Submission Paper of the Bar on the new Practice Direction on Criminal Proceedings in the Court of First Instance

Introduction

1. The Bar acknowledges the need for more efficient case management in the Court of First Instance and welcomes the implementation of a system which is more transparent and which will take into consideration the views of the parties affected by it. The Bar makes following general observations on the proposed new Practice Direction ("PD"):

(a) the proposed scheme should have more flexibility. At the moment the proposed steps are far too rigid and impose on the defence extremely onerous tasks which are very difficult to comply with in the short time limits prescribed;

(b) the Bar proposes that all the time limits prescribed should be allowed to be abridged or extended upon good cause being shown by the party applying;

(c) the consequence of the new scheme is that much more additional legal cost will have to be incurred by the defendants who are privately represented than those who are legally aided, due to the numerous steps and hearings which are to be held for the purpose of case management. Whether such a defendant can afford the additional cost is one matter, at least more time should be afforded him to raise funds as his case progresses through the schedule;

(d) the rules have been set on a pre-supposition that the choice of solicitors and counsel will remain unchanged throughout, which is often not the case in practice due to many possible reasons, for example, where the original counsel has overrun his availability in another professional commitment, where a change in representation is called for on account of conflict of interest arising during trial preparation, breach of duty by legal representatives which calls for replacement of the legal team, and so on. Such exigencies of events beyond the parties' control should not be ignored and the parties be allowed an opportunity in circumstances such as these to depart from any prescribed step. So far the PD merely permits departure in respect to very limited number of steps. Some members even take the view that the rigid rules have the effect of compelling a defendant not to change his legal representatives despite finding them unsuitable for trial;

(e) some accommodation ought to be given to counsel's diary throughout the process. So far there is none;

(f) the times set down requiring disclosure of important decisions by the defence in order to facilitate case management can are far too soon, which can result in many of them being made by solicitors alone before counsel is in a position to properly advise upon the matter. There is also a lack of any mechanism for answers already provided in case management to be amended or changed later upon trial counsel's advice which turns out not be in agreement with the solicitor's prior advice. The Bar recommends that the time available for the defence to provide such important answers as to plea, admitted facts, s.65B statements and the filing of the Case Management Questionnaire be extended to 3 months after service of the paginated Committal Bundle;

(g) mere inability to comply with the requirements laid down in the Practice Direction should not without more attract disciplinary liability by the professional bodies. The Bar is extremely concerned over the low threshold at which potential professional sanctions may be attracted to both solicitors and counsel such that they will be deterred from taking up a case halfway despite there is adequate time for trial preparation but insufficient time for fulfilling case management duties.

2. Without prejudice to the generality of the comments already submitted above, the Bar would also wish to make the following comments in relation to specific paragraphs of the Practice Direction.

1.1 Application

3. The PD applies to all cases with the exception of so-called "complex commercial crime cases" (§1.1.2) which are covered by Practice Direction 9.8. The exclusion is too narrow. These complex cases are confined only to cases involving fraudulent and dishonest conduct, but do not include other cases involving corruption which can be very complex. The parties should be given the ability to agree amongst themselves that a particular case is so complex that the normal rules or time-table under this PD should not apply to it, whatever the nature of its charges.

1.4 Milestone dates

4. The minimum notice requirement of 14 days for any application to vacate or adjourn a milestone date (§1.4.2) be reduced to 7 days so that the parties may have more time for discussion in the event they wish to lodge a joint application

supported by affirmation, or where the reason behind the application is not straightforward or the application requires gathering of supporting proof or materials from overseas.

2.1 Objective

5. The Bar suggests the last sentence in §2.1.1 be replaced by ", that nobody should be convicted except by the due process of law."

6. The requirement in §2.1.3(3) that there should be "strict" compliance be removed, as it has been stated above that compliance can be impossible at times, or strict compliance can lead to a lowering of the standards of professional service being rendered to a defendant.

2.2 Case management by the court

7. The Bar feels that whilst accepting cases should be brought to trial as soon as practicable once they are ready for trial (§2.2.1(7)), whether a defendant wishes to retain the counsel who has been advising on the case, and who has had conduct of the case and a substantial part to play in trial preparation and who may have personally attended case management hearings should be a choice open for the defendant. Further, the Bar strongly advocates that trial dates should be fixed in consultation with counsel's diary.

8. The words "full and strict" in §2.3.2(1) in line 1 be removed.

3.1 Cases committed for sentence

9. The time-table of 14 days set for preparation of an agreed paginated Plea and Sentence Bundle would probably be sufficient for a really simple case. But for a slightly more complex case more time allowance should be given to the parties, or alternatively some mechanism whereby the time limit can be relaxed or extended. At the moment the scheme envisaged proposes to make it mandatory that such a bundle should be lodged within 14 days without regard to any special or particular case where a longer time may be required by either or both parties. There should be some flexibility introduced.

4.2 Providing unused materials

10. In all cases where a criminal case is serious enough to be committed for trial in the High Court the prosecution should always provide a list of unused materials to the defence. There is no perceivable exception to this requirement. Even in cases where there is no unused materials, which will be rare, this should nonetheless be stated to be so. The qualifying words "where applicable" in §4.2.1 should be deleted.

5.1 Listing and Preparation before the Case Management Hearing (Fixture List)

11. The cases in the Fixture List are more likely to be privately funded, or probably more complex in nature, since more than one defendants are involved. Due to the necessity for the defendants to raise sufficient fund for legal fees utilising various means such as realisation of assets, collection of debts owed and

so on, which step is largely lacking in legal aid cases, more time should be allowed to the defendant who is privately represented to achieve confirmation of those matters listed in §5.1.3, or at least some mechanism to permit an extension of time in appropriate circumstances.

12. The Bar recognises the importance of having an estimate of the trial length at as early a stage as possible, however very often by the 14th day after service of the Committal Bundle the ultimate trial counsel would unlikely to have been instructed, read all the papers, held enough conferences to be armed with a fairly accurate estimate of the length of trial. It may be possible is really simple cases, but probably not in others. The Bar believes in the importance of some flexibility to be introduced into the time limit or some mechanism of time extension where the case calls for it. At the moment the proposal imposes a mandatory and strict scheme the compliance of which may be practically impossible in some cases.

6.3 Certificate of Readiness for Trial

13. The Bar has great reservation on the requirement for trial counsel to personally sign a Certificate of Readiness for Trial 7 days after the Case Management Hearing (§6.3.1). It is unclear whether this means on the 7th day after the hearing, or it refers to any day after the 7th day subsequent to the hearing. If the former, it becomes a mandatory requirement on the trial counsel to sign the Certificate irrespective of whether the case is really ready for trial or not. There is no exception or exemption provided for him not to sign the Certificate. What if the defence preparation is genuinely not ready at the case management stage, and there are some outstanding issues but it is expected that they will be resolved by the commencement of the trial? The trial counsel in that situation can reasonably agree

to a trial date being fixed. However to make it mandatory with potential disciplinary consequences to issue such a certificate is another matter. On the one hand, he issues a false certificate knowing of the outstanding issues, on the other hand he is compelled to issue it. Further, it will be impossible for trial counsel to certify that all issues will be resolved at least 2 weeks before the trial when it is not yet known when the trial will be. Conversely, if the interpretation is of the latter, the Bar sees no objectionable reason for it. The Certificate should be signed by trial counsel only if he is certain it is ready for trial and that is the course the Bar commends.

7.1 Cases that may be brought forward for trial (Expedited List)

14. The Bar is concerned that the Criminal Listing Judge may change a case initially listed into the Fixture List to the Expedited List without giving the parties any opportunity to make representations solely upon the ground that the criteria in the Schedule are satisfied (§7.1.1). The Bar welcomes the proposal to give reasonable notice to the parties (§7.1.2) but would suggest granting the parties the opportunity to make any representations at the same time.

15. Paragraph (2) of the Schedule may have ignored the plight of the defendant who is privately represented. Instead it focuses on the defendant who is represented by the LAD. A change from one list to the other may cause the minimal of disruption to the defendant represented by the LAD, yet on the other hand may have dire consequences to the defendant whose privately funded counsel has been acting for him from the beginning participating in all the case management steps. It may give rise to availability problems. It may be extremely difficult to find substitute counsel of comparable standing and ability at such short notice. The

change of counsel can also give rise to substantial additional costs implications upon short notice where the defendant may have to pay for two counsel and use only one.

16. The Bar further considers a threshold of not more than 15 days trial length as a trigger for a trial to be switched from one list to the other to be unduly long. A trial of 15 working days may not be a straightforward and simple case at all. The privately instructed counsel may consist of a team with Leading Counsel. It will be catastrophic to the defendant for the trial dates originally fixed to be changed to the Expedited List, without any opportunity for making representation, without consultation of the diary of any counsel.

17. Another example of a difficulty the Bar foresees is where availability of defence witnesses, especially overseas witnesses, are concerned. The criteria set out in the Schedule do not factor this in and ignore the existence of such special situations. The Bar would strongly suggest the inclusion of an opportunity to make representations before the decision is made to direct the change from one list to the other.

Case Management Questionnaire (Fixture List) (Appendix C1)

18. (4)(ii) The Bar's position is that the defence should not be compelled to compile a summary of the list of issues or matters under dispute. No burden should be imposed on the defence over and above the admission of facts and s.65B statements. Anything else not so admitted would be regarded as being in dispute and the case management should proceed on that basis.

19. (5)(iii) The Bar considers that more likely than not since the preparation of defence expert evidence can take a long time and is which can only be in response to the prosecution's expert evidence in the first place, it will be premature for the information to be ready by the time of the filing of the Questionnaire. Consequentially the Bar proposes this item should be made optional for answering on the Questionnaire.

20. The Questionnaire should also have an item relating to the status of the prosecution's disclosure of Unused Materials to the defence, which is presently missing. To include it will render the Questionnaire to be on par with that for the Expedited List where it is mentioned at (5)(v).

Standard Procedural Timetable (Fixture List)

21. A.1 The Bar views the time limit of 14 days after service of the paginated Committal Bundle to inform the court of the defence's estimated length of trial and the reasons for revising the estimate of the prosecution to be too short and difficult to comply with. By this stage trial counsel will unlikely to have been instructed. The defence's estimate at this stage will be arbitrary and will not serve any useful purpose. The time limit for the defence to give its estimate of trial length should be put back or the defence should be permitted to revise its estimate later.

22. C.1 The Bar is of the view that the 14-day set for the filing of written submissions should not be a mandatory one. There should be a mechanism for time extension.

23. E.1 This requires the prosecution to file its expert report within 42 days of the lodging of the paginated Committal Bundle. The Bar notes that on the other hand under §5.2.2 the defence has to file the Case Management Questionnaire (Fixture List) (Appendix C1) at the same time, wherein it requires the defence to state "if any expert testimony is to be called and the issues involved" (5)(iii). Obviously the defence will be unable to comply with this requirement on the same day or so shortly after receipt of the prosecution's expert report. The Bar proposes (5)(iii) of the Case Management Questionnaire to be made optional for answering.

24. E.2 The proposed PD seeks to impose a deadline before which the defence expert report must be filed. The Bar considers this may be inconsistent with section 65DA of the Criminal Procedure Ordinance, Cap.221, LHK where no such time limit is stipulated. The experience of the Bar has been that often the completion of the defence expert report can be affected by a plurality of factors, such as source of extra funding, limited pool of available experts, lack of direct access to exhibits, and very much the depth to which the prosecution's expert report goes, and the multitude of issues being discussed. The length of the trial and the complexity of the issues being litigated through the experts are two very different matters. One does not often accurately reflect the other. The Bar does not welcome the imposition of a straitjacket in terms of the time at which a defence expert report must be finalised and served. On this issue, each case will depend on its own circumstances.

25. F.1 The Bar objects to the requirement for grounds of objection in relation to any voir dire to be filed and served not less than 45 days before trial. There are many reasons against this proposal. Very often the grounds can only be settled based on the extrinsic information received, such as Government medical reports

which often takes a long time to obtain, or CAPO statements being collected, or independent defence witnesses being located and interviewed, or CCTV recordings in the vicinity being viewed and gathered. All these require time. Grounds of objection are not settled based solely on the defendant's personal memory of the incidents without any supporting evidence. Further, the present practice of serving the grounds on the prosecution nearer to the trial has been used for many years and has worked well. As long as the officers involved are being identified in advance of the trial it does not do injustice to the prosecution that the grounds are served later.

Conclusion

26. The Bar considers that administrative measures designed for listing and case management, if applied too rigidly may result in injustice, in particular to a defendant who is privately represented, and in a case of some complexity. Such injustice can be legal as well as financial in nature. The Bar calls for more flexibility and dialogue with the professions in the formulation of a practice direction governing listing and case management of criminal trials in the Court of First Instance.

HONG KONG BAR ASSOCIATION
Dated the 17th November, 2016.