

LARGE SCALE CASE ADMINISTRATION WORK STREAM

DISCLOSURE COUNSEL

1. General guidance

- 1.1 Best practice dictates that generally it should be the lawyer in a case who examines and makes decisions on unused material. However, it has to be acknowledged that in certain instances, it is appropriate to instruct counsel to carry out this task (or a proportion of it) on their own or in conjunction with the lawyer in the case. This can conveniently be described as appointing disclosure counsel. Counsel is instructed to advise the prosecutor and may be instructed to endorse the schedules as to his assessment of disclosure decisions.
- 1.2 Such a decision will usually be taken where the volume or complexity of the material is such that it is inappropriate or impractical for the lawyer to carry out the task or where time constraints render it so. In addition, such a course may be considered where counsel has a particular degree of expertise, for example either because of the specialised nature of the material or because of knowledge of a linked case.
- 1.3 Such a decision is more likely to be made at the outset of an enquiry with a view not only to assessing unused material but also deciding which items should constitute the evidence relied upon. Counsel instructed may be the junior for the whole case or may be instructed solely to deal with the question of disclosure. Irrespective, they should be instructed for the duration of the case. Exceptionally large cases may require a team of disclosure counsel.
- 1.4 Before instructing disclosure counsel, it should be ensured that the necessary fiscal responsibility has been granted. Such an appointment should only be made where necessary and where there is material ready for counsel to consider.

2. Case management

- 2.1 Any decision regarding the appointment of disclosure counsel should be recorded in the Disclosure Policy Document.
- 2.2 The rationale for the appointment, the extent of the appointment and the scope of counsel's duties should be recorded in counsel's brief.

- 2.3 The instructions should cover sensitive and non-sensitive material. The non-sensitive material sections should be also included in the disclosure policy document to be sent to the court and defence.
- 2.4 Where appropriate, separate duties should be recorded for the various stages of a case – pre-charge, post-charge, service of case and trial. A copy of the Disclosure Policy Document should accompany the brief.
- 2.5 The instructions should in essence form part of a ‘contract’ between the prosecutor and counsel.

3. Selection of counsel

- 3.1 Only suitably experienced, competent and capable Counsel should be appointed who are familiar with the CPIA, the Code, the Attorney General’s Guidelines, and the JOPI.
- 3.2 They should be instructed in writing, although in many cases it would be beneficial to reinforce those instructions in a conference which is also a good opportunity to introduce Counsel to the SIO and Disclosure Officer, with whom he will have to liase closely. Instructions should refer Counsel specifically to the CPIA, the Code, the Attorney General’s Guidelines and the JOPI.
- 3.3 Very careful consideration should be given to the basis of any fees paid. They should always be agreed in advance with Counsel’s chambers. If agreement is reached on a daily rate, there should also be a time estimate of how many days counsel will be expected to perform his or her duties as a disclosure counsel wherever possible. Agreement should also be reached on the fee basis when counsel attends any subsequent trial.
- 3.4 Counsel’s duties should be set out, detailing the specific tasks required, including where necessary endorsing the unused material schedules with review decisions and preparing any written submission to the trial court in respect of any PII application. The arranging of such hearings remains the responsibility of the Prosecutor.
- 3.5 Specific reference should be made to the necessity of examining each item on the sensitive unused material schedule unless the description is such that it clearly renders such examination unnecessary.

- 3.6 A written advice on disclosure will be required (if necessary adopting and incorporating the endorsed schedules) and arrangements should be made for interim progress reports from Counsel, orally or in writing and at times as deemed necessary by the instructing prosecutor.
- 3.7 Counsel should be instructed to maintain a full, written audit trail of the work they have carried out.
- 3.8 It should be made clear in the instructions that counsel will be expected to be disclosure counsel in any forthcoming trial. In the normal course it would be very exceptional reasons that would prevent counsel's attendance at the trial, and accordingly counsel should make the necessary arrangements to make themselves available as early as possible.

4 Respective legal responsibilities

- 4.1 Section 2(3) CPIA states:

"References to the prosecutor are to any person acting as prosecutor, whether individual or a body"

The CPIA Code at paragraph 2(1) states:

"the prosecutor is the authority responsible for the conduct, **on behalf of the Crown**, of criminal proceedings **resulting from a specific criminal investigation**. Particular duties may in practice fall to individuals acting on behalf of the prosecuting authority"

- 4.2 Particular duties, including disclosure decisions, may be delegated to someone acting on behalf of the prosecution authority. Thus disclosure counsel may be regarded acting on behalf of the prosecutor for the purposes of the CPIA and Code.

- 4.3 The Attorney General's Guidelines distinguish between prosecutor and prosecution advocate, but prosecution advocates have to consider discharging their respective duty of continuing review under the CPIA:

"Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice and in accordance with the law. Prosecutors must also be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally." Guideline 13

"The prosecution advocate must continue to keep under review until the conclusion of the trial decisions regarding disclosure. The

prosecution advocate must in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.” Guideline 24

4.4 In the course of the trial prosecution counsel has a further discretion:

“After a trial has started, it is recognised that in practice consultation on disclosure issues may not be practicable; it continues to be desirable, however, whenever this can be achieved without affecting unduly the conduct of the trial.” Guideline 25

4.5 Regular consultation on disclosure issues in large-scale cases may also not be practicable, for example using more than one disclosure counsel for several months at a time dealing with large volumes of unused material held in several different places.

4.6 Whatever role or responsibility is given to disclosure counsel, the ultimate responsibility for all aspects of the case, including therefore disclosure, remains with the reviewing lawyer.

4.7 It is the responsibility of the reviewing lawyer to manage their case in a way that means this accountability is properly borne. This means taking all reasonable steps to set out clearly:

- the parameters of disclosure counsel’s role
- the tasks
- the level of autonomy
- the type of decisions that counsel can take
- the type of decisions that have to be referred to the reviewing lawyer.
- the role of disclosure counsel in any subsequent trial

4.8 This amounts in effect to an instructions ‘contract, which should be agreed with leading and junior counsel as well as disclosure counsel and evidenced in the policy document.