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Consultation Document

Reform of legal representation provided by way of criminal
legal aid at the Crown Court

August 2009

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REFORM OF LEGAL REPRESENTATION PROVIDED BY WAY OF CRIMINAL LEGAL AID AT THE CROWN COURT

1.0 Introduction

- 1.1 The right to free legal aid for defendants being prosecuted at the Crown Court, who are unable to pay for their own defence, is a fundamental principle of the criminal justice system in Northern Ireland. This entitles a defendant to have a solicitor and counsel assigned to him/her to conduct his/her defence. For the more serious or complicated cases, the court may certify that a defendant should be represented by more than one counsel. In a very few instances this can mean a defendant being represented by three counsel though the normal position is that he/she is represented by two, usually a Queen's Counsel and a junior counsel.
- 1.2 The legislation that currently applies to certification in Northern Ireland has been in existence since the mid sixties. Equivalent legislation in England and Wales has been repealed and new regulations have been made setting out certain criteria that must be met in a case before the court can certify for two or more counsel. This has led to the position in Northern Ireland where proportionately more defendants at the Crown Court are represented by two counsel than in England and Wales.
- 1.3 The Northern Ireland Court Service (the Court Service) believes that a defendant's right to have more than one counsel must be maintained where the interests of justice and the right to a fair trial require it. However, the Court Service is conscious of the need to ensure that the finite resources allocated to legal aid are used efficiently and to the greatest good of all concerned. It is with these objectives in mind that the Court Service has developed the proposals set out in this consultation document that would regulate the assignment of counsel in Northern Ireland and bring this jurisdiction more into line with England and Wales.

2.0 Purpose of consultation

- 2.1 The purpose of this consultation document is to seek views on the proposal to regulate the circumstances in which two counsel could be assigned to defendants being prosecuted at the Crown Court.

3.0 How to respond

- 3.1 When responding to this consultation document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.
- 3.2 Please submit your response to this consultation by post, fax or email to:

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Bedford House
16-22 Bedford Street
BELFAST
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Tel: 028 9041 2241
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Closing date

- 3.3 Responses must be received by 18 December 2009.

Miscellaneous

- 3.4 Additional copies of this consultation document may be made without seeking permission from the Court Service. Printed copies may be obtained by post by contacting the Consultation Co-ordinator at the address below. An electronic version is available for viewing on the Court Service's website at <http://www.courtsni.gov.uk>

3.5 Please tell us if you know of others who would be interested in receiving this consultation document.

Confidentiality and complaints

3.6 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the information access legislation (that is, the Freedom of Information Act 2000 [FOI] and the Data Protection Act 1998 [DPA]). If you want information that you provide to be treated as confidential, please be aware that, under FOI, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.

3.7 In view of this, it would be helpful if you would explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system, or included as a general statement in your fax cover sheet will not, of itself, be regarded as binding on the Court Service and will be taken to apply, therefore, only to information in your response for which confidentiality has been requested.

3.8 The Court Service will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

3.9 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

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3.10 A copy of the consultation criteria being used in this consultation is set out in Annex A to this document.

4.0 Assignment of counsel in the Crown Court

Legislative position in Northern Ireland

- 4.1 The current legal aid system has its origins in the Legal Aid and Advice Act (Northern Ireland) 1965 (the 1965 Act). Using powers provided by that Act, rules governing the granting of legal aid for defendants being prosecuted at the Crown Court were made in 1966, namely the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 (the 1966 Rules). Rule 2(4) of the 1966 Rules provides that where the charge is one of murder, or the case appears to present exceptional difficulties, the court may certify that in its opinion 'the interests of justice' require that the person charged shall have the assistance of two counsel.
- 4.2 In 1981, the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (the 1981 Order) repealed the 1965 Act and put in place a new system for legal aid. Article 29 of the 1981 Order provides for the granting, by the court, of a criminal aid certificate in respect of persons returned for trial for an indictable offence and where such a certificate has been granted a defendant is entitled to have a solicitor and counsel assigned to him in such manner as may be prescribed by rules made under Article 36 of the 1981 Order.
- 4.3 On the basis that no rules were ever made under Article 36 concerning the assignment of more than one counsel, Rule 2(4) of the 1966 Rules remains the pertinent piece of legislation in Northern Ireland. In effect, the test on assigning more than one counsel in Northern Ireland is whether or not it is in the interests of justice to do so. In Northern Ireland, it is usual for the magistrates' court to grant the criminal aid certificate and apply this test following the making of an order committing the

defendant for trial at the Crown Court.

Legislative position in England and Wales

- 4.4 The position in England and Wales is that legal aid is governed by the Access to Justice Act 1999 (the 1999 Act). This Act, together with a range of secondary legislation, provides the framework for the legal aid system in that jurisdiction. The relevant legislation made under the 1999 Act is the Criminal Defence Service (General) (No 2) Regulations 2001 (the 2001 Regulations). Regulation 14(1) provides that a representation order, the equivalent of a criminal aid certificate in Northern Ireland, in respect of a defendant being prosecuted at the Crown Court automatically includes representation by one junior counsel. Regulation 14 also prescribes the circumstances in which more than one counsel may be assigned.
- 4.5 For a representation order to include a Queen's Counsel and one junior counsel, the following criteria set out in Regulation 14(5) of the 2001 Regulations must be met:
- (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 (below) is satisfied:

- (aa) two or more advocates have been instructed on behalf of the prosecution;
- (bb) the number of prosecution witnesses exceeds 80; or
- (cc) the number of pages of prosecution evidence exceeds 1,000.

4.6 For a representation order to include two junior counsel, the following criteria set out in Regulation 14(4) of the 2001 Regulations must be met:

(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

(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.

4.7 As in Northern Ireland, the granting of the representation order in England and Wales is usually done by the magistrates' court. Other than in murder cases and

prosecutions brought by the Serious Fraud Office, the assignment of more than one counsel, however, is a matter for the trial judge who must take account of the criteria set out above.

5.0 Comparison of data on the assignment of two counsel

- 5.1 To determine the position in respect of the assignment of two counsel in Northern Ireland as compared to England and Wales, the Court Service carried out a review using data from its court operations IT system and data supplied the Ministry of Justice in England and Wales. This data was organised and viewed by all Crown Court cases and then by Crown Court cases involving indictable offences only to remove the potential for disparity between the two jurisdictions, given the greater number of minor offences that are dealt with in the Crown Court in England and Wales. Viewing the data by all cases indicated that 41% of cases in Northern Ireland had two counsel assigned, whilst the figure for England and Wales was 2%. Viewing the data by indictable offences only, raised the figure in Northern Ireland to 58%, whilst in England and Wales it increased to 5%.
- 5.2 The two data sets were then organised and viewed by classification of cases as defined in the Legal Aid for Crown Court Proceedings (Cost) Rules (Northern Ireland) 2005, (the 2005 Rules) and the Criminal Defence Service (Funding) Order 2007, the corresponding instrument in England and Wales. The results of this analysis is set out in Tables A and B on the next page.

Table A - all cases

Class of case	Cases with 2 counsel instructed			
	% of cases		Number of cases	
	Northern Ireland	England & Wales	Northern Ireland	England & Wales
A (Homicide & related grave offences)	82	53	53	1384
B (Offences involving serious violence or damage, and serious drugs offences)	49	2	316	565
C (Lesser offences involving violence or damage, and less serious drugs offences)	32	0	116	97
D (Serious sexual offences, offences against children)	67	2	132	179
E (Burglary etc.)	5	0	7	2
F (Other offences of dishonesty under £30k)	20	1	11	91
G (Other offences of dishonesty over £30k)	34	7	75	324
H (Miscellaneous lesser offences)	22	0	30	33
I (Offences against public justice and similar offences)	8	1	1	44
Total	41	2	741	2719

(Note: Offences in E&W data falling within class J have been added to class D and offences falling within class K have been divided equally between classes F and G as no provision exists for classes J and K in the 2005 Rules.)

Table B - indictable offence cases only

	Indictable Only Cases with 2 counsel instructed			
	% of cases		Number of cases	
Class of case	Northern Ireland	England & Wales	Northern Ireland	England & Wales
A (Homicide & related grave offences)	90	55	53	1286
B (Offences involving serious violence or damage, and serious drugs offences)	61	2	259	463
C (Lesser offences involving violence or damage, and less serious drugs offences)	33	1	46	91
D (Serious sexual offences, offences against children)	78	3	53	147
F (Other offences of dishonesty under £30k)	20	2	1	61
G (Other offences of dishonesty over £30k)	50	13	5	233
H (Miscellaneous lesser offences)	49	1	19	17
I (Offences against public justice and similar offences)	9	2	1	38
Total	58	5	437	2339

(Note: Class E has been excluded as all class E offences are Hybrid, Indictable/Triable summarily. Again, offences in E&W data falling within class J have been added to class D and cases falling within class K have been divided equally between classes F and G as no provision exists for classes J and K in the 2005 Rules.)

5.3 From the tables it can be seen that there is a significantly greater instance of two counsel cases in Northern Ireland than in England & Wales. In Class A cases the difference is not as marked, which would be expected because it involves the more grave offences. However, in all other classes there is a significant disparity in the figures. The Court Service believes that this can be explained, at least partly, by the differences in legislation governing the assignment of counsel between the two jurisdictions.

6.0 Proposed reforms

- 6.1 It is proposed that the Court Service should introduce new rules governing representation in Crown Court cases. This would be on a similar basis to the regulations already enacted in England and Wales as they relate to certification for two counsel and would be achieved by bringing into effect the draft rules set out in Annex B to this document. This will also have the effect of removing the decision on assigning more than one counsel from the magistrates' court and placing it with the trial judge at the Crown Court where the responsibility may be better discharged.
- 6.2 It should be noted that the Court Service intends that the rules also act as a consolidating instrument to replace the Legal Aid Certificate Rules (Northern Ireland) 1966, the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 and the Legal Aid (Appeal Aid Certificates) Rules (Northern Ireland) 1966, which would be revoked. Moreover, the rules prescribe the new form of criminal aid certificates to be used when legal aid is granted in the magistrates' court and the Crown Court, and for appeals in the County Court and for extradition proceedings.

7.0 Savings

- 7.1 It is clear that by prescribing, more specifically, the circumstances in which two counsel can be assigned that the percentage of cases with more than one counsel will decrease. However, it is not possible to say whether the figures in Northern Ireland will align with England and Wales as the certification of more than one counsel will remain a judicial function.
- 7.2 The exercise carried out to assess the impact of a scenario where certification of more than one counsel assigned was aligned with England and Wales indicated that the savings could be as much as £2.0m annually. As the certification for more than one counsel will still retain some subjectivity and because more less-serious cases are dealt with in the Crown court in England and Wales, it is likely that the savings realised will be somewhat less than this. Nevertheless, it would not be unreasonable to assume that the annual savings will be in the region of £1.5m. Please see the impact assessment set out in Annex C to this document.

8.0 Conclusion

- 8.1 The Court Service believes that these rules will provide appropriate representation for defendants being prosecuted at the Crown Court in Northern Ireland. It also believes that the rules will assist in reducing unnecessary expenditure on criminal legal aid and establish the legislative framework for bringing the Northern Ireland jurisdiction more into line with England and Wales.
- 8.2 It is the Court Service's view that the new rules should apply to all criminal certificates granted under Article 29 of the 1981 Order on or after 1 February 2010.

9.0 Consultation questions

9.1 Introduction

The Court Service is eager to obtain the views of as many consultees as possible on the proposal to introduce rules to regulate the assignment of counsel, the draft rules and the impact assessment.

Questions

Q1. Do you agree that it is appropriate for criteria to be set down prescribing the circumstances in which two counsel may be assigned to a defendant?

Q2. Do you think that the criteria as set out in the draft rules are suitable for the cases being disposed of in the Crown Court in Northern Ireland?

Q3. What are your views on the trial judge only being able to assign two or more counsel to a defendant for proceedings at the Crown Court?

Q4. Should the Court Service seek to prescribe the circumstances in which the trial judge can assign three counsel to a defendant or Queens Counsel alone to a defendant as is the case in England and Wales?

9.2 All comments in relation to this consultation exercise are most welcome.

ANNEX A

CONSULTATION CRITERIA

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what the proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.



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