



Briefing Counsel Policy

Last Update: October 2021

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SUMMARY

- 1. This document sets out the CDPP policy in relation to all aspects of briefing counsel and should be read in conjunction with the following documents:
(a) Nomination of Counsel (TechOne) e-learning modules
(b) Federal Counsel Group Framework

- (c) Counsel Dashboard in caseHQ and Guides for Setting Counsel's Fees on e-hub
- (d) CDPP Decision Making Matrix
- (e) National Model Gender Equitable Briefing Policy
- (f) Director's Finance Instructions and CDPP Financial Delegations under the Public Governance, Performance and Accountability Act 2013 (PGPA Act)
- (g) OLSC Legal Services Directions – but only in relation to matters which are not briefings for prosecutions or prosecution related matters.

## PURPOSE

2. The purpose of this policy is to:
  - (a) Provide consistency in our approach to briefing counsel across practice groups and regions.
  - (b) Ensure that the CDPP complies with our obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), applicable principles in the Commonwealth Procurement Rules (CPRs) and Conflict of Interest Policy in relation to the expenditure of public funds.
  - (c) Maximise the value of a brief fee by ensuring that all briefs to counsel are well prepared and provide clear instructions.

## DEFINITIONS

<i>External Agent</i>	Solicitor from a private law firm or regional police force member who acts as our agent
<i>External Counsel</i>	Member of one of the various state or territory Bar Associations
<i>Federal Advocate</i>	CDPP PFP level or equivalent lawyer working in the "Federal Advocate" position
<i>Junior Counsel</i>	Member of the Bar who has not "taken silk"
<i>Senior Junior Counsel</i>	Junior Counsel with significant experience at the Bar (generally 10+ years)
<i>Senior Counsel</i>	Member of the Bar who has "taken silk" (Senior Counsel (SC) or Queen's Counsel (QC))

## WHEN TO BRIEF

3. Any decision to brief external counsel or a federal advocate **must** be made by reference to this policy and in accordance with the CDPP Decision Making Matrix (DMM).
4. When making an assessment pursuant to this policy, matters relevant to complexity include, but are not limited to, the following:
  - (a) Novelty of offending or esoteric area of law
  - (b) Complexity or uncertainty of the offence provision
  - (c) Number of accused
  - (d) Known evidentiary difficulties
  - (e) Seriousness of offending
  - (f) Level of expertise required to deal with subject matter of the brief
  - (g) Witnesses at risk of incrimination
  - (h) Views of partner agency
5. Decisions based on the complexity of a matter need to be made having regard to the level of experience and/or expertise of the relevant case officer. The DMM sets out the **minimum** level of

approval required **before** counsel is engaged. This is separate from the approval required for a Nomination of Counsel in TechOne.

### Non-operational Work

6. Counsel may be engaged to assist in matters that are not directly related to any specific operational file where it is in the best interests of the CDPP to do so. A Branch Head will determine the decision to brief counsel in relation to non-operational matters. Examples of such matters include, but are not limited to:
  - Drafting or settling Offence Guides, Manuals or Templates
  - Presenting training and participating in workshops, conferences and focus groups
  - Providing assistance in the early stages of matters, particularly in regards to strategic decisions and early resolution
  - Project managing large and complex litigation
  - Assisting with post-trial reviews

### Brief Assessment and Advice

7. The **standard position** is that CDPP officers will assess briefs of evidence for the purposes of determining whether a prosecution should commence (or continue in the case of an arrest matter) in accordance with the *Prosecution Policy of the Commonwealth*. As an **exception** to the standard position, it may be appropriate to brief external counsel or a federal advocate to undertake a brief assessment in matters that are complex, sensitive or high profile or where there are time deadlines (including the need to meet a brief assessment target).
8. There may also be occasions where a CDPP officer undertaking a brief assessment will require advice from counsel on a specific legal issue, such as the likely admissibility of a key item of evidence. Using counsel in this way can be very efficient and enable a CDPP case officer to process a brief assessment in a more timely and effective way.

### Summary Matters

9. The **standard position** is that CDPP officers will do all appearance work in summary matters. This includes mention hearings, pleas, contested hearings, breaches and appeals against conviction and/or sentence. As an **exception** to the standard position, it may be appropriate to brief external counsel or a federal advocate to undertake summary work where:
  - (a) The matter is unusually complex, sensitive or high profile, significant to the referring agency, a test case or an appeal.
  - (b) It is more efficient to brief counsel.

### Indictable Matters

10. The **standard position** in relation to indictable matters is:
  - (a) *Committals* – CDPP case officer will appear at hearings associated with the committal phase of a matter, including bail applications, mentions and contested hearings, particularly in more straightforward matters where the issues are confined. As an **exception** to the standard position where it may be appropriate to brief external counsel or a federal advocate include circumstances where:

- (i) The matter is complex, sensitive or high profile, significant to the referring agency, a test case, or in matters where it is very likely that counsel will need to be retained for the trial or plea/sentence hearing. In these cases, it makes sense to engage counsel early.
  - (ii) It is more efficient to brief counsel.
- (b) *Trials* – CDPP case officer will brief either external counsel or a federal advocate to appear for the prosecution at the trial and any necessary pre-trial hearings where the expectation of the relevant Court is that trial counsel will appear.
- (c) *Plea/Sentence Hearing* – CDPP case officer will appear at plea/sentence hearings in more routine matters. External counsel or a federal advocate should be retained to appear in large, complex and high-profile sentencing matters. Where counsel has been briefed to appear at trial, they should be retained for the plea/sentence hearing.
- (d) *Appeals & Applications* – CDPP case officer will brief either external counsel or a federal advocate to appear on any appeals or applications that may arise in a matter.

### High Court Matters

11. The Director should be made aware of all applications for special leave to appeal to the High Court and should be given first opportunity to accept the brief to appear in such matters as counsel. The Director should also be kept informed of any case that has been listed before the High Court and of the progress of such matters. In every such case the Director should be given the opportunity to consider whether to appear on the hearing of any application for special leave.
- If special leave is granted (even in matters in which the Director has not appeared at the special leave hearing), the Director should be given a further opportunity to consider whether to appear at the full hearing. The Director should also be provided with an opportunity to review all written submissions prepared and proposed to be filed at either the special leave or full hearing.
- Absent the Director accepting the brief to appear, all High Court matters should be briefed to an appropriate senior counsel, supported by junior counsel in the preparation of written submissions and in any appearance before the Court.

### WHO TO BRIEF

12. The decision of who to brief is an important one. The decision is ultimately one for the CDPP and not for the partner agency, although regard should be had to any views expressed by a partner agency. The suitability and availability of federal advocates should always be considered.<sup>1</sup>

### External Counsel Panel

13. The CDPP has established a national Panel of junior counsel who are available for briefing by the CDPP. Junior counsel apply to be on the Panel and applications are assessed by LBI. The Panel is a group of junior counsel available for briefing by the CDPP who appear in the counsel dashboard in caseHQ with a “date joined the Panel” together with their current fee, if briefed previously.<sup>2</sup> The Panel approach allows the CDPP to increase the number of junior counsel briefed, improve gender equity in our briefing practices and ensure counsel briefed have up to date and relevant experience

<sup>1</sup> Any scheduling conflicts will be determined by the PGL overseeing the Federal Counsel Group having regard to the most efficient use of CDPP resources.

<sup>2</sup> If no fee is listed or counsel requests a fee rise prior to being briefed, guidance is available on the Briefing External Counsel e-hub page.

to undertake the work of the office. The **standard position** is that junior counsel on the Panel should be briefed. In appropriate circumstances, an **exception** may be to brief junior counsel who are not on the Panel. The CDPP does not have a Senior Counsel Panel and all suitable senior counsel should be considered available to undertake the work of CDPP as required.

### What level of experience/seniority is required?

14. It is very important that the right counsel be selected. The level of seniority or experience depends on the nature and complexity of the matter, value for money as well as the nature of the work counsel is to do. This decision will be made in consultation with your supervisor and Branch Head. In selecting counsel the case officer should, within reason:
- identify a range of counsel in the relevant practice area;
  - actively consider engaging new counsel in appropriate matters with a view to expanding the pool of suitable counsel available to undertake the work of the CDPP; and
  - regularly monitor and review the engagement of counsel<sup>3</sup>.

### Briefing Senior Counsel

15. A decision to brief Senior Counsel will require the authorisation of the relevant Practice Group Leader. The **standard position** is that junior counsel (external or federal advocate) will be briefed to assist senior counsel. Any **exception** is a matter for the PGL. The names of Senior counsel currently briefed by the CDPP, together with their agreed daily and hourly fees, will appear on a search using the Counsel Dashboard in caseHQ. However, case officers are not limited to this list. New Senior counsel can be nominated and their fees negotiated in consultation with the relevant Practice Group Leader and LBI.

### Criteria to consider when briefing external counsel

16. Choosing appropriate external counsel entails making a professional judgment and ensuring that the method of decision-making complies with CDPP's obligations under the PGPA Act, Commonwealth Procurement Rules and the CDPP Conflicts Policy. The following is a non-exhaustive list of matters to consider when choosing counsel:
- (a) Search the caseHQ Counsel Dashboard (and, for junior counsel, preferably choose those who are members of the CDPP Panel) and don't look to always brief the same counsel. The CDPP needs to continually expand the range of able counsel familiar with our work.
  - (b) Consider briefing junior counsel in the less complex matters.
  - (c) Agencies have an obligation to select counsel for their skills and competency independently of their gender. In selecting counsel, the CDPP should ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief. Whilst counsel should be chosen for their skill and competency, the CDPP has adopted the National Model Gender Equitable Briefing Policy and is committed to ensuring its counsel arrangements and briefing practices are transparent and equitable in every respect. This requires that in recommending counsel, wherever possible and where availability permits, the names of at least two male and two female barristers are put forward for consideration by the person approving the briefing (usually the branch head).
  - (d) Arbitrary and prejudicial factors must not operate to limit the range of counsel being considered. You should ensure that any actual, potential or perceived conflicts of interest with counsel are identified, disclosed and managed in line with the CDPP Conflicts Policy and Disclosure Procedure.
  - (e) Consider briefing counsel located outside the relevant region when there is difficulty finding suitable and available counsel in a region.

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<sup>3</sup> LBI reports annually to the Law Council, bi-yearly to branch heads and quarterly to ELG on gender equity and diversity of briefing.

- (f) Consider briefing counsel who held CDDP briefs that have “fallen over”, where they are deemed to be of appropriate experience for the new brief. For example, counsel may have been briefed for a 6-week trial that resolved into a plea on the first day of the trial.
- (g) Care needs to be exercised in cases where the barrister we are considering briefing for a prosecution is the same barrister that was involved in giving advice to the relevant investigative agency on the matter. Whilst there are efficiencies from the CDDP’s perspective in using counsel who is familiar with the matter, there are also potential risks in doing so. For example, where a matter is particularly finely balanced in terms of the evidence, it will be important to ensure that the counsel we use brings an objective mind to the case. Where counsel has been exposed to compulsorily obtained material that will not be available to the prosecution, it will not be appropriate to brief that counsel. Ultimately it will be a question of applying common sense and judgement and approaching matters on a case by case basis. Whilst these issues tend to arise in some ASIC and ACCC cases, they might arise in other situations as well. Where a case raises this issue, case officers will need to escalate the use of such counsel to the relevant Branch Head or PGL for discussion and decision.

## STEPS INVOLVED IN BRIEFING COUNSEL

17. The following steps are involved in briefing counsel:
- (a) Determine the level of seniority required and whether you will brief a federal advocate or external counsel.
  - (b) If briefing a federal advocate, obtain approval pursuant to the DMM.
  - (c) If briefing external counsel, search using the Counsel Dashboard in caseHQ (including for relevant expertise) and, wherever possible and where availability permits, nominate two male and two female barristers.
  - (d) Obtain approval pursuant to the DMM, check availability and determine how much preparation time is required (see further below).
  - (e) Create a Nomination of Counsel (NOC) for approval in TechOne pursuant to the DMM or, if there is no operational file, a Non-Matter Related NOC. Include in the NOC some brief reasons for the selection of counsel (particular expertise, availability, complexity).
  - (f) Send counsel a memorandum, relevant materials and a counsel fee letter (using the national letter of engagement template) setting out the fee structure and general terms and conditions.

## HOW TO BRIEF

### Type of Brief Fee, Calculation of Preparation, Proofing and Conferencing Allowances

18. There are three alternative fee structures used when briefing external counsel:
- (a) Daily fee - the most common fee structure and used when counsel is briefed to appear.
  - (b) Hourly fee - often used where counsel is briefed to provide an advice. A daily fee and hourly fee can be combined. The hourly fee paid by the CDDP is calculated on the basis of 1/7<sup>th</sup> of the daily fee.
  - (c) All in fee - sometimes used when counsel is briefed to provide advice or appear in an appeal, or where a short appearance is required, such as a mention or to take sentence or judgment.
19. You need to estimate and set limits on what is appropriate for counsel to be paid by way of preparation, proofing of witnesses and conferencing. Amounts allowed for preparation, conferencing and proofing must be justifiable. If the amounts allowed are not sufficient, or something in the nature of the brief changes unexpectedly, then the amounts allowed can be revisited. Determining how much time to

allow for these things, if any, requires careful consideration of the following factors on a case-by-case basis:

- The preparation time already built in to the daily fee (see national letter to counsel);
- The complexity of the matter in general and whether there are any particularly complex legal or evidentiary issues counsel is required to consider;
- The nature of the offending;
- How long it will take to read the brief and other relevant material;
- The estimated length of the hearing and potential pre-trial applications;
- The number of prosecution witnesses and how many are likely to require proofing with counsel;
- The necessity to call “expert” witnesses and expected duration of conferences with them;
- The need for counsel to draft or settle particulars or admissions;
- Whether counsel has any prior knowledge of the matter;
- Experience of counsel in similar matters; and
- Whether counsel has been provided with evidentiary aids such as detailed spreadsheets and/or summaries to settle rather than having to produce these.

### Setting counsel fees

20. The counsel dashboard in caseHQ contains set daily fees for junior and senior counsel who have already been briefed by the CDPP. There are also a number of counsel appointed to the CDPP panel and senior counsel on the dashboard who are yet to be briefed and have no set fee. If you intend to brief counsel without a set daily fee, follow the instructions outlined in the Guides for setting external junior or senior counsel fees.
21. Other than in exceptional circumstances, the **standard position** is that once a fee has been set any increase to that fee will only be considered by LBI during the biennial fee review and will be dependent upon the level of work counsel has performed for the CDPP during the previous 2 years and the experience that has been gained in Commonwealth matters in doing so, whether the current fee is appropriate to counsel’s seniority as benchmarked in the internal fee bands, and how long counsel has been on that fee. Any requests from counsel for fee increases outside of the biennial fee review can only be approved by the CSPP, via LBI as set out in the Guide to External Counsel Fee Increases.
23. If counsel’s fees are increased (as part of this review process or otherwise) the new fee will only apply to new briefings (i.e. a new matter) or to briefings in a new phase of an existing matter. That is, if counsel is already briefed by the CDPP at the time of a fee increase, the new fee will not apply in relation to the current phase of the existing matter (i.e. it will not apply part way through an existing retainer). However the new fee *will* apply to a new phase of an existing matter (e.g. a trial brief where the previous retainer was for the committal). Where counsel is briefed in the new phase after a fee increase, a new retainer letter with the new fee must be sent to counsel.
24. An **exception** to this standard position may apply where there is likely to be a significant delay between the date of the fee increase and the matter proceeding or concluding in the existing phase. This may arise where, for example, the fee rise occurs early in an existing retainer in a long running matter where little work has been conducted by counsel, or the fee rise may occur at a stage where the trial or hearing is vacated and not relisted for an extended period. In such cases, the relevant PGL should be consulted and may decide in his or her discretion to approve a variation of the retainer so that the new fee applies mid - way through an existing retainer. In such cases, LBI should be informed so that arrangements can be made with the Finance team for receipting and payment of invoices for work conducted by counsel at both the existing and new fee rates.



**Nomination of Counsel (NOC)**

25. Before external counsel is formally engaged, a Nomination of Counsel (NOC) needs to be created and approved through TechOne. If there is no operational file, a Non Matter Related NOC must be created. For instructions on how this is to be done, please see the e-learning module “Creating a NOC – Non Matter Related”.
26. The following table<sup>4</sup> sets out the **minimum** level of approval required for the NOC, based on the daily brief fee of junior and senior counsel when briefing counsel in prosecutions and related proceedings:

Level of Counsel & Daily Fee Proposed	Branch Head	Practice Group Leader	CSPP	Director
Junior Counsel up to \$2000 per day (GST incl.)	X			
Junior Counsel up to \$2500 per day (GST incl.)		X		
Senior Counsel up to \$3500 per day (GST incl.)		X		
All counsel up to \$5000 per day (GST included)			X	
All counsel at any daily rate				X

**Counsel Fee Letter**

27. It is necessary to send counsel the Counsel Fee Letter and have a signed copy of that letter returned before proceeding to provide counsel with their brief. There is a national template letter.

**Memorandum / Observations to Counsel**

28. It is important to provide counsel with all material and information necessary in order for them to perform at their optimum for the CDPP. All briefs to counsel require a formal “Memorandum to Counsel” also referred to as “Observations for Counsel”. A thoroughly prepared memorandum reduces counsel preparation time and therefore cost. Memoranda will differ, depending on the nature of the brief and the individual circumstances of the matter, however all **must** include a chronology, a copy of the relevant offence provision(s) and Chapter 2 of the Code as at the time of the offences.
29. The memorandum should clearly and concisely:
- Set out what counsel is briefed to do and the timeframes, for example, to appear for the informant at a committal proceeding at (Location) Court on (date) and listed for (No.) days.
  - Set out any issues which urgently require counsel’s attention in the lead up to the hearing. If the settling of documents or advice is required, make that clear at the outset and clearly (**preferably in bold**) state any deadlines for the filing of documents etc.
  - Advise whether the defendant is represented, and if so, by whom and contact details.
  - Advise the name of the investigating agency, case officer at that agency and contact details.
  - List / index all documents enclosed with the brief (do not provide originals but copy documents only). The documents enclosed will generally include:

<sup>4</sup> Note:

- Staff should consult the [CDPP Financial Delegations Matrix](#) for details on maximum amounts of expenditure that can be authorised per level.
- The NOC is a secondary process to the decision to engage counsel in the first place, as set out in the “When to Brief” section above. Notably only the Director and Practice Group Leaders can engage senior counsel.
- Regard should be had to the Office of Legal Services (OLSC) fee approval process [Appendix D to the *Legal Services Directions 2005* entitled “Engagement of Counsel”] where counsel is briefed **other than in “criminal prosecutions and related proceedings”** ie typically civil litigation in which CDPP is a party. CDPP is otherwise exempt from these Directions when briefing counsel in prosecutions and related proceedings, which includes the “non-operational” work set out at paragraph 6 above [see General Notes 4 and 5 of the Directions].



- Counsel’s copy of the brief ;
- Copies of any documents filed with the Court by the prosecution and/or defence;
- Anything disclosed to the defence pursuant to the CDPP disclosure policy;
- Photobooks and electronic evidence on USB / CDs (telephone intercept, listening device product and surveillance);
- Any other materials (statements and exhibits) the prosecution wishes to rely on that do not form part of the brief and exhibit that is not within the brief;
- Charts or spreadsheets prepared by yourself or the investigating agency for the purposes of analysing the brief. Distinguish between documents produced by witnesses and documents created for the assistance of the prosecution team only;
- Prior history of the accused;
- In-house materials relevant to CDPP policy, for example, offence guides (but be aware of any document marked “confidential” or “for internal use only”). Consider extracting portions from such material in the form of giving instructions to counsel in the body of the memorandum.
- Copies of authorities / rulings to be relied upon, including unreported;
- Any in-house advices or submissions prepared by solicitors or other counsel, including your own submissions on the sufficiency of evidence (discuss with your Branch Head first); and
- Other relevant material, for example, previous memoranda, summaries prepared by you, correspondence between CDPP and informant or defence, defence subpoenas etc.

- (f) A summary of the facts which refers to all charges. Advise or seek clarification as to whether charges require amendment.
- (g) List all the witnesses to be called and briefly summarise their evidence.
- (h) Advise of logistical issues such as whether video link facilities or interpreters are required.
- (i) Advise of the CDPP policy on proofing witnesses (see NLD) and offer your opinion on which witnesses will require conferencing.
- (j) Results of any preliminary research you have undertaken and your views on issues which will assist counsel in undertaking the task briefed, for example, observations on matters of fact or law; evidentiary difficulties; reliability of witnesses; issues in dispute; any negotiations to date. Do **not** just bundle the documents together and expect counsel to find his or her way to the issues.

30. Advice briefs or briefs to appear on appeals or applications will also require memorandum/observations for counsel but the contents of the brief going to counsel will differ depending on the nature of the brief.

### Timing of Brief

31. Counsel should be briefed well in advance of any hearing date, or the date by which advice is required. If you are required to brief counsel at short notice it is very important that counsel are aware of the time-frames in relation to the matter.

### Your role as instructor

32. It’s important to remember that, notwithstanding that counsel is briefed to advise and /or appear on behalf of the office, the ultimate responsibility for the running of the case rests with the case officer and the office. It’s essential that CDPP case officers ensure they have a deep understanding of the evidence and the legal issues and that whilst counsel provide advice, ultimately it is critical we make our own judgment about whether we accept that advice. As issues arise, they should be discussed with your PTL and branch head as well as with counsel before deciding on a particular course.

33. The CDPP's relationship with counsel is an important one. The counsel we brief play a vital role in ensuring that our cases are prepared and presented to a high standard and they are a crucial part of the prosecution team. Dealings and discussions with counsel should always be conducted professionally and respectfully. This is particularly so where counsel has a different view to the office's view on the approach to take on a matter, or an aspect of a matter. In those situations, careful communication will be important, and making an offer to meet with counsel face to face, to discuss particular issues or to arrange for counsel to have access to the decision maker may be appropriate.