THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

CRIMINAL BAR ASSOCIATIONS RESPONSE TO TWO COUNSEL CONSULTATION

Response to Consultation Questions

Question 1

1. **Should the criteria used to guide the prosecution decision making process regarding the instruction of two advocates / QC alone be aligned to the criteria used to determine decisions for the defence in legally aided cases?**

Response

It is a useful guide but should not be the only criteria. There are cases where although the defence have one counsel the prosecution require two. Multi handed prosecutions and cases where there are difficult questions as regards disclosure. In all cases there must be at least one prosecution counsel in court who is cognisant with the unused material. Unless that is the case the Crown's continuing duty disclosure can not be fulfilled. Ensuring this is so may well require two prosecution counsel on occasion.

Equally, there may be cases where the task of prosecution is relatively straightforward but the defence require two counsel. This often arises in multi-handed cases where the burden falls on those 1st on the indictment.

It is vital that the public and the users of the prosecution services (victims of crime and the police) have confidence that the system is working in their best interests.

Well drawn criteria should ensure that in most cases, where public funds provide two counsel for a defendant the Crown is so represented.

The criteria should be looked at carefully where the defence are privately funded. The instruction of two defence counsel in such cases is very much led by those instructing and is often not truly reflective of a need for two counsel.

This demonstrates that the system must be sufficiently flexible that the correct decision in respect of two counsel and representation by a silk (or senior TC) and junior is taken.

Recommendations Under Question 1

1. **The Criteria should be amended to ensure there is no disparity as between prosecution and defence. The criteria should not be altered to affect the level or quality of representation judged objectively.**

Question 2

2. **How important is equality of arms in relation to prosecution and defence representation, in both legally aided and privately funded defence cases?**

Response

It is absolutely essential. However, equality of arms is not synonymous with having counsel of the same status. Equality of arms as regards representation means that the prosecution and each defendant have proper and adequate representation commensurate with the complexity of facts and/or law necessary for the preparation and presentation of their respective cases. In some instances the circumstances might call for parity of representation as we have pointed out above in others they may not.

What must not be allowed to happen is that cost cutting is allowed to reduce the standard of that equality of representation on both sides. In that instance injustice is

potential caused to both victim and defendants. Securing the acquittal of a guilty man or the conviction of an innocent one. Recently, comparative legal aid figures have been released which purport to show that the per capita cost of legal aid is considerably higher than the rest of Europe. These figures, as must be known within Government, show no such thing because they are not comparing like with like. In Europe they have an investigation led by the judiciary. The burden of a criminal investigation falls on them with input from both the prosecution and defence. In the UK that is not the case. The comparative European Legal Aid figures do not include the cost of the judiciary or their investigations. If those figures are added in, the alleged marked disparity is wiped out and in some case proves more costly than in the UK.

Recommendations Under Question 2

1. **The instruction of two Crown counsel should be automatic in all cases where a publically funded defendant is so represented. Subject only to the exceptional circumstance which would require written justification.**

<u>Question 3</u>

3. **Does the CPS criteria address the relevant considerations, if not how should they be changed?**

Response

The decision tree is in our judgement wholly inadequate and is not designed to appoint counsel taking into account the true seriousness or difficulties presented by a case. We have seen the suggested considerations set out in the Appendix to the response provided by Treasury Counsel's room and we would endorse them. We highlighted some matters which we consider essential.

a) **The issue of the proper, fair and efficient management of unused material.**

It should be a specific criterion taken into consideration when determining the level of representation. It is imperative that the prosecution is able to fulfil its disclosure

obligations both pre trial and on a continuing basis throughout the trial. It is in the interests of all participants in the criminal justice system that management of unused and disclosure are given the proper attention they deserve. Failure to do so causes delay, considerable extra cost, can and do lead to substantial injustices to victims, families and defendants alike. This is a factor unique to the prosecution and should be explicitly recognised in the decision making tree. If the disclosure process is going to function properly and fairly at least one law officer, whether it be a solicitor or barrister who has a complete working knowledge of the unused material must be present in court throughout the trial proceedings.

b) **The extent of pre-trial preparation of documentation**

Compliance with Criminal Procedure Rules (for example bad character, hearsay) the Heavy Fraud Protocol (and other such protocols relating to the prosecution of fraud), that require the prosecution advocate to prepare substantial pre trial documentation. The extent of such work should be also be a specific factor.

c) Where the defence level of representation changes

In order to ensure equality of arms, there should be a trigger in place to allow for an automatic "re-review" if / when defence levels of representation change and/or the complexity of the case changes.

d) Availability of assistance at court from a paralegal / caseworker

We do not agree with the CPS that this is a relevant consideration. It is a rarity that a paralegal / caseworker is available throughout the prosecution case and never once the defence case commences. In the current climate, paralegal recruitment, beyond the replacement of loss through retirement etc., in the foreseeable future, is unlikely given the limitations of the Comprehensive Spending Review, as they are fixed costs. On the other hand, the recruitment of a self employed junior counsel to assist a QC in what would otherwise be a silk alone case might be possible and desirable.

Recommendations Under Question 3

1. **The Decision Tree should be re-drawn so that the appropriate decision is taken in each case according to the nature of the case, its serious and complexity. All matters set out in the Appendix to Treasury Counsels response should be reflected.**

Question 4

4. **How should the cost to public finances be taken into account when determining the instruction of two advocates or QC?**

Response

We are of the opinion that public finances should never be a factor taken into consideration if the case does in fact require the instruction of two advocates. To argue to the contrary would suggest that an inadequate level of representation is permissible to save money. It would be wholly irresponsible and almost certainly counter-productive to suggest that a funding issue should permit inadequate representation, leading to potential mistrials and miscarriages of justice.

However, we recognise that the cost to public finances is not irrelevant. The instruction of two advocates must be properly scrutinised and only granted where the relevant criteria are met. However, criminal litigation is unpredictable and dynamic, where cases fall on the borderline they should be resolved in favour of the instruction of two counsel. The presence of two counsel on a team might well reduce that delay to an absolute minimum, thus saving costs and court time as the junior can progress urgent out of court work while the leader continues with the conduct of the case in court.

In addition, there should be greater flexibility in the approach to reviewing the individual needs of a case. For example, there are those cases that give rise to discrete and novel points of law which clearly merit the instruction of leading or specialist counsel. However, if the case does not otherwise justify granting a certificate for two counsel, it may be appropriate to allow the instruction of a silk

merely to research, develop and argue the point of law and construction as a discrete pre-trial issue. The trial process could thereafter be undertaken by junior counsel alone. Silks are often brought in to argue matters in the Court of Appeal. If a novel or important point can be identified pre-trial, a silk could be brought in for that limited purpose.

Recommendation Under Question 4

1. **Every case should receive appropriate representation by counsel decided by a sure set of criteria to meet the nature, seriousness and complexity of the case. Public finances are not saved by doing otherwise. Inadequate representation merely causes costs to be incurred on another balance sheet.**

Question 5

5. As a point of principle, should the page and witness count for the prosecution criteria be fixed at the same level as the defence criteria?

Question 6

If yes, do you consider the figures quoted in the 2001 defence regulations (80 witnesses / 1,000 pages of evidence) to be an appropriate threshold for 2012?

Question 7

If no, do you consider that the figures quoted in the existing CPS criteria (90 witnesses / 2,500 pages of evidence) should be maintained or do you consider it appropriate to revise the figures to reflect current caseload figures (100 witnesses / 3,800 pages of evidence)?

We take these questions together. Page count as a criteria should be abolished. It is an artificial and arbitrary test which rarely reflects the seriousness or complexity of a case. By way of example only, cases of so called abusive head injury (at one time shaken baby syndrome) rarely if ever exceed the page count. But they are some of the most complex and difficulty cases both to prosecute and defend. If a proper considered criteria is adopted, as we and others suggest, a page count test has no relevance.

Recommendations Under Question 5,6 & 7

1. **The abolition of the page count criteria to be replaced by a set of considered criteria for the appointment of two counsel.**