Neutral Citation Number: [2018] EWCA Crim 1760

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2018

Before:

THE RT HON THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

Criminal Practice Directions 2015

Amendment No. 7

AMENDMENT NO. 7 TO THE CRIMINAL PRACTICE DIRECTONS 2015

Introduction

This is the seventh amendment to the Criminal Practice Directions 2015.[1] It is issued by the Lord Chief Justice on 26th July 2018 and comes into force on 1st October 2018.

In this amendment:

1. **CPD I General matters 3F: INTERMEDIARIES is amended by substituting the below for 3F.12:**

   3F. 12 The court may direct the appointment of an intermediary to assist a defendant in reliance on its inherent powers (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)). There is however no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process, appointment is not mandatory (R v Cox [2012] EWCA Crim 549). The court should adapt the trial process to address a defendant's communication needs (R v Cox [2012] EWCA Crim 549). It will rarely exercise its inherent powers to direct appointment of an intermediary but where a defendant is vulnerable or for some other reason experiences communication or hearing difficulties, such that he or she needs more help to follow the proceedings than her or his legal representatives readily can give having regard to their other functions on the defendant's behalf, then the court should consider sympathetically any application for the defendant to be accompanied throughout the trial by a support worker or other appropriate companion who can provide that assistance. This is consistent with CrimPR 3.9(3)(b) (see paragraph 3D.2 above); consistent with the observations in R v Cox (see paragraph 3D.4 above), R (OP) v Ministry of Justice [2014] EWHC 1944 (Admin) and R v Rashid [2017] EWCA Crim 2; and consistent with the arrangements contemplated at paragraph 3G.8 below.

   and adding the additional sentence at the end 3F.13:

   3F.13 , keeping in mind paragraph 3F.12 above.

[1] [2015] EWCA Crim 1567. Amendment Number 1 [2016] EWCA Crim 97 was issues by the Lord Chief Justice on 23rd March 2016 and came into force on the 4th April 2016. Amendment Number 2 [2016] EWCA Crim 1714 was issued by the Lord Chief Justice on 16th November 2016 and came into force on 16th November 2016. Amendment Number 3 [2017] EWCA Crim 30 was issued by the Lord Chief Justice on 31st January 2017 and came into force on 31st January 2017. Amendment Number 4 [2017] EWCA Crim 310 was issued by the Lord Chief Justice on 28th March 2017 and came into force on 3rd April 2017. Amendment Number 5 [2017] EWCA Crim 1076 was issued by the Lord Chief Justice on 27th July 2017 and came into force on 2nd October 2017. Amendment Number 6 [2018] EWCA Crim 516 was issued by the Lord Chief Justice on 21st March 2018 and came into force on 2nd April 2018.

2. CPD I General matters 3N: USE OF LIVE LINKS AND TELEPHONE FACILITES is amended by adding the following at the end of the current paragraph.

3N.6 …In deciding whether to require a defendant to attend a first hearing in a magistrates' court by live link from a police station, the court should take into account any views expressed by the defendant, the terms of any mental health or other medical assessment of the defendant carried out at the police station, and all other relevant information and representations available. No single factor is determinative, but the court must keep in mind the terms of section 57C(6A) of the Crime and Disorder Act 1998 (Use of live link at preliminary hearings where accused is at police station) which provides that 'A live link direction under this section may not be given unless the court is satisfied that it is not contrary to the interests of justice to give the direction.'

3. CPD I General matters 3P: COMMISSIONING MEDICAL REPORTS insert the new sections as detailed below:

CPD I General matters 3P: COMMISSIONING MEDICAL REPORTS

General observations

3P.1 CrimPR 24.3 and 25.10 concern procedures to be followed in magistrates' courts and in the Crown Court respectively where there is doubt about a defendant's mental health and, in the Crown Court, the defendant's capacity to participate in a trial. CrimPR 3.28 governs the procedure where, on the court's own initiative, a magistrates' court requires expert medical opinion about the potential suitability of a hospital order under section 37(3) of the Mental Health Act 1983 (hospital order without convicting the defendant), the Crown Court requires such opinion about the defendant's fitness to participate at trial, under section 4 of the Criminal Procedure (Insanity) Act 1964, or either a magistrates' court or the Crown Court requires such opinion to help the court determine a question of intent or insanity.

3P.2 Rule 3.28 governs the procedure to be followed where a report is commissioned at the instigation of the court. It is not a substitute for the prompt commissioning of a report or reports by a party or party's representatives where expert medical opinion is material to that party's case. In particular, those representing a defendant may wish to obtain a medical report or reports wholly independently of the court. Nothing in these directions, therefore, should be read as discouraging a party from commissioning a medical report before the case comes before the court, where that party believes such a report to be material to an issue in the case and where it is possible promptly to commission it. However, where a party has commissioned such a report then if that report has not been

received by the time the court gives directions for preparation for trial, and if the court agrees that it seems likely that the report will be material to what is in issue, then when giving directions for trial the court should include a timetable for the reception of that report and should give directions for progress to be reviewed at intervals, adopting the timetable set out in these directions with such adaptations as are needed.

3P.3 In assessing the likely materiality of an expert medical report to help the court assess a defendant's health and capacity at the time of the alleged offence or the time of trial, or both, the court will be assisted by the parties' representations; by the views expressed in any assessment that may already have been prepared; and by the views of practitioners in local criminal justice mental health services, whose assistance is available to the court under local liaison arrangements.

3P.4 Where the court requires the assistance of such a report then it is essential that there should be (i) absolute clarity about who is expected to do what, by when, and at whose expense; and (ii) judicial directions for progress with that report to be monitored and reviewed at prescribed intervals, following a timetable set by the court which culminates in the consideration of the report at a hearing. This is especially important where the report in question is a psychiatric assessment of the defendant for the preparation of which specific expertise may be required which is not readily available and because in some circumstances a second such assessment, by another medical practitioner, may be required.

Timetable for the commissioning, preparation and consideration of a report or reports

3P.5 CrimPR 3.28 requires the court to set a timetable appropriate to the case for the preparation and reception of a report. That timetable must not be in substitution for the usual timetable for preparation for trial but must instead be incorporated within the trial preparation timetable. The fact that a medical report is to be obtained, whether that is commissioned at a party's instigation or on the court's own initiative, is never a reason to postpone a preparation for trial or a plea and trial preparation hearing, or to decline to give the directions needed for preparation for trial. It follows that a trial date must be set and other directions given in the usual way.

3P.6 In setting the timetable for obtaining a report or reports the court will take account of such representations and other information that it receives, including information about the anticipated availability and workload of medical practitioners with the appropriate expertise. However, the timetable ought not be a protracted one. It is essential to keep in mind the importance of maintaining progress: in recognition of the defendant's rights and with respect for the interests of victims and witnesses, as required by CrimPR Part 1 (the overriding objective). In a magistrates' court account must be taken, too, of section 11 of the Powers of Criminal Courts (Sentencing) Act 2000, which limits the duration of each remand

pending the preparation of a report to 3 weeks, where the defendant is to be in custody, and to 4 weeks if the defendant is to be on bail.

3P.7 Subject, therefore, to contrary judicial direction the timetable set by the court should require:

(a) the convening of a further pre-trial case management hearing to consider the report and its implications for the conduct of the proceedings no more than 6 – 8 weeks after the court makes its request in a magistrates' court, and no more than 10 – 12 weeks after the request in the Crown Court (at the end of Stage 2 of the directions for pre-trial preparation in the Crown Court);

(b) the prompt identification of an appropriate medical practitioner or practitioners, if not already identified by the court, and the despatch of a commission or commissions accordingly, within 2 business days of the court's decision to request a report;

(c) acknowledgement of a commission by its recipient, and acceptance or rejection of that commission, within 5 business days of its receipt;

(d) enquiries by court staff to confirm that the commission has been received, and to ascertain the action being taken in response, in the event that no acknowledgement is received within 10 business days of its despatch;

(e) delivery of the report within 5 weeks of the despatch of the commission;

(f) enquiries into progress by court staff in the event that no report is received within 5 weeks of the despatch of the commission.

3P.8 The further pre-trial case management hearing that is convened for the court to consider the report should not be adjourned before it takes place save in exceptional circumstances and then only by explicit judicial direction the reasons for which must be recorded. If by the time of that hearing the report is available, as usually should be the case, then at that hearing the court can be expected to determine the issue in respect of which the report was commissioned and give further directions accordingly. If by that time, exceptionally, the report is not available then the court should take the opportunity provided by that hearing to enquire into the reasons, give such directions as are appropriate, and if necessary adjourn the hearing to a fixed date for further consideration then. Where it is known in advance of that hearing that the report will not be available in time, the hearing may be conducted by live link or telephone: subject, in the defendant's case, to the same considerations as are identified at paragraph 3N.6 of these Practice Directions. However, it rarely will be appropriate to dispense altogether with that hearing, or to make enquiries and give further directions without any hearing at all, in view of the arrangements for monitoring and review that the court already will have directed and which, by definition therefore, thus far will have failed to secure the report's timely delivery.

3P.9 Where a requirement of the timetable set by the court is not met, or where on enquiry by court staff it appears that the timetable is unlikely to be met, and in any instance in which a medical practitioner who accepts a commission asks for more time, then court staff should not themselves adjust the timetable or accede to such a request but instead should seek directions from an appropriate judicial authority. Subject to local judicial direction, that will be, in the Crown Court, the judge assigned to the case or the resident judge and, in a magistrates' court, a District Judge (Magistrates' Courts) or justice of the peace assigned to the case, or the Justices' Clerk, an assistant clerk or other senior legal adviser. Even if the timetable is adjusted in consequence:

(a) the further pre-trial case management hearing convened to consider the report rarely should be adjourned before it takes place: see paragraph 3O.13 above;

(b) directions should be given for court staff henceforth to make regular enquiries into progress, at prescribed intervals of not more than 2 weeks, and to report the outcome to an appropriate judicial authority who will decide what further directions, if any, to give.

3P.10 Any adjournment of a hearing convened to consider the report should be to a specific date: the hearing should not be adjourned generally, or to a date to be set in due course. The adjournment of such a hearing should not be for more than a further 6 – 8 weeks save in the most exceptional circumstances; and no more than one adjournment of the hearing should be allowed without obtaining written or oral representations from the commissioned medical practitioner explaining the reasons for the delay.

Commissioning a report

3P.11 Guidance entitled 'Good practice guidance: commissioning, administering and producing psychiatric reports for sentencing' prepared for and published by the Ministry of Justice and HM Courts and Tribunals Service in September 2010 contains material that will assist court staff and those who are asked to prepare such reports:
http://www.ohrn.nhs.uk/resource/policy/GoodPracticeGuidePsychReports.pdf

The guidance includes standard forms of letters of instruction and other documents.

3P.12 CrimPR 3.28 requires the commissioner of a report to explain why the court seeks the report and to include relevant information about the circumstances. The HMCTS Guidance contains forms for judicial use in the instruction of court staff, and guidance to court staff on the preparation of letters of instruction, where a report is required for sentencing purposes. Those forms and that guidance can be adapted for use where the court requires a report on the defendant's fitness to particpate, in the Crown Court, or in a magistrates' court requires a report for the purposes of section 37(3) of the Mental Health Act 1983.

3P.13 The commission should invite a practitioner who is unable to accept it promptly to nominate a suitably qualified substitute, if possible, and to transfer the commission to that person, reporting the transfer when acknowledging the court officer's letter. It is entirely appropriate for the commission to draw the recipient's attention to CrimPR 1.2 (the duty of the participants in a criminal case) and to CrimPR 19.2(1)(b) (the obligation of an expert witness to comply with directions made by a court and at once to inform the court of any significant failure, by the expert or another, to take any step required by such a direction).

3P.14 Where the relevant legislation requires a second psychiatric assessment by a second medical practitioner, and where no commission already has been addressed to a second such practitioner, the commission may invite the person to whom it is addressed to nominate a suitably qualified second person and to pass a copy of the commission to that person forthwith.

Funding arrangements

3P.15 Where a medical report has been, or is to be, commissioned by a party then that party is responsible for arranging payment of the fees incurred, even though the report is intended for the court's use. That must be made clear in that party's commission.

3P.16 Where a medical report is requested by the court and commissioned by a party or by court staff at the court's direction then the commission must include (i) confirmation that the fees will be paid by HMCTS, (ii) details of how, and to whom, to submit an invoice or claim for fees, and (iii) notice of the prescribed rates of fees and of any legislative or other criteria applicable to the calculation of the fees that may be paid.

Remand in custody

3P.17 Where the defendant who is to be examined will be remanded in custody then notice that directions have been given for a medical report or reports to be prepared must be included in the information given to the defendant's custodian, to ensure that the preparation of the report or reports can be facilitated. This is especially important where bail is withheld on the ground that it would be otherwise impracticable to complete the required report, and in particular where that is the only ground for withholding bail.

4. CPD V Evidence 18D: WITNESS ANONYMINTY ORDERS, add new sections 18D.9, 18D.18, 18D.20, 18D.25 and renumber the rest of the section accordingly.

18D.9 The hearing of an application for a witness anonymity order usually should be in private: CrimPR 18.18(1)(a), and before the trial judge wherever possible. The court has power to hear a party in the absence of a defendant and that defendant's representatives: section 87(7) of the Act and rule

18.18(1)(b). In the Crown Court, a recording of the proceedings will be made, in accordance with CrimPR 5.5. The Crown Court officer must treat such a recording in the same way as the recording of an application for a public interest ruling. It must be kept in secure conditions, and the arrangements made by the Crown Court officer for any transcription must impose restrictions that correspond with those under CrimPR 5.5(2).

18D.18 Should the judge grant the anonymity then the following should be considered by the judge with the assistance of the court staff, so that the practical arrangements (confidentially recorded) are in place to ensure that the witness's anonymity is not compromised:

i. Any pre-trial visit by the anonymous witness;
ii. How the witness will enter and leave the court building;
iii. Where the witness will wait until they give evidence;
iv. Provision for prosecution counsel to speak to the anonymous witness at court before they give evidence;
v. Provision for the anonymous witness to see their statement or view their ABEs;
vi. How the witness will enter and leave the court room;
vii. Provisions to disguise the identity of the anonymous witness whilst they give evidence (voice modulation and screens);
viii. Provisions for the anonymous witness to have any breaks required;
ix. Provisions to protect the anonymity of the witness in the event of an emergency such as a security alert.

18D.20 Should the application for anonymity be refused, consideration will be given as to whether the witness to whom the application related can be compelled to give evidence despite any risk to their safely and what special measures could support them to give their evidence.

Arrangements at trial

18D.25 At trial the greatest possible care must be taken to ensure that nothing will compromise the witness' anonymity. Detailed arrangements may have been proposed by the applicant under CrimPR 18.19(1)(b) and directed by the court on determining the application for the order. Such arrangements must take account of the layout of the courtroom and of the means of access for the witness, for the defendant or defendants, and for members of the public. The risk of a chance encounter between the witness and someone who may recognise him or her, either then or subsequently, must be rigorously excluded. Subject to contrary direction by the trial judge, the court staff and those accompanying the witness must adopt necessary measures to ensure that the witness is neither seen nor heard by anyone whose observation would, or might, render nugatory the court's order. Further HMCTS guidance for court staff can be found in Guidance for Criminal Courts for England and Wales for Anonymous/Protected Witnesses.

5. CPD VII Sentencing R: MEDICAL REPORTS FOR SENTENCING PUPOSES insert the new sections as detailed below:

General observations

R.1 CrimPR 24.11 and 25.16 concern standard sentencing procedures in magistrates' courts and in the Crown Court respectively. CrimPR 28.8 deals with the obtaining of medical reports for sentencing purposes.

R.2 Rule 28.8 governs the procedure to be followed where a report is commissioned at the instigation of the court. It is not a substitute for the prompt commissioning of a report or reports by a defendant or defendant's representatives where expert medical opinion is material to the defence case. In particular, the defendant's representatives may wish to obtain a medical report or reports wholly independently of the court. Nothing in these directions, therefore, should be read as discouraging the commissioning of a medical report before the case comes before the court, where such a report is expected to be material and where it is possible promptly to commission it. However, where such a report has been commissioned then if that report has not been received in time for sentencing and if the court agrees that it seems likely to be material, then the court should set a timetable for the reception of that report and should give directions for progress to be reviewed at intervals, adopting the timetable set out in these directions with such adaptations as are needed.

R.3 In assessing the likely materiality of an expert medical report for sentencing purposes the court will be assisted by the parties' representations; by the views expressed in any pre-sentence report that may have been prepared; and by the views of practitioners in local criminal justice mental health services, whose assistance is available to the court under local liaison arrangements.

R.4 Where the court requires the assistance of such a report then it is essential that there should be (i) absolute clarity about who is expected to do what, by when, and at whose expense; and (ii) judicial directions for progress with that report to be monitored and reviewed at prescribed intervals, following a timetable set by the court which culminates in the consideration of the report at a hearing. This is especially important where the report in question is a psychiatric assessment of the defendant for the preparation of which specific expertise may be required which is not readily available and because in some circumstances a second such assessment, by another medical practitioner, may be required.

Timetable for the commissioning, preparation and consideration of a report or reports

R.5 CrimPR 28.8 requires the court to set a timetable appropriate to the case for the preparation and reception of a report. In doing so the court will take account of such representations and other information that it receives,

including information about the anticipated availability and workload of practitioners with the appropriate expertise. However, the timetable ought not be a protracted one. It is essential to keep in mind the importance of maintaining progress: in recognition of the defendant's rights and with respect for the interests of victims and witnesses, as required by CrimPR Part 1 (the overriding objective). In a magistrates' court account must be taken, too, of section 11 of the Powers of Criminal Courts (Sentencing) Act 2000, which limits the duration of each remand pending the preparation of a report to 3 weeks, where the defendant is to be in custody, and to 4 weeks if the defendant is to be on bail.

R.6 Subject, therefore, to contrary judicial direction the timetable set by the court should require:

(a) the convening of a hearing to consider the report no more than 6 – 8 weeks after the court makes its request;
(b) the prompt identification of an appropriate medical practitioner or practitioners, if not already identified by the court, and the despatch of a commission or commissions accordingly, within 2 business days of the court's decision to request a report;
(c) acknowledgement of a commission by its recipient, and acceptance or rejection of that commission, within 5 business days of its receipt;
(d) enquiries by court staff to confirm that the commission has been received, and to ascertain the action being taken in response, in the event that no acknowledgement is received within 10 business days of its despatch;
(e) delivery of the report within 5 weeks of the despatch of the commission;
(f) enquiries into progress by court staff in the event that no report is received within 5 weeks of the despatch of the commission.

R.7 The hearing that is convened for the court to consider the report, at 6 – 8 weeks after the court requests that report, should not be adjourned before it takes place save in exceptional circumstances and then only by explicit judicial direction the reasons for which must be recorded. If by the time of that hearing the report is available, as usually should be the case, then at that hearing the court can be expected to determine the issue in respect of which the report was commissioned and pass sentence. If by that time, exceptionally, the report is not available then the court should take the opportunity provided by that hearing to enquire into the reasons, give such directions as are appropriate, and if necessary adjourn the hearing to a fixed date for further consideration then. Where it is known in advance of that hearing that the report will not be available in time, the hearing may be conducted by live link or telephone: subject, in the defendant's case, to the same considerations as are identified at paragraph I.3N.6 of these Practice Directions. However, it rarely will be appropriate to dispense altogether with that hearing, or to make enquiries and give further directions without any hearing at all, in view of the arrangements for monitoring and review that the court already will have directed and which,

by definition therefore, thus far will have failed to secure the report's timely delivery.

R.8 Where a requirement of the timetable set by the court is not met, or where on enquiry by court staff it appears that the timetable is unlikely to be met, and in any instance in which a medical practitioner who accepts a commission asks for more time, then court staff should not themselves adjust the timetable or accede to such a request but instead should seek directions from an appropriate judicial authority. Subject to local judicial direction, that will be, in the Crown Court, the judge assigned to the case or the resident judge and, in a magistrates' court, a District Judge (Magistrates' Courts) or justice of the peace assigned to the case, or the Justices' Clerk, an assistant clerk or other senior legal adviser. Even if the timetable is adjusted in consequence:

(a) the hearing convened to consider the report (that is, the hearing set for no more than 6 – 8 weeks after the court made its request) rarely should be adjourned before it takes place: see paragraph R.13 above;

(b) directions should be given for court staff henceforth to make regular enquiries into progress, at intervals of not more than 2 weeks, and to report the outcome to an appropriate judicial authority who will decide what further directions, if any, to give.

R.9 Any adjournment of a hearing convened to consider the report should be to a specific date: the hearing should not be adjourned generally, or to a date to be set in due course. The adjournment of such a hearing should not be for more than a further 6 – 8 weeks save in the most exceptional circumstances; and no more than one adjournment of the hearing should be allowed without obtaining written or oral representations from the commissioned medical practitioner explaining the reasons for the delay.

Commissioning a report

R.10 Guidance entitled 'Good practice guidance: commissioning, administering and producing psychiatric reports for sentencing' prepared for and published by the Ministry of Justice and HM Courts and Tribunals Service in September 2010 contains material that will assist court staff and those who are asked to prepare such reports:
http://www.ohrn.nhs.uk/resource/policy/GoodPracticeGuidePsychReports.pdf

That guidance includes standard forms of letters of instruction and other documents.

R.11 CrimPR 28.8 requires the commissioner of a report to explain why the court seeks the report and to include relevant information about the circumstances. The HMCTS Guidance contains forms for judicial use in the instruction of court staff, and guidance to court staff on the preparation of letters of instruction, where a report is required for sentencing purposes. Where a report is requested in a case involving manslaughter by reason of

diminished responsibility, the report writer should have regard to the Sentencing Council's guideline on Manslaughter by reason of Diminished Responsibility. This should assist the report writer in providing the most helpful assessment to enable the court to determine the level of diminution involved in the case.

R.12 The commission should invite a practitioner who is unable to accept it promptly to nominate a suitably qualified substitute, if possible, and to transfer the commission to that person, reporting the transfer when acknowledging the court officer's letter. It is entirely appropriate for the commission to draw the recipient's attention to CrimPR 1.2 (the duty of the participants in a criminal case) and to CrimPR 19.2(1)(b) (the obligation of an expert witness to comply with directions made by a court and at once to inform the court of any significant failure, by the expert or another, to take any step required by such a direction).

R.13 Where the relevant legislation requires a second psychiatric assessment by a second medical practitioner, and where no commission already has been addressed to a second such practitioner, the commission may invite the person to whom it is addressed to nominate a suitably qualified second person and to pass a copy of the commission to that person forthwith.

Funding arrangements

R.14 Where a medical report has been, or is to be, commissioned by a party then that party is responsible for arranging payment of the fees incurred, even though the report is intended for the court's use. That must be made clear in that party's commission.

R.15 Where a medical report is requested by the court and commissioned by a party or by court staff at the court's direction then the commission must include (i) confirmation that the fees will be paid by HMCTS, (ii) details of how, and to whom, to submit an invoice or claim for fees, and (iii) notice of the prescribed rates of fees and of any legislative or other criteria applicable to the calculation of the fees that may be paid.

Remand in custody

R.16 Where the defendant who is to be examined will be remanded in custody then notice that directions have been given for a medical report or reports to be prepared must be included in the information given to the defendant's custodian, to ensure that the preparation of the report or reports can be facilitated. This is especially important where bail is withheld on the ground that it would be otherwise impracticable to complete the required report, and in particular where that is the only ground for withholding bail.

6. CPD IX Appeal 34: Appeal to the Crown Court: APPEALS TO THE CROWN COURT: INFORMATION FROM THE PARTIES substitute new paragraphs for the below in 34A:

34A.1 On an appeal against conviction CrimPR 34.3 requires the appellant and respondent to supply information needed for the effective case management of the appeal, but allows the Crown Court to relieve the appellant – not the respondent – of that obligation, in whole or part.

34A.2 The court is most likely to exercise that discretion in an appellant's favour where he or she is not represented and is unable, without assistance, to provide reliable such information. The notes to the standard form of appeal notice invite the appellant to answer the relevant questions in that form to the extent that he or she is able, explaining that while the appellant may not be able to answer all those questions nevertheless any answers that can be given will assist in making arrangements for the hearing of the appeal. Where an appellant uses the prescribed form of easy read appeal notice the court usually should assume that the appellant will not be able to supply case management information, and that form contains no questions corresponding with those in the standard appeal notice. In such a case relevant information will be supplied by the respondent in the respondent's notice and may be gleaned from material obtained from magistrates' court records by Crown Court staff.

7. Add new section CPD IX Appeal 34B: APPEAL TO THE CROWN COURT: INFORMATION FROM THE MAGISTRATES' COURT:

34B.1 CrimPR 34.4 applies when a defendant appeals to the Crown Court against conviction or sentence and specifies the information and documentation that must be made available by the magistrates' court.

34B.2 In all cases magistrates' court staff must ensure that Crown Court staff are notified of the appeal as soon as practicable: CrimPR 34.4(2)(b). In most cases Crown Court staff will be able to obtain the other information required by CrimPR 34.4(3) or (4) by direct access to the electronic records created by magistrates' court staff. However, if such access is not available then alternative arrangements must be made for the transfer of such information to Crown Court staff by electronic means. Paper copies of documents should be created and sent only as a last resort.

34B.3 On an appeal against conviction, the reasons given by the magistrates for their decision should not be included with the documents; the appeal hearing is not a review of the magistrates' court's decision but a re-hearing. There is no requirement for the Notice of Appeal form to be redacted in any way; the judge and magistrates presiding over the rehearing will base their decision on the evidence presented during the rehearing itself.

34B.4 On an appeal soley against sentence, the magistrates' court's reasons and factual finding leading to the finding of guilt should be included, but any reasons for the sentence imposed should be omitted as the Crown Court will be conducting a fresh sentencing exercise. Whilst reasons for the sentence imposed are not necessary for the rehearing, the Notice of Appeal form may include references to the sentence that is being appealed. There

is no requirement to react this before the form is given to the judge and magistrates hearing the appeal.

8. CPD IX Appeal 39C: APPEAL NOTICES CONTAINING GROUNDS OF APPEAL add new paragraph 39C.4:

39C.4 Where the appellant wants to rely on a ground of appeal that is not identified by the appeal notice, an application under CrimPR 36.14(5) is required. In R v James and Others [2018] EWCA Crim 285 the Court of Appeal identified as follows the considerations that obtain and the criteria that the court will apply on any such application:

(a) as a general rule all the grounds of appeal that an appellant wishes to advance should be lodged with the appeal notice, subject to their being perfected on receipt of transcripts from the Registrar.

(b) the application for permission to appeal under section 31 of the Criminal Appeal Act 1968 is an important stage in the process. It may not be treated lightly or its determination in effect ignored merely because fresh representatives would have done or argued things differently to their predecessors. Fresh grounds advanced by fresh representatives must be particularly cogent.

(c) as well as addressing the factors material to the determination of an application for an extension of time within which to renew an application for permission to appeal, if that is required, on an application under CrimPR 36.14(5) the appellant or his or her representatives must address directly the factors which the court is likely to consider relevant when deciding whether to allow the substitution or addition of grounds of appeal. Those factors include (but this list is not exhaustive):

(i) the extent of the delay in advancing the fresh ground or grounds;

(ii) the reasons for that delay;

(iii) whether the facts or issues the subject of the fresh ground were known to the appellant's representatives when they advised on appeal;

(iv) the interests of justice and the overriding objective in Part 1 of the Criminal Procedure Rules.

(d) on the assumption that an appellant will have received advice on appeal from his or her trial advocate, who will have settled the grounds of appeal in the original appeal notice or who will have advised that there are no reasonably arguable grounds to challenge the safety of the conviction:

(i) fresh representatives should comply with the duty of due diligence explained in McCook [2014] EWCA Crim 734. Waiver of privilege by the appellant is very likely to be required.

(ii) once the trial lawyers have responded, the fresh representatives should again consider with great care their duty to the court and whether the proposed fresh grounds should be advanced as reasonably arguable and particularly cogent.

(iii) the Registrar will obtain, before the determination of the application under CrimPR 36.14(5), transcripts relevant to the fresh grounds and, where required, a respondents' notice relating to the fresh grounds.

(e) while an application under CrimPR 36.14(5) will not require "exceptional leave", and hence the demonstration of substantial injustice should it not be granted, the hurdle for the applicant is a high one nonetheless. Representatives should remind themselves of the provisions of paragraph 39C.2 above.

(f) permission to renew out of time an application for permission to appeal is not given unless the applicant can persuade the court that very good reasons exist. If that application to renew out of time is accompanied by an application to vary the grounds of appeal, the hurdle will be higher still.

(g) any application to substitute or add grounds will be considered by a fully constituted court and at a hearing, not on the papers.

(h) on any renewal of an application for permission to appeal accompanied by an application under CrimPR 36.14(5), if the court refuses those applications it has the power to make a loss of time order or an order for costs in line with R v Gray and Others [2014] EWCA Crim 2372. By analogy with R v Kirk [2015] EWCA Crim 1764 (where the court refused an extension of time) the court has the power to order payment of the costs of obtaining the respondent's notice and any additional transcripts.

9. CPD IX Appeal 39C: DIRECT LODGEMENT add new paragraphs at 39C.5 to 39C.7

Direct Lodgement

39C.5 With effect from 1st October 2018, Forms NG and Grounds of Appeal which are covered by Part 39 of the Criminal Procedure Rules (appeal to the Court of Appeal about conviction or sentence) are to be lodged directly with the Criminal Appeal Office and not with the Crown Court where the appellant

was convicted or sentenced. This Practice Direction must be read alongside the detailed guidance notes that have been produced to accompany the new forms. They are available:

http://www.justice.gov.uk/courts/procedure-rules/criminal/forms

From this date the Crown Court will no longer accept Forms NG and will return them to the sender. Forms NG and Grounds of Appeal should only be lodged once. They should, where possible, be lodged by email. Applications should not be lodged directly onto the Digital Case System. Applications must be lodged at the following address: criminalappealoffice.applications@hmcts.x.gsi.gov.uk

If you do not have access to an email account, you should post Form NG and the Grounds of Appeal to:
The Registrar, Criminal Appeal Office, Royal Courts of Justice, Strand, London WC2A 2LL.
Once an application has been effectively lodged, the Registrar will confirm receipt within 7 days.

Service

39C.6 Legal representatives should make sure they provide their secure email address for the purposes of correspondence and service of document. The date of service for new applications lodged by email will be the day on which it is sent, if that day is a business day and if sent no later than 2:30pm on that day, otherwise the date of service will be on the next business day after it was sent.

Completing the Form NG

39C.7 All applications must be compliant with the relevant Criminal Procedure Rules, particularly those in Part 39. A separate Form NG should be completed for each substantive application which is being made. Each application (conviction, sentence and confiscation order) has its own Form NG and must be drafted and lodged as a stand-alone application.

10. CPD IX Appeal 39E: LOSS OF TIME replace the existing paragraphs on Loss of time for those detailed below:

39E.1 Both the Court and the single judge have power, in their discretion, under the Criminal Appeal Act 1968 sections 29 and 31, to direct that part of the time during which an applicant is in custody after lodging his notice of application for leave to appeal should not count towards sentence. When leave to appeal has been refused by the single judge, it is necessary to consider the reasons given by the single judge before making a decision whether to renew the application. Where an application devoid of merit has been refused by the single judge he may indicate that the Full Court

should consider making a direction for loss of time on renewal of the application. However, the Full Court may make such a direction whether or not such an indication has been given by the single judge.

39E.2 The case of *R v Gray & Others* [2014] EWCA Crim 2372 makes clear "that unmeritorious renewal applications took up a wholly disproportionate amount of staff and judicial resources in preparation and hearing time. They also wasted significant sums of public money… The more time the Court of Appeal Office and the judges spent on unmeritorious applications, the longer the waiting times were likely to be….The only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offenders Act 1985. "

39E.3 Further, applicants and counsel are reminded of the warning given by the Court of Appeal in *R v Hart and Others* [2006] EWCA Crim 3239, [2007] 1 Cr. App. R. 31, [2007] 2 Cr. App. R. (S.) 34 and should 'heed the fact that this court is prepared to exercise its power … The mere fact that counsel has advised that there are grounds of appeal will not always be a sufficient answer to the question as to whether or not an application has indeed been brought which was totally without merit.'

39E.4 Where the Single Judge has not indicated that the Full Court should consider making a Loss of Time Order because the defendant has already been released, the case of *R v Terence Nolan* [2017] EWCA Crim 2449 indicates that the Single Judge should consider what, if any, costs have been incurred by the Registrar and the Prosecution and should make directions accordingly. Reference should be made to the relevant Costs Division of the Criminal Practice Direction.

11. The table of content and CPD I General matters A.2 is amended accordingly.

Lord Chief Justice
26th July 2018