

## The Instruction of more than one Trial Advocate or QC Alone

### Crown Prosecution Service (CPS) Consultation

#### Introduction

1. The CPS prosecutes over 100,000 defendants in the Crown Court each year who are committed, sent or transferred for trial. Of those, about 17% are tried before a jury.
2. In every case the CPS has to decide the appropriate level and number of advocates to instruct for the prosecution, in particular whether to instruct:
  - A Junior advocate alone
  - A Queen's Counsel (QC) alone
  - A Leading junior advocate with a led junior
  - A QC with a led junior

[Note: For CPS purposes all members of the Senior Treasury Counsel team are treated as being QC equivalent]

3. The decision making process requires careful thought. It is axiomatic that cases must be properly prosecuted to a high standard with appropriately skilled advocates but it is also the case that government departments have to live within tight financial constraints and the use of two advocates or QC increases the cost of advocacy over a junior advocate alone. This creates a tension in the decision making process.
4. The purpose of this consultation is to seek views from interested individuals and groups on the criteria used by the CPS to determine decisions on the instruction of more than one trial advocate or QC alone.
5. The views received in response to the consultation will help to inform a review of the criteria.
6. This paper sets out the current position and contrasts the criteria which guide the prosecution decision against those which apply for the defence in legal aid cases. The CPS criteria are contained within a document known as 'the decision tree', attached at annex A. In addition to the decision tree the CPS has an authorisation form to ensure that decisions are taken at an appropriate level, based on necessary information, and properly recorded.
7. The criteria which apply to defence applications for the extension of legal aid representation orders to more than one advocate, or to a QC alone, are contained within Regulation 14 of the Criminal Defence Service (General) Regulations 2001. An extract of the Regulations can be found at annex B or in full at: <http://www.legislation.gov.uk/ukSI/2001/1437/regulation/14/made> .
8. In initiating this consultation we invite comment on the CPS decision tree criteria generally and specifically in relation to the following questions:
  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 legal aid cases?**

2. **How important is equality of arms in relation to prosecution and defence representation, in both legal aid and privately funded defence cases?**
3. **Does the CPS criteria address the relevant considerations, if not how should they be changed?**
4. **How should the cost to public finances be taken into account when determining the instruction of two advocates or QC?**

#### **The CPS Criteria**

5. The CPS revised its decision making process in relation to the instruction of two trial advocates / QC alone in July 2009, including a revised decision tree and the introduction of an authorisation form. This followed a ruling of the Recorder of Leeds, His Honour Judge Peter Collier QC, on an application for two advocates for the defence, and the introduction by Her Majesty's Courts and Tribunals Service (HMCTS) of a new form and guidance for defence applications to extend representation orders.
6. The revised CPS decision tree was designed to guide CPS operational staff through a consistent and logical process to determine the appropriate level and number of advocates for a case based on the following:
  - i. the number of defendants separately represented and volume of material in the prosecution case (witnesses and/or pages of evidence)
  - ii. substantial novel or complex issues of law or fact
  - iii. substantial complicating factors of gravity, sensitivity, complexity or responsibility
7. The CPS authorisation form provides a consistent process for reviewing lawyers and decision makers to determine the level and number of advocates appropriate to a case and an audit trail. The process requires the reviewing lawyer to consider and record a number of key factors including the nature and complexities of the case, the impact on cost and the proposed division of work between trial advocates.
8. In February 2012, the CPS extended the remit of the authorisation form to include formal approval of all decisions on the level of instruction in murder case, even where it is proposed to instruct a junior advocate alone.
9. The frequency and level of support provided to single trial advocates in court, either by a paralegal officer or noting junior should not be a factor which impacts decision on the number of advocates to be instructed. This is considered to be a separate issue which can be more effectively and economically addressed by the provision of more in-court support to a single advocate, rather than by the instruction of a second advocate.

#### **Her Majesty's Courts and Tribunals Service Process**

10. The current HMCTS process was introduced in November 2008. Defence applications for the extension of representation orders to more than one advocate, or to a QC alone, fall to be considered in accordance with Regulation 14 of the Criminal Defence Service (General) Regulations 2001.
11. All applications must be made using HMCTS Form 5138 (11.08). Applicants are required to confirm the number of witnesses and volume of the case

## CPS Consultation – August 2012

papers together with the trial estimate. In addition, they are required to confirm details of any substantial novel or complex issues of law or fact which could not be adequately presented except by the level of representation applied for.

12. Additionally, where an application is being made, either in whole or in part, based on parity with the prosecution, the applicant is required to endorse the names of the prosecution advocates and, in multiple defendant cases, explain why parity is necessary.
13. The decision to refuse or grant the application is generally made by a High Court Judge, Resident Judge or the nominated trial judge.

### **Comparison between Defence and Prosecution Criteria**

14. The criteria being applied by CPS, for the prosecution, and by the court, for the defence in legal aid cases, are contained in a single table for comparison purposes at annex C.
15. As can be seen, the criteria used for the prosecution and defence are broadly similar, although there are some differences.
16. In some instances the differences relate to issues specific only to the prosecution, such as consideration of the number of defendants being prosecuted. In others, however, such as the volume of evidence, the considerations apply equally.
17. This consultation invites comment on whether the criteria for prosecution and defence should be broadly analogous or whether, given the distinct roles performed by prosecuting and defence advocates, the criteria should be reflect those differences.

### **Volume of material / Number of witnesses**

18. The defence Regulations 2001 contain threshold volumes of served material which can act to trigger a higher level of representation, namely 1,000 pages of prosecution evidence and 80 prosecution witnesses respectively.
19. Upon reviewing the prosecution criteria in 2009, the CPS increased the threshold volumes of evidence and witnesses to 2,500 pages of prosecution evidence and 90 prosecution witnesses respectively. This reflected the increased size of cases between 2001 and 2009 evidenced through data on the average number of pages / witnesses in two counsel cases. The increase in the size of cases has been caused by a number of factors, but these include the relatively new phenomenon of electronic and telephone evidence and transcripts of digitally recorded interviews which add bulk to the page count. The increase to the threshold volumes also reflects the ability of advocates to use electronic search tools to help sift and search evidence.
20. A review of graduated fee scheme data for the period July 2011 to June 2012 reveals that the average number of witnesses in two advocate cases is now 101 and the average page count has increased further to 3,838 pages.
21. The consultation also invites comments on the following:
  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?**

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?**
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)?**

### **Equality of Arms**

22. In assessing an application to extend representation orders for the defence the court takes into account the number and/or level of advocate instructed on behalf of the prosecution. However, the number and/or level of advocate instructed by the defence are not currently factors considered as part of the prosecution criteria.
23. The CPS guidance requires consideration of the potential issues in the case and the complexity of evidence when determining the appropriate number and level of advocates. Although no direct reference is made in the CPS guidance to defence representation, this may be taken into account particularly where the case under consideration is a complex multi-handed case.
24. It is noted that in many cases the number and level of advocates to be instructed on behalf of the prosecution is determined at the outset and in advance of the court determining the level of defence representation. In such circumstances, reference to the defence position is unlikely to be a consideration.
25. It is worth noting that in privately funded defence cases some wealthy defendants secure representation by QCs and led juniors even where the defence case could be competently handled by a junior advocate.
26. The consultation invites comment on whether the level and number of counsel instructed by the defence should form a separate and specific consideration as part of the CPS criteria and whether this applies equally to legally aided and privately funded defence representation.

### **Impact of cost**

27. As part of the authorisation process the reviewing lawyer must make an assessment of the impact on the cost of advocacy which is likely to result if the level of representation is increased.
28. This is an important factor to be aware of but it does not currently form part of the routine decision making criteria although it becomes more relevant in borderline cases.
29. It is recognised that any increased cost met directly by the prosecution could be off-set by reduced costs for the court and other parties if the prosecution case runs more efficiently.
30. This consultation seeks views on how and to what extent the impact of cost should be taken into account when determining such applications.

### **Next Steps**

31. In respect of all these matters, you are invited to provide your response to questions 1 to 7, repeated below, and any other comment you consider

CPS Consultation – August 2012

appropriate, to Michael Hoare, Court Business Unit, Operations Directorate, CPS Headquarters, 2<sup>nd</sup> Floor, United House, York, YO1 9PQ or to [michael.hoare@cps.gsi.gov.uk](mailto:michael.hoare@cps.gsi.gov.uk) no later than 30 September 2012.

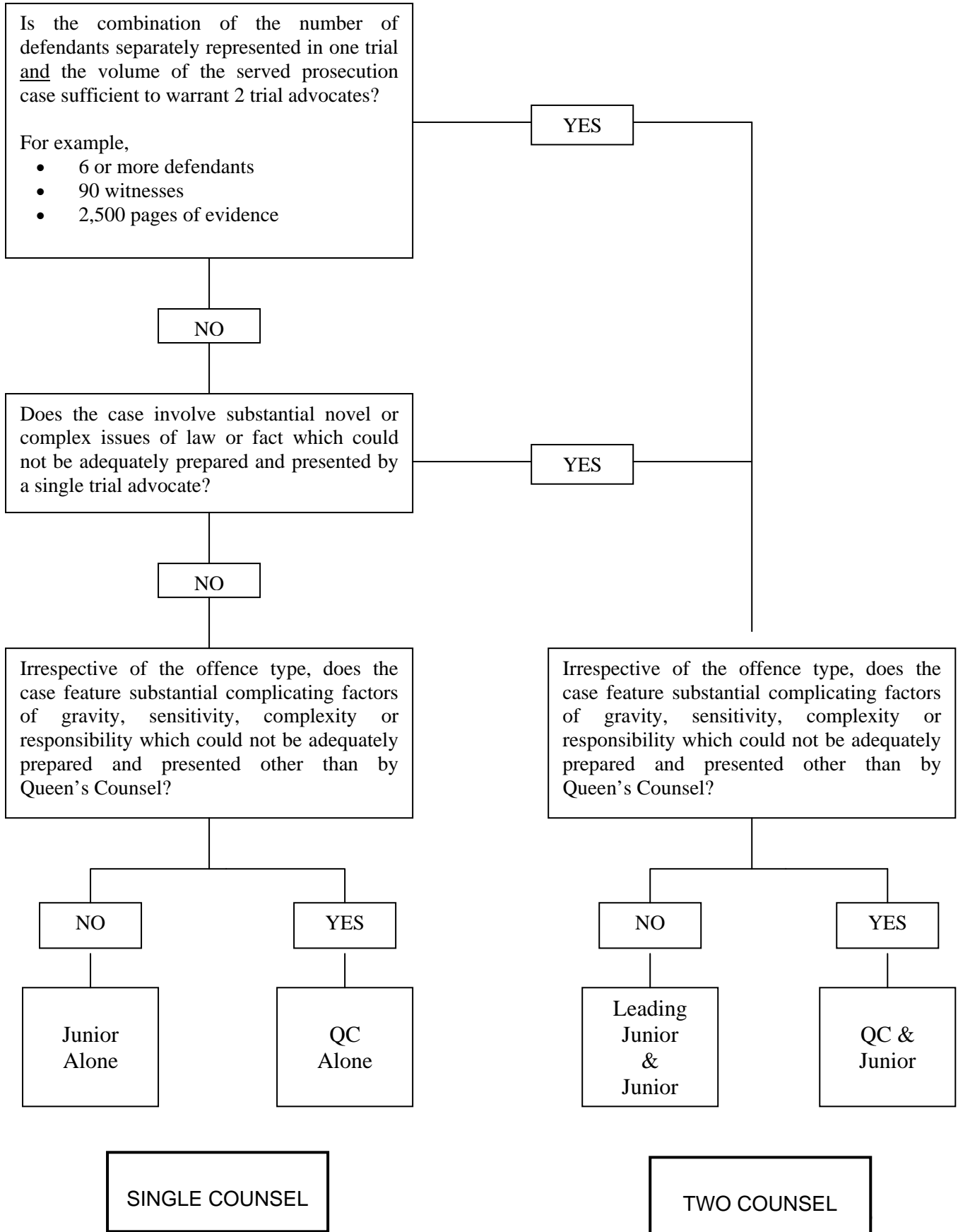
## CONSULTATION QUESTIONS

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?**
  2. **How important is equality of arms in relation to prosecution and defence representation, in both legally aided and privately funded defence cases?**
  3. **Does the CPS criteria address the relevant considerations, if not how should they be changed?**
  4. **How should the cost to public finances be taken into account when determining the instruction of two advocates or QC?**
  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?**
  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?**
  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)?**
32. Thank you for your consideration.

**Annex A**

**INSTRUCTING TRIAL ADVOCATES – DECISION TREE**

A trial advocate is counsel actively involved in the preparation and presentation of the case to the jury. A Disclosure Junior or Noting Junior is not treated as a trial advocate.



## **Annex B**

### **The Criminal Defence Service (General) (No. 2) Regulations 2001**

#### **Advocates in the Crown Court, Court of Appeal (Criminal Division) and House of Lords**

14. — (1) A representation order may provide for the services of a Queen's Counsel or of more than one advocate in respect of the whole or any specified part of any proceedings only in the cases specified and in the manner provided for by the following paragraphs of this regulation; and in this regulation "junior counsel" means any advocate other than a Queen's Counsel.

(2) Subject to paragraphs (3) to (9), a representation order may provide for the services of a Queen's Counsel or of more than one advocate in any of the following terms:

(a) a Queen's Counsel alone;

(b) where two advocates are required:

(i) a Queen's Counsel with a junior counsel;

(ii) a Queen's Counsel with a noting junior counsel;

(iii) two junior counsel; or

(iv) a junior counsel with a noting junior counsel;

(c) where three advocates are required:

(i) in any of the terms provided for in sub-paragraph (b) plus an extra junior counsel; or

(ii) in any of the terms provided for in sub-paragraph (b) plus an extra noting junior counsel.

(3) A representation order relating to proceedings in the Crown Court may be made in the terms of paragraph

(2) (a) if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel; and

(b) either:

(i) a Queen's Counsel or senior Treasury counsel has been instructed on behalf of the prosecution; or

(ii) the case for the assisted person is exceptional compared with the generality of cases involving similar offences.

(4) A representation order relating to proceedings in the Crown Court may be made in the terms of paragraph

(2) (b) (iii) or (iv) if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented by a single advocate; and

## CPS Consultation – August 2012

(b) either:

(i) two or more advocates have been instructed on behalf of the prosecution;

(ii) the case for the assisted person is exceptional compared with the generality of cases involving similar offences;

(iii) the number of prosecution witnesses exceeds 80; or

(iv) the number of pages of prosecution evidence exceeds 1,000

and for this purpose the number of pages of prosecution evidence shall include all witness statements, documentary and pictorial exhibits and records of interview with the assisted person and with other defendants forming part of the committal documents or included in any notice of additional evidence.

(5) A representation order relating to proceedings in the Crown Court may be made in the terms of paragraph (2) (b) (i) or (ii) if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel assisted by junior counsel; and

(b) either:

(i) the case for the assisted person is exceptional compared with the generality of cases involving similar offences; or

(ii) a Queen's Counsel or senior Treasury counsel has been instructed on behalf of the prosecution and one of the conditions in paragraph (4) (b) (i), (iii) or (iv) is satisfied.

(6) A representation order may be made in the terms of paragraph (2) (c) if and only if:

(a) the proceedings arise from a prosecution brought by the Serious Fraud Office;

(b) the court making the order considers that three advocates are required; and

(c) in the case of proceedings in the Crown Court, the conditions in paragraph (4) or (5) are satisfied.

(7) The fact that a Queen's Counsel has been or is proposed to be assigned under this regulation shall not by itself be a reason for making an order in any of the terms provided for by paragraph (2) (b) or (c).

(8) Where a Queen's Counsel has been or is proposed to be assigned under this regulation, no order in any of the terms provided for by paragraph (2) (b) or (c) shall be made where the case relates to an appeal to the Court of Appeal or to the House of Lords and it appears to the court at the time of making the order that representation can properly be undertaken by a Queen's Counsel alone.



## CPS Consultation – August 2012

(9) No order shall be made or amended so as to provide for representation:

(a) in the terms of paragraph (2) (b) unless the court making the order is of the opinion that the assisted person could not be adequately represented under an order in the terms of paragraph (2) (a);

(b) in the terms of paragraph (2) (b) (i) unless the court making the order is of the opinion that the assisted person could not be adequately represented under an order in the terms of paragraph (2) (b) (ii), (iii) or (iv);

(c) in the terms of paragraph (2) (b) (ii) unless the court making the order is of the opinion that the assisted person could not be adequately represented under an order in the terms of paragraph (2) (b) (iii) or (iv);

(d) in the terms of paragraph (2) (b) (iii) unless the court making the order is of the opinion that the assisted person could not be adequately represented under an order in the terms of paragraph (2) (b) (iv);

(e) in any of the terms provided for by paragraph (2) (c) (i) unless the court making the order is of the opinion that the assisted person could not be adequately represented under the corresponding order under paragraph (2) (c) (ii).

(10) Every application for a representation order in any of the terms provided for by paragraph (2), or for an amendment under paragraph (15), shall be in writing specifying:

(a) the terms of the order sought and the grounds of the application; and

(b) which of the conditions in paragraphs (3), (4), (5), (6) and (9) is relied upon in support of the order sought, and on what grounds it is contended that each such condition is fulfilled.

(11) A court may, before making a representation order in the terms provided for by paragraph (2) or amending the order under paragraph (15), require written advice from any advocate already assigned to the applicant on the question of what representation is needed in the proceedings.

(12) A court making a decision whether to make an order under paragraph (2) or to amend an order under paragraph (15) shall make annotations to the written application under paragraph (10), stating whether each of the conditions relied upon in support of the order made or sought is fulfilled.

(13) Subject to paragraph (14), a decision to make or amend a representation order so as to provide for the services of a Queen's Counsel or of more than one advocate may only be made:

(a) in the course of a trial or of a preliminary hearing, pre-trial review or pleas and directions hearing, by the judge presiding at that trial or hearing;

(b) where the proceedings are in the Crown Court, by a High Court judge, the resident judge of the Crown Court or (in the absence of the resident judge) a judge nominated for that purpose by the presiding judge of the circuit; or

## CPS Consultation – August 2012

(c) where the proceedings are in the Court of Appeal, by the registrar, a High Court judge or a judge of the Court of Appeal.

(14) A magistrates' court which may grant a representation order as respects any proceedings in the Crown Court by virtue of these Regulations may make:

(a) a representation order providing for the services of a Queen's Counsel without a junior counsel where the proceedings are a trial for murder and the order is made upon committal, transfer or sending for trial; or

(b) a representation order providing for the services of a Queen's Counsel with one junior counsel where the prosecution is brought by the Serious Fraud Office and the order is made upon receiving a notice of transfer under section 4 of the Criminal Justice Act 1987

but shall have no other power to make an order under this regulation.

(15) In proceedings to which paragraph (3), (4), (5) or (6) applies, a representation order may be amended:

(a) in any terms provided for by paragraph (2) in accordance with the provisions of this regulation; or

(b) to provide for representation by one junior counsel only.

(16) In every case in which a representation order is made under this regulation for the provision of funded services in terms provided for by paragraph (2) (b) or (c), it shall be the duty of:

(a) each representative:

(i) to keep under review the need for more than one advocate to be present in court or otherwise providing services; and

(ii) to consider whether the representation order should be amended as provided for in paragraph (15);

(b) Queen's Counsel, where the services of a Queen's Counsel are provided, to keep under review the question whether he could act alone.

(17) It shall be the duty of each representative, if of the opinion that the representation order should be amended as provided for in paragraph (15), to notify that opinion in writing:

(a) to the other representatives for the assisted person; and

(b) to the court

and the court shall, after considering the opinion and any representations made by any other representatives for the assisted person, determine whether and in what manner the representation order should be amended.

**Annex C**

**Comparative Criteria for Two Counsel or QC Alone**

The criteria for used in defence legal aid cases is taken from The Criminal Defence Service (General) (No. 2) Regulations 2001 and criteria for the prosecution from the CPS decision tree.

**QUEEN'S COUNSEL ALONE**

**DEFENCE**

The case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel; and either

i. a Queen's Counsel or senior Treasury counsel has been instructed on behalf of the prosecution; **or**

ii. the case for the assisted person is exceptional compared with the generality of cases involving similar offences.

**PROSECUTION**

The case features substantial complicating factors of gravity, sensitivity, complexity or responsibility which could not be adequately prepared and presented other than by Queen's Counsel.

**QC WITH JUNIOR OR QC WITH NOTING JUNIOR**

**DEFENCE**

The case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel assisted by junior counsel; and either:

i. the case for the assisted person is exceptional compared with the generality of cases involving similar offences; **or**

ii. a Queen's Counsel or Senior Treasury Counsel has been instructed on behalf of the prosecution and either; **or**

iii. the number of prosecution witnesses exceeds 80; **or**

iv. the number of pages of prosecution evidence exceeds 1,000

**PROSECUTION**

The case features substantial complicating factors of gravity, sensitivity, complexity or responsibility which could not be adequately prepared and presented other than by Queen's Counsel; and either:

i. the case involves substantial novel or complex issues of law or fact which could not be adequately prepared and presented by a single trial advocate; **or**

ii. the combination of the number of defendants separately represented in one trial and the volume of the served prosecution case sufficient to warrant two trial advocates.

For example,

- 6 or more defendants
- 90 witnesses
- 2,500 pages of evidence

## TWO JUNIOR COUNSEL OR A JUNIOR COUNSEL AND NOTING JUNIOR

### DEFENCE

The case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented by a single advocate; and either:

i. two or more advocates have been instructed on behalf of the prosecution; **or**

ii. the case for the assisted person is exceptional compared with the generality of cases involving similar offences; **or**

iii. the number of prosecution witnesses exceeds 80; **or**

iv. the number of pages of prosecution evidence exceeds 1,000

### PROSECUTION

The case involves substantial novel or complex issues of law or fact which could not be adequately prepared and presented by a single trial advocate; **or**

The combination of the number of defendants separately represented in one trial and the volume of the served prosecution case is sufficient to warrant two trial advocates.

For example,

- 6 or more defendants
- 90 witnesses
- 2,500 pages of evidence