

# CRIMINAL PRACTICE DIRECTIONS

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## II Preliminary proceedings

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### Part 6 Investigation orders and warrants

#### CPD II Preliminary proceedings 6A: INVESTIGATION ORDERS AND WARRANTS

- 6A.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. Part 6 of the Rules must be followed, and the accompanying forms must be used. These are designed to prompt applicants, and the courts, to deal with all of the relevant criteria.
- 6A.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.
- 6A.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.

- 6A.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.
- 6A.5 The forms that accompany Part 6 of the Rules provide for the most frequently encountered applications. 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.

## **Part 7 Starting a prosecution in a magistrates' court**

## **Part 8 Discontinuing a prosecution**

## **Part 9 Allocation and sending for trial**

### **CPD II Preliminary proceedings 9A: ALLOCATION (MODE OF TRIAL)**

- 9A.1 Courts must follow the Sentencing Council's guideline on Allocation (mode of trial) when deciding whether or not to send defendants charged with "either way" offences for trial in the Crown Court under section 51(1) of the Crime and Disorder Act 1998. The guideline refers to the factors to which a court must have regard in accordance with section 19 of the Magistrates' Courts Act 1980. Section 19(2)(a) permits reference to previous convictions of the defendant.
- 9A.2 The Allocation guideline lists four factors, a) to d), that the court must also have regard to. No examples or guidance are given, however, the following could be a consideration when applying the factors: that where cases involve complex

questions of fact or difficult questions of law, including difficult issues of disclosure of sensitive material, the court should consider sending for trial.

- 9A.3 Certain general observations can also be made:
- (a) the court should never make its decision on the grounds of convenience or expedition; and
  - (b) the fact that the offences are alleged to be specimens is a relevant consideration (although it has to be borne in mind that difficulties can arise in sentencing in relation to specimen counts: see *R v Clark* [1996] 2 Cr. App. R. 282, [1996] 2 Cr. App. R. (S.) 351; *R v Canavan and others* [1998] 1 W.L.R. 604, [1998] 1 Cr. App. R. 79, [1998] 1 Cr. App. R. (S.) 243 and *R v Oakes* [2012] EWCA Crim 2435, [2013] 2 Cr. App. R. (S.) 22 (see case of *R v Restivo*)); the fact that the defendant will be asking for other offences to be taken into consideration, if convicted, is not.

## **Part 10 Initial details of the prosecution case**

### **CPD II Preliminary proceedings 10A: DEFENDANT'S RECORD**

#### **Copies of record**

- 10A.1 The defendant's record (previous convictions, cautions, reprimands, etc) may be taken into account when the court decides not only on sentence but also, for example, about bail, or when allocating a case for trial. It is therefore important that up to date and accurate information is available. Previous convictions must be provided as part of the initial details of the prosecution case under Part 10 of the Rules.
- 10A.2 The record should usually be provided in the following format:
- Personal details and summary of convictions and cautions – Police National Computer ["PNC"] Court / Defence / Probation Summary Sheet;
  - Previous convictions – PNC Court / Defence / Probation printout, supplemented by Form MG16 if the police force holds convictions not shown on PNC;
  - Recorded cautions – PNC Court / Defence / Probation printout, supplemented by Form MG17 if the police force holds cautions not shown on PNC.
- 10A.3 The defence representative should take instructions on the defendant's record and if the defence wish to raise any objection to the record, this should be made known to the prosecutor immediately.
- 10A.4 It is the responsibility of the prosecutor to ensure that a copy of the defendant's record has been provided to the Probation Service.
- 10A.5 Where following conviction a custodial order is made, the court must ensure that a copy is attached to the order sent to the prison.
- #### **Additional information**
- 10A.6 In the Crown Court, the police should also provide brief details of the circumstances of the last three similar convictions and / or of convictions likely to be of interest to the court, the latter being judged on a case-by-case basis.

10A.7 Where the current alleged offence could constitute a breach of an existing sentence such as a suspended sentence, community order or conditional discharge, and it is known that that sentence is still in force then details of the circumstances of the offence leading to the sentence should be included in the antecedents. The detail should be brief and include the date of the offence.

10A.8 On occasions the PNC printout provided may not be fully up to date. It is the responsibility of the prosecutor to ensure that all of the necessary information is available to the court and the Probation Service and provided to the defence. Oral updates at the hearing will sometimes be necessary, but it is preferable if this information is available in advance.

## **Part 11 - [Empty]**

## **Part 12 - [Empty]**

## **Part 13 - [Empty]**

## **Part 14 The indictment**

### **CPD II Preliminary proceedings 14A: SETTLING THE INDICTMENT**

14A.1 Rule 14.1 of the Criminal Procedure Rules requires the prosecutor to serve a draft indictment not more than 28 days after service of the evidence in a case sent for trial, after the sending of the defendant for trial, or after one of the other events listed in that rule. Rule 14.2(5) provides that an indictment may contain any count charging substantially the same offence as one sent for trial and any other count based on the prosecution evidence already served which the Crown Court has jurisdiction to try. Where the prosecutor intends to include in the draft indictment counts which differ materially from, or are additional to, those on which the defendant was sent for trial then the defendant should be given as much notice as possible, usually by service of a draft indictment, or a provisional draft indictment, at the earliest possible opportunity.

14A.2 There is no rule of law or practice which prohibits two indictments being in existence at the same time for the same offence against the same person and on the same facts. But the court will not allow the prosecution to proceed on both indictments. They cannot be tried together and the court will require the prosecution to elect the one on which the trial will proceed. Where different defendants have been separately sent for trial for offences which can lawfully be charged in the same indictment then it is permissible to join in one indictment counts based on the separate sendings for trial even if an indictment based on one of them already has been signed. Where necessary the court should be invited to exercise its powers of amendment under section 5 of the Indictments Act 1915.

14A.3 Save in the special circumstances described in the following paragraphs of this Practice Direction, it is undesirable that a large number of counts should be contained in one indictment. Where defendants on trial have a variety of offences alleged against them then, in the interests of effective case management, it is the court's responsibility to exercise its powers in accordance with the overriding objective set out in Part 1 of the Criminal Procedure Rules. The prosecution may be required to identify a selection of counts on which the trial should proceed, leaving a decision to be taken later whether to try any of the remainder. Where an indictment contains substantive counts and one or more related conspiracy counts, the court will expect the prosecution to justify the joinder. Failing justification, the prosecution should be required to choose whether to proceed on the substantive counts or on the conspiracy counts. In any event, if there is a conviction on any counts that are tried, then those that have been postponed can remain on the file marked "not to be proceeded with without the leave of the court or the Court of Appeal". In the event that a conviction is later quashed on appeal, the remaining counts can be tried. Where necessary the court has power to order that an indictment be severed.

**Multiple offending: trial by jury and then by judge alone**

- 14A.4 Under sections 17 to 21 of the Domestic Violence, Crime and Victims Act 2004, the court may order that the trial of certain counts will be by jury in the usual way and, if the jury convicts, that other associated counts will be tried by judge alone. The use of this power is likely to be appropriate where justice cannot be done without charging a large number of separate offences and the allegations against the defendant appear to fall into distinct groups by reference to the identity of the victim, by reference to the dates of the offences, or by some other distinction in the nature of the offending conduct alleged.
- 14A.5 In such a case, it is essential to make clear from the outset the association asserted by the prosecutor between those counts to be tried by a jury and those counts which it is proposed should be tried by judge alone, if the jury convict on the former. A special form of indictment is prescribed for this purpose.
- 14A.6 An order for such a trial may be made only at a preparatory hearing. It follows that where the prosecutor intends to invite the court to order such a trial it will normally be appropriate to proceed as follows. The draft indictment served under Rule 14.1 should be in the form appropriate to such a trial. It should be accompanied by an application under Rule 15.3 for a preparatory hearing. This will ensure that the defendant is aware at the earliest possible opportunity of what the prosecution propose and of the proposed association of counts in the indictment. It is undesirable for a draft indictment in the usual form to be served where the prosecutor expects to apply for a two stage trial and hence, of necessity, for permission to amend the indictment at a later stage in order that it may be in the special form.
- 14A.7 On receipt of a draft two part indictment, a Crown Court officer should sign it at the end of Part Two. At the start of the preparatory hearing, the defendant should be arraigned on all counts in Part One of the indictment. Arraignment on Part Two need not take place until after there has been either a guilty plea to, or finding of guilt on, an associated count in Part One of the indictment.

14A.8 If the prosecution application is successful, the prosecutor should prepare an abstract of the indictment, containing the counts from Part One only, for use in the jury trial. Preparation of such an abstract does not involve “amendment” of the indictment. It is akin to where a defendant pleads guilty to certain counts in an indictment and is put in the charge of the jury on the remaining counts only.

14A.9 If the prosecution application for a two stage trial is unsuccessful, the prosecutor may apply to amend the indictment to remove from it any counts in Part Two which would make jury trial on the whole indictment impracticable and to revert to a standard form of indictment. It will be a matter for the court whether arraignment on outstanding counts takes place at the preparatory hearing, or at a future date.

**Multiple offending: count charging more than one incident**

14A.10 Rule 14.2(2) of the Criminal Procedure Rules allows a single count to allege more than one incident of the commission of an offence in certain circumstances. Each incident must be of the same offence. The circumstances in which such a count may be appropriate include, but are not limited to, the following:

- (a) the victim on each occasion was the same, or there was no identifiable individual victim as, for example, in a case of the unlawful importation of controlled drugs or of money laundering;
- (b) the alleged incidents involved a marked degree of repetition in the method employed or in their location, or both;
- (c) the alleged incidents took place over a clearly defined period, typically (but not necessarily) no more than about a year;
- (d) in any event, the defence is such as to apply to every alleged incident without differentiation. Where what is in issue differs between different incidents, a single “multiple incidents” count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.

14A.11 Even in circumstances such as those set out above, there may be occasions on which a prosecutor chooses not to use such a count, in order to bring the case within section 75(3)(a) of the Proceeds of Crime Act 2002 (criminal lifestyle established by conviction of three or more offences in the same proceedings): for example, because section 75(2)(c) of that Act does not apply (criminal lifestyle established by an offence committed over a period of at least six months). Where the prosecutor proposes such a course, it is unlikely that Part 1 of the Rules (the overriding objective) will require an indictment to contain a single “multiple incidents” count in place of a larger number of counts, subject to the general principles set out at 14A.3.

14A.12 For some offences, particularly sexual offences, the penalty for the offence may have changed during the period over which the alleged incidents took place. In such a case, additional “multiple incidents” counts should be used so that each count only alleges incidents to which the same maximum penalty applies.

14A.13 In other cases, such as sexual or physical abuse, a complainant may be in a position only to give evidence of a series of similar incidents without being able to specify when or the precise circumstances in which they occurred. In these cases, a 'multiple incidents' count may be desirable. If on the other hand, the complainant is able to identify particular incidents of the offence by reference to a date or other specific event, but alleges that in addition there were other incidents which the complainant is unable to specify, then it may be desirable to include separate counts for the identified incidents and a 'multiple incidents' count or counts alleging that incidents of the same offence occurred 'many' times. Using a 'multiple incidents' count may be an appropriate alternative to using 'specimen' counts in some cases where repeated sexual or physical abuse is alleged. The choice of count will depend on the particular circumstances of the case and should be determined bearing in mind the implications for sentencing set out in *R v Canavan; R v Kidd; R v Shaw* [1998] 1 W.L.R. 604, [1998] 1 Cr. App. R. 79, [1998] 1 Cr. App. R. (S.) 243.

## **CPD II Preliminary proceedings 14B: VOLUNTARY BILLS OF INDICTMENT**

14B.1 Section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 and paragraph 2(6) of Schedule 3 to the Crime and Disorder Act 1998 allow the preferment of a bill of indictment by the direction or with the consent of a judge of the High Court. Bills so preferred are known as 'voluntary bills'.

14B.2 Applications for such consent must not only comply with each paragraph of the Indictments (Procedure) Rules 1971, SI 1971/2084, but must also be accompanied by:

- (a) a copy of any charges on which the defendant has been sent for trial;
- (b) a copy of any charges on which his or her sending for trial was refused by the magistrates' court;
- (c) a copy of any existing indictment which has been preferred in consequence of his or her sending for trial;
- (d) a summary of the evidence or other document which
  - (i) identifies the counts in the proposed indictment on which he or she has been sent for trial (or which are substantially the same as charges on which he or she has been so sent), and
  - (ii) in relation to each other count in the proposed indictment, identifies the pages in the accompanying statements and exhibits where the essential evidence said to support that count is to be found.

14B.3 These requirements should be complied with in relation to each defendant named in the indictment for which consent is sought, whether or not it is proposed to prefer any new count against him or her.

14B.4 The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it.

- 14B.5 Neither the 1933 Act, the 1998 Act nor the 1971 Rules expressly require a prosecuting authority applying for consent to the preferment of a voluntary bill to give notice of the application to the prospective defendant, nor to serve on him or her a copy of documents delivered to the judge; nor is it expressly required that the prospective defendant have any opportunity to make any submissions to the judge, whether in writing or orally.
- 14B.6 However, the Attorney-General previously issued guidance to prosecutors on the procedures to be adopted in seeking judicial consent to the preferment of voluntary bills. Those procedures remain applicable and prosecutors should:
- (a) on making an application for consent to preferment of a voluntary bill, give notice to the prospective defendant that such application has been made;
  - (b) at about the same time, serve on the prospective defendant a copy of all the documents delivered to the judge (save to the extent that these have already been served on him or her);
  - (c) inform the prospective defendant that he or she may make submissions in writing to the judge, provided that he or she does so within nine working days of the giving of notice under (a) above.
- 14B.7 Prosecutors must follow these procedures unless there are good reasons for not doing so, in which case prosecutors must inform the judge that the procedures have not been followed and seek leave to dispense with all or any of them. Judges should not give leave to dispense unless good reasons are shown.
- 14B.8 A judge to whom application for consent to the preferment of a voluntary bill is made will, of course, wish to consider carefully the documents submitted by the prosecutor and any written submissions made by the prospective defendant, and may properly seek any necessary amplification. The judge may invite oral submissions from either party, or accede to a request for an opportunity to make oral submissions, if the judge considers it necessary or desirable to receive oral submissions in order to make a sound and fair decision on the application. Any such oral submissions should be made on notice to the other party and in open court.

## **Part 15 Preparatory hearings in the Crown Court**

### **Part 16 Reporting, etc. restrictions**

#### **CPD II Preliminary proceedings 16A: UNOFFICIAL SOUND RECORDING OF PROCEEDINGS**

- 16A.1 Section 9 of the Contempt of Court Act 1981 contains provisions governing the unofficial use of equipment for recording sound in court. Section 9(1) provides that it is a contempt of court
- (a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the permission of the court;

- (b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;
- (c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

These provisions do not apply to the making or use of sound recordings for purposes of official transcripts of the proceedings, upon which the Act imposes no restriction whatever.

- 16A.2 The discretion given to the court to grant, withhold or withdraw leave to use equipment for recording sound or to impose conditions as to the use of the recording is unlimited, but the following factors may be relevant to its exercise:
- (a) the existence of any reasonable need on the part of the applicant for leave, whether a litigant or a person connected with the press or broadcasting, for the recording to be made;
  - (b) the risk that the recording could be used for the purpose of briefing witnesses out of court;
  - (c) any possibility that the use of the recorder would disturb the proceedings or distract or worry any witnesses or other participants.
- 16A.3 Consideration should always be given whether conditions as to the use of a recording made pursuant to leave should be imposed. The identity and role of the applicant for leave and the nature of the subject matter of the proceedings may be relevant to this.
- 16A.4 The particular restriction imposed by section 9(1)(b) applies in every case, but may not be present in the mind of every applicant to whom leave is given. It may therefore be desirable on occasion for this provision to be drawn to the attention of those to whom leave is given.
- 16A.5 The transcript of a permitted recording is intended for the use of the person given leave to make it and is not intended to be used as, or to compete with, the official transcript mentioned in section 9(4).
- 16A.6 Where a contravention of section 9(1) is alleged, the procedure in section 2 of Part 62 of the Rules should be followed. Section 9(3) of the 1981 Act permits the court to 'order the instrument, or any recording made with it, or both, to be forfeited'. The procedure at Rule 16.10 should be followed.

## **CPD II Preliminary proceedings 16B: RESTRICTIONS ON REPORTING PROCEEDINGS**

- 16B.1 Open justice is an essential principle in the criminal courts but the principle is subject to some statutory restrictions. These restrictions are either automatic or discretionary. Guidance is provided in the joint publication of the Judicial College, the Newspaper Society, the Society of Editors and Times Newspapers Limited entitled 'Reporting Restrictions in the Criminal Courts'. The current version is the second edition dated October 2009 and is available at [http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/crown\\_cou](http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/crown_cou)

rt\_reporting\_restrictions\_021009.pdf (Note that the HMCTS protocol referred to in the guidance has since been updated.)

- 16B.2 Where a restriction is automatic no order can or should be made in relation to matters falling within the relevant provisions. However, the court may, if it considers it appropriate to do so, give a reminder of the existence of the automatic restriction. The court may also discuss the scope of the restriction and any particular risks in the specific case in open court with representatives of the press present. Such judicial observations cannot constitute an order binding on the editor or the reporter although it is anticipated that a responsible editor would consider them carefully before deciding what should be published. It remains the responsibility of those reporting a case to ensure that restrictions are not breached.
- 16B.3 Before exercising its discretion to impose a restriction the court must follow precisely the statutory provisions under which the order is to be made, paying particular regard to what has to be established, by whom and to what standard.
- 16B.4 Without prejudice to the above paragraph, certain general principles apply to the exercise of the court's discretion:
- (a) The court must have regard to Parts 16 and 29 of the Criminal Procedure Rules.
  - (b) The court must keep in mind the fact that every order is a departure from the general principle that proceedings shall be open and freely reported.
  - (c) Before making any order the court must be satisfied that the purpose of the proposed order cannot be achieved by some lesser measure e.g. the grant of special measures, screens or the clearing of the public gallery (usually subject to a representative/s of the media remaining).
  - (d) The terms of the order must be proportionate so as to comply with Article 10 ECHR (freedom of expression).
  - (e) No order should be made without giving other parties to the proceedings and any other interested party, including any representative of the media, an opportunity to make representations.
  - (f) Any order should provide for any interested party who has not been present or represented at the time of the making of the order to have permission to apply within a limited period e.g. 24 hours.
  - (g) The wording of the order is the responsibility of the judge or Bench making the order: it must be in precise terms and, if practicable, agreed with the advocates.
  - (h) The order must be in writing and must state:
    - (i) the power under which it is made;
    - (ii) its precise scope and purpose; and
    - (iii) the time at which it shall cease to have effect, if appropriate.
  - (i) The order must specify, in every case, whether or not the making or terms of the order may be reported or whether this itself is

prohibited. Such a report could cause the very mischief which the order was intended to prevent.

- 16B.5 A series of template orders have been prepared by the Judicial College and are available as an appendix to the Crown Court Bench Book Companion; these template orders should generally be used.
- 16B.6 A copy of the order should be provided to any person known to have an interest in reporting the proceedings and to any local or national media who regularly report proceedings in the court.
- 16B.7 Court staff should be prepared to answer any enquiry about a specific case; but it is and will remain the responsibility of anyone reporting a case to ensure that no breach of any order occurs and the onus rests on such person to make enquiry in case of doubt.

## **Part 17 Extradition**