

**Submission to the Legislative Council Panel
On Administration of Justice and Legal Services**

**Response of the Hong Kong Bar Association
on Briefing-out in civil and criminal cases
by the Department of Justice**

1. On 26th February 2018, representatives from the Hong Kong Bar Association, Mr. Philip Dykes SC and Mr. Randy Shek attended the LegCo AJLS Panel (the “Panel”) to discuss the Bar’s observations on the Department of Justice’s (“DoJ”) Briefing-out practices. The DoJ representatives dealt with briefing out in criminal cases, commonly called ‘*fiat*’ cases¹, and briefing out in civil matters.
2. This paper aims to summarize those observations and, where appropriate, provide suggestions for improvement.

No Accessible Criteria for Briefing Out

3. The main criticism of existing arrangements, both for *fiat* cases and civil cases, was that the criteria for selection as counsel who would be given responsibility for conducting cases on behalf of the DoJ were not clear. Although some indication of how counsel would be selected in *fiat* cases was given through the procedures used to identify counsel who might prosecute in magistracies, there were no accessible criteria for civil cases.
4. In civil cases, the selection of counsel was said to be in accordance with ‘established internal guidelines’ which were said to ‘ensure propriety of the process and avoid any possible favouritism’: see paragraph 12 of LC Paper No. CB (4)619/17-18(04).
5. The DoJ is a recipient of public funds voted by the Legislative Council. As such, the Legislative Council is entitled to be satisfied that the criteria used by DoJ to select counsel to do

¹ ‘*Fiat*’ is a Latin word meaning ‘let it be done’. It relates back to a time when the Attorney General would give permission for a person to commence litigation which, but for the permission or ‘*fiat*’, could not otherwise be maintained except by the Attorney General himself. It is another Latinism in Hong Kong legal language that has outlived its usefulness

legal work on its behalf are in fact reasonable and fair and are applied in such a way that competent counsel with necessary expertise can have the opportunity to undertake such work. The general public has an interest too in seeing how public money is spent.

6. Ensuring that a wide range of counsel is available to do this work is a way of ensuring that significant sums of expenditure are value for money.² As part of its oversight responsibilities, the Legislative Council needs to be satisfied that criteria for selection do not discriminate against counsel on grounds that have nothing to do with his or her legal ability.
7. There would appear to be no arguments against DoJ committing itself publicly to a statement that counsel will be selected to do government work on a non-discriminatory basis.
8. Such a statement would complement the Bar's own rules governing the acceptance of instructions. Subject only to specific provisions concerning availability, competence in the subject matter of the case, conflict and a few other exceptions, Rule 6(1) of the Bar's Code of Conduct requires a barrister to accept instructions irrespective of the nature of the case and the party who provides them.
9. The AG for England & Wales publicizes the criteria used to select counsel for central government legal work. The English AG is also committed to ensuring that the selection process is not discriminatory. The current statement about this process (March 2018) on the UK Government website (www.gov.uk) includes this statement:

“The Attorney General operates an equal opportunities policy in relation to the civil panels. The assessment process emphasises the importance of making recommendations for appointment on the basis of demonstrable skills.

The Attorney General appoints the best candidates solely on merit, irrespective of age, ethnic origin, gender, marital

² Paragraphs 6 and 7 of LC Paper No.CB(4)619/17-18(03) discloses that about \$100 million was spent on *fiat* cases in 2016-17 and that about \$200 million was spent on civil cases in the same period.

status, sexual orientation, political affiliation, religion, disability, or the chambers at which they practise.”

10. The English Attorney General also requires that chambers and barristers doing government legal work conform to set guidelines designed to secure equality of opportunity.³
11. The perception at the Bar is that selection of counsel to undertake civil work is not conducted fairly. No criteria for selection to do this work are published on DoJ's website. Many say that government legal work on the civil side is given to a limited number of barristers in only a few sets of chambers. There are others who have reported that, while they have written to the DoJ for inclusion in a list of counsel who are available to conduct cases for the DoJ and have been subsequently informed of their acceptance, they have not received any instructions from the DoJ. This lack of transparency is an avoidable source of resentment which could be avoided should selection criteria be published and counsel be permitted to apply to undertake legal work under those criteria.
12. On the criminal side, things are a bit more transparent because of the training programme that is held for barristers who wish to undertake *fiat* work. See paragraph 19 below.
13. Notwithstanding this greater degree of transparency, the same logic applies to criminal briefing-out as in civil cases and that DoJ should make a public commitment to seeing that *fiat* work is provided on a non-discriminatory basis. The English Crown Prosecution Service (CPS) has its own statement on equality and diversity principles that can be found on the CPS website. They are similar to the statement at paragraph 9 above.
14. On the same website the CPS publishes its selection criteria and gives details on how performance is monitored and what will happen in the event that an advocate is to be removed from a list. A feature of the system is that representatives from the Bar

1. ³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263359/Equality_and_diversity_expectations_statement_for_civil_and_criminal_panel_counsel.pdf

and Law Society are members of committees that select trial advocates and monitor their performance.

15. In the interests of transparency, the DoJ should consider the desirability of opening up the selection and monitoring processes in *fiat* cases. (Paragraphs 19 to 59 below deal with criticisms of the existing system.)

Protocols for *Fiat* Cases

16. Some counsel have commented on the variable quality of instructions received when cases are briefed out. CFI cases are usually accompanied with fairly comprehensive instructions; District Court cases have been reviewed by a professional officer, usually a public prosecutor from within the DoJ, but usually do not contain instructions identifying important points and issues; cases which are destined to be heard by a magistrate do not, as a rule, pass through the hands of a professional officer and the quality of instructions and 'back up' usually depends on the competence of a law enforcement officer who has no legal training.
17. There seems to be a good case for establishing protocols on which *fiat* cases are offered by the DoJ and accepted by barristers. In any case which will go to trial DoJ should offer, as a minimum, timely instructions which identify the issues in the case; deals with decisions made about unused materials; unless the legal issues are straight-forward, identifies any relevant case law or legislation and gives guidance as to proposed disposal of the case. The protocols should also deal with matters such as acting on the advice of trial counsel before trial on matters such as additional evidence, adding or amending charges, disclosure etc.
18. Such protocols exist in other comparable jurisdictions. In England & Wales a judge, Lord Justice Farquharson, drew up a set of protocols for the Bar and the CPS in 1986 setting out the respective roles and responsibilities of CPS officials and barristers. These protocols have been reviewed and revised over the past thirty years. Similar, and simpler, protocols exist governing the relationship between the Bar and the Office of Public Prosecutions, Victoria in Australia.

Inclusion into the List of *Fiat* Counsel

19. As noted by the DoJ's paper *Briefing Out Case of the Department of Justice* [CB(4)619/17-18(03)], it is the DoJ's policy to brief-out criminal cases "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." Those barristers who receive DoJ briefing-out instructions are customarily referred to as "*fiat* counsel" and "prosecuting on *fiat*".
20. Currently, the DoJ, along with the Hong Kong Bar Association and the Law Society of Hong Kong, runs a training program for those young lawyers, *i.e.* both solicitors and barristers with less than 5 years' post-qualification experience, who are in private practice and wish to become *fiat* counsel.
21. This training program consists of a one-day session divided into lecture and mock court components. Thereafter, trainees will be assigned to a 2-week placement in a magistrate's court to conduct prosecution for the DoJ.
22. This placement will also allow the DoJ to assess a trainee's suitability and competence for *fiat* work.
23. Once a trainee passes the training and the assessment process, he will be placed on the Magistrates Court "B" List. They would be instructed to prosecute cases in place of Court Prosecutors. The Bar's experience is that a qualified *fiat* counsel can expect to be instructed to prosecute in magistracies once every 4 to 6 weeks.
24. A "B" List *fiat* counsel is usually instructed to prosecute for 2 days. He will be responsible for handling all the cases fixed before a particular court during that time. It is often the case that a *fiat* counsel will handle multiple cases on a given day. In particularly busy courts, such as traffic courts, *fiat* counsel may be required to conduct 2 or 3 even trials in one day. *Fiat* counsel usually receive case papers 3 or 4 days (including weekends) before assignments.

25. “B” List *fiat* counsel are currently remunerated at \$7,020 per day on a full-day instruction, or \$3,490 on a half-day instruction.
26. The Bar welcomes the DoJ’s proactive involvement in developing the junior Bar. Not only will these opportunities provide practical advocacy experience, they are also a welcomed source of income as well as providing valuable insight into the role of the advocate in the criminal justice process. The training materials in particular are practical and provide useful guidance to make up for the lack of experience of young lawyers.
27. The Bar has three main concerns. The first is the process through which a young lawyer is enlisted as *fiat* counsel. The other the progression of *fiat* counsel from “B” List to “A” List, and then on to prosecuting in the higher courts. Finally, the rate of remuneration for *fiat* work falls far behind privately-funded work which makes it unattractive for more experienced and established practitioners to take up *fiat* work.
 - A) Selection Process
28. Some concern has been expressed about the transparency of the enlistment process. After an applicant completes the two-week placement, feedback on their performance varies from court to court. Some Senior Court Prosecutor I (“SCPI”), who are put in charge of supervising a “baby *fiat*” and assessing their performance, provide feedback while many others don’t.
29. Notification of failing or passing this 2-week assessment often took up to 6 months to be made. No explanations are offered for failure, neither are there any explanations of the criteria used in the assessment.
30. There have been reports of failed applicants not being allowed to re-apply. If an applicant failed the assessment, there does not appear to be any structured process for re-application.
31. Furthermore, it is not clear whether new applicants would receive priority over those who re-apply. Failed applicants often did not know whether they could re-apply to become *fiat* counsel.

32. It is suggested that a system of application, enlisting, and feedback be devised so that applicants can be informed of their application and receive useful feedback in better preparation for taking up *fiat* work in a timely manner.
- B) Instructions and Progression
33. After a *fiat* counsel is successfully enlisted into the “B” List, he will begin receiving instructions from the DoJ at a frequency of approximately once every 4 to 6 weeks.
34. There have been reports of *fiat* counsel receiving notice of passing “probation” after having been regularly instructed for over 7 years. The DoJ does not appear to have any clear policy on putting *fiat* counsel on probation after enlistment.
35. Assignment of *fiat* work generally proceed on a roster basis. *Fiat* counsel are offered a number of days in the week following and choice of court location when instructed to take up *fiat* work.
36. SCPIs at individual courts may have preference for certain *fiat* counsel and instruct them directly. Those instructions would then be given outside of the roster assignment at the DoJ. Since such assignments are made by, and depend upon, the preferences of individual SCPIs, there are concerns about favouritism.
37. SCPIs are generally a useful and often approachable source of guidance and advice; they can offer practical suggestions to inexperienced *fiat* counsel as situations arise. However, *fiat* counsel learn on the job by trial and error. There are no feedback provided to the younger *fiat* counsel and no suggestions of areas of improvement.
38. In this regard, continued training or refresher programs in the first few years may be beneficial to younger *fiat* counsel. Even administrative improvements such as providing case papers to *fiat* counsel well ahead of time can improve *fiat* counsel performance by allowing sufficient time for case preparation and research.

39. Timely provision of case papers is also very important for proper preparation of cases by *fiat* counsel. At the magistracy level, a case can proceed to trial without the case file being scrutinized by a qualified prosecutor at the DoJ. Instead, files are put together by law enforcement officers who do not have training in the presentation of a case at trial. There are occasions when *fiat* counsel only discover shortcomings in the preparation of case exhibits on trial day when they are provided with them for the first time. Similarly, where there are gaps or missing evidence in witness statements, or short-comings in disclosure, *fiat* counsel sometimes needs to scramble at the last minute to get the materials ready for court. This is often a source of irritation with the court. Situations like these could be easily avoided if case papers are made available to *fiat* counsel at least a week ahead of the trial hearings.
40. The “B” List differs from the Magistrates’ Court “A” List in that “A” List *fiat* counsel handle departmental summons and complicated cases that would otherwise have required Government Counsel to appear.
41. They are also remunerated differently. “A” List *fiat* counsel are instructed on a case-by-case basis at a brief fee of \$14,700 and daily refresher of \$7,340 per day.
42. There is no process or transparency in how a “B” List *fiat* counsel progress to the “A” List. There is also no assessment of competence for such progression. *Fiat* counsel simply do not know when and how one progresses from the “B” List to the “A” List.
43. It would be desirable to have a clear and structured progression system for *fiat* counsel to advance. There is no reason a *fiat* counsel at the private Bar could not perform on the same level as a Government Counsel to prosecute on the “A” List after a certain number of years of criminal litigation experience.
44. Similarly, there is no clear and structured progression of *fiat* counsel moving from the Magistrates’ Court’s lists to the District Court *fiat* counsel list, then to the Court of First Instance list.

45. The Bar points out that a practitioner should and would be competent enough to prosecute at the District Court or the Court of First Instance if they already qualify for receiving instructions from the Legal Aid Department to defend at those court levels. Progression of *fiat* counsel should be in step with progression in receiving instructions to defend.

C) Remuneration

46. The Government reviews duty lawyer fees, prosecution fees and criminal legal aid fees on a biennial basis to take into account of changes in the Consumer Price Index (C). Adjustments of prosecution fees can be made administratively without approval from the Legislative Council unlike criminal legal aid fees.

47. Since 1990, prosecution fees had been adjusted mainly in accordance with the general price movements on a biennial basis. Currently, the maximum fees for *fiat* work at various court levels are as follows:

<u>Court Level</u>	<u>Brief Fee</u>	<u>Court Hearing (per day)</u>
MC "B"	\$7,020	\$7,020 / \$3,490 (half day)
MC "A"	\$14,700	\$7,340
District Court	\$24,480	\$12,240
Court of First Instance	\$36,780	\$18,390

48. So long as prosecution fees are increased in step with fees paid by the duty lawyer service and criminal legal aid fees, the equality of arms between public-funded prosecution work and public-funded defence work would be maintained. However, infrequent significant adjustments in publicly-funded work would enlarge the fees differential between publicly and privately-funded work.

49. This in turn would discourage experienced and suitably qualified practitioners from undertaking publicly-funded work.

50. It is suggested that the Legislative Counsel should be aware of the consequences of approving the increase of criminal legal aid fees. This has the knock on effect of increasing prosecution fees and duty lawyer fees so that experienced and successful practitioners would be attracted to undertake publicly-funded

work. In turn, an enlarged pool of qualified practitioners would be available to perform *fiat* work at the expected level.

51. In addition to *fiat* prosecution work, the DoJ also offers the “understudy” program where counsel with less than 10 years’ experience can act as an understudy to Senior Counsel or senior junior counsel who is briefed to prosecute a complex and sensitive case. The understudy is remunerated at a daily rate of \$1,000.
52. Complex cases with the involvement of Senior Counsel (or senior junior counsel) are frequently cases that last many weeks at a time and require an immense amount of preparation. At a token monthly rate of \$20,000, most counsel, regardless of seniority, would find it difficult to meet their overheads and basic living requirements if they were to devote all their time to these complex cases.
53. As a result, the pool of junior counsel able to take advantage of this opportunity is limited. Ironically, this state of affairs defeats the DoJ’s intention to equip junior counsel with the experience and skills to prosecute cases.
54. It is suggested that DoJ should review and adjust this rate to a realistic level before considering expansion of this scheme to a wider range of criminal cases.
55. A realistic rate for the DoJ’s understudy program would also serve as a benchmark for other bodies such as the Securities and Futures Commission who would also find it desirable to implement similar program to train up young lawyers to prosecute on their instructions.
56. As a matter of suggestion, adopting a daily rate similar to that offered to Magistrates’ Court “B” List as a benchmark would be realistic and sufficient to attract more young lawyers to take up this opportunity.
57. Another observation the Bar has is that there is no structured procedure for enrollment into the understudy program. Interested candidates have no means to learn of these opportunities when they arise. DoJ should advertise this scheme and the criteria for selection.

58. The Bar sees no reason to confine this understudy program to criminal cases only. A similar program should also be available in civil cases where junior practitioners could be assigned to cases at the interlocutory stage or even earlier. (The English Attorney General sometimes retains barristers of at least two years call to undertake work ancillary to large cases but not involving any advocacy.)
59. The Bar takes the view that a transparent and fair process of selection would increase the pool of candidates and enhance the quality of those chosen to take part. In turn, a larger pool of suitably qualified *fiat* counsel would be available to take up prosecution work.

20th March 2018

HONG KONG BAR ASSOCIATION