

**For discussion on
26 February 2018**

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

Briefing Out Cases of the Department of Justice

Introduction

The Panel on Administration of Justice and Legal Services (“the Panel”) has raised question previously about the briefing out arrangement of the Department of Justice (“DoJ”) and the high litigation costs incurred owing to the briefing out of cases to senior counsel in private practice, and has requested the DoJ to consider handling more cases in-house.

2. This paper sets out for Members’ information the DoJ’s briefing out policy and expenditure, the mechanism for the selection of fiat counsel, as well as measures to enhance the case-handling capability of both in-house and outside counsel.

DoJ’s briefing out policy

3. The DoJ has been briefing out certain criminal and civil cases, according to fee schedules approved by the Finance Committee¹ (“standard briefing out”), or at negotiated fees in specified circumstances (“non-standard briefing out”). Briefing out is mainly to meet operational needs. In general, the DoJ may resort to briefing out when –

- (a) there is a need for expert assistance where the requisite skill is not available in the DoJ;
- (b) there is no suitable in-house counsel to appear in court for the

¹ At the Finance Committee (“FC”) meeting held on 13 June 2003, Members gave approval for the Director of Administration to exercise the delegated authority to make adjustments to the approved fees provided that the extent of adjustment was no greater than the movement of the Consumer Price Index (C). On 12 June 2007, the authority for approving adjustments to the approved fees was re-delegated to the Permanent Secretary for Home Affairs. The approved schedule of fees for 2016-17 is at **Annex A**. For equality of arms, the rate for engaging lawyers in private practice on a standard briefing-out basis to prosecute criminal cases on fiat in place of counsel makes reference to the same fee scale as that of the Legal Aid Department (“LAD”), so as to ensure that neither LAD nor DoJ would have unfair advantage in competing for the same pool of lawyers. For fiat counsel prosecuting at the magistracy level in place of Court Prosecutors on a standard briefing-out basis, the briefing out rate is tied to that for duty lawyers.

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- (c) the size, complexity, quantum and length of a case so dictate;
- (d) it is deemed appropriate to obtain independent outside counsel's advice or services so as to address possible perception of bias or issues of conflict of interests;
- (e) there is a need for continuity and economy, e.g. where a former member of the DoJ who is uniquely familiar with the subject matter is in private practice at the time when legal services are required, or where it will be economical and in the interest of justice to engage the fiat trial counsel to conduct the relevant appeal; and
- (f) there is a need for advice or proceedings involving members of the DoJ.

4. In addition, some criminal cases are briefed out with the specific objective of promoting a strong and independent local Bar by providing work, particularly to the junior Bar, and of building a pool of experienced prosecutors to supplement those within the DoJ.

Expenditure in Briefing Out in the past five years

5. A table showing the briefing out expenditure of the DoJ in the past five financial years is at **Annex B**. It is noted from the figures that although the amount of briefing out expenditures for different types of cases fluctuated from year to year, there was, in the overall, no substantial increase in briefing out expenditure : comparing the figures for 2012-13 and those for 2016-17, the increase in total briefing out expenditure was only 2.8%.

6. In the immediate past financial year (2016-17), the payment for standard briefing out incurred (i.e. under item (a) of Annex B) was \$95,409,124 (involving 1 753 cases conducted by fiat counsel in place of Government Counsel, plus 5 711 court days undertaken by fiat counsel to prosecute in place of Court Prosecutors²). These cases only cover criminal cases. Due to varying complexity and nature of cases, civil cases (including construction disputes) are generally briefed out to outside professionals on a non-standard basis³.

² Fiat counsel engaged to prosecute in the Magistrates' Courts in place of Court Prosecutors are required to attend to all cases before a particular magistrate on each day or half day basis, hence their engagement is on a court-day basis rather than case-based.

³ While civil cases are mostly briefed out at negotiated rates, certain types of case, which are relatively standard in nature and considered more economical to be briefed out (e.g. death inquests and proceedings before disciplinary boards), are briefed to junior counsel by reference to the scale fees for fiat counsel in criminal cases.

7. As regards payment for non-standard briefing out (i.e. under items (b) and (c) of Annex B), a total amount of \$196,308,189 (\$135,877,460 plus \$60,430,729) was incurred in the financial year of 2016-17, involving 575 cases. Most of these cases were civil cases (covering 528 cases involving payment of \$104,794,119), while the amount involved for construction dispute resolution was also quite substantial (covering \$60,430,729 involving 15 cases). Although a substantial part of the payment is for counsel fee, the expenditure also covers fees paid to accountants, expert witnesses, consultants and appointed arbitrators whom we engaged in the proceedings.

Selection of briefed out counsel

8. The selection of briefed out counsel is made in accordance with established internal guidelines on briefing out. For standard briefing out (i.e. cases under paragraph 6 above), cases are assigned to fiat counsel on a rotation basis. For non-standard briefing out (i.e. cases under paragraph 7 above), outside counsel are selected based on established selection criteria including the briefed out counsel's years of experience and suitability in terms of areas of expertise and availability for the case concerned in light of its nature and complexity etc.. The level of fees charged by the briefed out counsel is also one of the factors to be taken into account, as public money is involved.

9. In the case of engagement of local Senior Counsel and/or overseas counsel, we have been acting most cautiously to ensure that cases are so briefed out only where circumstances so warrant, having regard to, for example, complexity regarding points of law, significant constitutional, policy or financial implications or public interest, controversy of the issues involved, the legal representation of the opposite party etc. They are selected based on established criteria mentioned in paragraph 8 above and the Secretary for Justice would necessarily be consulted on the selection in those briefing out cases, which are complex and significant. Further, where an overseas counsel is to be engaged to perform the work of local barristers in Hong Kong, it will be subject to approval of their admission by the Court of First Instance, which may impose such restrictions and conditions on the admission as it may see fit. In respect of such admission applications, section 33 of the Legal Practitioners Ordinance (Cap. 159) grants a general right of audience to the Bar Council and requires the papers to be served on it.

Enhancing the case-handling capability of both in-house and outside counsel acting for DoJ cases

Development of advocacy skills of DoJ counsel

10. Strengthening the advocacy capability of prosecutors, especially the younger ones, has been a priority of the Prosecutions Division ("PD"). (In fact, six additional Government Counsel posts are created in PD in 2017-18 to

provide additional manpower so as to allow counsel more opportunities to handle court work.) Besides, for new recruits, they would have the opportunity to be posted to the advocacy subdivision for about one year to gain hands-on prosecuting experience. Moreover, after gaining some on-the-job experience, they will also be arranged to attend a short term overseas advocacy course. All these measures provide good opportunities for the young counsel to develop /enhance their advocacy skills.

11. For civil cases, in-house counsel responsible for such cases will have the opportunity to enhance their advocacy skills either through appearing in hearings before various statutory tribunals/ boards and the courts, or as junior counsel to leading counsel in appropriate briefed-out cases. Similar to counsel in PD, selected counsel from the civil law stream will also have the opportunity to join overseas advocacy training courses.

Assistance to young lawyers in private practice

12. As mentioned in paragraph 4 above, it is our aim to build a pool of experienced prosecutors outside the DoJ to supplement those within the DoJ to handle prosecution cases, by providing work to the Bar, particularly to the junior Bar. To facilitate our young lawyers in private practice to take up prosecution work, since 2012, we have been organising a biannual Joint Training Programme together with the Hong Kong Bar Association and the Law Society of Hong Kong for new lawyers in private practice (i.e. those with less than five years' post-qualification experience) who are interested in prosecuting cases for the DoJ. The programme comprises a one-day training course and (subject to satisfactory completion of the course) a two-week supervised engagement to prosecute in the Magistrates' Courts (at a fixed fee of \$47,080 for the whole period). During the two-week attachment, participants will be assessed on their suitability for inclusion in the PD Magistrates' Courts Fiat Counsel list. We also stand ready to work with the two legal professional bodies to provide assistance in the enhancement of their training for their young lawyers in criminal law and procedures, so as to further facilitate young lawyers to take up prosecution work.⁴

13. On top of training opportunities mentioned above, in order to equip junior counsel with the experience and the skills in prosecuting cases, counsel with less than 10 years' experience are engaged, at a token daily rate of \$1,000, to act as an understudy to Senior Counsel / senior junior counsel who is

⁴ In this regard, PD has recently participated in a cooperation project spearheaded by the Bar on "Professional Training Course for Prosecutors" whereby in-house prosecutors of the DoJ, judicial officers and senior members of the Bar will give lectures and practical guidance to participants on topics including drafting of court documents, techniques of examining witnesses, the adjectival law on conducting cases in the magistrates' courts as a prosecutor, etc.

briefed to prosecute a complex and sensitive case for PD. Looking ahead, we will actively consider expanding the scheme to a wider range of criminal cases so as to further increase young lawyers' exposure to criminal advocacy work and to equip them with the necessary skill sets and capabilities to take up fiat work on their own.

14. While the briefing out of civil cases necessitates different considerations due to their diversified nature and complexity as well as the requirements of court or tribunal procedures, certain types of cases (e.g. death inquests and proceedings before disciplinary boards) which are relatively standard in nature are considered suitable and more economical for briefing out to junior counsel with fewer years of experience (see footnote 3 above). In suitable circumstances, we also briefed out cases to junior barristers (with relatively fewer years of post-qualification experience) to enhance efficiency, e.g. to act as a second junior counsel to provide assistance to Senior Counsel and undertake some ground work, such as conducting legal research, summarising legal issues and authorities for advice and preparing draft documents. These assignments will provide very good opportunities for junior counsel in private practice to consolidate and further develop their skills and to gain experience in handling civil cases. We will continue to identify suitable areas of work for engagement of junior counsel while taking into account the need for exposure and training of our in-house counsel.

Department of Justice
February 2018

Approved scale of maximum fees for briefing out cases

	For cases briefed up to 13 November 2016 (rate effective since 29 November 2013)	For cases briefed from 14 November 2016 and onwards (rate effective since 14 November 2016) [#]
	\$	\$
(a) Court of Appeal		
(i) brief fee	32,700	49,050
(ii) refresher fee per day	16,350	24,530
(b) Court of First Instance		
	\$	\$
(i) brief fee	24,520	36,780
(ii) refresher fee per day	12,260	18,390
(iii) conference per hour	1,270	1,910
Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.		
(c) District Court		
	\$	\$
(i) brief fee	16,320	24,480
(ii) refresher fee per day	8,160	12,240
(iii) conference per hour	1,040	1,560
Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.		
(iv) brief fee for attending sentencing hearings or procedural applications	3,240	4,860
(d) Magistrates' Court		
	\$	\$
(i) brief fee	9,800	14,700
(ii) refresher fee per day	4,890	7,340
(iii) brief fee on daily basis	6,520	7,020

[#] On 14 November 2016, with Legislative Council's endorsement, the rates of the approved criminal legal aid fees were adjusted upward by around 50%. As the Department uses the same scale of fees for briefing out, the briefing out fees for cases briefed since that date were adjusted accordingly.

Briefing Out Expenditure by Type of Cases from 2012-13 to 2016-17

	2012-13 (\$)	2013-14 (\$)	2014-15 (\$)	2015-16 (\$)	2016-17 (\$)
Payment for hire of legal services and related professional fees¹					
(a) Briefing out of cases according to approved fee schedule (involving criminal cases) ²	56,586,215 [909 cases + 4 579 court days]	74,550,147 [1 329 cases + 5 297 court days]	87,967,246 [1 617 cases + 5 152 court days]	94,694,047 [1 848 cases + 5 617 court days]	95,409,124 [1 753 cases + 5 711 court days]
(b) Briefing out of cases at fees not covered by the approved scales, comprising					
● <i>Civil cases</i>	96,780,873[589]	109,829,465[618]	75,568,585[483]	105,790,709[563]	104,794,119[528]
● <i>Criminal cases</i>	30,196,903[59]	42,720,637[61]	68,136,516[45]	31,559,616[45]	31,083,341[32]
	183,563,991	227,100,249	231,672,347	232,044,372	231,286,584
Payment for legal services for construction dispute resolution¹					
(c) Briefing out of construction dispute resolution cases at fees not covered by approved scales ²	100,321,724 [24]	101,595,097 [26]	103,291,625 [22]	90,927,839 [25]	60,430,729 [15]
Total annual expenditure in briefing out	283,885,715	328,695,346	334,963,972	322,972,211	291,717,313

¹ The number of cases is denoted in square brackets; for criminal cases briefed out according to approved fee schedule, fiat counsel engaged to prosecute in the Magistrates' Courts in place of Court Prosecutors are required to attend to all cases before a particular magistrate on each day or half day, hence their engagement is on court-day basis rather than case-base.

² There is no approved scale of fee for civil cases or construction dispute resolution because it is not possible to fix scale fees for such cases which vary by complexity and nature.