offences
23. Cruelty to animals offences
24. Criminal damage or other related offences involving argument on land law
25. Customs and Excise (C & E) cases – copyright offences where the copyright issue is challenged
26. C & E cases – complicated trade summonses with considerable amount of documentary exhibits involved
27. C & E cases – false trademark and false trade description offences where the trademark issue or the trade description issue is challenged
28. C & E cases – forfeiture proceedings where there is no evidence that the claimant did in any way participate in or facilitate the contravention which resulted in the article becoming liable to forfeiture
29. C & E cases – complicated vehicle first registration tax summonses with considerable amount of documentary exhibits involved
30. Dealing with property known or reasonably believed to represent proceeds of an indictable offence, except simple cases relying merely on the cautioned statement to prosecute the offence and the scale of operation is minimal (for example a drug addict gave his bank account to someone for use)
31. Department of Health cases involving considerable amount of drugs seized and argument on the knowledge of the nature of the drugs
32. Department of Highways cases (other than simple and straightforward cases merely involving the contravention of conditions listed in excavation permits)
33. Endangering the safety of a person in the sea
34. Education Bureau cases
35. Ill-treatment of child and cruelty to child offences (other than relatively simple cases of a nature similar to the offence of “occasioning actual bodily harm”²)
36. Lending money at excessive interest rate
37. Liquor licence offences
38. Managing an unregistered clinic
39. Mandatory Provident Fund offences
40. Misconduct in a public office
41. Object falling from the height offences where there is no direct evidence that defendant or the contractor actually dropped the thing

² In case CCTV trial is involved in these cases, they should be handled by SCP II(SD).

42. Operating an illegal chit fund
43. Practising dentistry / medicine without registration or licence
44. Public order events
45. Riot
46. Triad related offences and other offences such as Trafficking in Dangerous Drugs and Affray etc. arising from a police undercover operation involving multiple defendants
47. Traffic cases involving accident reconstruction evidence
48. Traffic cases – Fatal careless driving
49. Traffic cases – Dangerous driving causing death
50. Traffic cases – Dangerous driving causing grievous bodily harm
51. Traffic cases – Drink driving cases where the accuracy and reliability of the breath analysing instrument is challenged
52. Traffic cases – Speeding cases where the accuracy and reliability of speed detection device is challenged
53. Traffic cases – Road racing
54. Unlawful assembly

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