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IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2019

Before:

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

Criminal Practice Directions 2015

Amendment No. 8

AMENDMENT NO. 8 TO THE CRIMINAL PRACTICE DIRECTONS 2015

Introduction

This is the eighth amendment to the Criminal Practice Directions 2015.[1] It is issued by the Lord Chief Justice on 28th March 2019 and comes into force on 1st April 2019.

In this amendment:

1. **Add new paragraph to CPD 1 A.1 GENERAL MATTERS: the overriding objective**

1A.3 The Criminal Procedure Rules and the Criminal Practice Directions are the law. Together they provide a code of current practice that is binding on the courts to which they are directed, and which promotes the consistent administration of justice. Participants must comply with the Rules and Practice Direction, and directions made by the court, and so it is the responsibility of the courts and those who participate in cases to be familiar with, and to ensure that these provisions are complied with**.**

2. **In CPD III Custody and bail, remove current 14E.1-14E.4 and substitute 14E.1 with the below;**

CPD III Custody and bail 14E: TRIALS IN ABSENCE

14E.1 Paragraphs VI 24C and 25B of these Practice Directions (Trial adjournment in magistrates' courts; Trial adjournment in the Crown Court) include guidance on the circumstances in which the court should proceed with or adjourn a trial from which the defendant absents himself or herself voluntarily.

3. **Add new paragraphs to CPD V Trial 19A.7-19A.9**

CPD V Evidence 19A: EXPERT EVIDENCE

19A.7 To assist in the assessment described above, CrimPR 19.3(3)(c) requires a party who introduces expert evidence to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the

[1] [2015] EWCA Crim 1567. Amendment Number 1 [2016] EWCA Crim 97 was issued 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. Amendment Number 7 [2018] EWCA Crim 1760 was issued by the Lord Chief Justice on 26th July 2018 and came into force on the 1st October 2018.

reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert; and CrimPR 19.2(3)(d) requires the expert to disclose to that party any such matter of which the expert is aware. Examples of matters that should be disclosed pursuant to those rules include (this is not a comprehensive list), both in relation to the expert and in relation to any corporation or other body with which the expert works, as an employee or in any other capacity:

(a) any fee arrangement under which the amount or payment of the expert's fees is in any way dependent on the outcome of the case (see also the declaration required by paragraph 19B.1 of these directions);

(b) any conflict of interest of any kind, other than a potential conflict disclosed in the expert's report (see also the declaration required by paragraph 19B.1 of these directions);

(c) adverse judicial comment;

(d) any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence;

(e) any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority, including the Forensic Science Regulator;

(f) any such adverse finding or disciplinary proceedings against, or other such criticism of, others associated with the corporation or other body with which the expert works which calls into question the quality of that corporation's or body's work generally;

(g) conviction of a criminal offence in circumstances that suggest:

(i) a lack of respect for, or understanding of, the interests of the criminal justice system (for example, perjury; acts perverting or tending to pervert the course of public justice),

(ii) dishonesty (for example, theft or fraud), or

(iii) a lack of personal integrity (for example, corruption or a sexual offence);

(h) lack of an accreditation or other commitment to prescribed standards where that might be expected;

(i) a history of failure or poor performance in quality or proficiency assessments;

(j) a history of lax or inadequate scientific methods;

(k) a history of failure to observe recognised standards in the expert's area of expertise;

(l) a history of failure to adhere to the standards expected of an expert witness in the criminal justice system.

19A.8 In a case in which an expert, or a corporation or body with which the expert works, has been criticised without a full investigation, for example by adverse

comment in the course of a judgment, it would be reasonable to expect those criticised to supply information about the conduct and conclusions of any independent investigation into the incident, and to explain what steps, if any, have been taken to address the criticism.

19A.9 The rules require disclosure of that of which the expert, or the party who introduces the expert evidence, is aware. The rules do not require persistent or disproportionate enquiry, and courts will recognise that there may be occasions on which neither the expert nor the party has been made aware of criticism. Nevertheless, where matters ostensibly within the scope of the disclosure obligations come to the attention of the court without their disclosure by the party who introduces the evidence then that party, and the expert, should expect a searching examination of the circumstances by the court; and, subject to what emerges, the court may exercise its power under section 81 of the Police and Criminal Evidence Act 1984 or section 20 of the Criminal Procedure and Investigations Act 1996 to exclude the expert evidence.

4. In CPD VI Trial 24B substitute 24B.1 for new section:

CPD VI Trial 24B: IDENTIFICATION FOR THE COURT OF THE ISSUES IN THE CASE

24B.1 CrimPR 3.11(a) requires the court, with the active assistance of the parties, to establish what are the disputed issues in order to manage the trial. To that end, the purpose of the prosecutor's summary of the prosecution case is to explain briefly, in the prosecutor's own terms, what the case is about, including any relevant legislation or case law relevant to the particular case. It will not usually be necessary, or helpful, to present a detailed account of all the prosecution evidence due to be introduced.

5. Add new practice direction CPD VI Trial 24C.1-24C.32:

CPD VI Trial 24C: TRIAL ADJOURNMENT IN MAGISTRATES' COURTS

24C.1 Courts are entitled to expect the parties and other participants to adhere to CrimPR 1.2 (The duty of the participants in a criminal case) and to prepare accordingly for the trial to proceed on the date arranged. The court will expect communication between the parties and with the court regarding any issues which are likely to affect the effectiveness of any trial: CrimPR 3.2(2)(b)-(e). In particular, any revision of the information provided in the preparation for effective trial form must be reported to the court and each other party well in advance of the trial, not at trial or shortly before; and in considering any application to adjourn a trial the court will regard as especially significant any failure in this respect. Any communication should clearly identify the issue and any direction sought and should require reference to a legal adviser or case progression officer. The parties and other participants are entitled to expect the court and its staff to adhere to CrimPR 1.3 (The application by the

court of the overriding objective) and to conduct its business accordingly. If relevant Criminal Procedure Rules, Criminal Practice Directions and judicial directions for trial preparation are followed, an effective trial on the date arranged will be the result.

24C.2 In some circumstances during preparation for trial it will become apparent to a party that a trial will not be required. It is in the interests of victims, witnesses, defendants, the court and legal representatives that these decisions are made at the earliest opportunity and that the other party, or parties, and the court are notified immediately. The requirements for an application to vacate a trial fixture are set out at paragraphs 24C.30 to 24C.32 beneath.

24C.3 Where a defendant who previously has pleaded not guilty decides to enter a guilty plea, notice of that decision, and the basis of plea, should be given to the prosecution and court as soon as possible so that a decision can be taken about the need for witnesses to attend (but caution should be exercised before the witnesses' attendance is dispensed with, and usually it will be advisable to set a date for the plea to be taken in advance of the date already set for trial). The sooner that notice of such a plea is given, the greater the reduction in sentence the defendant can expect. The court will expect an explanation for the change of plea to assess the level of credit to be applied.

24C.4 Where a party is unable to comply with a direction within the time set by the court, and that failure will have implications for preparation by another party or for the likelihood of the trial proceeding within the time allocated, the party concerned should advise each other party and the court immediately of the failure and of the anticipated date for compliance: CrimPR 1.2(1)(c) and 3.10(2)(d). Parties are encouraged to communicate with each other to agree alternative dates consistent with maintaining the trial fixture: CrimPR 3.7.

Application to adjourn on day of trial

General principles

24C.5 The court is entitled to expect that trials will start on time with all case management issues dealt with in advance of the trial date. Early engagement between the parties and communication with the court should mean that it is rare for applications to adjourn trials to be made on the day of trial, except in circumstances that could not have been foreseen. However, there will be occasions on which, on the day set for trial, the court is invited without prior warning to adjourn to another day in consequence of an event or events said to make it unjust to proceed as planned; and in some circumstances it may have been necessary to arrange to hear a contested application to adjourn a trial on the very date on which that trial is due to begin (though before making such arrangements the court should have kept in mind the need to make time available for other cases, too, where the time available for the trial will be abbreviated by the time required to hear the application to adjourn it).

24C.6 Section 10 of the Magistrates' Courts Act 1980 confers a discretionary power to adjourn, and see also CrimPR 24.2(3). The following directions codify and

restate procedural principles established in a long line of judgments of the senior courts, to some of which they refer. Therefore these directions supersede those judgments and it is to these directions that magistrates' courts must refer in the first instance.

24C.7 The starting point is that the trial should proceed. The basic approach was explained by Gross LJ in *Director of Public Prosecutions v Petrie* [2015] EWHC 48 (Admin):

" … successive initiatives … have repeatedly exhorted the magistracy and District Bench to case manage robustly and to resist the granting of adjournments. Although there are of course instances where the interests of justice require the grant of an adjournment, this should be a course of last rather than first resort – and after other alternatives have been considered. … It is essential that parties to proceedings in a magistrates' court should proceed on the basis of a need to get matters right first time; any suggestion of a culture readily permitting an opportunity to correct failures of preparation should be firmly dispelled."

24C.8 A magistrates' court may keep in mind that, if appropriate, the court's decision may be re-opened (see CrimPR 24.18), and that avenues of appeal by way of rehearing or of review are open to the parties, including in a case in which it is later discovered that the court has acted on a material mistake of fact (see *R (Director of Public Prosecutions) v Sunderland Magistrates' Court, R (Kharaghan) v City of London Magistrates' Court* [2018] EWHC 229 (Admin)). The court should not be deterred from a prompt and robust determination therefore. Only if there are compelling reasons for doing so will the High Court interfere with the court's exercise of its discretion.

24C.9 In general, the relevant principles relating to trial adjournment are these:

- the court's duty is to deal justly with the case, which includes doing justice between the parties.
- the court must have regard to the need for expedition. Delay is generally inimical to the interests of justice and brings the criminal justice system into disrepute. Proceedings in a magistrates' court should be simple and speedy.
- applications for adjournments should be rigorously scrutinised and the court must have a clear reason for adjourning. To do this, the court must review the history of the case.
- where the prosecutor asks for an adjournment the court must consider not only the interest of the defendant in getting the matter dealt with without delay but also the public interest in ensuring that criminal charges are adjudicated upon thoroughly, with the guilty convicted as well as the innocent acquitted.
- with a more serious charge the public interest that there be a trial will carry greater weight. It is, however, reasonable for the court to expect that parties should have given especially careful attention to the preparation of trials involving serious offences or where the trial has significant implications for victims or witnesses.

- where the defendant asks for an adjournment the court must consider whether he or she will be able to present the defence fully without and, if not, the extent to which his or her ability to do so is compromised.
- the court must consider the consequences of an adjournment and its impact on the ability of witnesses and defendants accurately to recall events.
- the impact of adjournment on other cases. The relisting of one case almost inevitably delays or displaces the hearing of others. The length of the hearing and the extent of delay in other cases will need to be considered.

The relevance of fault

24C.10 As the starting point is that the trial should proceed, a consequence of doing so without adjournment may be that the prosecutor is unable to prove the prosecution case, or that the defendant is unable to explore an issue. That may be a just consequence of inadequate preparation. Even in the absence of fault on the part of either party it may not be in the interests of justice to adjourn, notwithstanding that an imperfect trial may be the result.

24C.11 The reason why the adjournment is required should be examined and if it arises through the fault of the applicant for that adjournment then that weighs against its grant, carrying weight in accordance with the gravity of the fault. For the purposes of this paragraph, the prosecutor and those who investigated the case usually should be treated as one.

24C.12 If the applicant was at fault, was it serious? A fault will be serious if the relevant act or omission has been repeated, especially where it has caused a previous adjournment, or where there is no reasonable explanation for that act or omission. The more serious the default, the less willing the court will be to adjourn.

24C.13 Where a party has been at fault, did the other party, if aware of it, draw attention to that fault promptly and explicitly? CrimPR 1.2(1)(c) imposes a collective responsibility on participants promptly to draw attention to a significant failure to take a required procedural step. CrimPR 3.10(2)(d) requires each party promptly to inform the court and the other parties of anything that may affect the date or duration of the trial or significantly affect the progress of the case in any other way. If no such action has been taken by a party who could have done so then the court may look less favourably on any application by that same party to adjourn, and especially if that application reasonably might have been made before the trial date.

Length of adjournment

24C.14 Were an adjournment granted, for how long would it need to be? The shorter the necessary adjournment, the less objectionable it will be – although much will depend on the ability of the court to accommodate it without undue impact on other cases. Courts must make every effort to make the adjournment as short as possible, for example by using time vacated by another trial or by conducting the hearing at another court house. In some

cases it may be possible to achieve a just outcome by a short adjournment to later on the same day.

24C.15 If the reason for the application to adjourn is that the applicant party seeks more time in which to raise or explore an issue, has that party reasonable grounds for its late identification despite the requirements of CrimPR 3.3(1) read with 3.2(2) (early identification of issues)? In the absence of such grounds, that failure will constitute a fault for the purposes of these directions.

Particular grounds of applications to adjourn trials

24C.16 The following paragraphs identify some particular factors which may need to be taken into account in addition to those identified in paragraphs 24C.5 – 24C15.

Absence of defendant

24C.17 If a defendant has attained the age of 18 years, the court shall proceed in his absence unless it appears to the court to be contrary to the interests of justice to do so: section 11 of the Magistrates' Courts Act 1980. In marked contrast to the position in the Crown Court, in magistrates' courts proceeding in the absence of a defendant is the default position where the defendant is aware of the date of trial and no acceptable reason is offered for that absence. The court is not obliged to investigate if no reason is offered. In assessing where the interests of justice lie the court will take into account all factors, including such reasons for absence as may be offered; the reliability of the information supplied in support of those reasons; the date on which the reasons for absence became known to the defendant; and what action the defendant thereafter took in response. Where the defendant provides a medical note to excuse his or her non-attendance the court must consider 5C of these Practice Directions (issue of medical certificates) and give reasons if deciding to proceed notwithstanding.

24C.18 If the court does not proceed to trial in the absence of the defendant it is required by the 1980 Act to give its reasons, which must be specific to the case: section 11(7), and see also CrimPR 24.16(h).

24C.19 Where a defendant is under 18, there is no presumption that the court should proceed in absence. In deciding whether it is in the interests of justice to proceed the court should take into account:

- that trial in absence can and sometimes does result in acquittal and that it is in nobody's interests to delay an acquittal;
- that if convicted the defendant can ask that the conviction be re-opened in the interests of justice, for example if absence was involuntary;
- that if convicted the defendant has a right to a rehearing on appeal to the Crown Court;
- the age, vulnerability, or experience of the defendant;

- whether a parent or guardian is present, whether a parent or guardian ordinarily would be required to attend and whether such a person has attended a previous hearing;
- the interests of any co-defendant in the case proceeding;
- the interests of witnesses who have attended, including the age of any such witness;
- the nature of the evidence and whether memories of relevant evidence are liable to fade;
- how soon an adjourned trial can be accommodated in the court list.

When proceeding in absence or adjourning the court must give its reasons.

Absence of witness

24C.20 Where the court is asked to adjourn because a witness has failed to attend, the court must:

- rigorously investigate the steps taken to secure that witness' attendance, the reasons given for absence and the likelihood of the witness attending should the case be adjourned;
- consider the relevance of the witness to the case, and whether the witness' statement can be agreed or admitted, in whole or part, as hearsay, including under section 114(1)(d) of the Criminal Justice Act 2003;
- in the case of a defence witness, consider whether proper notice has been given of the intention to call that witness;
- consider whether an absent witness can be heard later in the trial;
- where other witnesses have attended and the court has determined that the absent witness is required, consider hearing those witnesses who are present and adjourning the case part-heard, provided the next hearing can be held conveniently in a matter of days or weeks, not months, to avoid having to recall all the witnesses.

Failure to serve evidence in time

24C.21 It should rarely be the case that an application to adjourn based on a failure to serve evidence is made on the day of trial. The court is entitled to expect that evidence will have been served in good time and in accordance with the directions of the court. The court should consider whether the party who complains of the failure had drawn attention to it: CrimPR 1.2(1)(c) and 3.10(2)(d), and see paragraphs 24C.10 – 24C.13 above.

24C.22 The court must conduct a rigorous inquiry into the nature of the evidence and must consider whether any of what is sought has been served, and if so when; the volume and the significance of what is sought; and the time likely to be needed for its consideration. In particular, the court must satisfy itself that any material still sought is relevant and that the party seeking it has a right to it. In some circumstances a failure to serve evidence can be addressed by refusing to admit it instead of by adjourning the trial to allow it to be served: see *R v Boardman* [2015] EWCA Crim 175; [2015] 1 Cr. App. R. 33; [2015] Crim. L.R. 451.

Failure to comply with disclosure obligations

24C.23 The parties' disclosure obligations arise from the Criminal Procedure and Investigations Act 1996. The procedure to comply with those duties is set out at CrimPR Part 15. Disclosure is not a trial issue. It should have been resolved by the parties complying with their statutory obligations and with the Rules in advance of the trial.

24C.24 Where a defendant complains of a prosecution failure to disclose material that ought to have been disclosed the court must first establish whether either party is applying for an adjournment as a result. If an adjournment is sought, the court should consider whether the matter can be resolved by the giving of disclosure immediately. If it cannot, the court should consider whether the parties have complied with their obligations under CrimPR 3.3 and under the provisions listed in paragraph 24C.1 above, and should consider the relevance of fault.

24C.25 If the prosecutor has complied or purported to comply with his or her initial disclosure obligations, no further material is disclosable and consequently no application to adjourn should be entertained unless the defendant has served a defence statement in accordance with section 6 of the Criminal Procedure and Investigations Act 1996 and CrimPR 15.4.

24C.26 If the defendant has served a defence statement and asks for further disclosure, in consequence of the prosecutor's allegedly inadequate response or in consequence of a failure to respond at all, the court has no power to entertain an application for that further disclosure unless it is made pursuant to section 8 of the Criminal Procedure and Investigations Act 1996 and CrimPR 15.5. The court should consider hearing such an application immediately, provided that there is sufficient time available for the application itself and then for the defence to consider any material disclosed in consequence of it.

Managing trials within available court time

24C.27 Where there is a risk of a trials being adjourned for lack of court time the court or legal adviser must assess the priority to be assigned to each trial listed for hearing that day based on the needs of the parties, whether the case has been adjourned before and the seriousness of the offence; giving priority to any cases in which the defendant is in custody by reason only of a trial due to be heard that day. Where more than one court is sitting to deal with trials, liaison between courtrooms should occur to determine the potential for all listed trials to be heard through movement of cases. Where a case is moved from one courtroom to another and as a result is assigned to a different advocate, the court must allow the fresh advocate adequate time in which to prepare. Courts should always begin a trial by reviewing the need for witnesses and the timetable set during pre-trial case management. The court will be slow to adjourn a trial until it is clear that all other trials assessed as having an equal or higher priority for hearing that day will be effective.

24C.28 The court is entitled to expect that parties will present their case within the time set during pre-trial case management. In entertaining additional applications for which no time has been allowed the court must keep in mind the expectation that the trial will be completed within the allocated time with minimal impact on other cases.

24C.29 While it is preferable to complete a trial on the date allocated, there will be occasions on which it is appropriate to adjourn part-heard, particularly where it is possible to hear the majority of witnesses. If necessary future listings will be moved to accommodate the hearing.

Applications to vacate trials

24C.30 To make the best use of the court's and the parties' time it is expected that applications to vacate trials will be made promptly and in writing, in advance of the date of trial. Any application should be served on each other party at the same time as it is served on the court. As a general rule, such an application will be dealt with outside the courtroom under CrimPR 3.5. An application to vacate a trial will be considered in accordance with the same principles as those identified in paragraphs 24C.5 – 24C.26 of these Directions.

24C.31 Given the binding nature of any decision on an application to vacate and refix a trial, absent a change of circumstances, it is incumbent on the parties to provide full and accurate information to the court to enable it to assess where the interests of justice lie: see *R (on the application of F and another) v Knowsley Magistrates Court* [2006] EWHC 695 (Admin); *R (Jones) v South East Surrey Local Justice Area* [2010] EWHC 916 (Admin), (2010) 174 JP 342; *DPP v Woods* [2017] EWHC 1070 (Admin). Any application should, as a minimum, include (as should, as appropriate, any response):

- the reason for the application;
- a chronology of the case, recording the dates of compliance with any directions and of communication between the parties;
- an assessment of the interests of justice, addressing the factors identified in these Practice Directions and indicating the likely effect should the court conclude that the trial should proceed on the date fixed;
- any restrictions on the future availability of witnesses;
- any likely changes to the number of witnesses or the way in which the evidence will be presented and any impact on the trial time estimate.

24C.32 On receipt of an application each other party should serve that party's response on the court and on the applicant within 2 business days unless the court otherwise directs. Any request for the matter to be determined at a hearing should be served with the application to vacate the trial or with the response to that application, as the case may be, together with the reasons for that request, to enable the court to decide whether a hearing is needed.

6. Add new sections to CPD VI Trial 25B1-25B.3:

CPD VI Trial 25B: TRIAL ADJOURNMENT IN THE CROWN COURT

25B.1 A defendant has a right, in general, to be present and to be represented at his trial. However, a defendant may choose not to exercise those rights, such as by voluntarily absenting himself and failing to instruct his lawyers adequately so that they can represent him.

25B.2 The court has a discretion as to whether a trial should take place or continue in the defendant's absence and must exercise its discretion with due regard for the interests of justice. The overriding concern must be to ensure that such a trial is as fair as circumstances permit and leads to a just outcome. If the defendant's absence is due to involuntary illness or incapacity it would very rarely be right to exercise the discretion in favour of commencing or continuing the trial.

25B.3 Proceeding in the absence of a defendant is a step which ought normally to be taken only if it is unavoidable. The court must exercise its discretion as to whether a trial should take place or continue in the defendant's absence with the utmost care and caution. Due regard should be had to the judgment of Lord Bingham in *R v Jones (Anthony William)* [2002] UKHL 5, [2003] 1 A.C. 1, [2002] 2 Cr. App. R. 9. Circumstances to be taken into account before proceeding include:

i) the conduct of the defendant,
ii) the disadvantage to the defendant,
iii) the public interest, taking account of the inconvenience and hardship to witnesses, and especially to any complainant, of a delay; if the witnesses have attended court and are ready to give evidence, that will weigh in favour of continuing with the trial,
iv) the effect of any delay,
v) whether the attendance of the defendant could be secured at a later hearing, and
vii) the likely outcome if the defendant is found guilty.

Even if the defendant is voluntarily absent, it is still generally desirable that he or she is represented.

7. In CPD VII Sentencing replace I IMPACT STATEMENTS FOR BUSINESS I.1-I.10 with below:

CPD VII Sentencing I: IMPACT STATEMENTS FOR BUSINESSES

I.1 Individual victims of crime are invited to make a statement, known as a Victim Personal Statement ('VPS'), see CPD VII Sentencing F. If a victim, or one of those others affected by a crime, is a business, enterprise or other body (including a charity or public body, for example a school or hospital), of any size, a nominated representative may make an Impact Statement for Business ('ISB'). The ISB gives a formal opportunity for the court to be informed how a crime has affected a business or other body. The court will take the statement into account when determining sentence. This does not

prevent individual employees from making a VPS about the impact of the same crime on them as individuals. Indeed, the ISB should be about the impact on the business or other body exclusively, and the impact on any individual included within a VPS.

I.2 When a police officer takes statements about the alleged offence, he or she should also inform the business or other body about the scheme. An ISB may be made to the police at that time, or the ISB template may be downloaded from www.police.uk, completed and emailed or posted to the relevant police contact. Guidance on how to complete the form is available on www.police.uk and on the CPS website. There is no obligation to make an ISB.

I.3 An ISB or an updated ISB may be made (in proper s.9 form, see below) at any time prior to the disposal of the case. It will not be appropriate for an ISB to be made after disposal of the case but before an appeal.

I.4 A business or other body wishing to make an ISB should consider carefully who to nominate as the representative to make the statement on its behalf. A person making an ISB on behalf of such a business or body, the nominated representative, must be authorised to do so on its behalf, either by nature of their position, such as a director or owner or a senior official, or by having been suitably authorised, such as by the owner or Board of Directors or governing body. The nominated representative must also be in a position to give admissible evidence about the impact of the crime on the business or body. This will usually be through first hand personal knowledge, or using business documents (as defined in section 117 of the Criminal Justice Act 2003). The most appropriate person will vary depending on the nature of the crime, and the size and structure of the business or other body and may for example include a manager, director, chief executive or shop owner.

I.5 If the nominated representative leaves the business before the case comes to court, he or she will usually remain the representative, as the ISB made by him or her will still provide the best evidence of the impact of the crime, and he or she could still be asked to attend court. Nominated representatives should be made aware of the on-going nature of the role at the time of making the ISB.

I.6 If necessary a further ISB may be provided to the police if there is a change in circumstances. This could be made by an alternative nominated representative. However, the new ISB will usually supplement, not replace, the original ISB and again must contain admissible evidence. The prosecutor will decide which ISB to serve on the defence as evidence, and any ISB that is not served in evidence will be included in the unused material and considered for disclosure to the defence.

I.7 The ISB must be made in proper form, that is as a witness statement made under section 9 of the Criminal Justice Act 1967 or an expert's report; and served in good time upon the defendant's solicitor or the defendant, if he or

she is not represented. The maker of an ISB can be cross-examined on its content.

I.8 The ISB and any evidence in support should be considered and taken into account by the court, prior to passing sentence. The statement should be referred to in the course of the sentencing hearing and/or in the sentencing remarks. Subject to the court's discretion, the contents of the statement may be summarised or read out in open court; the views of the business or body should be taken into account in reaching a decision.

I.9 The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victims and others affected, including any business or other corporate victim. Opinions as to what the sentence should be are therefore not relevant. If, despite the advice, opinions as to sentence are included in the statement, the court should pay no attention to them.

I.10 Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on a business or other body.

8. Replace existing CPD XI Other Proceedings 47A.1-47A.5 with the below:

CPD XI Other proceedings 47A: INVESTIGATION ORDERS AND WARRANTS

47A.1 Powers of entry, search and seizure, and powers to obtain banking and other confidential information, are among the most intrusive that investigators can exercise. Every application must be carefully scrutinised with close attention paid to what the relevant statutory provision requires of the applicant and to what it permits. CrimPR Part 47 must be followed, and the prescribed forms (retaining the Notes for Guidance section) must be used. These are designed to prompt applicants, and the courts, to deal with all of the relevant criteria.

47A.2 The issuing of a warrant or the making of such an order is never to be treated as a formality and it is therefore essential that the judge or magistrate considering the application is given, and must take, sufficient time for the purpose. The prescribed forms require the applicant to provide a time estimate, and listing officers and justices' legal advisers should take account of these.

47A.3 Applicants for orders and warrants owe the court duties of candour and truthfulness. On any application made without notice to the respondent, and so on all applications for search warrants, the duty of frank and complete disclosure is especially onerous. The applicant must draw the court's attention to any information that is unfavourable to the application. The existence of unfavourable information will not necessarily lead to the

application being refused; it will be a matter for the court what weight to place on each piece of information. As Hughes LJ made clear in *Re Stanford International Limited*[2] "In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge". This is, as Aitkins LJ recognised, "a heavy burden but a vital safeguard. Full details must be given[3]."

47A.4 Where an applicant supplements an application with additional oral or written information, on questioning by the court or otherwise, it is essential that the court keeps an adequate record. What is needed will depend upon the circumstances. The Rules require that a record of the 'gist' be retained. The purpose of such a record is to allow the sufficiency of the court's reasons for its decision subsequently to be assessed. The gravity of such decisions requires that their exercise should be susceptible to scrutiny and to explanation by reference to all of the information that was taken into account.

47A.5 The forms that accompany CrimPR Part 47 provide for the most frequently encountered applications. The included Notes for Guidance summarise for the applicant and the court the relevant criteria for making and considering an application. However, there are some hundreds of powers of entry, search and seizure, supplied by a corresponding number of legislative provisions. In any criminal matter, if there is no form designed for the particular warrant or order sought, the forms should still be used, as far as is practicable, and adapted as necessary. The applicant should pay particular attention to the specific legislative requirements for the granting of such an application to ensure that the court has all of the necessary information, and, if the court might be unfamiliar with the legislation, should provide a copy of the relevant provisions. Applicants must comply with the duties of candour and truthfulness, and include in their application the declarations required by the Rules and must make disclosure of any unfavourable information to the court.

9. In CPD XI Other Proceedings, add new sections 47B:

CPD XI Other proceedings 47B: INVESTIGATION ORDERS AND WARRANTS IN THE CROWN COURT

47B.1 This section covers applications made under:

(i) Schedule 1 Police and Criminal Evidence Act 1984 (PACE);
(ii) Section 2 Criminal Justice Act 1987;
(iii) Drug Trafficking Act 1994;
(iv) Part 8 of the Proceeds of Crime act 2002;

[2] [2010] EWCA Civ 137 at para 159
[3] R (On the Application of S, F and L) v Chief Constable of the British Transport Police and Southwark Crown Court [2013] EWHC 2189 (Admin) at [45 (d)].

(v) Section 5 Coroners and Justice Act 2009
(vi) Terrorism Act 2000.

It does NOT cover applications under the Extradition Act 2003.

Crown Court Centres

47B.2 Investigators must give careful consideration to which Crown Court centre is most appropriate to hear the application. In all cases, the application must explain the rationale for choosing the particular court centre. Relevant considerations will usually be:

- where any subsequent proceedings are likely to be commenced;
- where a main suspect has some geographical connection; and/or
- where, in broad terms, the offending has taken place.

A court centre should not be chosen simply because it is most convenient or proximate to the investigators location. Any dispute over the proper venue for an application should be determined by the relevant Presiding Judges.

47B.3 Where the investigation is complex, lengthy and/or involves multiple suspects all applications should be made to one court centre. To ensure consistency, all subsequent applications arising out of the same or any connected investigation should be made to the same court centre and, where practicable, the same judge.

47B.4 Judges can refuse to determine applications and request they be resubmitted (if necessary to another court) where:

- the application is not in the proper form;
- there is an inaccurate reading time estimate; and/or
- there is insufficient justification for the application to be made at that court centre.

Dealing with applications without a hearing

47B.5 The court must not determine an application in the applicant's absence in the circumstances set out in CrimPR 47.5(2); or in the absence of any respondent in the circumstances set out in CrimPR 47.5(3) and (4).

47B.6 When permitted by the rules, and where the application has been sufficiently completed and submitted on the correct form, there is a presumption that the application will be dealt with without a hearing. The judge is always entitled to require a hearing to clarify omissions or ambiguity on the application, or for any other reason.

47B.7 It will often not be appropriate for a court to deal with an application without a hearing in the following situations:

- where the investigation involved covert activity or the application is based on material gathered covertly;
- where the application is based on material which is especially sensitive and/or where it will be necessary to ensure the security at court of the material produced in support of the application;
- where the case may result in substantial local and/or national public interest;
- where the application is particularly lengthy, serious or complex.

47B.8 Applications should be sent electronically to the designated secure email address at the relevant court centre.

47B.9 A judge considering an application without a hearing will subject the application to the usual intense level of scrutiny ensuring that the relevant statutory requirements have been met. If the judge is not so satisfied then the judge will refuse the application, require further information to be served or adjourn it for a hearing in court, which can be carried out via live link or telephone, where permitted by the Rules. The Court will inform the applicant of the outcome and make the necessary arrangements for any additional hearings that may be required. There is no requirement for any order to be signed by the judge with a "wet ink" signature. The applicant will be notified electronically of any orders that are made.

47B.10 Applications considered without a hearing will be determined by a judge as soon as practicable. Approved orders will be returned electronically to the applicant and an electronic copy must be securely saved by the court.. If there is a particular urgency with any application, that fact should be made clear to the court when it is served and the judge should expedite it where possible.

Listing

47B.11 To assist the listing process, the applicant must supply a realistic estimate of the reading time required when the application is served. This estimate should be provided in the application and in the covering email to which it is attached. The covering email should also stipulate whether there have been any previous applications in the same or any connected investigation and provide the name of the judge who granted any previous Orders.

47B.12 Where the judge has decided that a hearing is required to determine or further consider the application, the expectation is that this hearing should usually take place by live link or telephone.[4] Where the judge directs a hearing at court, any additional material relied on by the applicant must be brought to

[4] Although the court cannot receive evidence by telephone, information in support of the application can be given on oath by this means.

court on the day of the hearing. Any additional material should not be retained by the court once the application has been determined, but must be taken away by the applicant at the end of the hearing.[5]

47B.13 When listing such hearings consideration should be given to Division XIII Listing of these practice directions which states at A.1 that listing is a judicial responsibility and function. G.3(1) of that division envisages that such applications will be completed by 10.30am or start after 4.30pm so as not to interfere with trials. This general direction does not prevent a judge from considering applications outside of these times where other court business allows.

47B.14 However, as paragraph G.8 of Division XIII Listing makes clear, along with the relevant case law, that the search powers in PACE constitute "a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility."[6] Accordingly, there must be adequate time allowed for the judge to read carefully the application and all the supporting evidence supplied with it. The judge will require sufficient time to enable a short judgment to be given, where necessary so that in the event of challenge in the Administrative Court there is an explanation of the reasons for the decision for that court to consider.

DARTS Recording

47B.15 Hearings in court are required to be recorded whether on DARTS or some other secure method such as on a hand-held machine. Determination of the method of recording is a matter for the judge.

10. In CPD XIII Listing and Allocation, replace C5, E11 and G.3 with the below; add new section E.12

CPD XIII Listing C: REFERRAL OF CASES IN THE CROWN COURT FROM THE RESDIENT JUDGES TO THE PRESIDING JUDGES:

Cases in the Crown Court to be referred to the Resident Judge

C.5 Resident Judges should give guidance to the judges and staff of their respective courts as to which Class 2B cases should be referred to them following consultation with the Senior Presiding Judge. This will include any cases that may be referred to the Presiding Judge, see below. Class 2B cases to be referred to the Resident Judge are likely to be identified by the list officer, or by the judge at the first hearing in the Crown Court. Any appeal against conviction and/or sentence from a Youth Court involving a Class 2B case must be bought to the attention of the Resident Judge as soon as practicable. Where

[5] Generally, there are no secure storage at facilities at court centres where sensitive material can be safely left.
[6] *per* Lloyd LJ *R v Maidstone Crown Court, ex p Waitt* [1988] Crim LR 384,

not provided with the appeal papers, the list officer must obtain a full summary of the prosecution case so as to allow an informed allocation decision to be made.

CPD XIII Listing E: ALLOCATION OF BUSINESS WITHIN THE CROWN COURT

E.11 Appeals from decisions of magistrates' courts shall be heard by:

i. a Resident Judge, or
ii. a Circuit Judge, nominated by the Resident Judge, or
iii. a Recorder or qualifying judge advocate or a Deputy Circuit Judge listed by the Presiding Judge to hear such appeals; or, if there is no such list nominated by the Resident Judge to hear such appeals;
iv. and, no less than two and no more than four justices of the peace, none of whom took part in the decision under appeal;
v. where no Circuit Judge or Recorder or qualifying judge advocate satisfying the requirements above is available, by a Circuit Judge, Recorder, qualifying judge advocate or Deputy Circuit Judge selected by the Resident Judge to hear a specific case or cases listed on a specific day.

E.12 Appeals from the youth court in relation to sexual offences shall be heard by:

i. A Resident Judge or;
ii. a Circuit Judge nominated by the Resident Judge who is authorised under D.3 to hear sexual offences in Class 1C or Class 2B;
iii. and no less than two and no more than four justices of the peace, none of whom took part in the decision under appeal. The justices of the peace must have undertaken specific training to deal with youth matters.
iv. No appeal against conviction and/or sentence from a Youth Court involving a Class 1C or Class 2B offence shall be heard by a Recorder save with the express permission of the Presiding Judge of the Circuit.

CPD XIII Listing G: LISTING OF HEARINGS OTHER THAN TRIALS

G.3 Hearings other than trials include the following:

i. Applications for search warrants and Production Orders, sufficient reading time must be provided, see G.8 below;
ii. Bail applications;
iii. Applications to vacate or adjourn hearings;
iv. Applications for dismissal of charges;
v. Pre-Trial and Preparation Hearing;
vi. Applications for disclosure of further unused material under section 8 of CPIA 1996;
vii. Case progression or case management hearings;

viii. Applications in respect of sentence indications not sought at the PTPH;
ix. Sentences;
x. Civil applications under the Anti-Social Behaviour, Crime and Policing Act 2014;
xi. Appeals from the magistrates' court: it is essential in all cases where witnesses are likely to be needed on the appeal to check availability before a date is fixed
xii. Appeals from the youth court: where the case involves a Class 2B offence then a directions hearing will be required before the re-hearing to consider special measures, ground rules and appropriate adjustments for the hearing of the trial.

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

Lord Chief Justice
28th March 2019