



RESPONSE TO
CRIMINAL PROCEDURE RULE COMMITTEE
TRIAL AND SENTENCE IN THE CROWN COURT AND
PREPARATION FOR CROWN COURT TRIAL

(I) INTRODUCTION

1. The Criminal Bar Association is one of a number of organisations and individuals involved in the criminal justice system invited by the Criminal Procedure Rule Committee to respond to the proposal made by the Rule Committee to make new rules about procedure at trial in the Crown Court, including the procedure at trial for selecting jurors from the jury panel and associated new rules about preparation for Crown Court trial.
2. The Criminal Bar Association exists to represent the views and interests of the practising members of the criminal bar in England & Wales. Members of the Criminal Bar Association have experience of prosecuting and defending in trials of all kinds in the Crown Court, and in dealing with the Criminal Procedure Rules as they apply to Crown Court trials on a daily basis.
3. This is our response to the proposal.

(II) EXECUTIVE SUMMARY

4. In the light of the *Transforming Legal Aid* consultation and wider cuts to the budget of the Crown Prosecution Service, considerable changes are likely to result in the conduct of criminal proceedings in the Crown Court. Both prosecution and defence will have fewer resources to prepare and conduct criminal trials. The Criminal Bar Association welcomes the

centralisation of provisions governing the conduct of Crown Court trials within the Criminal Procedure Rules. Court users will find these provisions easier to locate and easier to understand.

5. The CBA does not have observations in respect of every proposal made by the Committee, but in summary, in addition to welcoming in general terms the proposed changes, it makes the following suggestions:

Proposed Rule 3

- In ensuring that the allegation, the effect on sentence of a guilty plea, and trial procedure have been explained to a defendant (proposed Rule 3.8(2)(c)), the Committee might give consideration as to how this is done with an unrepresented defendant.
- At proposed Rule 3.14, the notion of the “instructed advocate” may not survive the proposed changes to the remuneration scheme.
- At Rule 3.18, in relation to applications for an indication of sentence, the CBA considers that a 5 day period for reflection by the prosecution may not be necessary in every case and consideration might be given to changing the wording to reflect that.

Proposed Rule 38

- In respect of the proposed Rule 38.6, the CBA considers that the additional juror scheme has much to recommend it. It considers that 2 additional jurors should be the norm although this might be subject to increase where the interests of justice require it. The CBA respectfully suggests that the additional jurors should be integrated with the remainder of the jury for the purposes of directions and prosecution opening speech. The CBA further suggests that jurors to be deselected at the end of the prosecution opening speech should be chosen at random, rather than simply being the last two jurors to be called.
- In respect of the proposed Rule 38.14, the situation where the trial judge gives a list of questions to a jury should be extended to include the possibility of giving the jury written directions on the law.
- In respect of the proposed Rule 38.15, consideration might be given to making provision for adjourning sentence pending the outcome of a trial or re-trial of co-defendants.
- Rule 38.16 requires any party relying on a document to serve it on all other parties. This may not always be necessary (e.g. letters or statements supporting good character) and provision might be made for exceptions to this rule.

Proposed Rule 39

- The CBA considers that the requirement to give reasons to inspect the

jury panel after the trial has started is not one which has any statutory support and consideration might be given to whether this is necessary and appropriate.

6. The CBA's response to the questions posed by the Committee is generally in line with the views expressed in the paper and above.

(III) SUBSTANTIVE RESPONSE TO MATTERS RAISED

(i) **Observations on individual rules**

Part 3: Case management.

7. **Rules 3.1 – 3.7**

No observations.

8. **Rule 3.8**

This rule makes provision at the new paragraph 3 (c) for *inter alia* the court to ensure that it has been explained to a defendant and that he has understood the allegations, the effect of a guilty plea on sentence, and trial procedure.

In respect of this paragraph the CBA respectfully suggests that the Committee may wish to give consideration as to how and by whom the proposed explanations will be given to an unrepresented defendant.

9. **Rules 3.9 – 3.13**

No observations.

10. **Rule 3.14**

This rule relates to the defendant's obligations to serve a defence statement and witness notice. It also creates an obligation on the defendant to notify the court officer of the identity of the proposed advocate.

The CBA note the proposed obligation to warn the defendant of the potential consequences of the failure to comply with the requirements of

the Criminal Procedure and Investigations Act 1996. This reflects current practice.

The obligation to notify the court officer of the identity of the defence trial advocate and any changes to the identity of the trial advocate should in the respectful suggestion of the CBA be monitored as changes of advocate (and indeed the absence of any advocate) may become more frequent in the new financial environment. If last-minute changes do become more frequent, case management by the court may become more difficult. The CBA notes that the regulations governing the identification of the 'instructed advocate' for the purposes of legal aid may be subject to change very soon.

10. Rule 3.15

No observations.

11. Rule 3.16

This Rule relates to applications to stay a case for abuse of process.

The introduction of a rule to assist the court in managing applications to stay proceedings is welcomed by the CBA. Any increase in advocates who are more concerned with the time they spend on a case than the proper presentation of an argument makes this rule an invaluable protection for the defendant.

The CBA considers that a period of 14 days for the prosecution to respond should be sufficient in most cases where the abuse is a relatively simple point. In such cases where the abuse is lengthy and/or complex, the prosecution will no doubt be allowed an extension of time under rule 3.12 above.

12. Rule 3.17

The CBA welcomes the formalisation of applications for joinder and severance.

13. Rule 3.18

This rule relates to applications for an indication of sentence.

Although the CBA respectfully considers that this rule ensuring that an application for an indication of sentence is made in writing, is appropriate, necessary and a protection for future defendants, we conclude that some further thought might be given to paragraph (4).

Paragraph (4) directs that the court must not determine an application under this rule unless the prosecutor has had at least 5 business days in which to make representations.

Many applications for an indication of sentence are made on the basis that the defendant would be sentenced on the full facts put forward by the prosecution. In many of these cases, there will be no call for victim impact statements or such statements (along with the defendant's antecedents) will already be on the prosecution file. In such circumstances, it might create an unnecessary adjournment to prevent the court from determining the application unless the prosecution has had 5 days to consider the issue.

It is our experience that if the prosecution are not in a position to deal with sentence or any potential basis of plea, an advocate will properly apply for an adjournment which will be granted.

14. Rule 3.19

The CBA welcomes this provision relating to arraignment and does not consider that the mute of malice/mute by visitation of God provisions have any place in a modern criminal justice system.

15. Rules 3.20 – 3.26

No observations.

Part 38 Trial and sentence in the Crown Court.

16. Rules 38.1 – 38.5

No observations.

17. Rule 38.6

This Rule provides for selecting the jury.

The CBA notes that the proposition that a jury consists of 12 people is based on common law and has no statutory foundation (see *e.g.* 1 *Coke Institutes*, 154a). So far as the CBA is aware, the basis for a jury of 12 is the Biblical significance of that number, and it was adopted during the reforms to the justice system of Henry II during the twelfth century.

The CBA welcomes the alternative proposals in cases of length, and

considers that the end of the prosecution opening is the appropriate stage to discharge any supplementary or reserve jurors.

The CBA has some concerns that reserve jurors or the 13th and 14th additional jurors may under the proposed scheme be tempted to pay less attention to the prosecution opening or the judge's directions (notably on internet research) than the other jurors. In order to minimise this, the CBA respectfully suggests the Committee might give consideration to adopting the additional juror scheme, but then discharging any extra juror or jurors remaining at the close of the prosecution opening by random selection. The CBA respectfully suggests that this might also minimise any sense of exclusion felt by the supplementary jurors towards the remainder of the jury during recesses.

The CBA notes and adopts the other concerns expressed by the committee in respect of the reserve juror scheme.

18. Rules 38.7 – 38.13

No observations.

19. Rule 38.14

This Rule relates to the summing up of the case and taking the verdict.

After the trial procedure has concluded and the court sums up the case, the CBA respectfully suggests that the Committee might give consideration in the proposed subparagraph (1)(c) (relating to the provision of questions to the jury) to the situation where the court gives the jury written directions rather than questions, for example explaining the elements of a particular offence.

In addition, at subparagraph (2) the Rule goes on to consider the situation in the absence of a verdict, but after the trial procedure has concluded. The CBA respectfully suggests that the Committee might give consideration in subparagraph (2)(c) to making it clear that these powers to discharge juries from considering particular counts, inviting them to convict defendants or directing them to acquit, may in certain circumstances be exercised at any stage during the trial and do not require the procedure in rule 38.9 to have been concluded ("after following the sequence in rule 38.9" referred to in the preamble).

20. Rule 38.15

This Rule sets out the procedure if the court convicts a defendant.

The CBA respectfully suggests that provision may be made under subparagraph (7) relating to adjournment before sentence, for the possibility of adjournment to await verdicts in respect of co-defendants where it is in the interests of justice so to do.

21. **Rule 38.16**

This Rule sets out the requirement that documents which are provided for the court must be provided to all other parties and the jury where appropriate.

The CBA respectfully suggests that it is not always the case that each other party requires a copy of a document produced or used by the Crown or one defendant (*e.g.* evidence of good character), and consideration might be given to amending this rule to reflect that. Furthermore, it is hoped by the CBA that 'providing a copy' might include 'providing a copy electronically'.

22. **Rule 38.17**

No observations.

Part 39: Jurors

23. **Rules 39.1 – 39.4**

No observations.

24. **Rule 39.5**

This Rule creates provision for inspecting the jury panel.

The CBA is respectfully concerned that the imposition of the requirement on any party to give reasons for inspection of the jury panel after the jury has been selected is not one which has statutory support and suggests that fresh consideration might be given as to whether this is (a) necessary and (b) appropriate in the light of that.

(ii) Questions for consideration

25. ***(1) Should there be an explicit rule about applications to amend the indictment as well as a rule about separate and joint trials?***

The CBA respectfully agrees with the conclusion in the body of the consultation paper that there are sufficient general procedural powers to accommodate applications to amend the indictment. The CBA is not aware of any problems either procedural or otherwise that have been raised that would necessitate a change. The CBA does not consider that the mere requirement for a 'greater degree of formality' is in itself sufficient reason to require an explicit rule for applications to amend. In relation to separate and joint trials, there are no observable objections.

(2) Should the rules preserve the once practice of selecting a jury to decide whether a defendant who declines to plead is 'mute of malice' or 'mute by visitation of God'?

The CBA considers that there is no compelling reason to retain the practice. Determining an inability or refusal to speak may be adequately addressed through the availability of intermediaries, medical and mental health assessment and fitness to plead hearings. The CBA considers there is no special reason that a jury would be better placed or required to decide the same issue. The CBA considers that there is also no particular detriment to the defendant's rights under the HRA.

(3) In connection with the suggested provision for additional or reserve jurors:

(a) Should the rules provide only for one or other scheme, and if so which? Or should the rules allow courts a discretion to choose either?

The CBA is of the view that the rules should provide only for the additional juror scheme. It is important that the jury is a united body from the beginning, and the CBA is concerned that if certain jurors perceive themselves to be "second class" jurors, they may be less tempted to follow e.g. the opening statement from prosecution counsel, and more tempted to take a casual view of directions from the trial judge in relation to e.g. looking matters up on the internet.

Thus the CBA recommends that the additional jurors take the same oath, and that when the time comes for discharging any juror or jurors no longer required, the selection should be undertaken randomly.

(b) What should be the criteria for the court's decision to retain additional or reserve jurors? Or should the rules allow courts a discretion to retain them in any case?

The CBA accepts that the six week/witness distress test set out in the draft Rule 38.6 is sensible and appropriate. The CBA would not however be in favour of extending the practice to other cases since the circumstances in which such a practice might be required are difficult to envisage. The CBA also concludes that the discharge of additional jurors should take place at the end of the prosecution opening speech and before any evidence is adduced.

(c) Should additional or reserve jurors take an oath, and if so in what terms?

The CBA considers it important that all jurors take the same oath. This would avoid creating the impression or result that the jurors are not equally bound or are of lesser standing.

(d) How many additional or reserve jurors should the rules allow courts to retain? Or should the rules allow courts a discretion to decide how many?

The CBA considers that the normal rule should be two, but that the court should retain a discretion to decide how many. See (b).

(e) On the release of additional or reserve jurors, should the rules require that they be released from further jury service on that occasion or should that be left to the court's discretion?

The CBA considers that the court should retain a discretion to decide whether the released jurors should be released from further jury service on that occasion. This would depend on the nature and particular circumstances of each case.

(4) Are the suggested criteria appropriate for the appointment of a person to put the case for the defence, where the defendant is found unfit to plead?

In the present financial climate, the CBA respectfully invites the Committee to consider whether this proposal is consistent with funding arrangements which may be in place. Otherwise the CBA has no further suggested criteria.

(5) Should any of the proposed rules be omitted and the matters with which it deals be removed to the Practice Direction?

The CBA does not consider that any matters should be either omitted or removed to the Practice Direction.

(6) Should any provision in the current Practice Direction be removed to the rules?

The CBA has not identified any matters in the current Practice Direction which could usefully be removed to the rules.

(7) Insofar as the rules incorporate legislation, do they do so accurately and clearly, or is there anything in them liable to

mislead the reader?

The CBA does not consider that there is anything in the proposed rules which is liable to mislead the reader.

(8) Bearing in mind that other, existing, Criminal Procedure Rules will apply, are there any additional procedure rules needed and, if so, about what?

The CBA has not identified any additional procedure rules which are needed.

(IV) **SUMMARY**

26. The CBA broadly welcomes the proposals in the report. The additional jurors proposal is one which the CBA considers systematises differing practices in court centres around the country and is sensible. The CBA has some suggestions to make but hopes that they are not controversial and simply reflect existing practice and the changing financial landscape.
27. The increasing concern is whether those instructed to prosecute and defend trials in the Crown Courts in the future have the time and resources to fulfil their obligations under these Rules.

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11 June 2013