CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION II

PRELIMINARY PROCEEDINGS

Contents of this Division

CrimPR Part 7 Starting a prosecution in a magistrates' court

CPD II Preliminary proceedings 7A: FIRST COURT ATTENDANCE AFTER CHARGE AND DETENTION

7A.1 A defendant who has been kept in police detention after being charged with an offence must be brought before a magistrates' court as soon as practicable and in any event no later than the first subsequent court sitting: section 46 of the Police and Criminal Evidence Act 1984. If no magistrates' court is due to sit on the day on which the defendant is charged, or on the next day which is not a Sunday, Christmas Day or Good Friday, then the Act requires the police custody officer to inform the court's designated officer of the defendant's detention, and requires the designated officer to arrange for a magistrates' court to sit.

7A.2 The 1984 Act thus imposes duties on the police and on HM Courts and Tribunals Service. In *R (on the application of H (A Child)) v Clerk to Teesside Justices* [2000] 10 WLUK 532 the High Court observed, "it is incumbent on justices and their clerks, however busy their courts may be, to ensure that they are able to receive persons in custody up to the end of normal court hours, at least, in order to comply with section 46 …, unless some exceptional circumstance intervenes to make that impossible in any particular case".

7A.3 To comply with those duties arrangements must be made to allow courts to receive such defendants during the course of a sitting day if the available time allows for the hearing of all cases to be concluded by 4.30pm, or later if, and only if, some disability or vulnerability of the defendant so requires. In practice, to allow sufficient time for consultation with a legal representative and for the subsequent hearing, the defendant must have been brought to the court building, or given access to a live link to the court, by no later than 3.30pm. To that end, Judicial Business Groups must ensure that effective practical arrangements have been made between police forces, HMCTS, the Crown Prosecution Service and

prisoner escort contractors for the prompt transmission of information about defendants held for production before the court.

7A.4 On a Saturday or bank holiday normal court hours may differ from court to court based on likely caseload. Those hours must be determined by the HMCTS Head of Legal Operations in consultation with the judiciary and other agencies. In accordance with the court's observations in the *Teesside Justices' Clerk* case, all magistrates' courts should sit until at least 11.30 a.m. to receive defendants to whom these directions apply unless arrangements have been made for such defendants to be dealt with by another court, either by attendance in person or by live link.

7A.5 For the purposes of section 46 of the 1984 Act the designated officer is the HMCTS Director of Operations, by whom the exercise of that statutory function is delegated to members of court staff. When informing such a delegate of a defendant's detention the police custody officer must at the same time supply the following, usually by electronic means:

(a) confirmation that:
  (i) the defendant has been charged,
  (ii) the case file is complete and available,
  (iii) any interpreter required is available,
  (iv) any appropriate adult or local authority officer responsible for the defendant's care has been notified and is available,
  (v) the defendant's legal representative has been notified and is available, and
  (vi) the CPS or other relevant prosecuting authority has been notified;

(b) the custody officer's proposal for the means by which the defendant should attend court, whether by live link or in person, and, if the latter, then whether by police transport or by prisoner escort contractor transport; and

(c) details of:
  (i) any physical or mental disability or other vulnerability (whether by reason of age or other circumstance) of the defendant of which police officers are aware, in particular where any such might be thought to make the use of live link inappropriate, and
  (ii) the expected time of arrival at court, if the defendant is to be brought to court in person.

No court should be expected to hear a case in respect of which such information is missing or incomplete, or in respect of which such arrangements have not been made.

7A.6 The designated officer's delegates must liaise with staff at the court buildings to which defendants in police detention may be brought. Each such delegate must be sufficiently experienced to be able to assess, swiftly and accurately, the availability of courts sitting in those buildings, and of sufficient seniority to take the decisions required by these directions. Each must be in a position to assess (i) the availability of court members, of legal advisers, of prosecutors and of the other staff needed to deal with an unexpected case, (ii) the potential effect of an unexpected case on other cases awaiting hearing that day, including the risk of a less urgent case being adjourned, perhaps not for the first time, in consequence of accommodating the unexpected hearing, (iii) the likely length of the unexpected hearing, and (iv) the significance of the age and any disability or other vulnerability of the unexpected defendant.

7A.7 The delegate to whom a police custody officer reports a defendant's detention must decide whether, and if so how, when and where, to accommodate that defendant's case within the period to which paragraph 7A.3 or 7A.4 refers, having regard to the availability and content of the information to which paragraph 7A.5 refers and to the considerations listed in paragraph 7A.6. The decision must be informed by the views of those court members and legal advisers who may be affected, as listing is a judicial responsibility and function. It may be necessary for the delegate to take such steps as arranging for the unexpected case to be heard by live link; reorganising courts sitting in the court building to which the defendant is due to be brought; adjourning other cases; calling upon additional resources; or making arrangements with the delegate at another court building for the unexpected case to be heard by a court sitting there, by live link if appropriate. It may be necessary for the court that hears the unexpected case to impose a timetable for representations or to restrict the decisions that will be taken immediately. If it will not be possible to hear within the period to which paragraph 7A.3 or 7A.4 refers every case due to be heard that day at the court building to which the defendant is to be brought then every effort must be made to ensure that the cases of all defendants in custody, whether in that court building or attending by live link, still can be heard within that period. The delegate for that building must ensure that the police, the staff responsible for the court's own cells and the relevant prisoner escort contractor all are aware of the arrangements that have been made. If the prosecuting authority is not the CPS then that delegate must ensure that that other authority will arrange for a representative to attend, in person or by live link, to assist the court.

7A.8 If after conducting the assessment required by paragraph 7A.6 and taking the steps to which paragraph 7A.7 refers the designated

officer's delegate finds it impossible to accommodate an unexpected case within the period to which paragraph 7A.3 or 7A.4 refers then arrangements must be made to hear the case on the next sitting day and the police custody officer must promptly be so informed.

CrimPR Part 8 Initial details of the prosecution case
CPD II Preliminary proceedings 8A: DEFENDANT'S RECORD

Copies of record

8A.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 CrimPR Part 8.

8A.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.

8A.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.

8A.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.

8A.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

8A.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.

8A.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.

8A.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.

CrimPR 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.

CrimPR Part 10 The indictment

CPD II Preliminary proceedings 10A: PREPARATION AND CONTENT OF THE INDICTMENT

Preferring the indictment

10A.1 Section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 allows Criminal Procedure Rules to "make provision … as to the manner in which and the time at which bills of indictment are to be preferred". CrimPR 10.2(5) lists the events which constitute preferment for the purposes of that Act. Where a defendant is contemplating an application to the Crown Court to dismiss an offence sent for trial, under the provisions to which CrimPR 9.16 applies, or where the prosecutor is contemplating discontinuance, under the provisions to which CrimPR Part 12 applies, the parties and the court must be astute to the effect of the occurrence of those events: the right to apply for dismissal is lost if the defendant is arraigned, and the right to discontinue is lost if the indictment is preferred.

Printing and signature of indictment

10A.2 Neither Section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 nor the Criminal Procedure Rules require an indictment to be printed or signed. Section 2(1) of the Act was amended by section 116 of the Coroners and Justice Act 2009 to remove the requirement for signature. For the potential benefit of the Criminal Appeal Office, CrimPR 10.2(7) requires only that any paper copy of the indictment which for any reason in fact is made for the court must be endorsed with a note to identify it as a copy

of the indictment, and with the date on which the indictment came into being. For the same reason, CrimPR 3.22 requires only that any paper copy of an indictment which in fact has been made must be endorsed with a note of the order and of its date where the court makes an order for joint or separate trials affecting that indictment or makes an order for the amendment of that indictment in any respect.

Content of indictment; joint and separate trials

10A.3 The rule has been abolished which formerly required an indictment containing more than one count to include only offences founded on the same facts, or offences which constitute all or part of a series of the same or a similar character. However, if an indictment charges more than one offence, and if at least one of those offences does not meet those criteria, then CrimPR 3.21(4) cites that circumstance as an example of one in which the court may decide to exercise its power to order separate trials under section 5(3) of the Indictments Act 1915. It is for the court to decide which allegations, against whom, should be tried at the same time, having regard to the prosecutor's proposals, the parties' representations, the court's powers under the 1915 Act (see also CrimPR 3.21(4)) and the overriding objective. Where necessary the court should be invited to exercise those powers. It is generally undesirable for a large number of counts to be tried at the same time and the prosecutor 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.

10A.4 Where an indictment contains substantive counts and one or more related conspiracy counts, the court will expect the prosecutor to justify their joint trial. Failing justification, the prosecutor 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 not been proceeded with 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.

10A.5 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. However, the court will not allow the prosecutor to proceed on both indictments. They cannot be tried together and the court will require the prosecutor to elect the one on which the trial will proceed. Where different defendants have been separately sent for trial for offences which properly may be tried together 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 exists.

Draft indictment generated electronically on sending for trial

10A.6 CrimPR 10.3 applies where court staff have introduced arrangements for the charges sent for trial to be presented in the Crown Court as the counts of a draft indictment without the need for those charges to be rewritten and served a second time on the defendant and on the court office. Where such arrangements are introduced, court users will be informed (and the fact will become apparent on the sending for trial).

10A.7 Now that there is no restriction on the counts that an indictment may contain (see paragraph 10A.3 above), and given the Crown Court's power, and in some cases obligation, to order separate trials, few circumstances will arise in which the court will wish to exercise the discretion conferred by rule 10.3(1) to direct that the rule will not apply, thus discarding such an electronically generated draft indictment. The most likely such circumstance to arise would be in a case in which prosecution evidence emerging soon after sending requires such a comprehensive amendment of the counts as to make it more convenient to all participants for the prosecutor to prepare and serve under CrimPR 10.4 a complete new draft indictment than to amend the electronically generated draft.

Draft indictment served by the prosecutor

10A.8 CrimPR 10.4 applies after sending for trial wherever CrimPR 10.3 does not. It requires the prosecutor to prepare a draft indictment and serve it on the Crown Court officer, who by CrimPR 10.2(7)(b) then must serve it on the defendant. In most instances service will be by electronic means, usually by making use of the Crown Court digital case system to which the prosecutor will upload the draft (which at once then becomes the indictment, under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 and CrimPR 10.2(5)(b)(ii)).

10A.9 The prosecutor's time limit for service of the draft indictment under CrimPR 10.4 is 28 days after serving under CrimPR 9.15 the evidence on which the prosecution case relies. The Crown Court may extend that time limit, under CrimPR 10.2(8). However, under paragraph CrimPD I 3A.16 of these Practice Directions the court will expect that in every case a draft indictment will be served at least 7 days before the plea and trial preparation hearing, whether the time prescribed by the rule will have expired or not.

Amending the content of the indictment

10A.10 Where the prosecutor wishes to substitute or add counts to a draft indictment, or to invite the court to allow an indictment to be amended, so that the draft indictment, or indictment, will charge offences which differ from those with which the defendant first

was charged, the defendant should be given as much notice as possible of what is proposed. It is likely that the defendant will need time to consider his or her position and advance notice will help to avoid delaying the proceedings.

Multiple offending: count charging more than one incident

10A.11 CrimPR 10.2(2) 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. Where what is in issue differs in relation to 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).

10A.12 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 CrimPR Part 1 (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 paragraph 10A.3.

10A.13 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.

10A.14 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. In R v A [2015] EWCA Crim 177, [2015] 2 Cr.App.R.(S.) 115(12) the Court of Appeal reviewed the circumstances in which a mixture of multiple incident and single incident counts might be appropriate where the prosecutor alleged sustained sexual abuse.

Multiple offending: trial by jury and then by judge alone

10A.15 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.

10A.16 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.

10A.17 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. A draft indictment in the form appropriate to such a trial should be served with an application under CrimPR 3.15 for a preparatory hearing. This will ensure that the defendant is aware at the earliest possible opportunity of what the prosecutor proposes and of the proposed association of counts in the indictment.

10A.18 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.

10A.19 If the prosecutor's 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.

10A.20 If the prosecutor's 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.

CPD II Preliminary proceedings 10B: VOLUNTARY BILLS OF INDICTMENT

10B.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'.

10B.2 Applications for such consent must comply with CrimPR 10.3.

10B.3 Those 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.

10B.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.

10B.5 Prosecutors must follow the procedures prescribed by the rule 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.

10B.6 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. CrimPR 10.3(4)(b) allows the judge to set a timetable for representations. 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 unless the judge otherwise directs.