



Audit of the instruction of prosecution advocates in the Crown Court and the payment of counsel by the Crown Prosecution Service

Executive Summary

July 2009

*The audit was conducted contemporaneously with
and to inform HMCPsi's thematic review of the quality
of prosecution advocacy and case presentation*

Introduction

The selection of a prosecution advocate to take on the conduct of a case in the Crown Court is as important as thorough case preparation. They are under an obligation not only to present the case in court but also to provide to the Crown Prosecution Service (CPS) with advice on any legal issues and on any further work the advocate believes to be necessary. If the person selected does not have the correct level of experience there may be serious consequences in regard to the progress of the case and its outcome.

As part of the selection and instruction process the CPS provides the advocate with a brief which should include the evidence, an analysis of issues in the case and other vital documents. The standard of the brief is important as it is the only information that the advocate holds on the case. The quality of instructions to counsel has been an element of inspection for many years and has often been noted as a concern in area reports. It is also important that the brief is provided in good time for the advocate to be able to prepare thoroughly for the court hearing.

The timely payment of counsel for work carried out in respect of Crown Court cases is an aspect of performance that is regularly scrutinised by the CPS using its own performance measures and internal audits. There are guidelines for arrangements to pay counsel and areas have systems in place to ensure that they comply with them. This audit has examined the systems against the guidelines.

The effectiveness of systems for allocation of cases to both in-house advocates and the self employed Bar (counsel), the clarity of instructions provided to counsel and the efficient and timely payment of fees have always been essential to the effective operation of the CPS. Over recent years these processes and systems have become much more important as the CPS has rolled-out its advocacy strategy and started to undertake a significant proportion of its own advocacy in the Crown Court and across the full range of cases. This audit examines the efficiency and effectiveness of the handling by the CPS of those three stages (allocation, instruction, payment) and compliance with its own guidance and standards.

Allocation of Crown Court cases to an advocate

Cases should be allocated to an appropriate advocate taking into account their complexity and sensitivity and the experience and expertise of the advocate. Assessing the 'weight' of a case requires judgement on the part of either the lawyer involved or an experienced caseworker. In most of the country self employed counsel are given a grading by a Joint Advocate Selection Committee made up of members of the Bar and the CPS. There is a parallel system of grading for crown advocates (CAs) which had not been fully implemented by the time of this audit. The CPS/Bar Framework of Principles for Prosecution Advocates in the Crown Court (CPS/Bar Framework) provides for allocation of any case likely to be contested to be undertaken at least two weeks before the plea and case management hearing (PCMH), and furthermore that the selected advocate will be expected to retain the conduct of the case through to trial.

In some areas it was common place for the initial case allocation to be based on the availability of a CA to cover the case at the PCMH. Thereafter if the case is to go for trial as a result of a not guilty plea the brief is likely to be reallocated to a more experienced CA or to counsel. Overall the CPS is undertaking 58% of PCMHs in-house and this does not appear out of alignment with the approximate rate of 80% pleas of guilty in the Crown Court. However it ignores the rate of late pleas of guilty at or near trial and in-house coverage of PCMHs varied substantially around the country with between 28% to 89% being undertaken by CAs.

One of the major considerations of those allocating cases was meeting the target set for savings generated by the deployment of CAs rather than counsel in the Crown Court. The need for maximum deployment contributes to the late allocation of cases in some areas. Allocation is often delayed until the publication of the final Crown Court list to facilitate one CA undertaking up to five PCMHs in the same court room, as well as to avoid changes of advocate after receipt of the list.

In some areas when a not guilty plea was entered at PCMH the case was promptly reallocated to the trial advocate, whether it be counsel or CA. In others it was the practice to allocate a number of such cases generally to the pool of CAs and for there to be a late decision near the trial date as to whether a particular advocate was to be instructed or the case sent out to counsel. In either event there was an inherent risk of last minute work being necessary to prepare the case for trial. Additionally, the practice of reallocating cases for trial after the PCMH increased the risk that necessary action was delayed by several weeks because the trial advocate did not receive the case at the outset.

In the end cases were allocated to the right advocate in terms of experience and expertise, but in a significant number the practices meant that the CPS/Bar Framework was not being complied with. Additionally the instances of late allocation meant that necessary work was not undertaken at an early stage and this could impact upon readiness for trial and the quality of case presentation.

There was no training and minimal guidance available for the crown advocate clerks who coordinated the work of the CAs.

Instructions to the advocate

In preparing cases for committal or sending to the Crown Court CPS areas compile briefs to the advocate, whether in the event a CA or counsel is instructed. Counsel, and sometimes CAs, do not have direct access to the CPS case files until they are in court and so all information, evidence and documents necessary to prosecute a case effectively should be provided in the instructions sent to them. These should tell the prosecuting advocate what is required of them and provide the information and evidence necessary for this to be done. Briefs should be provided and read early enough to allow any further work required to be progressed in good time.

Of the 74¹ briefs examined 55 (74%) comprised mostly standard paragraphs with little or no information tailored to the particular case. Some staff commented that counsel no longer read briefs as they contained little of value. It was often hard to be certain what had been sent out due to incomplete lists of enclosures, poor organisation of documents and lack of endorsements. On some files it was unclear if work outstanding at the time of the last case review or evidence received after this had been dealt with. It would be helpful if relevant information that the CPS wishes counsel or the CA to know is highlighted at the front of the brief as this would provide a clear summary of what evidence had been seen and considered prior to its completion.

Lawyers were responsible for the content of the brief in all areas visited. This was nearly always prepared at the time of their review prior to committal or service of papers under section 51, Crime and Disorder Act 1998 and they had no further involvement in the instructions sent out.

In the past an experienced caseworker was allocated the case on committal and finalised the instructions and retained responsibility for it thereafter. In five areas this was now being done by level A2 casework support officers and cases were not allocated to caseworkers with Crown Court experience until after the brief has gone out (or at all in some areas). In these areas it was unclear if anyone with the relevant

1 Of the 80 cases seen six had no brief on the file or CMS. The audit therefore assessed the overall quality of 74 briefs.

experience to deal with correspondence or further evidence saw the file before the brief went out, or sometimes shortly before the PCMH.

The audit found that there was lack of clarity about who was responsible for cases at the various stages. Allocation and case 'ownership' bring accountability. Without allocation it is necessary to have a clear set of instructions to staff on the systems to be used for brief preparation, file management and endorsement. These are crucial to allow anyone picking up files to see quickly what has been done, when, by whom, and what is outstanding.

Returned briefs

In our file sample more cases were returned by CAs than counsel proportionate to the number allocated to each, indicating that counsel provided greater continuity at court and in case ownership. However a survey conducted by the CPS in the week of 23 March 2009 showed the opposite for late returns within seven days of the trial date.

There was an attitude that returns between CAs was not a matter for concern because this has no cost implications. However care needs to be exercised to aim for continuity, which is especially important in the more serious cases and can impact adversely upon case strategies and victim and witness care. The CPS expects case continuity from counsel where feasible and should aim for the same from CAs.

In some of those areas where it was the practice to reallocate cases following a not guilty plea at the PCMH there had been a return in every case after the first hearing.

Some areas continue to monitor the number of returns from counsel and will address any issues arising from this at meetings with counsel's chambers. Few areas recorded the number and reasons for returns between CAs and assessed whether this had had any influence on the outcome of the case.

If a brief is returned by counsel or a CA it should be reallocated to an appropriate advocate of at least the same grade or level. On a positive note we found that this was always done in the cases in the file sample.

Payment of counsel

It is proper for a public authority such as the CPS to ensure that counsel are paid in good time for work done. It is also beneficial to make timely payments to allow accurate budget planning.

Six of the eight areas visited had adequate or good systems in place to ensure that timely claims for payment are received and unpaid fees are identified. They also had systems to reconcile the amounts claimed with the work recorded on the CPS file. However, two areas were less successful.

Timeliness in all areas was nevertheless hampered by the inaccurate completion of the initial fee information sheet (FIST) to authorise payment. Poor file management and endorsements on the fee logs also caused difficulties in resolving anomalies between the work noted as done on the CPS file and that claimed for by counsel. Fee clerks often relied upon the record of work provided by the court rather than that on the CPS papers and some fees had gone unnoticed and unpaid due to poor recording.

Caseworkers completing the FISTs had not had training for some time and new caseworkers were trained by colleagues. There were concerns that sometimes incorrect instructions were passed on.

Most staff were not aware of their levels of financial delegation or what purpose this had under the graduated fee scheme.

The audit identified 21 compliance and action points which if implemented will improve the current service.

Compliance and action points

- 1 CPS Headquarters should either ensure that areas adhere to the CPS/Bar Framework of Principles for Prosecution Advocates in the Crown Court concerning the allocation of cases likely to be contested, or renegotiate the provisions (paragraph 3.9).

- 2 The CPS should identify at an early stage those cases which need to be handled by the same advocate throughout and establish suitable systems to achieve this, introducing a category in which the file is allocated with a view to the advocate retaining the case throughout, particularly in contested cases with victims (paragraph 3.21).

- 3 CPS areas should have a system in place to ensure that the date of allocation, name of the advocate to whom a case is allocated and any changes to this are recorded and notified to the caseworker and reviewing lawyer (paragraph 3.25).

- 4 CPS areas should ensure that individual advocates are instructed in good time prior to the plea and case management hearing for basic checks on the case (e.g. the correctness of the indictment) to be done, particularly in cases which are likely to go to trial (paragraph 3.25).

- 5 CPS areas must ensure that cases are allocated and checked for readiness before any hearing so that remedial action can be taken (paragraph 3.52).

- 6 CPS areas should seek arrangements with Crown Court listing officers which ensure that the legitimate interests of the Service are properly considered (paragraph 3.52).

- 7 The CPS should introduce guidance and training for crown advocate clerks to ensure consistency in the allocation of briefs and in managing deployment of crown advocates at court (paragraph 3.62).

- 8 The CPS should consider developing a more tailored and sophisticated diary system to assist crown advocate clerks (paragraph 3.67).

- 9 CPS areas should record the number of, and reasons for, returns from both crown advocates and counsel. This information should be used in an effort to reduce the number of returns (paragraph 4.10).

- 10 The CPS should reconsider the content and format of the brief preparation package to ensure the case specific content is in a prominent place where it can be identified and easily read (paragraph 5.36).

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- 11 CPS area managers should ensure that instructions to counsel are prepared with properly listed and marked enclosures, and copies retained on file (paragraph 5.36).
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- 12 CPS area managers should quality assure the content of the instructions to counsel or crown advocates (paragraph 5.36).
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- 13 CPS areas should put in place systems to assure the accuracy and content of the indictment prior to it being lodged (paragraph 5.40).
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- 14 CPS areas should introduce or reinvigorate systems to ensure that counsel and crown advocates confirm that they have received and read the instructions and initial advice should be provided at the earliest possible time where relevant (paragraph 5.43).
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- 15 CPS areas should ensure that the allocation of responsibility for decision-making and case/file management should be clearly defined for each stage as the case progresses (paragraph 5.48).
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- 16 CPS areas should ensure that systems are in place to quality assure the completion of the fee information sheet and fee log and the reconciliation of the graduated fee claim with the fee information sheet (paragraph 6.22).
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- 17 The CPS should determine best practice and provide guidance to areas to assist them to work with counsel's chambers so as to receive graduated fee claims in good time (paragraph 6.27).
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- 18 CPS areas should have systems in place to deal with late graduated fee claims and decisions not to pay should be made by staff of an appropriate level against clear criteria (paragraph 6.48).
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- 19 The CPS should update the fees guidance and ensure that it is easily accessible as a helpful and comprehensive point of reference for all staff involved in fee payments. (paragraph 6.51).
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- 20 CPS areas should provide regular refresher training for all staff in the completion of the fee information sheet and fee logs. Local area champions should be appointed and trained appropriately to assist with training and updating staff (paragraph 6.57).
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- 21 The CPS should issue guidance clarifying the appropriate levels and purpose of financial delegation for all individuals involved in fee payments and raise awareness and understanding (paragraph 6.62).
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The full text of this report may be obtained from the Corporate Services Group at HMCPS Inspectorate (telephone 020 7210 1197) and is also available online at www.hmcpai.gsi.gov.uk.