CRIMINAL PRACTICE DIRECTIONS DIVISION V

EVIDENCE

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Part 27 Witness statements

CPD V Evidence 27A: EVIDENCE BY WRITTEN STATEMENT

27A.1 Where the prosecution proposes to tender written statements in evidence under section 9 of the Criminal Justice Act 1967, it will frequently be necessary for certain statements to be edited. This will occur either because a witness has made more than one statement whose contents should conveniently be reduced into a single, comprehensive statement, or where a statement contains inadmissible, prejudicial or irrelevant material. Editing of statements must be done by a Crown Prosecutor (or by a legal representative, if any, of the prosecutor if the case is not being conducted by the Crown Prosecution Service) and not by a police officer.

Composite statements

27A.2 A composite statement giving the combined effect of two or more earlier statements must be prepared in compliance with the requirements of section 9 of the 1967 Act; and must then be signed by the witness.

Editing single statements

27A.3 There are two acceptable methods of editing single statements. They are:-

(a) By marking copies of the statement in a way which indicates the passages on which the prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the evidence so marked. The original signed statement to be tendered to the court is not marked in any way.
The marking on the copy statement is done by lightly striking out the passages to be edited, so that what appears beneath can still be read, or by bracketing, or by a combination of both. It is not permissible to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that

the defence and the court should be served with copies of the signed original statement.
Whenever the striking out / bracketing method is used, it will assist if the following words appear at the foot of the frontispiece or index to any bundle of copy statements to be tendered:
'The prosecution does not propose to adduce evidence of those passages of the attached copy statements which have been struck out and / or bracketed (nor will it seek to do so at the trial unless a notice of further evidence is served)'.

(b) By obtaining a fresh statement, signed by the witness, which omits the offending material, applying the procedure for composite statements above.

27A.4 In most cases where a single statement is to be edited, the striking out/ bracketing method will be the more appropriate, but the taking of a fresh statement is preferable in the following circumstances:

(a) When a police (or other investigating) officer's statement contains details of interviews with more suspects than are eventually charged, a fresh statement should be prepared and signed, omitting all details of interview with those not charged except, insofar as it is relevant, for the bald fact that a certain named person was interviewed at a particular time, date and place.

(b) When a suspect is interviewed about more offences than are eventually made the subject of charges, a fresh statement should be prepared and signed, omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration, or evidence about those offences is admissible on the charges preferred. It may, however, be desirable to replace the omitted questions and answers with a phrase such as: *'After referring to some other matters, I then said, "… … …" '*, so as to make it clear that part of the interview has been omitted.

(c) A fresh statement should normally be prepared and signed if the only part of the original on which the prosecution is relying is only a small proportion of the whole, although it remains desirable to use the alternative method if there is reason to believe that the defence might itself wish to rely, in mitigation or for any other purpose, on at least some of those parts which the prosecution does not propose to adduce.

(d) When the passages contain material which the prosecution is entitled to withhold from disclosure to the defence.

27A.5 Prosecutors should also be aware that, where statements are to be tendered under section 9 of the 1967 Act in the course of summary proceedings, there will be a need to prepare fresh statements excluding inadmissible or prejudicial material, rather than using the striking out or bracketing method.

27A.6 Whenever a fresh statement is taken from a witness and served in evidence, the earlier, unedited statement(s) becomes unused material and should be scheduled and reviewed for disclosure to the defence in the usual way.

CPD V Evidence 27B: VIDEO RECORDED EVIDENCE IN CHIEF

27B.1 The procedure for making an application for leave to admit into evidence video recorded evidence in chief under section 27 of the Youth Justice and Criminal Evidence Act 1999 is given in Part 29 of the Criminal Procedure Rules.

27B.2 Where a court, on application by a party to the proceedings or of its own motion, grants leave to admit a video recording in evidence under section 27(1) of the 1999 Act, it may direct that any part of the recording be excluded (section 27(2) and (3)). When such direction is given, the party who made the application to admit the video recording must edit the recording in accordance with the judge's directions and send a copy of the edited recording to the appropriate officer of the Crown Court and to every other party to the proceedings.

27B.3 Where a video recording is to be adduced during proceedings before the Crown Court, it should be produced and proved by the interviewer, or any other person who was present at the interview with the witness at which the recording was made. The applicant should ensure that such a person will be available for this purpose, unless the parties have agreed to accept a written statement in lieu of attendance by that person.

27B.4 Once a trial has begun, if, by reason of faulty or inadequate preparation or for some other cause, the procedures set out above have not been properly complied with and an application is made to edit the video recording, thereby necessitating an adjournment for the work to be carried out, the court may, at its discretion, make an appropriate award of costs.

CPD V Evidence 27C: EVIDENCE OF AUDIO AND VIDEO RECORDED INTERVIEWS

27C.1 The interrogation of suspects is primarily governed by Code C, one of the Codes of Practice under the Police and Criminal Evidence Act 1984 ('PACE'). Under that Code, interviews must normally be contemporaneously recorded. Under PACE Code E, interviews conducted at a police station concerning an indictable offence must normally be audio-recorded. In practice, most interviews are audio-recorded under Code E, or video-recorded under Code F, and it is best practice to do so. The questioning of terrorism suspects is governed separately by Code H. The Codes are available electronically on the Home Office website.

27C.2Where a record of the interview is to be prepared, this should be in accordance with the current national guidelines, as envisaged by Note 5A of Code E.

27C.3 If the prosecution wishes to rely on the defendant's interview in evidence, the prosecution should seek to agree the record with the defence. Both parties should have received a copy of the audio or video recording, and can check the record against the recording. The record should be edited (see below) if

inadmissible matters are included within it and, in particular if the interview is lengthy, the prosecution should seek to shorten it by editing or summary.

27C.4 If the record is agreed there is usually no need for the audio or video recording to be played in court. It is a matter for the discretion of the trial judge, but usual practice is for edited copies of the record to be provided to the court, and to the jury if there is one, and for the prosecution advocate to read the interview with the interviewing officer or the officer in the case, as part of the officer's evidence in chief, the officer reading the interviewer and the advocate reading the defendant and defence representative. In the magistrates' court, the Bench sometimes retire to read the interview themselves, and the document is treated as if it had been read aloud in court. This is permissible, but Rule 37.5 should be followed.

27C.5 Where the prosecution intends to adduce the interview in evidence, and agreement between the parties has not been reached about the record, sufficient notice must be given to allow consideration of any amendment to the record, or the preparation of any transcript of the interview, or any editing of a recording for the purpose of playing it in court. To that end, the following practice should be followed.

(a) Where the defence is unable to agree a record of interview or transcript (where one is already available) the prosecution should be notified at latest at the Plea and Case Management Hearing ('PCMH'), with a view to securing agreement to amend. The notice should specify the part to which objection is taken, or the part omitted which the defence consider should be included. A copy of the notice should be supplied to the court within the period specified above. The PCMH form inquires about the admissibility of the defendant's interview and shortening by editing or summarising for trial.

(b) If agreement is not reached and it is proposed that the audio or video recording or part of it be played in court, notice should be given to the prosecution by the defence as ordered at the PCMH, in order that the advocates for the parties may agree those parts of the audio or video recording that should not be adduced and that arrangements may be made, by editing or in some other way, to exclude that material. A copy of the notice should be supplied to the court.

(c) Notice of any agreement reached should be supplied to the court by the prosecution, as soon as is practicable.

27C.6 Alternatively, if, the prosecution advocate proposes to play the audio or video recording or part of it, the prosecution should at latest at the PCMH, notify the defence and the court. The defence should notify the prosecution and the court within 14 days of receiving the notice, if they object to the production of the audio or video recording on the basis that a part of it should be excluded. If the objections raised by the defence are accepted, the prosecution should prepare an edited recording, or make other arrangements to exclude the material part; and should notify the court of the arrangements made.

27C.7 If the defendant wishes to have the audio or video recording or any part of it played to the court, the defence should provide notice to the prosecution and the court at latest at the PCMH. The defence should also, at that time, notify the prosecution of any proposals to edit the recording and seek the prosecution's agreement to those amendments.

27C.8 Whenever editing or amendment of a record of interview or of an audio or video recording or of a transcript takes place, the following general principles should be followed:

(i) Where a defendant has made a statement which includes an admission of one or more other offences, the portion relating to other offences should be omitted unless it is or becomes admissible in evidence;

(ii) Where the statement of one defendant contains a portion which exculpates him or her and partly implicates a co-defendant in the trial, the defendant making the statement has the right to insist that everything relevant which is exculpatory goes before the jury. In such a case the judge must be consulted about how best to protect the position of the co-defendant.

27C.9 If it becomes necessary for either party to access the master copy of the audio or video recording, they should give notice to the other party and follow the procedure in PACE Code E at section 6.

27C.10 If there is a challenge to the integrity of the master recording, notice and particulars should be given to the court and to the prosecution by the defence as soon as is practicable. The court may then, at its discretion, order a case management hearing or give such other directions as may be appropriate.

27C.11 If an audio or video recording is to be adduced during proceedings before the Crown Court, it should be produced and proved in a witness statement by the interviewing officer or any other officer who was present at the interview at which the recording was made. The prosecution should ensure that the witness is available to attend court if required by the defence in the usual way.

27C.12 It is the responsibility of the prosecution to ensure that there is a person available to operate any audio or video equipment needed during the course of the proceedings. Subject to their other responsibilities, the court staff may be able to assist.

27C.13 If either party wishes to present audio or video evidence, that party must ensure, in advance of the hearing, that the evidence is in a format that is compatible with the court's equipment, and that the material to be used does in fact function properly in the relevant court room.

27C.14 In order to avoid the necessity for the court to listen to or watch lengthy or irrelevant material before the relevant part of a recording is reached, counsel shall indicate to the equipment operator those parts of a recording which it may be necessary to play. Such an indication should, so far as possible, be expressed in terms of the time track or other identifying process used by the interviewing

police force and should be given in time for the operator to have located those parts by the appropriate point in the trial.

27C.15 Once a trial has begun, if, by reason of faulty preparation or for some other cause, the procedures above have not been properly complied with, and an application is made to amend the record of interview or transcript or to edit the recording, as the case may be, thereby making necessary an adjournment for the work to be carried out, the court may make at its discretion an appropriate award of costs.

27C.16 Where a case is listed for hearing on a date which falls within the time limits set out above, it is the responsibility of the parties to ensure that all the necessary steps are taken to comply with this Practice Direction within such shorter period as is available.

Part 28 Witness summonses, warrants and orders
CPD V Evidence 28A: WARDS OF COURT AND CHILDREN SUBJECT TO CURRENT FAMILY PROCEEDINGS

28A.1 Where police wish to interview a child who is subject to current family proceedings, leave of the Family Court is only required where such an interview may lead to a child disclosing information confidential to those proceedings and not otherwise available to the police under Working Together to Safeguard Children (March 2013), a guide to inter-agency working to safeguard and promote the welfare of children: www.workingtogetheronline.co.uk/chapters/contents.html

28A.2 Where exceptionally the child to be interviewed or called as a witness in criminal proceedings is a Ward of Court then the leave of the court which made the wardship order will be required.

28A.3 Any application for leave in respect of any such child must be made to the court in which the relevant family proceedings are continuing and must be made on notice to the parents, any actual carer (e.g. relative or foster parent) and, in care proceedings, to the local authority and the guardian. In private proceedings the Family Court Reporter (if appointed) should be notified.

28A.4 If the police need to interview the child without the knowledge of another party (usually a parent or carer), they may make the application for leave without giving notice to that party.

28A.5 Where leave is given the order should ordinarily give leave for any number of interviews that may be required. However, anything beyond that actually authorised will require a further application.

28A.6 Exceptionally the police may have to deal with complaints by or allegations against such a child immediately without obtaining the leave of the court as, for example

(a) a serious offence against a child (like rape) where immediate medical examination and collection of evidence is required; or
(b) where the child is to be interviewed as a suspect.

When any such action is necessary, the police should, in respect of each and every interview, notify the parents and other carer (if any) and the Family Court Reporter (if appointed). In care proceedings the local authority and guardian should be notified. The police must comply with all relevant Codes of Practice when conducting any such interview.

28A.7 The Family Court should be appraised of the position at the earliest reasonable opportunity by one of the notified parties and should thereafter be kept informed of any criminal proceedings.

28A.8 No evidence or document in the family proceedings or information about the proceedings should be disclosed into criminal proceedings without the leave of the Family Court.

Part 29 Measures to assist a witness or defendant to give evidence

CPD V Evidence 29A: MEASURES TO ASSIST A WITNESS OR DEFENDANT TO GIVE EVIDENCE

29A.1 For special measures applications, the procedures at Part 29 should be followed. However, assisting a vulnerable witness to give evidence is not merely a matter of ordering the appropriate measure. Further directions about vulnerable people in the courts, ground rules hearings and intermediaries are given in the Practice Direction accompanying Part 3.

29A.2 Special measures need not be considered or ordered in isolation. The needs of the individual witness should be ascertained, and a combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room.

CPD V Evidence 29B: WITNESSES GIVING EVIDENCE BY LIVE LINK

29B.1 A special measures direction for the witness to give evidence by live link may also provide for a specified person to accompany the witness (Rule 29.10(f)). In determining who this should be, the court must have regard to the wishes of the witness. The presence of a supporter is designed to provide emotional support to the witness, helping reduce the witness's anxiety and stress and contributing to the ability to give best evidence. It is preferable for the direction to be made well before the trial begins and to ensure that the designated person is available on the day of the witness's testimony so as to provide certainty for the witness.

29B.2 An increased degree of flexibility is appropriate as to who can act as supporter. This can be anyone known to and trusted by the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. The supporter may be a member of the Witness Service but need not be an usher or court official. Someone else may be appropriate.

29B.3 The usher should continue to be available both to assist the witness and the witness supporter, and to ensure that the court's requirements are properly complied with in the live link room.

29B.4 In order to be able to express an informed view about special measures, the witness is entitled to practise speaking using the live link (and to see screens in place). Simply being shown the room and equipment is inadequate for this purpose.

29B.5 If, with the agreement of the court, the witness has chosen not to give evidence by live link but to do so in the court room, it may still be appropriate for a witness supporter to be selected in the same way, and for the supporter to sit alongside the witness while the witness is giving evidence.

CPD V Evidence 29C: VISUALLY RECORDED INTERVIEWS: MEMORY REFRESHING AND WATCHING AT A DIFFERENT TIME FROM THE JURY

29C.1 Witnesses are entitled to refresh their memory from their statement or visually recorded interview. The court should enquire at the PCMH or other case management hearing about arrangements for memory refreshing. The witness's first viewing of the visually recorded interview can be distressing or distracting. It should not be seen for the first time immediately before giving evidence. Depending upon the age and vulnerability of the witness several competing issues have to be considered and it may be that the assistance of the intermediary is needed to establish exactly how memory refreshing should be managed.

29C.2 If the interview is ruled inadmissible, the court must decide what constitutes an acceptable alternative method of memory refreshing.

29C.3 Decisions about how, when and where refreshing should take place should be court-led and made on a case-by-case basis in respect of each witness. General principles to be addressed include:

i. the venue for viewing. The delicate balance between combining the court familiarisation visit and watching the DVD, and having them on two separate occasions, needs to be considered in respect of each witness as combining the two may lead to 'information overload'. Refreshing need not necessarily take place within the court building but may be done, for example, at the police ABE suite.

ii. requiring that any viewing is monitored by a person (usually the officer in the case) who will report to the court about anything said by the witness.

iii. whether it is necessary for the witness to see the DVD more than once for the purpose of refreshing. The court will need to ask the advice of the intermediary, if any, with respect to this.

iv. arrangements, if the witness will not watch the DVD at the same time as the trial bench or judge and jury, for the witness to watch it before attending to be cross examined, (depending upon their ability to retain information this may be the day before).

29C.4 There is no legal requirement that the witness should watch the interview at the same time as the trial bench or jury. Increasingly, this is arranged to occur at a different time, with the advantages that breaks can be taken as needed without disrupting the trial, and cross-examination starts while the witness is fresh. An intermediary may be present to facilitate communication but should

not act as the independent person designated to take a note and report to the court if anything is said. Where the viewing takes place at a different time from that of the jury, the witness is sworn just before cross-examination, asked if he or she has watched the interview and if its contents are 'true' (or other words tailored to the witness's understanding).

CPD V Evidence 29D: WITNESS ANONYMITY ORDERS

29D.1 This direction supplements Part 29 of the Rules, which governs the procedure to be followed on an application for a witness anonymity order. The court's power to make such an order is conferred by the Coroners and Justice Act 2009 (in this section, 'the Act'); section 87 of the Act provides specific relevant powers and obligations.

29D.2 As the Court of Appeal stated in *R v Mayers and Others* [2008] EWCA Crim 2989, [2009] 1 W.L.R. 1915, [2009] 1 Cr. App. R. 30 and emphasised again in *R v Donovan and Kafunda* [2012] EWCA Crim 2749, unreported, 'a witness anonymity order is to be regarded as a special measure of the last practicable resort': Lord Chief Justice, Lord Judge. In making such an application, the prosecution's obligations of disclosure 'go much further than the ordinary duties of disclosure' (*R v Mayers*); reference should be made to the Judicial Protocol on Disclosure, see the Practice Direction accompanying Part 22.

Case management

29D.3 Where such an application is proposed, with the parties' active assistance the court should set a realistic timetable, in accordance with the duties imposed by Rules 3.2 and 3.3. Where possible, the trial judge should determine the application, and any hearing should be attended by the parties' trial advocates.

Service of evidence and disclosure of prosecution material pending an application

29D.4 Where the prosecutor proposes an application for a witness anonymity order, it is not necessary for that application to have been determined before the proposed evidence is served. In most cases, an early indication of what that evidence will be if an order is made will be consistent with a party's duties under Rules 1.2 and 3.3. The prosecutor should serve with the other prosecution evidence a witness statement setting out the proposed evidence, redacted in such a way as to prevent disclosure of the witness' identity, as permitted by section 87(4) of the Act. Likewise the prosecutor should serve with other prosecution material disclosed under the Criminal Procedure and Investigations Act 1996 any such material appertaining to the witness, similarly redacted.

The application

29D.5 An application for a witness anonymity order should be made as early as possible and within the period for which Rule 29.3 provides. The application, and any hearing of it, must comply with the requirements of that rule and with those of Rule 29.19. In accordance with Rules 1.2 and 3.3, the applicant must provide the court with all available information relevant to the considerations to which the Act requires a court to have regard.

Response to the application

29D.6 A party upon whom an application for a witness anonymity order is served must serve a response in accordance with Rule 29.22. That period may be extended or shortened in the court's discretion: Rule 29.5.

29D.7 To avoid the risk of injustice, a respondent, whether the Prosecution or a defendant, must actively assist the court. If not already done, a respondent defendant should serve a defence statement under section 5 or 6 of the Criminal Procedure and Investigations Act 1996, so that the court is fully informed of what is in issue. When a defendant makes an application for a witness anonymity order the prosecutor should consider the continuing duty to disclose material under section 7A of the Criminal Procedure and Investigations Act 1996; therefore a prosecutor's response should include confirmation that that duty has been considered. Great care should be taken to ensure that nothing disclosed contains anything that might reveal the witness' identity. A respondent prosecutor should provide the court with all available information relevant to the considerations to which the Act requires a court to have regard, whether or not that information falls to be disclosed under the 1996 Act.

Determination of the application

29D.8 All parties must have an opportunity to make oral representations to the court on an application for a witness anonymity order: section 87(6) of the Act. However, a hearing may not be needed if none is sought: Rule 29.18(1)(a). Where, for example, the witness is an investigator who is recognisable by the defendant but known only by an assumed name, and there is no likelihood that the witness' credibility will be in issue, then the court may indicate a provisional decision and invite representations within a defined period, usually 14 days, including representations about whether there should be a hearing. In such a case, where the parties do not object the court may make an order without a hearing. Or where the court provisionally considers an application to be misconceived, an applicant may choose to withdraw it without requiring a hearing. Where the court directs a hearing of the application then it should allow adequate time for service of the representations in response.

29D.9 The hearing of an application for a witness anonymity order usually should be in private: Rule 29.18(1)(a). The court has power to hear a party in the absence of a defendant and that defendant's representatives: section 87(7) of the Act and Rule 29.18(1)(b). In the Crown Court, a recording of the proceedings will be made, in accordance with Rule 5.5. The Crown Court officer must treat such a recording in the same way as the recording of an application for a public interest ruling. It must be kept in secure conditions, and the arrangements made by the Crown Court officer for any transcription must impose restrictions that correspond with those under rule 5.5(2).

29D.10 Where confidential supporting information is presented to the court before the last stage of the hearing, the court may prefer not to read that information until that last stage.

29D.11 The court may adjourn the hearing at any stage, and should do so if its duty under rule 3.2 so requires.

29D.12 On a prosecutor's application, the court is likely to be assisted by the attendance of a senior investigator or other person of comparable authority who is familiar with the case.

29D.13 During the last stage of the hearing it is essential that the court test thoroughly the information supplied in confidence in order to satisfy itself that the conditions prescribed by the Act are met. At that stage, if the court concludes that this is the only way in which it can satisfy itself as to a relevant condition or consideration, exceptionally it may invite the applicant to present the proposed witness to be questioned by the court. Any such questioning should be carried out at such a time, and the witness brought to the court in such a way, as to prevent disclosure of his or her identity.

29D.14 The court may ask the Attorney General to appoint special counsel to assist. However, it must be kept in mind that, 'Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant': *R v H* [2004] UKHL 3, [2004] 2 A.C. 134 (at paragraph 22), [2004] 2 Cr. App. R. 10. Whether to accede to such a request is a matter for the Attorney General, and adequate time should be allowed for the consideration of such a request.

29D.15 The Court of Appeal in *R v Mayers* 'emphasise[d] that all three conditions, A, B and C, must be met before the jurisdiction to make a witness anonymity order arises. Each is mandatory. Each is distinct.' The Court also noted that if there is more than one anonymous witness in a case any link, and the nature of any link, between the witnesses should be investigated: 'questions of possible improper collusion between them, or cross-contamination of one another, should be addressed.'

29D.16 Following a hearing the court should announce its decision on an application for a witness anonymity order in the parties' presence and in public: rule 29.4(2). The court should give such reasons as it is possible to give without revealing the witness' identity. In the Crown Court, the court will be conscious that reasons given in public may be reported and reach the jury. Consequently, the court should ensure that nothing in its decision or its reasons could undermine any warning it may give jurors under section 90(2) of the Act. A record of the reasons must be kept. In the Crown Court, the announcement of those reasons will be recorded.

Order

29D.17 Where the court makes a witness anonymity order, it is essential that the measures to be taken are clearly specified in a written record of that order approved by the court and issued on its behalf. An order made in a magistrates' court must be recorded in the court register, in accordance with rule 5.4.

29D.18 Self-evidently, the written record of the order must not disclose the identity of the witness to whom it applies. However, it is essential that there be maintained some means of establishing a clear correlation between witness and order, and especially where in the same proceedings witness anonymity orders are made in respect of more than one witness, specifying different measures in

respect of each. Careful preservation of the application for the order, including the confidential part, ordinarily will suffice for this purpose.

Discharge or variation of the order

29D.19 Section 91 of the Act allows the court to discharge or vary a witness anonymity order: on application, if there has been a material change of circumstances since the order was made or since any previous variation of it; or on its own initiative. Rule 29.21 allows the parties to apply for the variation of a pre-trial direction where circumstances have changed.

29D.20 The court should keep under review the question of whether the conditions for making an order are met. In addition, consistently with the parties' duties under rules 1.2 and 3.3, it is incumbent on each, and in particular on the applicant for the order, to keep the need for it under review.

29D.21 Where the court considers the discharge or variation of an order, the procedure that it adopts should be appropriate to the circumstances. As a general rule, that procedure should approximate to the procedure for determining an application for an order. The court may need to hear further representations by the applicant for the order in the absence of a respondent defendant and that defendant's representatives.

Retention of confidential material

29D.22 If retained by the court, confidential material must be stored in secure conditions by the court officer. Alternatively, subject to such directions as the court may give, such material may be committed to the safe keeping of the applicant or any other appropriate person in exercise of the powers conferred by rule 29.6. If the material is released to any such person, the court should ensure that it will be available to the court at trial.

Part 33 Expert evidence

CPD V Evidence 33A: EXPERT EVIDENCE

33A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

33A.2 Legislation relevant to the introduction and admissibility of such evidence includes section 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and Part 33 of the Criminal Procedure Rules, which in exercise of the powers conferred by section 81 of the Police and Criminal Evidence Act 1984 and section 20 of the Criminal Procedure and Investigations Act 1996 requires the service of expert evidence in advance of trial in the terms required by those rules.

33A.3 In the Law Commission report entitled 'Expert Evidence in Criminal Proceedings in England and Wales', report number 325, published in March, 2011, the Commission recommended a statutory test for the admissibility of expert evidence. However, in its response the government declined to legislate. The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and rule 33.4 of the Criminal Procedure Rules lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

33A.4 In its judgment in *R v Dlugosz and Others* [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

33A.5 Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

33A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

Part 35 Evidence of bad character
CPD V Evidence 35A: SPENT CONVICTIONS

35A.1 The effect of section 4(1) of the Rehabilitation of Offenders Act 1974 is that a person who has become a rehabilitated person for the purpose of the Act in respect of a conviction (known as a 'spent' conviction) shall be treated for all purposes in law as a person who has not committed, or been charged with or prosecuted for, or convicted of or sentenced for, the offence or offences which were the subject of that conviction.

35A.2 Section 4(1) of the 1974 Act does not apply, however, to evidence given in criminal proceedings: section 7(2)(a). During the trial of a criminal charge, reference to previous convictions (and therefore to spent convictions) can arise in a number of ways. The most common is when a bad character application is made under the Criminal Justice Act 2003. When considering bad character applications under the 2003 Act, regard should always be had to the general principles of the Rehabilitation of Offenders Act 1974.

35A.3 On conviction, the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such. No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require. When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed.