



### Briefing Counsel Policy

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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) Instructions set out in the “Counsel CRIMS Policy” and “Counsel Nomination” in the CRIMS Manual
  - (b) Federal Counsel Group Framework
  - (c) External Counsel Panel
  - (d) CDPP Decision Making Matrix
  - (e) National Model Gender Equitable Briefing Policy
  - (f) Appendix D to the *Legal Services Directions 2005* entitled “Engagement of Counsel”

## PURPOSE

2. The purpose of this policy is to:
  - (a) Encourage CDPP lawyers to think creatively about the way in which external counsel may be used. Whilst counsel are often engaged to advise and appear in matters before the courts, there is no reason why counsel should not also be used for non-operational matters where it is efficient and in the best interests of the CDPP to do so.
  - (b) Provide consistency in our approach to briefing counsel across practice groups and regions.
  - (c) 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 Conflicts Policy in relation to the expenditure of public funds.
  - (d) 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 CRIMS.

### 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 manage large and complex litigation
  - Mentor staff, especially in relation to advocacy and trial preparation
  - Assisting with post-trial reviews
7. To ensure compliance with the PGPA Act, Commonwealth Procurement Rules and CDPP Conflicts Policy, a project plan should be completed and submitted with the external NOC (template attached).

### Brief Assessment and Advice

8. 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).
9. 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

10. 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

11. 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.

- (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* – Where counsel has been briefed to appear at trial, they should be retained for the plea/sentence hearing. Where there is an early indication that the matter will proceed as a plea/sentence hearing prior to counsel being briefed, then the CDPP case officer will appear.
  - (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.
12. **Exceptions** to the standard position where it may be appropriate to brief external counsel or a federal advocate include circumstances where:
- (a) The CDPP case officer is unable to appear due to conflicting court or other commitments and it is not practicable or efficient for another CDPP officer to appear.
  - (b) The CDPP case officer is absent from the office, for the court hearing and/or during the preparation time and it is not practicable or efficient for another CDPP officer to appear.
  - (c) The CDPP case officer’s supervisor is of the opinion that it is in the best interests of the CDPP for someone other than the officer to appear. For example, the complexity, sensitivity or profile of the matter is such that it requires briefing, either internally or externally; or it may be more efficient to use external counsel or an agent.

### High Court Matters

13. The Director is to be offered the brief as Senior Counsel in all High Court matters. If the Director is unavailable, the matter is to be offered to an appropriate Senior Counsel. In all High Court matters both senior and junior counsel must be engaged for both drafting written submissions and appearances.

### WHO TO BRIEF

13. 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 Junior Counsel Panel

14. The CDPP has established a national panel of junior counsel who are available for briefing by the CDPP. The Panel is a time-limited list of counsel available for briefing by the CDPP together with their current fee.<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 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 Panel does not apply to Senior Counsel.

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<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, contact LBI. Further information is available on the External Counsel panel e-hub page.

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

15. 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 wide range of counsel in the relevant practice area;
  - actively consider engaging such counsel; and
  - regularly monitor and review the engagement of counsel<sup>3</sup>.

### Briefing Senior Counsel

16. 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 **exceptions** is a decision for the PGL.

### Criteria to consider when briefing external counsel

17. 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) Check the External Counsel 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 barristers 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, 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.
  - (f) Consider briefing counsel who held CDPP 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.

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<sup>3</sup> LBI will report bi-yearly to branch heads and quarterly to ELG on gender equity and diversity of briefing.

## STEPS INVOLVED IN BRIEFING COUNSEL

18. 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, check availability and complete a proposal to engage federal counsel.
  - (c) If briefing external counsel, check the External Counsel Panel and 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) Prepare a Nomination of Counsel (NOC) on CRIMS for approval pursuant to the DMM or, if there is no CRIMS file, a Nomination of Counsel Commitment (external 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 setting out the fee structure and general terms and conditions.

## HOW TO BRIEF

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

19. 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 CDPP 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.
20. 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 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
- Whether counsel has been provided with evidentiary aids such as detailed spreadsheets and/or summaries to settle rather than having to produce these

### Nomination of Counsel (NOC)

21. Before external counsel is formally engaged, the Nomination of Counsel (NOC) details in CRIMS need to be completed and authorised. If there is no CRIMS file, a Nomination of Counsel Commitment (external NOC) must be completed and authorised. For detailed instructions on how this is to be done, please see the CRIMS manual documents “Counsel CRIMS Policy” and “Nomination of Counsel”.
22. 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:

Level of Counsel & Daily Fee Proposed	Branch Head	Practice Group Leader	Director
Junior Counsel up to \$2000 per day (GST incl.)	X		
Junior Counsel \$2001 to \$2500 per day (GST incl.)		X	
Junior Counsel \$2501 to \$5000 per day (GST incl.)			X
Senior Counsel up to \$3000 per day (GST incl.)		X	
Senior Counsel \$3001 to \$3500 per day (GST incl.)		X	
Senior Counsel \$3501 to \$5000 per day (GST incl.)			X

### Counsel Fee Letter

23. 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 template letter.

### Memorandum / Observations to Counsel

24. 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.
25. The memorandum should clearly and concisely:
- (a) 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.

<sup>4</sup> Note:

(1) the approval of the Attorney-General is required, via OLSC, for a brief fee of more than \$5000 per day (GST incl.)  
(2) 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.  
(3) Staff should consult the [CDPP Financial Delegations Matrix](#) for details on maximum amounts of expenditure that can be authorised per level.

- (b) 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.
  - (c) Advise whether the defendant is represented, and if so, by whom and contact details.
  - (d) Advise the name of the investigating agency, case officer at that agency and contact details.
  - (e) List / index all documents enclosed with the brief (do not provide originals but copy documents only). The documents enclosed will generally include:
    - 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)
    - 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 the CDPP policy on proofing witnesses 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.
26. 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**

27. 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.



## Name of Project

### Scope

- 1.
- 2.

### Methodology

- 1.
- 2.

### Key Deliverables

- 1.
- 2.

### Key Stakeholders

- 1.
- 2.

### Time Frames

- 1.
- 2.

### Progress Reports

- 1.
- 2.

### Budget

- 1.
- 2.

### Risk Management

- 1.
- 2.