CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION VII

SENTENCING

Contents of this Division

CPD VII Sentencing A: PLEAS OF GUILTY IN THE CROWN COURT

A.1 Prosecutors and Prosecution Advocates should be familiar with and follow the Attorney-General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise.

CPD VII Sentencing B: DETERMINING THE FACTUAL BASIS OF SENTENCE

Where a guilty plea is offered to less than the whole indictment and the prosecution is minded to accept pleas tendered to some counts or to lesser alternative counts.

B.1 In some cases, defendants wishing to plead guilty will simply plead guilty to all charges on the basis of the facts as alleged and opened by the prosecution, with no dispute as to the factual basis or the extent of offending. Alternatively a defendant may plead guilty to some of the charges brought; in such a case, the judge will consider whether that plea represents a proper plea on the basis of the facts set out by the papers.

B.2 Where the prosecution advocate is considering whether to accept a plea to a lesser charge, the advocate may invite the judge to approve the proposed course of action. In such circumstances, the advocate must abide by the decision of the judge.

B.3 If the prosecution advocate does not invite the judge to approve the acceptance by the prosecution of a lesser charge, it is open to the judge to express his or her dissent with the course proposed and invite the advocate to reconsider the matter with those instructing him or her.

B.4 In any proceedings where the judge is of the opinion that the course proposed by the advocate may lead to serious injustice, the proceedings may be adjourned to allow the following procedure to be followed:

(a) as a preliminary step, the prosecution advocate must discuss the judge's observations with the Chief Crown Prosecutor or the senior prosecutor of the relevant prosecuting authority as appropriate, in an attempt to resolve the issue;

(b) where the issue remains unresolved, the Director of Public Prosecutions or the Director of the relevant prosecuting authority should be consulted;

(c) in extreme circumstances the judge may decline to proceed with the case until the prosecuting authority has consulted with the Attorney General, as may be appropriate.

B.5 Prior to entering a plea of guilty, a defendant may seek an indication of sentence under the procedure set out in *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 2 Cr. App. R. 20; see below.

Where a guilty plea is offered on a limited basis

B.6 A defendant may put forward a plea of guilty without accepting all of the facts as alleged by the prosecution. The basis of plea offered may seek to limit the facts or the extent of the offending for which the defendant is to be sentenced. Depending on the view taken by the prosecution, and the content of the offered basis, the case will fall into one of the following categories:

(a) a plea of guilty upon a basis of plea agreed by the prosecution and defence;

(b) a plea of guilty on a basis signed by the defendant but in respect of which there is no or only partial agreement by the prosecution;

(c) a plea of guilty on a basis that contains within it matters that are purely mitigation and which do not amount to a contradiction of the prosecution case; or

(d) in cases involving serious or complex fraud, a plea of guilty upon a basis of plea agreed by the prosecution and defence accompanied by joint submissions as to sentence.

(a) A plea of guilty upon a basis of plea agreed by the prosecution and defence

B.7 The prosecution may reach an agreement with the defendant as to the factual basis on which the defendant will plead guilty, often known as an "agreed basis of plea". It is always subject to the approval of the court, which will consider whether it adequately and appropriately reflects the evidence as disclosed on the papers, whether it is fair and whether it is in the interests of justice.

B.8 *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr. App. R. 13, [2005] 1 Cr. App. R. (S.) 90 outlines the principles to be applied where the defendant admits that he or she is guilty, but disputes the basis of offending alleged by the prosecution:

(a) The prosecution may accept and agree the defendant's account of the disputed facts or reject it in its entirety, or in part. If the prosecution accepts the defendant's basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case;

(b) In resolving any disputed factual matters, the prosecution must consider its primary duty to the court and must not agree with or acquiesce in an agreement which contains material factual disputes;

(c) If the prosecution does accept the defendant's basis of plea, it must be reduced to writing, be signed by advocates for both sides, and made available to the judge prior to the prosecution's opening;

(d) An agreed basis of plea that has been reached between the parties should not contain matters which are in dispute and any aspects upon which there is not agreement should be clearly identified;

(e) On occasion, the prosecution may lack the evidence positively to dispute the defendant's account, for example, where the defendant asserts a matter outside the knowledge of the prosecution. Simply because the prosecution does not have evidence to contradict the defendant's assertions does not mean those assertions should be agreed. In such a case, the prosecution should test the defendant's evidence

and submissions by requesting a *Newton* hearing (*R v Newton* (1982) 77 Cr. App. R. 13, (1982) 4 Cr. App. R. (S.) 388), following the procedure set out below.

(f) If it is not possible for the parties to resolve a factual dispute when attempting to reach a plea agreement under this part, it is the responsibility of the prosecution to consider whether the matter should proceed to trial, or to invite the court to hold a *Newton* hearing as necessary.

B.9 *R v Underwood* emphasises that, whether or not pleas have been "agreed", the judge is not bound by any such agreement and is entitled of his or her own motion to insist that any evidence relevant to the facts in dispute (or upon which the judge requires further evidence for whatever reason) should be called. Any view formed by the prosecution on a proposed basis of plea is deemed to be conditional on the judge's acceptance of the basis of plea.

B.10 A judge is not entitled to reject a defendant's basis of plea absent a *Newton* hearing unless it is determined by the court that the basis is manifestly false and as such does not merit examination by way of the calling of evidence or alternatively the defendant declines the opportunity to engage in the process of the *Newton* hearing whether by giving evidence on his own behalf or otherwise.

(b) a plea of guilty on a basis signed by the defendant but in respect of which there is no or only partial agreement by the prosecution

B.11 Where the defendant pleads guilty, but disputes the basis of offending alleged by the prosecution and agreement as to that has not been reached, the following procedure should be followed:

(a) The defendant's basis of plea must be set out in writing, identifying what is in dispute and must be signed by the defendant;

(b) The prosecution must respond in writing setting out their alternative contentions and indicating whether or not they submit that a *Newton* hearing is necessary;

(c) The court may invite the parties to make representations about whether the dispute is material to sentence; and

(d) If the court decides that it is a material dispute, the court will invite such further representations or evidence as it may require and resolve the dispute in accordance with the principles set out in *R v Newton*.

B.12 Where the disputed issue arises from facts which are within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, the defence advocate should

be prepared to call the defendant. If the defendant is not willing to testify, and subject to any explanation which may be given, the judge may draw such inferences as appear appropriate.

B.13 The decision whether or not a *Newton* hearing is required is one for the judge. Once the decision has been taken that there will be a *Newton* hearing, evidence is called by the parties in the usual way and the criminal burden and standard of proof applies. Whatever view has been taken by the prosecution, the prosecutor should not leave the questioning to the judge, but should assist the court by exploring the issues which the court wishes to have explored. The rules of evidence should be followed as during a trial, and the judge should direct himself appropriately as the tribunal of fact. Paragraphs 6 to 10 of *Underwood* provide additional guidance regarding the *Newton* hearing procedure.

(c) a plea of guilty on a basis that contains within it matters that are purely mitigation and which do not amount to a contradiction of the prosecution case

B.14 A basis of plea should not normally set out matters of mitigation but there may be circumstances where it is convenient and sensible for the document outlining a basis to deal with facts closely aligned to the circumstances of the offending which amount to mitigation and which may need to be resolved prior to sentence. The resolution of these matters does not amount to a *Newton* hearing properly so defined and in so far as facts fall to be established the defence will have to discharge the civil burden in order to do so. The scope of the evidence required to resolve issues that are purely matters of mitigation is for the court to determine.

(d) Cases involving serious fraud – a plea of guilty upon a basis of plea agreed by the prosecution and defence accompanied by joint submissions as to sentence

B.15 This section applies when the prosecution and the defendant(s) to a matter before the Crown Court involving allegations of serious or complex fraud have agreed a basis of plea and seek to make submissions to the court regarding sentence.

B.16 Guidance for prosecutors regarding the operation of this procedure is set out in the 'Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud', which came into force on 5 May 2009 and is referred to in this direction as the "Attorney General's Plea Discussion Guidelines".

B.17 In this part –

(a) "a plea agreement" means a written basis of plea agreed between the prosecution and defendant(s) in accordance with the principles set out in *R v*

Underwood, supported by admissible documentary evidence or admissions under section 10 of the Criminal Justice Act 1967;

(b) "a sentencing submission" means sentencing submissions made jointly by the prosecution and defence as to the appropriate sentencing authorities and applicable sentencing range in the relevant sentencing guideline relating to the plea agreement;

(c) "serious or complex fraud" includes, but is not limited to, allegations of fraud where two or more of the following are present:

(i) the amount obtained or intended to be obtained exceeded £500,000;

(ii) there is a significant international dimension;

(iii) the case requires specialised knowledge of financial, commercial, fiscal or regulatory matters such as the operation of markets, banking systems, trusts or tax regimes;

(iv) the case involves allegations of fraudulent activity against numerous victims;

(v) the case involves an allegation of substantial and significant fraud on a public body;

(vi) the case is likely to be of widespread public concern;

(vii) the alleged misconduct endangered the economic well-being of the United Kingdom, for example by undermining confidence in financial markets.

Procedure

B.18 The procedure regarding agreed bases of plea outlined above, applies with equal rigour to the acceptance of pleas under this procedure. However, because under this procedure the parties will have been discussing the plea agreement and the charges from a much earlier stage, it is vital that the judge is fully informed of all relevant background to the discussions, charges and the eventual basis of plea.

B.19 Where the defendant has not yet appeared before the Crown Court, the prosecutor must send full details of the plea agreement and sentencing submission(s) to the court, at least 7 days in advance of the defendant's first appearance. Where the defendant has already appeared before the Crown Court, the prosecutor must notify the court as soon as is reasonably practicable that a plea agreement and sentencing submissions under the Attorney General's Plea Discussion Guidelines are to be submitted. The court should set a date for the matter to be heard, and the prosecutor must send full

details of the plea agreement and sentencing submission(s) to the court as soon as practicable, or in accordance with the directions of the court.

B.20 The provision to the judge of full details of the plea agreement requires sufficient information to be provided to allow the judge to understand the facts of the case and the history of the plea discussions, to assess whether the plea agreement is fair and in the interests of justice, and to decide the appropriate sentence. This will include, but is not limited to:

(i) the plea agreement;
(ii) the sentencing submission(s);
(iii) all of the material provided by the prosecution to the defendant in the course of the plea discussions;
(iv) relevant material provided by the defendant, for example documents relating to personal mitigation; and
(v) the minutes of any meetings between the parties and any correspondence generated in the plea discussions.

The parties should be prepared to provide additional material at the request of the court.

B.21 The court should at all times have regard to the length of time that has elapsed since the date of the occurrence of the events giving rise to the plea discussions, the time taken to interview the defendant, the date of charge and the prospective trial date (if the matter were to proceed to trial) so as to ensure that its consideration of the plea agreement and sentencing submissions does not cause any unnecessary further delay.

Status of plea agreement and joint sentencing submissions

B.22 Where a plea agreement and joint sentencing submissions are submitted, it remains entirely a matter for the court to decide how to deal with the case. The judge retains the absolute discretion to refuse to accept the plea agreement and to sentence otherwise than in accordance with the sentencing submissions made under the Attorney General's Plea Discussion Guidelines.

B.23 Sentencing submissions should draw the court's attention to any applicable range in any relevant guideline, and to any ancillary orders that may be applicable. Sentencing submissions should not include a specific sentence or agreed range other than the ranges set out in sentencing guidelines or authorities.

B.24 Prior to pleading guilty in accordance with the plea agreement, the defendant(s) may apply to the court for an indication of the likely maximum sentence under the procedure set out below (a '*Goodyear* indication').

B.25 In the event that the judge indicates a sentence or passes a sentence which is not within the submissions made on sentencing, the plea agreement remains binding.

B.26 If the defendant does not plead guilty in accordance with the plea agreement, or if a defendant who has pleaded guilty in accordance with a plea agreement, successfully applies to withdraw his plea under CrimPR 25.5, the signed plea agreement may be treated as confession evidence, and may be used against the defendant at a later stage in these or any other proceedings. Any credit for a timely guilty plea may be lost. The court may exercise its discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude any such evidence if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

B.27 Where a defendant has failed to plead guilty in accordance with a plea agreement, the case is unlikely to be ready for trial immediately. The prosecution may have been commenced earlier than it otherwise would have been, in reliance upon the defendant's agreement to plead guilty. This is likely to be a relevant consideration for the court in deciding whether or not to grant an application to adjourn or stay the proceedings to allow the matter to be prepared for trial in accordance with the protocol on the 'Control and Management of Heavy Fraud and other Complex Criminal Cases', or as required.

CPD VII Sentencing C: INDICATIONS OF SENTENCE: *R v Goodyear*

C.1 Prior to pleading guilty, it is open to a defendant in the Crown Court to request from the judge an indication of the maximum sentence that would be imposed if a guilty plea were to be tendered at that stage in the proceedings, in accordance with the guidance in *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 2 Cr. App. R. 20. The defence should notify the court and the prosecution of the intention to seek an indication in advance of any hearing.

C.2 Attention is drawn to the guidance set out in paragraphs 53 and following of *R v Goodyear*. The objective of the *Goodyear* guidelines is to safeguard against the creation or appearance of judicial pressure on a defendant. Any advance indication given should be the maximum sentence if a guilty plea were to be tendered at that stage of the proceedings only; the judge should not indicate the maximum possible sentence following conviction by a jury after trial. The judge should only give a *Goodyear* indication if one is requested by the defendant, although the judge can, in an

appropriate case, remind the defence advocate of the defendant's entitlement to seek an advance indication of sentence.

C.3 Whether to give a *Goodyear* indication, and whether to give reasons for a refusal, is a matter for the discretion of the judge, to be exercised in accordance with the principles outlined by the Court of Appeal in that case. Such indications should normally not be given if there is a dispute as to the basis of plea unless the judge concludes that he or she can properly deal with the case without the need for a *Newton* hearing. If there is a basis of plea agreed by the prosecution and defence, it must be reduced into writing and a copy provided to the judge. As always, any basis of plea will be subject to the approval of the court. In cases where a dispute arises, the procedure in *R v Underwood* should be followed prior to the court considering a sentence indication further, as set out above. The judge should not become involved in negotiations about the acceptance of pleas or any agreed basis of plea, nor should a request be made for an indication of the different sentences that might be imposed if various different pleas were to be offered.

C.4 There should be no prosecution opening nor should the judge hear mitigation. However, during the sentence indication process the prosecution advocate is expected to assist the court by ensuring that the court has received all of the prosecution evidence, any statement from the victim about the impact of the offence, and any relevant previous convictions. Further, where appropriate, the prosecution should provide references to the relevant statutory powers of the court, relevant sentencing guidelines and authorities, and such other assistance as the court requires.

C.5 Attention is drawn to paragraph 70(d) of *Goodyear* which emphasises that the prosecution "should not say anything which may create the impression that the sentence indication has the support or approval of the Crown." This prohibition against the Crown indicating its approval of a particular sentence applies in all circumstances when a defendant is being sentenced, including when joint sentencing submissions are made.

C.6 An indication, once given, is, save in exceptional circumstances (such as arose in *R v Newman* [2010] EWCA Crim 1566, [2011] 1 Cr. App. R. (S.) 68), binding on the judge who gave it, and any other judge, subject to overriding statutory obligations such as those following a finding of "dangerousness". In circumstances where a judge proposes to depart from a *Goodyear* indication this must only be done in a way that does not give rise to unfairness (see *Newman*). However, if the defendant does not plead guilty, the indication will not thereafter bind the court.

C.7 If the offence is a specified offence such that the defendant might be liable to an assessment of 'dangerousness' in accordance with the Criminal Justice Act 2003 it is unlikely that the necessary material for such an assessment will be available. The court can still proceed to give an indication of sentence, but should state clearly the limitations of the indication that can be given.

C.8 A *Goodyear* indication should be given in open court in the presence of the defendant but any reference to the hearing is not admissible in any subsequent trial; and reporting restrictions should normally be imposed.

CPD VII Sentencing D: FACTS TO BE STATED ON PLEAS OF GUILTY

D.1 To enable the press and the public to know the circumstances of an offence of which an accused has been convicted and for which he is to be sentenced, in relation to each offence to which an accused has pleaded guilty the prosecution shall state those facts in open court, before sentence is imposed.

CPD VII Sentencing E: CONCURRENT AND CONSECUTIVE SENTENCES

E.1 Where a court passes on a defendant more than one term of imprisonment, the court should state in the presence of the defendant whether the terms are to be concurrent or consecutive. Should this not be done, the court clerk should ask the court, before the defendant leaves court, to do so.

E.2 If a defendant is, at the time of sentence, already serving two or more consecutive terms of imprisonment and the court intends to increase the total period of imprisonment, it should use the expression 'consecutive to the total period of imprisonment to which you are already subject' rather than 'at the expiration of the term of imprisonment you are now serving', as the defendant may not then be serving the last of the terms to which he is already subject.

E.3 The Sentencing Council has issued a definitive guideline on Totality which should be consulted. Under section 125(1) of the Coroners and Justice Act 2009, for offences committed after 6 April 2010, the guideline must be followed unless it would be contrary to the interests of justice to do so.

CPD VII Sentencing F: VICTIM PERSONAL STATEMENTS

F.1 Victims of crime are invited to make a statement, known as a Victim Personal Statement ('VPS'). The statement gives victims a formal opportunity to say how a crime has affected them. It may help to identify whether they have a particular need for information, support and protection. The court will take the statement into account when determining sentence. In some

circumstances, it may be appropriate for relatives of a victim to make a VPS, for example where the victim has died as a result of the relevant criminal conduct. The revised Code of Practice for Victims of Crime, published on 29 October 2013 gives further information about victims' entitlements within the criminal justice system, and the duties placed on criminal justice agencies when dealing with victims of crime.

F.2 When a police officer takes a statement from a victim, the victim should be told about the scheme and given the chance to make a VPS. The decision about whether or not to make a VPS is entirely a matter for the victim; no pressure should be brought to bear on their decision, and no conclusion should be drawn if they choose not to make such a statement. A VPS or a further VPS may be made (in proper s.9 form, see below) at any time prior to the disposal of the case. It will not normally be appropriate for a VPS to be made after the disposal of the case; there may be rare occasions between sentence and appeal when a further VPS may be necessary, for example, when the victim was injured and the final prognosis was not available at the date of sentence. However, VPS after disposal should be confined to presenting up to date factual material, such as medical information, and should be used sparingly.

F.3 If the court is presented with a VPS the following approach, subject to the further guidance given by the Court of Appeal in *R v Perkins; Bennett; Hall* [2013] EWCA Crim 323, [2013] Crim L.R. 533, should be adopted:

a) The VPS and any evidence in support should be considered and taken into account by the court, prior to passing sentence.

b) Evidence of the effects of an offence on the victim contained in the VPS or other statement, must be in proper form, that is a witness statement made under section 9 of the Criminal Justice Act 1967 or an expert's report; and served in good time upon the defendant's solicitor or the defendant, if he or she is not represented. Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on the victim. The maker of a VPS may be cross-examined on its content.

c) At the discretion of the court, the VPS may also be read aloud or played in open court, in whole or in part, or it may be summarised. If the VPS is to be read aloud, the court should also determine who should do so. In

making these decisions, the court should take account of the victim's preferences, and follow them unless there is good reason not to do so; examples of this include the inadmissibility of the content or the potentially harmful consequences for the victim or others. Court hearings should not be adjourned solely to allow the victim to attend court to read the VPS. For the purposes of CPD I General matters 5B: Access to information held by the court, a VPS that is read aloud or played in open court in whole or in part should be considered as such, and no longer treated as a confidential document.

d) In all cases it will be appropriate for a VPS to be referred to in the course of the sentencing hearing and/or in the sentencing remarks.

e) The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim or the victim's close relatives as to what the sentence should be are therefore not relevant, unlike the consequences of the offence on them. Victims should be advised of this. If, despite the advice, opinions as to sentence are included in the statement, the court should pay no attention to them.

CPD VII Sentencing G: FAMILIES BEREAVED BY HOMICIDE AND OTHER CRIMINAL CONDUCT

G.1 In cases in which the victim has died as a result of the relevant criminal conduct, the victim's family is not a party to the proceedings, but does have an interest in the case. Bereaved families have particular entitlements under the Code of Practice for Victims of Crime. All parties should have regard to the needs of the victim's family and ensure that the trial process does not expose bereaved families to avoidable intimidation, humiliation or distress.

G.2 In so far as it is compatible with family members' roles as witnesses, the court should consider the following measures:

a) Practical arrangements being discussed with the family and made in good time before the trial, such as seating for family members in the courtroom; if appropriate, in an alternative area, away from the public gallery.

b) Warning being given to families if the evidence on a certain day is expected to be particularly distressing.

c) Ensuring that appropriate use is made of the scheme for Victim Personal Statements, in accordance with the paragraphs above.

G.3 The sentencer should consider providing a written copy of the sentencing remarks to the family after sentence has been passed. Sentencers should tend in favour of providing such a copy, unless there is good reason not to do so, and the copy should be provided as soon as is reasonably practicable after the sentencing hearing.

CPD VII Sentencing H: COMMUNITY IMPACT STATEMENTS

H.1 A community impact statement may be prepared by the police to make the court aware of particular crime trends in the local area and the impact of these on the local community.

H.2 Such statements must be in proper form, that is a witness statement made under section 9 of the Criminal Justice Act 1967 or an expert's report; and served in good time upon the defendant's solicitor or the defendant, if he is not represented.

H.3 The community impact statement and any evidence in support should be considered and taken into account by the court, prior to passing sentence. The statement should be referred to in the course of the sentencing hearing and/or in the sentencing remarks. Subject to the court's discretion, the contents of the statement may be summarised or read out in open court.

H.4 The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the local community. Opinions as to what the sentence should be are therefore not relevant. If, despite the advice, opinions as to sentence are included in the statement, the court should pay no attention to them.

H.5 Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on the local community.

H.6 It will not be appropriate for a Community Impact Statement to be made after disposal of the case but before an appeal.

CPD VII Sentencing I: IMPACT STATEMENTS FOR BUSINESSES

I.1 Individual victims of crime are invited to make a statement, known as a Victim Personal Statement ('VPS'), see CPD VII Sentencing F. If a victim, or one of those others affected by a crime, is a business, enterprise or other body (including a charity or public body, for

example a school or hospital), of any size, a nominated representative may make an Impact Statement for Business ('ISB'). The ISB gives a formal opportunity for the court to be informed how a crime has affected a business or other body. The court will take the statement into account when determining sentence. This does not prevent individual employees from making a VPS about the impact of the same crime on them as individuals. Indeed, the ISB should be about the impact on the business or other body exclusively, and the impact on any individual included within a VPS.

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

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

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

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

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

I.7 The ISB must be made in proper form, that is as a witness statement made under section 9 of the Criminal Justice Act 1967 or an expert's report; and served in good time upon the defendant's solicitor or the defendant, if he or she is not represented. The maker of an ISB can be cross-examined on its content.

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

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

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

CPD VII Sentencing J: BINDING OVER ORDERS AND CONDITIONAL DISCHARGES

J.1 This direction takes into account the judgments of the European Court of Human Rights in *Steel v United Kingdom* (1999) 28 EHRR 603, [1998] Crim. L.R. 893 and in *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, [2000] Crim. L.R. 185. Its purpose is to give practical guidance, in the light of those two judgments, on the practice of imposing binding over orders. The direction applies to orders made under the court's common law powers, under the Justices of the Peace Act 1361, under section 1(7) of the Justices of the Peace Act 1968 and under section 115 of the Magistrates'

Courts Act 1980. This direction also gives guidance concerning the court's power to bind over parents or guardians under section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 and the Crown Court's power to bind over to come up for judgment. The court's power to impose a conditional discharge under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 is also covered by this direction.

Binding over to keep the peace

J.2 Before imposing a binding over order, the court must be satisfied so that it is sure that a breach of the peace involving violence, or an imminent threat of violence, has occurred or that there is a real risk of violence in the future. Such violence may be perpetrated by the individual who will be subject to the order or by a third party as a natural consequence of the individual's conduct.

J.3 In light of the judgment in *Hashman*, courts should no longer bind an individual over "to be of good behaviour". Rather than binding an individual over to "keep the peace" in general terms, the court should identify the specific conduct or activity from which the individual must refrain.

Written order

J.4 When making an order binding an individual over to refrain from specified types of conduct or activities, the details of that conduct or those activities should be specified by the court in a written order, served on all relevant parties. The court should state its reasons for the making of the order, its length and the amount of the recognisance. The length of the order should be proportionate to the harm sought to be avoided and should not generally exceed 12 months.

Evidence

J.5 Sections 51 to 57 of the Magistrates' Courts Act 1980 set out the jurisdiction of the magistrates' court to hear an application made on complaint and the procedure which is to be followed. This includes a requirement under section 53 to hear evidence and the parties, before making any order. This practice should be applied to all cases in the magistrates' court and the Crown Court where the court is considering imposing a binding over order. The court should give the individual who would be subject to the order and the prosecutor the opportunity to make representations, both as to the making of the order and as to its terms. The court should also hear any admissible evidence the parties wish to call and which has not already been heard in the proceedings. Particularly careful consideration may be required where the individual who would be subject to the order is a witness in the proceedings.

J.6 Where there is an admission which is sufficient to found the

making of a binding over order and / or the individual consents to the making of the order, the court should nevertheless hear sufficient representations and, if appropriate, evidence, to satisfy itself that an order is appropriate in all the circumstances and to be clear about the terms of the order.

J.7 Where there is an allegation of breach of a binding over order and this is contested, the court should hear representations and evidence, including oral evidence, from the parties before making a finding. If unrepresented and no opportunity has been given previously the court should give a reasonable period for the person said to have breached the binding over order to find representation.

Burden and standard of proof

J.8 The court should be satisfied so that it is sure of the matters complained of before a binding over order may be imposed. Where the procedure has been commenced on complaint, the burden of proof rests on the complainant. In all other circumstances, the burden of proof rests upon the prosecution.

J.9 Where there is an allegation of breach of a binding over order, the court should be satisfied on the balance of probabilities that the defendant is in breach before making any order for forfeiture of a recognisance. The burden of proof shall rest on the prosecution.

Recognisance

J.10 The court must be satisfied on the merits of the case that an order for binding over is appropriate and should announce that decision before considering the amount of the recognisance. If unrepresented, the individual who is made subject to the binding over order should be told he has a right of appeal from the decision.

J.11 When fixing the amount of recognisance, courts should have regard to the individual's financial resources and should hear representations from the individual or his legal representatives regarding finances.

J.12 A recognisance is made in the form of a bond giving rise to a civil debt on breach of the order.

Refusal to enter into a recognizance

J.13 If there is any possibility that an individual will refuse to enter a recognizance, the court should consider whether there are any appropriate alternatives to a binding over order (for example, continuing with a prosecution). Where there are no appropriate alternatives and the individual continues to refuse to enter into the

recognisance, the court may commit the individual to custody. In the magistrates' court, the power to do so will derive from section 1(7) of the Justices of the Peace Act 1968 or, more rarely, from section 115(3) of the Magistrates' Courts Act 1980, and the court should state which power it is acting under; in the Crown Court, this is a common law power.

J.14 Before the court exercises a power to commit the individual to custody, the individual should be given the opportunity to see a duty solicitor or another legal representative and be represented in proceedings if the individual so wishes. Public funding should generally be granted to cover representation. In the Crown Court this rests with the Judge who may grant a Representation Order.

J.15 In the event that the individual does not take the opportunity to seek legal advice, the court shall give the individual a final opportunity to comply with the request and shall explain the consequences of a failure to do so.

Antecedents

J.16 Courts are reminded of the provisions of section 7(5) of the Rehabilitation of Offenders Act 1974 which excludes from a person's antecedents any order of the court "with respect to any person otherwise than on a conviction".

Binding over to come up for judgment

J.17 If the Crown Court is considering binding over an individual to come up for judgment, the court should specify any conditions with which the individual is to comply in the meantime and not specify that the individual is to be of good behaviour.

J.18 The Crown Court should, if the individual is unrepresented, explain the consequences of a breach of the binding over order in these circumstances.

Binding over of parent or guardian

J.19 Where a court is considering binding over a parent or guardian under section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 to enter into a recognisance to take proper care of and exercise proper control over a child or young person, the court should specify the actions which the parent or guardian is to take.

Security for good behaviour

J.20 Where a court is imposing a conditional discharge under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, it has the power, under section 12(6) to make an order that a person who consents to do so give security for the good behaviour of the offender. When making such an order, the court should specify the type of conduct from which the offender is to refrain.

CPD VII Sentencing K: COMMITTAL FOR SENTENCE

K.1 CrimPR 28.10 applies when a case is committed to the Crown Court for sentence and specifies the information and documentation that must be provided by the magistrates' court. On a committal for sentence any reasons given by the magistrates for their decision should be included with the documents. All of these documents should be made available to the judge in the Crown Court if the judge requires them, in order to decide before the hearing questions of listing or representation or the like. They will also be available to the court during the hearing if it becomes necessary or desirable for the court to see what happened in the lower court.

CPD VII Sentencing L: IMPOSITION OF LIFE SENTENCES

L.1 Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 empowers a judge when passing a sentence of life imprisonment, where such a sentence is not fixed by law, to specify by order such part of the sentence ('the relevant part') as shall be served before the prisoner may require the Secretary of State to refer his case to the Parole Board. This is applicable to defendants under the age of 18 years as well as to adult defendants.

L.2 Thus the life sentence falls into two parts:

(a) the relevant part, which consists of the period of detention imposed for punishment and deterrence, taking into account the seriousness of the offence, and

(b) the remaining part of the sentence, during which the prisoner's detention will be governed by consideration of risk to the public.

L.3 The judge is not obliged by statute to make use of the provisions of section 82A when passing a life sentence. However, the judge should do so, save in the very exceptional case where the judge considers that the offence is so serious that detention for life is justified by the seriousness of the offence alone, irrespective of the risk to the public. In such a case, the judge should state this in open court when passing sentence.

L.4 In cases where the judge is to specify the relevant part of the sentence under section 82A, the judge should permit the advocate for the defendant to address the court as to the appropriate length of the relevant part. Where no relevant part is to be specified, the advocate for the defendant should be permitted to address the court as to the appropriateness of this course of action.

L.5 In specifying the relevant part of the sentence, the judge should have regard to the specific terms of section 82A and should indicate the reasons for reaching his decision as to the length of the relevant part.

CPD VII Sentencing M: MANDATORY LIFE SENTENCES

M.1 The purpose of this section is to give practical guidance as to the procedure for passing a mandatory life sentence under section 269 and schedule 21 of the Criminal Justice Act 2003 ('the Act'). This direction also gives guidance as to the transitional arrangements under section 276 and schedule 22 of the Act. It clarifies the correct approach to looking at the practice of the Secretary of State prior to December 2002 for the purposes of schedule 22 of the Act, in the light of the judgment in *R. v Sullivan, Gibbs, Elener and Elener* [2004] EWCA Crim 1762,[2005] 1 Cr. App. R. 3, [2005] 1 Cr. App. R. (S.) 67.

M.2 Section 269 came into force on 18 December 2003. Under section 269, all courts passing a mandatory life sentence must either announce in open court the minimum term the prisoner must serve before the Parole Board can consider release on licence under the provisions of section 28 of the Crime (Sentences) Act 1997 (as amended by section 275 of the Act), or announce that the seriousness of the offence is so exceptionally high that the early release provisions should not apply at all (a 'whole life order').

M.3 In setting the minimum term, the court must set the term it considers appropriate taking into account the seriousness of the offence. In considering the seriousness of the offence, the court must have regard to the general principles set out in Schedule 21 of the Act as amended and any guidelines relating to offences in general which are relevant to the case and not incompatible with the provisions of Schedule 21. Although it is necessary to have regard to such guidance, it is always permissible not to apply the guidance if a judge considers there are reasons for not following it. It is always necessary to have regard to the need to do justice in the particular case. However, if a court departs from any of the starting points given in Schedule 21, the court is under a duty to state its reasons for doing so (section 270(2)(b) of the Act).

M.4 Schedule 21 states that the first step is to choose one of five starting points: "whole life", 30 years, 25 years, 15 years or 12 years. Where the 15 year starting point has been chosen, judges should have in mind that this starting point encompasses a very broad range of murders. At paragraph 35 of *Sullivan*, the court found it should not be assumed that Parliament intended to raise all minimum terms that would previously have had a lower starting point, to 15 years.

M.5 Where the offender was 21 or over at the time of the offence, and the court takes the view that the murder is so grave that the offender ought to spend the rest of his life in prison, the appropriate starting point is a 'whole life order'. (paragraph 4(1) of Schedule 21). The effect of such an order is that the early release provisions in section 28 of the Crime (Sentences) Act 1997 will not apply. Such an order should only be specified where the court considers that the seriousness of the offence (or the combination of the offence and one or more other offences associated with it) is exceptionally high. Paragraph 4 (2) sets out examples of cases where it would normally be appropriate to take the 'whole life order' as the appropriate starting point.

M.6 Where the offender is aged 18 to 20 and commits a murder that is so serious that it would require a whole life order if committed by an offender aged 21 or over, the appropriate starting point will be 30 years. (Paragraph 5(2)(h) of Schedule 21).

M.7 Where a case is not so serious as to require a 'whole life order' but where the seriousness of the offence is particularly high and the offender was aged 18 or over when he committed the offence, the appropriate starting point is 30 years (paragraph 5(1) of Schedule 21). Paragraph 5 (2) sets out examples of cases where a 30 year starting point would normally be appropriate (if they do not require a 'whole life order').

M.8 Where the offender was aged 18 or over when he committed the offence, took a knife or other weapon to the scene intending to commit any offence or have it available to use as a weapon, and used it in committing the murder, the offence is normally to be regarded as sufficiently serious for an appropriate starting point of 25 years (paragraph 5A of Schedule 21).

M.9 Where the offender was aged 18 or over when he committed the offence and the case does not fall within paragraph 4 (1), 5 (1) or 5A(1) of Schedule 21, the appropriate starting point is 15 years (see paragraph 6).

M.10 18 to 20 year olds are only the subject of the 30-year, 25-year and 15-year starting points.

M.11 The appropriate starting point when setting a sentence of detention during Her Majesty's pleasure for offenders aged under 18 when they committed the offence is always 12 years (paragraph 7 of Schedule 21).

M.12 The second step after choosing a starting point is to take account of any aggravating or mitigating factors which would justify a departure from the starting point. Additional aggravating factors

(other than those specified in paragraphs 4 (2), 5(2) and 5A) are listed at paragraph 10 of Schedule 21. Examples of mitigating factors are listed at paragraph 11 of Schedule 21. Taking into account the aggravating and mitigating features, the court may add to or subtract from the starting point to arrive at the appropriate punitive period.

M.13 The third step is that the court should consider the effect of section 143(2) of the Act in relation to previous convictions; section 143(3) of the Act where the offence was committed whilst the offender was on bail; and section 144 of the Act where the offender has pleaded guilty (paragraph 12 of Schedule 21). The court should then take into account what credit the offender would have received for a remand in custody under section 240 or 240ZA of the Act and/or for a remand on bail subject to a qualifying curfew condition under section 240A, but for the fact that the mandatory sentence is one of life imprisonment. Where the offender has been thus remanded in connection with the offence or a related offence, the court should have in mind that no credit will otherwise be given for this time when the prisoner is considered for early release. The appropriate time to take it into account is when setting the minimum term. The court should make any appropriate subtraction from the punitive period it would otherwise impose, in order to reach the minimum term.

M.14 Following these calculations, the court should have arrived at the appropriate minimum term to be announced in open court. As paragraph 9 of Schedule 21 makes clear, the judge retains ultimate discretion and the court may arrive at any minimum term from any starting point. The minimum term is subject to appeal by the offender under section 271 of the Act and subject to review on a reference by the Attorney-General under section 272 of the Act.

CPD VII Sentencing N: TRANSITIONAL ARRANGEMENTS FOR SENTENCES WHERE THE OFFENCE WAS COMMITTED BEFORE 18 DECEMBER 2003

N.1 Where the court is passing a sentence of mandatory life imprisonment for an offence committed before 18 December 2003, the court should take a fourth step in determining the minimum term in accordance with section 276 and Schedule 22 of the Act.

N.2 The purpose of those provisions is to ensure that the sentence does not breach the principle of non-retroactivity, by ensuring that a lower minimum term would not have been imposed for the offence when it was committed. Before setting the minimum term, the court must check whether the proposed term is greater than that which the Secretary of State would probably have notified under the practice followed by the Secretary of State before December 2002.

N.3 The decision in *Sullivan, Gibbs, Elener and Elener* [2004] EWCA Crim 1762, [2005] 1 Cr. App. R. 3, [2005] 1 Cr. App. R. (S.) 67 gives detailed guidance as to the correct approach to this practice and judges passing mandatory life sentences where the murder was committed prior to 18 December 2003 are well advised to read that judgment before proceeding.

N.4 The practical result of that judgment is that in sentences where the murder was committed before 31 May 2002, the best guide to what would have been the practice of the Secretary of State is the letter sent to judges by Lord Bingham CJ on 10th February 1997, the relevant parts of which are set out below.

N.5 The practice of Lord Bingham, as set out in his letter of 10 February 1997, was to take 14 years as the period actually to be served for the 'average', 'normal' or 'unexceptional' murder. Examples of factors he outlined as capable, in appropriate cases, of mitigating the normal penalty were:

(1) Youth;
(2) Age (where relevant to physical capacity on release or the likelihood of the defendant dying in prison);
(3) [Intellectual disability or mental disorder];
(4) Provocation (in a non-technical sense), or an excessive response to a personal threat;
(5) The absence of an intention to kill;
(6) Spontaneity and lack of premeditation (beyond that necessary to constitute the offence: e.g. a sudden response to family pressure or to prolonged and eventually insupportable stress);
(7) Mercy killing;
(8) A plea of guilty, or hard evidence of remorse or contrition.

N.6 Lord Bingham then listed the following factors as likely to call for a sentence more severe than the norm:

(1) Evidence of planned, professional, revenge or contract killing;
(2) The killing of a child or a very old or otherwise vulnerable victim;
(3) Evidence of sadism, gratuitous violence, or sexual maltreatment, humiliation or degradation before the killing;
(4) Killing for gain (in the course of burglary, robbery, blackmail, insurance fraud, etc.);
(5) Multiple killings;
(6) The killing of a witness, or potential witness, to defeat the ends of justice;

(7) The killing of those doing their public duty (policemen, prison officers, postmasters, firemen, judges, etc.);
(8) Terrorist or politically motivated killings;
(9) The use of firearms or other dangerous weapons, whether carried for defensive or offensive reasons;
(10) A substantial record of serious violence;
(11) Macabre attempts to dismember or conceal the body.

N.7 Lord Bingham further stated that the fact that a defendant was under the influence of drink or drugs at the time of the killing is so common he would be inclined to treat it as neutral. But in the not unfamiliar case in which a couple, inflamed by drink, indulge in a violent quarrel in which one dies, often against a background of longstanding drunken violence, then he would tend to recommend a term somewhat below the norm.

N.8 Lord Bingham went on to say that given the intent necessary for proof of murder, the consequences of taking life and the understandable reaction of relatives to the deceased, a substantial term will almost always be called for, save perhaps in a truly venial case of mercy killing. While a recommendation of a punitive term longer than, say, 30 years will be very rare indeed, there should not be any upper limit. Some crimes will certainly call for terms very well in excess of the norm.

N.9 For the purposes of sentences where the murder was committed after 31 May 2002 and before 18 December 2003, the judge should apply the Practice Statement handed down on 31 May 2002 reproduced at paragraphs N.10 to N.20 below.

N.10 This Statement replaces the previous single normal tariff of 14 years by substituting a higher and a normal starting point of respectively 16 (comparable to 32 years) and 12 years (comparable to 24 years). These starting points have then to be increased or reduced because of aggravating or mitigating factors such as those referred to below. It is emphasised that they are no more than starting points.

The normal starting point of 12 years

N.11 Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in paragraph N.13. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

N.12 The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because:-

(a) the case came close to the borderline between murder and manslaughter; or
(b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or
(c) the offender was provoked (in a non-technical sense) such as by prolonged and eventually unsupportable stress; or
(d) the case involved an over-reaction in self-defence; or
(e) the offence was a mercy killing.

These factors could justify a reduction to 8/9 years (equivalent to 16/18 years).

The higher starting point of 15/16 years

N.13 The higher starting point will apply to cases where the offender's culpability was exceptionally high, or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as:-

(a) the killing was 'professional' or a contract killing;
(b) the killing was politically motivated;
(c) the killing was done for gain (in the course of a burglary, robbery etc.);
(d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness);
(e) the victim was providing a public service;
(f) the victim was a child or was otherwise vulnerable;
(g) the killing was racially aggravated;
(h) the victim was deliberately targeted because of his or her religion or sexual orientation;
(i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing;
(j) extensive and/or multiple injuries were inflicted on the victim before death;
(k) the offender committed multiple murders.

Variation of the starting point

N.14 Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

N.15 Aggravating factors relating to the offence can include:

(a) the fact that the killing was planned;

(b) the use of a firearm;
(c) arming with a weapon in advance;
(d) concealment of the body, destruction of the crime scene and/or dismemberment of the body;
(e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

N.16 Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

N.17 Mitigating factors relating to the offence will include:
(a) an intention to cause grievous bodily harm, rather than to kill;
(b) spontaneity and lack of pre-meditation.

N.18 Mitigating factors relating to the offender may include:
(a) the offender's age;
(b) clear evidence of remorse or contrition;
(c) a timely plea of guilty.

Very serious cases

N.19 A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.

N.20 Among the categories of case referred to in paragraph N.13, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime, or the offence was a terrorist or sexual or sadistic murder, or involved a young child. In such a case, a term of 20 years and upwards could be appropriate.

N.21 In following this guidance, judges should bear in mind the conclusion of the Court in *Sullivan* that the general effect of both these statements is the same. While Lord Bingham does not identify as many starting points, it is open to the judge to come to exactly the same decision irrespective of which was followed. Both pieces of guidance give the judge a considerable degree of discretion.

CPD VII Sentencing P: PROCEDURE FOR ANNOUNCING THE MINIMUM TERM IN OPEN COURT

P.1 Having gone through the three or four steps outlined above, the court is then under a duty, under section 270 of the Act, to state in open court, in ordinary language, its reasons for deciding on the minimum term or for passing a whole life order.

P.2 In order to comply with this duty, the court should state clearly the minimum term it has determined. In doing so, it should state which of the starting points it has chosen and its reasons for doing so. Where the court has departed from that starting point due to mitigating or aggravating features, it must state the reasons for that departure and any aggravating or mitigating features which have led to that departure. At that point, the court should also declare how much, if any, time is being deducted for time spent in custody and/or on bail subject to a qualifying curfew condition. The court must then explain that the minimum term is the minimum amount of time the prisoner will spend in prison, from the date of sentence, before the Parole Board can order early release. If it remains necessary for the protection of the public, the prisoner will continue to be detained after that date. The court should also state that where the prisoner has served the minimum term and the Parole Board has decided to direct release, the prisoner will remain on licence for the rest of his life and may be recalled to prison at any time.

P.3 Where the offender was 21 or over when he committed the offence and the court considers that the seriousness of the offence is so exceptionally high that a 'whole life order' is appropriate, the court should state clearly its reasons for reaching this conclusion. It should also explain that the early release provisions will not apply.

CPD VII Sentencing Q: FINANCIAL, ETC. INFORMATION REQUIRED FOR SENTENCING

Q.1 These directions supplement CrimPR 24.11 and 25.16, which set out the procedure to be followed where a defendant pleads guilty, or is convicted, and is to be sentenced. They are not concerned exclusively with corporate defendants, or with offences of an environmental, public health, health and safety or other regulatory character, but the guidance which they contain is likely to be of particular significance in such cases.

Q.2 The rules set out the prosecutor's responsibilities in all cases. Where the offence is of a character, or is against a prohibition, with which the sentencing court is unlikely to be familiar, those responsibilities are commensurately more onerous. The court is

entitled to the greatest possible assistance in identifying information relevant to sentencing.

Q.3 In such a case, save where the circumstances are very straightforward, it is likely that justice will best be served by the submission of the required information in writing: see *R v Friskies Petcare (UK) Ltd* [2000] 2 Cr App R (S) 401. Though it is the prosecutor's responsibility to the court to prepare any such document, if the defendant pleads guilty, or indicates a guilty plea, then it is very highly desirable that such sentencing information should be agreed between the parties and jointly submitted. If agreement cannot be reached in all particulars, then the nature and extent of the disagreement should be indicated. If the court concludes that what is in issue is material to sentence, then it will give directions for resolution of the dispute, whether by hearing oral evidence or by other means. In every case, when passing sentence the sentencing court must make clear on what basis sentence is passed: in fairness to the defendant, and for the information of any other person, or court, who needs or wishes to understand the reasons for sentence.

Q.4 If so directed by or on behalf of the court, a defendant must supply accurate information about financial circumstances. In fixing the amount of any fine the court must take into account, amongst other considerations, the financial circumstances of the offender (whether an individual or other person) as they are known or as they appear to be. Before fixing the amount of fine when the defendant is an individual, the court must inquire into his financial circumstances. Where the defendant is an individual the court may make a financial circumstances order in respect of him. This means an order in which the court requires an individual to provide a statement as to his financial means, within a specified time. It is an offence, punishable with imprisonment, to fail to comply with such an order or for knowingly/recklessly furnishing a false statement or knowingly failing to disclose a material fact. The provisions of section 20A Criminal Justice Act 1991 apply to any person (thereby including a corporate organisation) and place the offender under a statutory duty to provide the court with a statement as to his financial means in response to an official request. There are offences for non-compliance, false statements or non-disclosure. It is for the court to decide how much information is required, having regard to relevant sentencing guidelines or guideline cases. However, by reference to those same guidelines and cases the parties should anticipate what the court will require, and prepare accordingly. In complex cases, and in cases involving a corporate defendant, the information required will be more extensive than in others. In the case of a corporate defendant, that information usually will include details of the defendant's corporate structure; annual profit and loss accounts,

or extracts; annual balance sheets, or extracts; details of shareholders' receipts; and details of the remuneration of directors or other officers.

Q.5 In *R v F Howe and Son (Engineers) Ltd* [1999] 2 Cr App R (S) 37 the Court of Appeal observed:

> "If a defendant company wishes to make any submission to the court about its ability to pay a fine it should supply copies of its accounts and any other financial information on which it intends to rely in good time before the hearing both to the court and to the prosecution. This will give the prosecution the opportunity to assist the court should the court wish it. Usually accounts need to be considered with some care to avoid reaching a superficial and perhaps erroneous conclusion. Where accounts or other financial information are deliberately not supplied the court will be entitled to conclude that the company is in a position to pay any financial penalty it is minded to impose. Where the relevant information is provided late it may be desirable for sentence to be adjourned, if necessary at the defendant's expense, so as to avoid the risk of the court taking what it is told at face value and imposing an inadequate penalty."

Q.6 In the case of an individual, the court is likewise entitled to conclude that the defendant is able to pay any fine imposed unless the defendant has supplied financial information to the contrary. It is the defendant's responsibility to disclose to the court such information relevant to his or her financial position as will enable it to assess what he or she reasonably can afford to pay. If necessary, the court may compel the disclosure of an individual defendant's financial circumstances. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

CPD VII Sentencing R: MEDICAL REPORTS FOR SENTENCING PURPOSES

General observations

R.1 CrimPR 24.11 and 25.16 concern standard sentencing procedures in magistrates' courts and in the Crown Court respectively. CrimPR 28.8 deals with the obtaining of medical reports for sentencing purposes.

R.2 Rule 28.8 governs the procedure to be followed where a report is commissioned at the instigation of the court. It is not a substitute for the prompt commissioning of a report or reports by a defendant or defendant's representatives where expert medical

opinion is material to the defence case. In particular, the defendant's representatives may wish to obtain a medical report or reports wholly independently of the court. Nothing in these directions, therefore, should be read as discouraging the commissioning of a medical report before the case comes before the court, where such a report is expected to be material and where it is possible promptly to commission it. However, where such a report has been commissioned then if that report has not been received in time for sentencing and if the court agrees that it seems likely to be material, then the court should set a timetable for the reception of that report and should give directions for progress to be reviewed at intervals, adopting the timetable set out in these directions with such adaptations as are needed.

R.3 In assessing the likely materiality of an expert medical report for sentencing purposes the court will be assisted by the parties' representations; by the views expressed in any pre-sentence report that may have been prepared; and by the views of practitioners in local criminal justice mental health services, whose assistance is available to the court under local liaison arrangements.

R.4 Where the court requires the assistance of such a report then it is essential that there should be (i) absolute clarity about who is expected to do what, by when, and at whose expense; and (ii) judicial directions for progress with that report to be monitored and reviewed at prescribed intervals, following a timetable set by the court which culminates in the consideration of the report at a hearing. This is especially important where the report in question is a psychiatric assessment of the defendant for the preparation of which specific expertise may be required which is not readily available and because in some circumstances a second such assessment, by another medical practitioner, may be required.

Timetable for the commissioning, preparation and consideration of a report or reports

R.5 CrimPR 28.8 requires the court to set a timetable appropriate to the case for the preparation and reception of a report. In doing so the court will take account of such representations and other information that it receives, including information about the anticipated availability and workload of practitioners with the appropriate expertise. However, the timetable ought not be a protracted one. It is essential to keep in mind the importance of maintaining progress: in recognition of the defendant's rights and with respect for the interests of victims and witnesses, as required by CrimPR Part 1 (the overriding objective). In a magistrates' court account must be taken, too, of section 11 of the Powers of Criminal Courts (Sentencing) Act 2000, which limits the duration of each remand pending the preparation of a report to 3 weeks, where the

defendant is to be in custody, and to 4 weeks if the defendant is to be on bail.

R.6 Subject, therefore, to contrary judicial direction the timetable set by the court should require:

(a) the convening of a hearing to consider the report no more than 6 – 8 weeks after the court makes its request;
(b) the prompt identification of an appropriate medical practitioner or practitioners, if not already identified by the court, and the despatch of a commission or commissions accordingly, within 2 business days of the court's decision to request a report;
(c) acknowledgement of a commission by its recipient, and acceptance or rejection of that commission, within 5 business days of its receipt;
(d) enquiries by court staff to confirm that the commission has been received, and to ascertain the action being taken in response, in the event that no acknowledgement is received within 10 business days of its despatch;
(e) delivery of the report within 5 weeks of the despatch of the commission;
(f) enquiries into progress by court staff in the event that no report is received within 5 weeks of the despatch of the commission.

R.7 The hearing that is convened for the court to consider the report, at 6 – 8 weeks after the court requests that report, should not be adjourned before it takes place save in exceptional circumstances and then only by explicit judicial direction the reasons for which must be recorded. If by the time of that hearing the report is available, as usually should be the case, then at that hearing the court can be expected to determine the issue in respect of which the report was commissioned and pass sentence. If by that time, exceptionally, the report is not available then the court should take the opportunity provided by that hearing to enquire into the reasons, give such directions as are appropriate, and if necessary adjourn the hearing to a fixed date for further consideration then. Where it is known in advance of that hearing that the report will not be available in time, the hearing may be conducted by live link or telephone: subject, in the defendant's case, to the same considerations as are identified at paragraph I.3N.6 of these Practice Directions. However, it rarely will be appropriate to dispense altogether with that hearing, or to make enquiries and give further directions without any hearing at all, in view of the arrangements for monitoring and review that the court already will have directed and which, by definition therefore, thus far will have failed to secure the report's timely delivery.

R.8 Where a requirement of the timetable set by the court is not met, or where on enquiry by court staff it appears that the timetable is unlikely to be met, and in any instance in which a medical practitioner who accepts a commission asks for more time, then court staff should not themselves adjust the timetable or accede to such a request but instead should seek directions from an appropriate judicial authority. Subject to local judicial direction, that will be, in the Crown Court, the judge assigned to the case or the resident judge and, in a magistrates' court, a District Judge (Magistrates' Courts) or justice of the peace assigned to the case, or the Justices' Clerk, an assistant clerk or other senior legal adviser. Even if the timetable is adjusted in consequence:

(a) the hearing convened to consider the report (that is, the hearing set for no more than 6 – 8 weeks after the court made its request) rarely should be adjourned before it takes place: see paragraph R.13 above;

(b) directions should be given for court staff henceforth to make regular enquiries into progress, at intervals of not more than 2 weeks, and to report the outcome to an appropriate judicial authority who will decide what further directions, if any, to give.

R.9 Any adjournment of a hearing convened to consider the report should be to a specific date: the hearing should not be adjourned generally, or to a date to be set in due course. The adjournment of such a hearing should not be for more than a further 6 – 8 weeks save in the most exceptional circumstances; and no more than one adjournment of the hearing should be allowed without obtaining written or oral representations from the commissioned medical practitioner explaining the reasons for the delay.

Commissioning a report

R.10 Guidance entitled 'Good practice guidance: commissioning, administering and producing psychiatric reports for sentencing' prepared for and published by the Ministry of Justice and HM Courts and Tribunals Service in September 2010 contains material that will assist court staff and those who are asked to prepare such reports:

http://www.ohrn.nhs.uk/resource/policy/GoodPracticeGuidePsychReports.pdf

That guidance includes standard forms of letters of instruction and other documents.

R.11 CrimPR 28.8 requires the commissioner of a report to explain why the court seeks the report and to include relevant information about the circumstances. The HMCTS Guidance contains forms for judicial use in the instruction of court staff, and guidance to court staff on the preparation of letters of instruction, where a report is

required for sentencing purposes. Where a report is requested in a case involving manslaughter by reason of diminished responsibility, the report writer should have regard to the Sentencing Council's guideline on Manslaughter by reason of Diminished Responsibility. This should assist the report writer in providing the most helpful assessment to enable the court to determine the level of diminution involved in the case.

R.12 The commission should invite a practitioner who is unable to accept it promptly to nominate a suitably qualified substitute, if possible, and to transfer the commission to that person, reporting the transfer when acknowledging the court officer's letter. It is entirely appropriate for the commission to draw the recipient's attention to CrimPR 1.2 (the duty of the participants in a criminal case) and to CrimPR 19.2(1)(b) (the obligation of an expert witness to comply with directions made by a court and at once to inform the court of any significant failure, by the expert or another, to take any step required by such a direction).

R.13 Where the relevant legislation requires a second psychiatric assessment by a second medical practitioner, and where no commission already has been addressed to a second such practitioner, the commission may invite the person to whom it is addressed to nominate a suitably qualified second person and to pass a copy of the commission to that person forthwith.

Funding arrangements

R.14 Where a medical report has been, or is to be, commissioned by a party then that party is responsible for arranging payment of the fees incurred, even though the report is intended for the court's use. That must be made clear in that party's commission.

R.15 Where a medical report is requested by the court and commissioned by a party or by court staff at the court's direction then the commission must include (i) confirmation that the fees will be paid by HMCTS, (ii) details of how, and to whom, to submit an invoice or claim for fees, and (iii) notice of the prescribed rates of fees and of any legislative or other criteria applicable to the calculation of the fees that may be paid.

Remand in custody

R.16 Where the defendant who is to be examined will be remanded in custody then notice that directions have been given for a medical report or reports to be prepared must be included in the information given to the defendant's custodian, to ensure that the preparation of the report or reports can be facilitated. This is especially important where bail is withheld on the ground that it would be otherwise impracticable to complete the required report,

and in particular where that is the only ground for withholding bail.

CPD VII Sentencing S: VARIATION OF SENTENCE

S.1 Under section 142 of the Magistrates' Courts Act 1980, in some circumstances a magistrates' court may vary or rescind a sentence or other order that it has imposed or made if that appears to be in the interests of justice. Under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 the Crown Court may vary or rescind a sentence or order which it has imposed or made, within a period of 56 days beginning with the date of that sentence or order, or beginning with the date of another defendant's acquittal or sentencing in some circumstances (see CrimPR 28.4(1)(b)).

S.2 CrimPR 28.4(2) allows the court to exercise those powers at a hearing, in public or in private, or without a hearing. However, rule 28.4(4) confines the court's discretion to dispense with a hearing by requiring the defendant's presence, necessarily at a hearing, unless the variation is one proposed by the defendant, or the effect of the variation is such that the defendant is no more severely dealt with under the sentence as varied than before; or, if neither of those conditions is satisfied, where a hearing has been convened at which the defendant has had an opportunity to make representations, whether or not he or she in fact attends. Moreover, rule 28.4 requires service on the other party of any application to vary a sentence or order, in response to which that other party may wish to make such representations as general principles of law require to be heard. It follows that the circumstances in which a variation of sentence properly may be made without a hearing, consistently with the rule, will be confined to cases in which neither party objects to what is proposed and in which the consequences for the defendant of the variation will be neutral or benign.

S.3 In such a case usually there will be no other objection to the making of the variation without a hearing. Even in such a case, however, the court retains a discretion to convene a hearing, in the exercise of which discretion due regard must be had to the overriding objective and to the importance of dealing with criminal cases in public, in accordance with the principle of open justice. The application of that latter principle was described in *R v Cox* [2019] EWCA Crim 71; [2019] 4 WLR 88 at paragraphs 18 – 19 in these terms:

> "As stated in cases such as *R v Pinkerton* [2017] 1 Cr App R(S) 47 at [8] (a case where there in fact was a downward adjustment of a concurrent custodial sentence which did not impact on the overall sentence) such alterations should be done openly "so that justice may be seen to be done". Likewise, in *R v Warren*

> [2017] 2 Cr App R(S) 5, the general desirability of re-sentencing taking place in the presence of the defendant and in court was stressed.
>
> Accordingly, whilst it is easy to understand the attractions of administrative convenience … and particularly perhaps where the sentencing judge is not a full-time judge based at a particular court centre, those administrative attractions should not be permitted routinely to prevail over the delivery of open justice."

In reaching its decision the court therefore will take into account each of the relevant factors listed in CrimPR 1.1, and will be astute to distinguish between, on the one hand, the completion of details or the correction of errors of a quasi-administrative character and, on the other, a variation of sentence in which the determination will be a matter of legitimate public interest.

S.4 In any event, the making of the decision and the reasons for that decision always must be announced at a public hearing, even if only briefly and even if the parties are absent on that occasion: CrimPR 28.4(2)(b). While the decision itself must be made, and the reasons for that decision formulated, by the sentencing court itself (section 142(1) of the 1980 Act; section 155(4) of the 2000 Act), the public announcement may be made by a differently constituted court if it would be impracticable for the sentencing court to sit in public for the purpose within a reasonable time.