

**立法會**  
***Legislative Council***

LC Paper No. CB(4)619/17-18(04)

Ref : CB4/PL/AJLS

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

**Meeting on 26 February 2018**

**Background brief on briefing out of criminal and civil cases  
by the Department of Justice**

**Purpose**

This paper provides background information on briefing out of criminal and civil cases by the Department of Justice ("DoJ") and summarizes major views and concerns of Members on this subject.

**Background**

2. DoJ's purview includes providing legal advice to Government bureaux and departments, and represents the Government in courts for judicial proceedings. Where necessary, DoJ engages solicitors or barristers in private practice to provide assistance in handling certain criminal and civil cases.

3. According to the Administration, briefing out is mainly to meet operational needs. Generally speaking, DoJ may resort to briefing out when –

- (a) there is a need for expert assistance where the requisite skill is not available within DoJ;
- (b) there is no suitable in-house counsel to appear in court for the Hong Kong Special Administrative Region;
- (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 DoJ who is uniquely familiar with the subject matter is in private practice at the time when legal services are required; and
  - (f) there is a need for advice or proceedings involving members of DoJ.
4. DoJ has been briefing out cases according to fee schedules approved by the Finance Committee ("FC")<sup>1</sup>("the approved fee schedules") or at negotiated fees in specified circumstances. During the year ending 31 March 2017, DoJ paid out a total of \$291,717,313 as briefing out expenses. The number of cases conducted and court days undertaken by in-house counsel and fiat counsel in 2015 and 2016 respectively are shown in **Appendix I**.

## **Major views and concerns of Members**

5. Major views and concerns of Members on briefing out of criminal and civil cases by DoJ are summarized in the ensuing paragraphs.

### Briefing out of criminal cases

6. There was a view that the work relating to making prosecution decisions, in particular those relating to the "controversial cases" (such as "Occupy Central Movement" cases), should be handled by in-house government counsels and hence DoJ should consider recruiting more Government Counsels to handle the cases. Some Members raised queries whether private legal practitioners could be able to handle prosecution matters in an objective manner and whether overseas legal private practitioners engaged to handle prosecution cases were familiar with Hong Kong's situation.
7. The Administration advised that the majority of the prosecutions, including the "controversial cases", were conducted by public prosecutors, i.e. in-house staff of DoJ. However, there was a need for briefing out some of the prosecution cases arising out of the controversial cases where there was a need

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<sup>1</sup> According to DoJ, it currently adopts the same fee scale as that of the Legal Aid Department for criminal legal aid fees as prescribed in the Legal Aid in Criminal Cases Rules (Cap. 221D) under the Criminal Procedure Ordinance (Cap. 221), as well as that for the duty lawyer fees under the duty lawyer scheme, as appropriate, when engaging lawyers in private practice on a standard briefing-out basis to prosecute criminal cases on fiat. This will ensure that neither the defence nor the prosecution would have unfair advantage in competing for the same pool of lawyers, thus ensuring parity between the defendants and the prosecution.

for expert assistance or it was deemed appropriate to obtain independent outside counsel's advice or services so as to address possible perception of bias or issues of conflict of interest. The Administration stressed that the Director of Public Prosecutions and his staff in the Prosecutions Division would consider the circumstances of each case thoroughly in deciding whether to prosecute, and the sensitivity of a case in deciding whether it should be briefed out. DoJ had been acting cautiously to monitor the briefed-out cases to ensure that the cases were dealt with strictly in accordance with law and legal principles and in an objective manner.

8. The Administration further advised that, where appropriate, some criminal cases were briefed out with the objective, among others, of promoting a strong and independent local Bar by providing work particularly to the junior Bar, and of securing a pool of experienced prosecutors to supplement those within DoJ. This practice was also intended to help change the commonly-held perception that all prosecutors must be government lawyers whereas the private Bar can represent only the defence in criminal cases.

9. In respect of the concern of briefing out of cases to overseas counsel, the Administration advised that cases were briefed out to overseas counsel only where circumstances so warrant, having regard to, for example, complexity regarding points of law, significant constitutional, policy or financial implications or public interest, sensitivity of the issues involved, the legal representation of the opposite party, etc. Besides, admission of overseas barristers to conduct cases before the Hong Kong court was ultimately subject to the court's approval.

#### Briefing out of civil cases

10. Given that one of the stated objectives of DoJ's policy to brief out cases is to promote a strong and independent local Bar, particularly to the junior Bar, some Members raised queries whether DoJ would consider briefing out civil cases to a greater diversity of junior counsels in different sets of chambers.

11. The Administration advised that unless under special circumstances (e.g. the engagement of a junior counsel for a selected senior counsel in the same chambers for better work efficiency where the circumstances so required), the chambers to which a counsel belonged was not one of the considerations of selecting a briefed out counsel.

12. The Administration added that the selection of briefed out counsel for the handling of civil cases was made in accordance with established internal guidelines on briefing out so as to ensure propriety of the process and avoid any possible favouritism. For cases briefed out according to the approved fee

schedules, they were assigned to fiat counsel on a rotation basis. For cases briefed out not covered by the approved fee schedules, outside counsel were selected based on established selection criteria including the years of experience, suitability in terms of areas of expertise and availability for the case concerned, and the level of fees charged by the counsel concerned. Where appropriate, DoJ would allow junior counsel to participate in the handling of civil cases.

13. The Administration emphasized that while it supported the promotion of a strong and independent local Bar, such a factor was not and could not be the sole factor when briefing out civil cases.

#### Briefing out of Magistrates' Court cases to outside counsel

14. Noting that the conviction rate after trial of Magistrates' Court cases was about 49.4% in 2016, some Members enquired about the number of trial cases prosecuted by Court Prosecutors and fiat counsel respectively.

15. The Administration advised that in 2016, the number of cases conducted by fiat counsel in place of Government Counsel at the Magistracy level was 957. The number of court days undertaken by Court Prosecutors and that undertaken by fiat counsel in place of Court Prosecutors are 8 939 and 5 636 respectively. For cases with adverse rulings, the Administration had not maintained information on whether such cases were prosecuted by Court Prosecutors or fiat counsel, or the offences involved. The Administration pointed out that a lot of factors might affect the result of court cases (for example, whether witnesses come up to proof or whether new evidence emerged at a late stage), and these factors were not entirely within the control of DoJ or the prosecutors.

16. The Administration further advised that the caseload of criminal prosecutions in 2016 was around 150 000 cases while there were only around 70-80 public prosecutors working in the Magistrate Courts. Owing to the manpower situation in DoJ, the private bar had been employed to conduct prosecutions for a considerable number of cases in the Magistrates and the District Courts on a regular basis.

#### Expenditure on briefed out cases

17. Some Members raised enquiries about the average expenditure for briefed out cases. Some held the view that DoJ's practice of briefing out cases to counsels in the private practice with higher seniority would incur higher litigation costs to another side.

18. In response, the Administration advised that the expenditure for briefing out varies from case to case, depending on its complexity, number of defendants involved, number of trial days, the need for expert witnesses to testify, etc. It was therefore neither appropriate nor helpful to make a comparison amongst briefed out cases solely on the basis of their expenditure. Further, it was also not possible to provide the average briefing out expenditure for cases at the magistracy level because fiat counsel engaged to prosecute in the Magistrates' Court in place of Court Prosecutors were required to attend to all cases before a particular magistrate on each day or half day, hence their engagement was on court-day basis rather than case-base. The Administration also stressed that the Court would assess whether the legal costs were reasonable.

### **Question raised at Council meeting and other relevant papers**

19. A question relating to briefing out of cases by DoJ was raised at the Council meeting on 3 June 2015. The hyperlinks to the question and the Administration's response, together with other relevant papers which are available on the Legislative Council website, are listed in **Appendix II**.

### **Latest position**

20. At the work plan meeting with the Administration on 30 October 2017, the Chairman expressed concerns about the policy on briefing out of criminal and civil cases by DoJ. The Panel will discuss the matter with the Administration at the regular meeting on 26 February 2018.

Council Business Division 4  
Legislative Council Secretariat  
14 February 2018

## 本科律師及外判律師處理的案件數目及出庭日數

### Number of cases conducted and court days undertaken by In-house Counsel and Fiat Counsel

本科律師及外判律師處理的案件數目

Number of cases conducted by In-house Counsel and Fiat Counsel



本科律師及外判律師的出庭日數

Number of court days undertaken by In-house Counsel and Fiat Counsel



\* 包括裁判法院上訴案件、在上訴法庭和終審法院聆訊的上訴案件。

This includes magistracy appeals and appeals heard in the Court of Appeal and the Court of Final Appeal.

^ 包括限制令申請、死因研訊、保釋申請、訟費評定及高等法院的雜項程序。

This includes restraint applications, death inquests, bail applications, taxation of costs and High Court miscellaneous proceedings.

# 以四捨五入方式計算至最接近的整數。

The number is rounded up to the nearest whole number.

資料來源：《香港刑事檢控 2016》

Source: Prosecutions Hong Kong 2016

## Background brief on briefing out of cases by the Department of Justice

## List of relevant papers

Committee	Date	Paper
Council	3.6.2015	<a href="#">Hon Dennis KWOK raised a question on brief out cases</a>
Panel on Administration of Justice and Legal Services	23.1.2017	<a href="#">Minutes of meeting</a>
	18.7.2017	<a href="#">Minutes of meeting</a>
	30.10.2017	<a href="#">Minutes of meeting</a>
	29.1.2018	<a href="#">Administration's paper</a>
Finance Committee	1.4.2016	<a href="#">Examination of Estimates of Expenditure 2016-2017 (Reply Serial No. SJ032)</a>
	3.4.2017	<a href="#">Examination of Estimates of Expenditure 2017-2018 (Reply Serial Nos. SJ002, SJ004, SJ018, SJ023, SJ029, SJ031 and SJ037)</a>  <a href="#">Minutes of meeting</a>
	12.2017	<a href="#">FCRI(2017-18)19</a>

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