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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2022

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE OF ENGLAND WALES

Criminal Practice Directions 2015

Amendment No. 12

AMENDMENT NO. 12 TO THE CRIMINAL PRACTICE DIRECTIONS 2015

Introduction

This is the twelfth amendment to the Criminal Practice Directions 2015.¹

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. Amendment Number 8 EWCA [2019] Crim 495 was issued by the Lord Chief Justice on 28th March 2019 and came into force on the 1st April 2019; Amendment Number 9 [2019] EWCA Crim 1603 was issued by the Lord Chief Justice on 10th October 2019 and comes into force on 14th October 2019; Amendment Number 10 EWCA [2020] Crim 604 was issued by the Lord Chief Justice on 12th May 2020 and came into force on the 13th May 2020; Amendment No 11 EWCA Crim 1347 was issued by the Lord Chief Justice on 29th October 2020 and came into force on Monday 16th November 2020.

In this amendment:

1. In the heading “**CPD V Evidence 18E: USE OF S. 28 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999; PRE-RECORDING OF CROSS-EXAMINATION AND RE-EXAMINATION FOR WITNESSES CAPTURED BY S.16 YCEA 1999.**” Delete the words “**FOR WITNESSES CAPTURED BY S.16 YCEA 1999**”.

2. At paragraph 18E.1:

- (i) after “When Section 28 of the Youth Justice and Criminal Evidence Act 1999 (s.28 YJCEA 1999)” delete “is” and insert “has been”.
- (ii) After “brought into force” delete “by Statutory Instrument”.
- (iii) After “for a particular Crown Court” delete “,under that SI,”
- (iv) After “a witness will be eligible for special measures under” delete “s.28 if:
 - i. he or she is under the age of 18 at the time of the special measures determination; or
 - ii. he or she suffers from a mental disorder within the meaning of the Mental Health Act 1983, or has a significant impairment of intelligence and social functioning, or has a physical disability or a physical disorder, and the quality of his or her evidence is likely to be diminished as a consequence.”

And insert: “that section by virtue of section 16 of the Act (age or incapacity) or section 17 (fear or distress about testifying, or in proceedings for a sexual or other specified offence), to the extent provided by the relevant commencement order. A list of those orders, with links, appears at <https://www.legislation.gov.uk/ukpga/1999/23/section/28>.”

3. At paragraph 18E.2:

- (i) delete “this process is” and add in “Applications for special measures directions are”
- (ii) After “governed by” add in “Part 18 of”
- (iii) After “the obligations on the parties.” Delete “Advocates should also refer to the annex of this practice direction which contains further detailed guidance on ground rules hearings” and add in “In addition to these paragraphs of these Practice Directions, paragraphs I 3D (Vulnerable people in the courts), I 3E (about ground rules hearings), I 3F (Intermediaries) V 18A (about special measures generally) and V 18C (about video recorded interviews) contain relevant guidance”.

4. Delete current paragraphs 18E. 3- 18E.4 and substitute with the below;

“18E.3 Other guidance applicable primarily to the parties but of which courts should be aware includes:

- (i) the *Protocol between the National Police Chiefs’ Council, the Crown Prosecution Service and Her Majesty’s Courts & Tribunals Service to expedite cases involving witnesses under 10 years;*

- (ii) *Achieving Best Evidence in criminal proceedings*;
- (iii) the *Attorney General's Guidelines on Disclosure*;
- (iv) the *2013 Protocol and Good Practice Model on Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings*;
- (v) the *Advocates Gateway Toolkits*;
- (vi) the Inns of Court College of Advocacy training document *Advocacy and the vulnerable: 20 principles of questioning*.

18E.4 Advocates should also refer to the annex to this practice direction which contains further detailed guidance on ground rules hearings where the witness is eligible for assistance under section 16 of the 1999 Act. "

5. In paragraph 18E.5:

- (i) After "Witnesses eligible for special measures under s.28 YJCEA 1999 should be identified" add in "promptly".
- (ii) After "by the police." delete "The police and Crown Prosecution Service should discuss," and add in "If it will not cause undesirable delay, a representative of the Crown Prosecution Service should give prior approval before the police discuss,"
- (iii) After "This may include use of a Registered Intermediary." Delete "See Criminal Practice Directions of 2015 (CPD) General matters 3D: Vulnerable people in the courts and 3F: Intermediaries."

6. Delete paragraph 18E.6

7. At paragraph 18E.7:

- (i) After "For timetabling of the case, it is imperative that the investigators and prosecutor commence the disclosure process at the start of the investigation." delete "*The Judicial Protocol on Disclosure of Unused Material in Criminal Proceedings* (November 2013)" and add in "The Attorney-General's Guidelines: Disclosure for Investigators, Prosecutors and Defence Practitioners".
- (ii) Delete "Local Implementation Teams (LITs) should encourage all appropriate agencies to endorse and follow both the Protocol and the Good Practice Model. LITs should monitor compliance and issues should initially be raised at the LITs."

8. Renumber paragraph 18E.7 as paragraph 18E.6.

9. Before the heading "The first hearing in the magistrates' court" insert in the below:

"18E.7 From the point of grant of the s.28 YJCEA 1999 special measures application, timescales provided by section 8.6 of A protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her

Majesty's Courts and Tribunals Service to expedite cases involving witnesses under 10 years will cease to apply and the case should be managed in accordance with the timescales established in this practice direction.

18E.8 Local Implementation Teams (LITs) should be established with all relevant agencies represented by someone of sufficient seniority. Their task will be to monitor the operation of the scheme and compliance with this practice direction and other relevant protocols. LITs should encourage all appropriate agencies to endorse and follow both the Protocol and the Good Practice Model. LITs should monitor compliance and issues should initially be raised at the LITs"

10. After the heading "The first hearing in the magistrates' court", delete paragraphs 18E.8- 18E.9 and substitute in the below:

"18E.9 The prosecutor must formally notify the court and the defence at the first hearing (or as soon as possible thereafter if eligibility only becomes apparent following the first hearing)
(a) that the case is eligible for special measures under s.28 YJCEA 1999; and
(b) whether or not the prosecutor intends to apply for such a direction in the Crown Court."

11. In paragraph 18E.10:

- (i) delete "At the hearing the court must follow part 9 of the Rules (Allocation) and refer to the Sentencing Council's guideline on Allocation."
- (ii) After "This practice direction applies only where the defendant indicates a not guilty plea or does not indicate a plea, and the case is sent for trial in the Crown Court" delete ", either with or without allocation".

12. Delete paragraph 18E.11.

13. In paragraph 18E.12:

- (i) After "the timetable is that as established by the Better Case Management initiative." delete "The Court must be mindful of its duties under Parts 1 and 3 of the Rules to manage the case effectively. Wherever the Crown Prosecution Service will seek a s.28 YJCEA 1999 special measures direction this should, where possible, be listed for" and add in "The".
- (ii) After "PTPH" add in "should be listed"
- (iii) After "within 28 days of the date of sending from the magistrates' court." Delete "Section 10.2 of *A protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts and Tribunals Service to expedite cases involving witnesses under 10 years* does not apply."

14. Renumber paragraph 18E.12 as 18E.11.

15. Delete paragraph 18E.13.

16. In the heading “Before the PTPH hearing in the Crown Court”, delete “PTPH” and replace with “Plea and Trial Preparation Hearing”.

17. Delete paragraph 18E.14.

18. In paragraph 18E.15:

- (i) After “A transcript of the ABE interview and the application for special measures, including under s.28 YJCEA 1999, must be served on the Court and defence at least” delete “7” and add in “5 business”.
- (ii) After “The report of any Registered Intermediary” add in “addressing this issue”.

19. Renumber paragraph 18E.15 as 18E.12.

20. In paragraph 18E.16:

After “Any defence representations about the application for special measures must be served before the PTPH” delete “, within 28 days from the first hearing at the magistrates’ court, when notice was first given of the application”.

21. Renumber paragraph 18E.16 as 18E.13 and then insert the below:

“18E.14 An application for a witness summons to obtain material held by a third party, should be served in advance of the PTPH and determined at that hearing, or as soon as reasonably practicable thereafter. The timetable should accommodate any consequent hearings or applications, but it is imperative parties are prompt to obtain third party disclosure material. The prosecution must make the court and the defence aware of any difficulty as soon as it arises.”

22. In the heading “Plea and Trial Preparation Hearing” add in “At the” before the word “Plea”.

23. Delete paragraphs 18E.17- 18E.18 and substitute with the below;

“18E.15 The Resident Judge may have appointed a judicial lead from the salaried judiciary at the court centre who will be responsible for monitoring and supervising the scheme. The Plea and Trial Preparation Hearing (PTPH) must be conducted by a salaried judge.”

24. Delete the heading “The application”.

25. In paragraph 18E.19:

After “The judge may hear submissions from the advocates and will rule on the application” delete “If it is refused (see the assumptions to be applied by the courts in s.21 and s.22 of the YJCEA 1999), this practice direction ceases to apply” and add in “for special measures”.

26. Renumber paragraph 18E.19 as 18E.16

27. Delete paragraph 18E.20 and then insert the below;

“18E.17 The judge will need to consider:

- whether any of the special measures, or a combination of them, would be likely to improve the quality of the witness’s evidence, and if so
- which of the special measures, or a combination of them would be likely to maximise, so far as practicable, the quality of evidence given by the witness.

18E.18 The judge should bear in mind all the circumstances of the case, including any views expressed by the witness and whether the measure or measures might tend to inhibit such evidence being effectively tested.

18E. 19 The judge should pay careful regard to whether a section 28 special measures direction will in fact materially advance the date for the cross-examination and re-examination, so as to maximise, along with any other measures, the quality of the witness’s evidence. This will involve detailed consideration of when the section 28 recording and the trial are likely to occur. This in turn will depend, amongst other things, on any waiting list to use the recording equipment, the likely length of the section 28 hearing and the availability of the judge, the advocates, the witness and a suitable courtroom.

18E.20 Furthermore, if there have already been delays, for instance because of a lack of resources to facilitate the timely prerecording of the ABE interview (the examination-in-chief), that additionally is a matter to which the judge should have regard when viewing the situation overall and deciding whether the section 28 special measure will improve and maximise the quality of the evidence.

18E.21 Against that background, the judge should determine which, if any, of the measures, or combination of them, would be likely to maximise so far as practicable the quality of the witness’s evidence. It may be necessary for the judge to revisit the decision in this context in the light of changed circumstances.

18E.22 If the application is refused (see the assumptions to be applied by the courts in s.21 and s.22 of the YJCEA 1999), this practice direction ceases to apply.

18E.23 If the application is granted, the judge should make orders and give directions for preparation for the recorded cross-examination and re-examination hearing and advance preparation for the trial, including for any outstanding disclosure of unused material. The correct and timely application of the Criminal Procedure and Investigations Act 1996 (‘CPIA 1996’) will be vital and close attention should be paid to the *2013 Protocol*

and Good Practice Model on Disclosure (November 2013) and the Attorney-General's Guidelines: Disclosure for Investigators, Prosecutors and Defence Practitioners, as referred to above."

28. In paragraph 18E.21:

- a) at vii:
 - i. before "prior to the recorded cross-examination and re-examination" delete "fixing a date for a ground rules hearing, about one week" and add in: "It will be for the judge to decide whether a ground rules hearing is necessary. If one is to take place, depending on the circumstances of the case, this should be listed either at a convenient date prior to the recorded cross-examination and re-examination hearing or it should take place immediately".
 - ii. After "prior to the recorded cross-examination and re-examination" delete the word "hearing"
 - iii. Before "see CPD General matters 3E: Ground rules hearings to plan questioning of a vulnerable witness or defendant" add in "(" and after "or defendant" add in ")".

b) renumber subparagraph xiii as xiv and after subparagraph xii insert:

"xiii. Provision by the prosecution of the paginated jury bundle, if possible, in advance of the s.28 hearing;"

29. Renumber paragraph 18E.21 as 18E.24.

30. In paragraph 18E.22:

- (i) after "The ground rules hearing" add in ", if one is ordered,"
- (ii) After "will usually be soon" add in "as is feasible"
- (iii) After "after the deadline for service of the defence statement" delete ",the recorded cross-examination and re-examination hearing about one week later. However, there must be time" and add in ". Time must be".

31. Renumber paragraphs 18E.22 as 18E.25 and 18E.23 as 18E.26 respectively.

32. In paragraph 18E.24 delete "For a young child, the hearing should usually be in the morning and conclude before lunch time."

33. Renumber paragraph 18E.24 as 18E.27 and delete current paragraph 18E.25.

34. Renumber paragraph 18E.26 as 18E.28.

35. In paragraph 18E.27:

After "If ordered, the lead lawyer for the prosecution and defence must provide a weekly update to the court" delete "Case Progression Officer, copied to the judge and parties".

36. Renumber paragraph 18E.27 as 18E.29 and paragraph 18E.28 as 18E.30 respectively.

37. In paragraph 18E.29:

- (i) after “The witness’ court familiarisation visit” delete the word “must” and add in “should”.
- (ii) After “take place” Delete “, including” and add in “. When the witness is under 18 or it is otherwise appropriate, there should be”.
- (iii) After “an opportunity to practice on the live link/recording facilities” delete “, see the Code of Practice for Victims of Crime, October 2013, Chapter 3, paragraph 1.22”
- (iv) After “The witness must have the opportunity to view his or her ABE interview to refresh” delete “his or her” and add in “the witness”.

38. Renumber paragraph 18E.29 as 18E.31.

39. In paragraph 18E.30:

- (i) Before “that the case is suitable for the witness to give evidence from a remote site then a familiarisation visit should take place at that site.” Delete “When the court has deemed” and add in “If the court decides”
- (ii) After “that the case is suitable for the witness to give evidence from a remote site then a familiarisation visit should take place at that site.” Delete “At the ground rules hearing” and add in “If a ground rules hearing is ordered,”.

40. Renumber paragraph 18E.30 as 18E.32.

41. In paragraph 18E.31:

- (i) After “Applications to vary or discharge a special measures declaration must comply with” delete “rule” and replace with “CrimPR”.
- (ii) After “18.11.” delete “Although the need for prompt action will make case preparation tight.” And add in “The rule requires the application to be made as soon as reasonably practicable after becoming aware of the grounds for doing so.”

42. Renumber paragraph 18E.31 as 18E.33.

43. In paragraph 18E.32:

- (i) After “Advocates should master the toolkits available through The Advocate’s Gateway.” Add in “The toolkits have potential relevance to applications where the witness is eligible for assistance under either s.16 or s.17 YJCEA 1999.”
- (ii) After “These provide guidance on questioning a vulnerable witness, see CPD General matters 3D and the annex to this practice direction” add in “and the Inns of Court College of Advocacy (“ICCA”) 20 Principles of Questioning.”

44. Renumber paragraph 18E.32 as 18E.34.

45. In paragraph 18E.33:

After “Any appointed Registered Intermediary must attend the ground rules hearing, see” delete “CPD General matters 3E.2” and insert “CrimPR 3.9(2)”.

46. Renumber paragraph 18E.33 as 18E.35.

47. In paragraph 18E.34:

- (i) Before “defence advocate” delete the word “The” and add in “Depending on the circumstances of the case, the judge may order that the”
- (ii) After “defence advocate” add in “who appeared”
- (iii) After “at the ground rules hearing” delete “must be she or he who will” and add in “is to”
- (iv) After “conduct the recorded cross-examination” delete “See listing and allocation below on continuity of counsel and release from other cases.” And add in (see listing and allocation below)”.

48. In paragraph 18E.35:

After “Topics that” delete “will need discussion in every case will” and add in “may require discussion, depending on the circumstances of the case,”

49. Renumber paragraphs 18E.35 as 18E.36 and 18E.36 as 18E.37 respectively.

50. In paragraph 18E.37:

Delete “At the ground rules hearing the judge should” and add in “If a ground rules hearing is ordered (whether or not on a date in advance of the recorded cross-examination and re-examination), this may provide a convenient opportunity for the judge to:”

51. Renumber paragraph 18E.37 as 18E.39.

52. Renumber the following paragraphs:

- 18E.38 as 18E.40
- 18E.39 as 18E.41
- 18E.40 as 18E.42
- 18E.41 as 18E.43
- 18E.42 as 18E.44
- 18E.43 as 18E.45
- 18E.44 as 18E.46
- 18E.45 as 18E.47
- 18E.46 as 18E.48
- 18E.47 as 18E.49
- 18E.48 as 18E.50
- 18E.49 as 18E.51
- 18E.50 as 18E.52
- 18E.51 as 18E.53
- 18E.52 as 18E.54

53. In paragraph 18E.53:

After “Any application under section 28(5) must be in writing and be served on the court and the prosecution at least” delete “28” and add in “20 business”.

54. Renumber paragraph 18E.53 as 18E.55.

55. In paragraph 18E.54:

- (i) After “The prosecution should respond in writing within” delete “7” and add in “5 business”
- (ii) After “Any further cross-examination ordered must be recorded via live link in advance of the trial and served on the court and the parties.” Add in “These timescales may be abridged for good reason on application to the judge.”

56. Renumber paragraph 18E. 54 as 18E.56.

57. Renumber paragraphs 18E.55 as 18E.57 and 18E.56 as 18E.58 respectively.

58. In paragraph 18E.57:

After “If the matter was not addressed at the ground rules hearing, the judge should discuss with the advocates how any limitations on questioning should be explained to the jury before summing-up.” Add in “If not dealt with at the ground rules hearing, this should usually occur at the commencement of the trial. The judge will need to consider when to give a direction to the jury in this context, which is likely to be necessary before the recording is played.”

59. Renumber paragraphs 18E.57 as 18E.59 and 18E.58 as 18E.60 respectively.

60. In paragraph 18E.59:

- (i) After “**Advocates**” delete “It is the responsibility of the defence advocate, on accepting the brief, to ensure that he or she is available for both the ground rules hearing and the hearing under section 28; continuity at trial is obligatory except in exceptional circumstances. The” and add in “Depending on the circumstances of the case, the judge may order that the defence advocate who appeared at the ground rules hearing must conduct the recorded cross-examination. When such an order is made, the”
- (ii) After “judge and list office will make whatever reasonable arrangements are” delete the word “possible” and insert “feasible”.
- (iii) After “to achieve this, assisted by the Resident Judge” delete “where” and insert “when”.
- (iv) After the word “necessary”, add in “Although continuity of representation is to be encouraged, it is not mandatory for the advocate who conducted the section 28 cross-examination to represent the defendant at trial. “

61. Renumber paragraph 18E.59 as 18E.61.

62. In paragraph 18E.60:

After “When the timetable for the case is being set, advocates must have their up to date availability with them (in so far as is possible). When” delete:

“an advocate who is part-heard in another trial at a different Crown Court centre finds themselves in difficulties in attending either the ground rules hearing, s.28 hearing itself or the trial where s.28 has been utilised, they must inform the Resident Judges of both courts as soon as practicable. The Resident Judges must resolve any conflict with the advocate’s availability. The starting point should be that the case involving s.28 hearing takes priority. However, due consideration should also be given to custody time limits, other issues which make either case particularly complex or sensitive, high profile cases and anything else that the judges should take into consideration in the interests of justice”

and add in:

“it has been ordered that the defence advocate who appeared at the ground rules hearing must conduct the recorded cross-examination, an advocate who is part-heard in another trial and is in difficulties in attending the s.28 hearing must inform the judges conducting the respective proceedings as soon as practicable. The judges shall resolve the conflict as regards the advocate’s availability, taking into consideration the circumstances of the cases and the interests of justice (referring the issue, if necessary, to the Resident Judge(s)).”

63. Renumber paragraph 18E.60 as 18E.62.

64. Delete paragraph 18E.61.

65. In paragraph 18E.62:

Before “Once the s.28 hearing has taken place, any judge, in accordance with CPD XIII Listing E, including recorders, can deal with the trial.” Delete:

“It is essential that the ground rules hearing and the s.28 YJCEA 1999 hearing are before the same judge.”

And add in:

“Depending on the circumstances of the case, the Resident Judge or the nominated lead judge may order that the ground rules hearing and the s. 28 YJCEA 1999 hearing are to be listed before the same judge.”

66. Renumber paragraph 19E.62 as 18E.63.

67. Delete current paragraph 18E.63.

68. In paragraph 18E.64:

- (i) After “**Listing**” delete “Due to the limited availability of recording facilities, the hearing held under section 28 must take precedence over other hearings.”
- (ii) After “Section 28 hearings should be listed” deleted “as the first matter in the morning and will usually conclude before lunch time.” And add in “at a time determined by the list officer, or as directed by the judge or Resident Judge, bearing in mind the circumstances of the witness as well the availability of the judge, the advocates and a courtroom with the relevant equipment, including the ability to record the evidence.”

- (iii) After “Ground rules hearings” add in “, if they are listed in advance of the day when the recorded cross-examination and re-examination is to occur,”

69. In paragraph 18E.65:

After “CPD” delete “Preliminary Proceedings 16B” and insert “I General Matters 6B”

70. In subparagraph 18E.66(ii.):

After “Section 25 of the YJCEA 1999, applicable to the evidence of a” delete “child or vulnerable adult in sexual offences cases” and insert “witness where the proceedings relate to a sexual offence or an offence under section 1 or 2 of the Modern Slavery Act 2015, or it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.”

71. In paragraph 18E.67:

After “Note that public access to information held by the court is now the subject of” delete “Rule 5.8” and add in “CrimPR 5.7 to 5.10”.

72. In Annex for section 28 ground rules hearings at the Crown Court when dealing with witnesses under s.16 YJCEA 1999:

- (i) at paragraph 6 delete “www.theadvocatesgateway.org/toolkits”
- (ii) Delete paragraph 14 and substitute in the below;
“14. The judge may have ordered that the defendant’s advocate attending the hearing is to be the same advocate who will be conducting the recorded cross-examination (and the subsequent trial, if any).”
- (iii) In paragraph 15 after “Any intermediary for the witness should only be warned for the GRH and the section 28 hearing they are assisting with. An Intermediary should not be instructed unless available to attend the GRH and the section 28 hearings ordered by the court” add in “(if listed on separate days)”.
- (iv) In paragraph 22 after Additional information can be found in the Inns of Court College of Advocacy training document “Advocacy and the vulnerable: 20 principles of questioning” delete “at the following link: www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf”

- 73. Amend the heading “Court of Appeal guidance” so that it reads “Court of Appeal guidance on questioning children of tender years and witnesses who are vulnerable as a result of mental incapacity”.**

The Lord Chief Justice

March 2022

