



CPS

CPS INSTRUCTIONS FOR PROSECUTING ADVOCATES

These instructions are incorporated into every prosecution brief.

Any advocate prosecuting on behalf of the Crown Prosecution Service will be expected to be familiar with the material in the booklet and to apply these instructions.

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1. **ABUSE OF PROCESS AND THE HUMAN RIGHTS ACT 1998**

- 1.1 In determining whether a defendant can receive a fair trial a Court is bound to take into account the protections guaranteed under Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Since the implementation of the Human Rights Act 1998, direct regard should be had to Article 6 of the ECHR and the related Strasbourg jurisprudence.
- 1.2 The House of Lords decision in *R v DPP ex parte Kebilene and others* [1999] 3 W.L.R. 972 is helpful if an application is made by the defence to stay proceedings on the grounds that they amount to an abuse of process by reason of an alleged breach of the European Convention on Human Right (the Convention).
- 1.3 In *Kebilene*, the House of Lords quashed the declaration of the Divisional Court that the continuing decision of the DPP to proceed with the prosecution was an unlawful act. Absent dishonesty or *mala fides* or some exceptional circumstance, the decision of the Director to consent to a prosecution is not amenable to judicial review.
- 1.4 The House also held that once HRA was in force, arguments that domestic legislation is incompatible with the Convention should be brought during the trial or appeal process, the defendants not being entitled to an additional remedy of judicial review.
- 1.5 There are two categories of ECHR-based challenges which the defence may make in applications to stay proceedings. The first category is where the defence allege that a statutory provision is incompatible with the Convention. The second category is where the grounds for the application are that the Convention has been breached in some other way, for example, evidence obtained in breach of Convention rights.

Incompatibility of domestic legislation

- 1.6 The prosecution might be confronted with an argument that a criminal prosecution amounts to an abuse of process on the ground that the offence-creating provision in question is incompatible with the ECHR. Whenever an abuse of process argument is brought on this basis it will be necessary to consider whether:
- on the existing principles of statutory construction the provision in question is compatible with the Convention. If so, no difficulty arises. If not,
 - it is possible to read and give effect to the provision in a way which is compatible with Convention rights. If so, no difficulty arises.
- 1.7 Cases where the primary legislation in question is irretrievably incompatible with the Convention are likely to be extremely rare. Even where this situation pertains, the incompatibility does not deprive the provision of its force and validity, and therefore, it should not affect the criminal trial.

- 1.8 Where in these circumstances the defence argues that a trial should be stayed as an abuse of process because of incompatibility with the ECHR, the notice of the Court should be drawn to the following provisions of the Human Rights Act 1998:
- Section 4(5); provides a list of courts that may make a “declaration of incompatibility” where it is satisfied that the incompatibility between the legislation and ECHR cannot be resolved. The courts include the High Court, Court of Appeal and House of Lords. The list does **not** include the Crown Court or Magistrates’ courts.
 - Section 3(2)(b); provides that, as far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. However, where there is incompatibility between the domestic legislation and the Convention, the validity of the legislation is not affected if primary legislation prevents the removal of the incompatibility.
 - Section 6(2); provides that a public authority is not acting unlawfully if, as a result of primary legislation, it could not have acted differently (i.e. the CPS cannot be held to be acting unlawfully for prosecuting in accordance with existing legislation).
- 1.9 Relying on these provisions, the prosecution can respond that a decision to stay a prosecution on the ground that the Act establishing the offence is allegedly incompatible with the ECHR is not a matter for either the Magistrates or the Crown Court to consider. Moreover, it may also be asserted that under the HRA a finding of incompatibility is no bar to trial. The removal of any incompatibility is a matter exclusively for Parliament.

Procedural and evidential breaches

- 1.10 Other alleged breaches of the Convention, (for example, obtaining evidence in breach of a Convention right or excessive delay in bringing the case to trial), should similarly not provide a basis to stay proceedings.
- 1.11 The trial process itself can deal with allegations of unfairness; ***Khan v UK (Application No. 35394/97); Schenk v Switzerland 1988 13 EHRR 242***. The Court in Strasbourg is only concerned with the overall fairness of the proceedings, it will not rule on the admissibility of evidence in domestic trials which is deemed to be a matter for the contracting states.
- 1.12 The impetus towards abuse applications has increased since the incorporation of the ECHR into domestic law, but the appellate courts have maintained a consistently restrictive attitude towards the application of the doctrine. The clear preference remains that cases should continue to trial and that the judge should use other powers (such as the discretion to exclude unfairly obtained evidence) to regulate the conduct of the trial so as to avoid unfairness to the defendant; see e.g. ***R (Ebrahim) v Feltham Magistrates’ Court; Mouat v DPP*** [2001] 2 Cr App R 23.

1.13 As to cases where a defendant seeks to argue that his or her ECHR right to a fair trial has been breached by delay see **Attorney General's Reference (No 2 of 2001)** [2004] 2 A.C. 72, HL. The majority in the House of Lords confirmed the earlier statement of the Court of Appeal on the implications of Article 6 for the question whether a prosecution should be stayed by reason of delay alone. The opinion of the House (set out in the speech of Lord Bingham) was:

“Criminal Proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6(1) of the Convention only if (a) a fair hearing is no longer possible or (b) it is for any compelling reason unfair to try the defendant.”

1.14 See also **R v Dunlop** [2006] EWCA Crim 1354, [2007] 1 Cr. App. R. 8: in which the Lord Chief Justice reminded trial judges that, “The passage of time is, of itself, no impediment to the fairness of a retrial.”

In conclusion

1.15 The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances: **A-G's Reference (No.1 of 1990)** [1992] Q.B. 630, CA; **A-G's Reference (No.2 of 2001)** above. The essential focus of the doctrine is on preventing unfairness at trial through which the defendant is prejudiced in the presentation of his or her case. Courts which are asked to exercise their inherent power to stay should first consider whether other procedural measures such as the exclusion of specific evidence or directions to the jury might prevent ‘trial unfairness’ and allow the prosecution to continue.

1.16 The reviewing lawyer should include specific instructions in the brief on ECHR points which he or she has identified. If the prosecuting advocate believes that the case involves an ECHR point, which is not addressed in the instructions, the reviewing lawyer should be advised immediately. The advocate is also asked to inform the Crown Prosecution Service if any issues involving the HRA arise during the conduct of the case. The advocate is asked to make a note of the point, the arguments put forward and the judge's ruling.

1.17 Where the defence intend to make an application to stay a prosecution on the ground of abuse of process, on whatever basis, the advocate should ensure that the arrangements set out in The Consolidated Criminal Practice Direction at paragraph IV.36 are followed.

1.18 If an ECHR point is raised unexpectedly during the conduct of the case, the prosecuting advocate should make a note on the brief in red pen, setting out how the point was decided. The advocate should also follow this up with a telephone call to the reviewing lawyer so that early consideration can be given, in appropriate cases, to whether an appeal is possible and if so, whether it is necessary and also to inform those responsible for the fast tracking of appeals on two points:

- about the impact of the ruling on the criminal justice system as a whole:
and

- whether the point at issue needs to be litigated speedily.

2. **ACCEPTANCE OF PLEAS**

2.1 On 21 October 2005 the Attorney General issued new guidelines that govern the acceptance of pleas and in doing so complement Section 10 of the *Code for Crown Prosecutors* and embrace *The Farquharson Guidelines The Role and Responsibilities of the Prosecution Advocate* (February 2002).

2.2 Prosecutors must familiarise themselves with the new Guidelines “*The Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise*” and in doing so will note Section “C” which emphasises that:

- Prosecutors must be careful not to agree a plea on a misleading or untrue set of facts;
- Defence advocates should commit the basis of the plea to writing. Where the basis of the plea is agreed, the prosecutor should endorse the document and it should then be lodged with the court. Where the prosecutor takes issue with all or part of the written basis of the plea then what is accepted and what is rejected should be recorded and the matter placed before the court;
- Such a document should not contain personal mitigation;
- Prosecutors should not concede the point where a defendant puts forward assertions of fact which are outside the scope of the prosecutor’s knowledge; a typical example is the defendant’s state of mind;
- Instead prosecutors should invite sentencers not to accept such mitigation without hearing from the defendant on oath and to test his or hers account in cross examination; and
- Prosecutors should always ensure that the defence advocate is aware of the basis on which the prosecution case will be opened to the court.

2.3 B3 of the Guidelines should always be followed:

“When a case is listed for trial and the prosecution form the view that the appropriate course is to accept a plea before the proceedings commence or continue, or to offer no evidence on the indictment or any part of it, the prosecution should whenever practicable speak to the victim or victims family, so that the position can be explained. The views of the victim or the family may assist in informing the prosecutor’s decision as to whether it is in the public interest, as defined by the *Code for Crown Prosecutors*, to accept or reject the plea. The victim or victim’s family should then be kept informed and decisions explained once they are made at court”.

3. **ADVANCE SENTENCE INDICATION**

PROCEDURE

Scope

- 3.1 The Advance Sentence Indication procedure is only applicable to cases before the Crown Court.
- 3.2 The principles of the judgment in R –v- Goodyear 20 April 2005 CA modify the rule of practice adopted by courts following the decision in R –v- Turner 1970 2 QB 321.
- 3.3 Section “D” of The Attorney General’s Guidelines 2005 on the *Acceptance of Pleas and the Prosecutor’s Role in The Sentencing Exercise*, provides specific guidance on the approach to the procedure and should always be followed.

Acceptable plea

- 3.4 The Advance Sentence Indication is **only** available to the defence where there is an acceptable plea the basis of which has been committed to writing. Prosecutors are reminded that they must ensure that Section 6 of the Farquharson Guidelines as to The Role of and Responsibilities of the Prosecution Advocate are followed and that the necessary consultation takes place both with victims or victim’s family and in the case of an independent prosecution advocate, with the CPS.
- 3.5 The guidelines make clear that an indication should not be sought on a basis of hypothetical facts. Where there is a dispute about a particular fact and the defence believes the point to be effectively immaterial to the sentencing decision, the difference should be recorded so that the judge may decide.
- 3.6 The guidelines are emphatic that a Judge should not be invited to give an indication on what would be, or what would appear to be a “plea bargain”.

Request for an indication

- 3.7 As the request for indication comes from the defence, the prosecutor is obliged to react, rather than initiate the process.
- 3.8 On the basis of an acceptable plea, the defence may request an advance indication of sentence at any stage of the proceedings, including in trial. However, the guidelines recommend that ordinarily the procedure will take place at the Plea and Case Management Hearing. This is usually the first opportunity for the defendant to plead guilty and take advantage of the maximum sentence discount applying the guidance set down by the Sentencing Guideline Council.
- 3.9 Whilst the Judge may remind a defendant that he may wish to take advantage of the procedure he may not insist that an indication takes place. A Judge

may also decline to give an indication or decide to defer giving an indication to later in the trial process.

- 3.10** Where there are issues in the case that are considered “complicated or difficult”, the defence are required to give proper notice in writing to the prosecution and the court of their intention to seek an advance sentence indication. In such cases no less than 7 days notice in writing of an intention to seek an indication should normally be given. If an application is made without notice when it should have been given, any adjournment that may flow as a consequence could result in the defendants discount for an early plea being reduced.
- 3.11** Whilst the guidelines are silent as to what defines “complicated or difficult” it is clear from the guidelines that any issues between the prosecution and defence must be resolved before the Judge will accede to a request for an indication. Prosecutors will need to be alive to the need to ensure that the court are made aware of any unresolved issues and that such hearings should not take place in such circumstances.

The Hearing

- 3.12** The hearing should be conducted in open court with a full recording of the proceedings, with both sides represented and in the presence of the defendant.
- 3.13** Reporting restrictions will apply in order to safeguard a situation where the indication is not accepted and the matter moves to trial.
- 3.14** It is anticipated that the process should not take up a disproportionate amount of court time, as the procedure does not require an opening by the prosecution or a mitigation plea by the defence.
- 3.15** The role of the prosecutor described in paragraph 70 of the Judgment is reproduced in full:
- 3.15.1** We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.
- a.** If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.
 - b.** If an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.

- c. If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.
 - d. **In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.**
- 3.16 In giving an indication the judge will normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.**
- 3.17** The court rejected the suggestion that as part of the procedure the Judge should indicate the maximum level of sentence following a conviction by a jury. The rationale for adopting this approach is described at paragraph 54 of the Judgement.
- 3.18** Once an indication is given it is binding and remains binding on the judge who has given it. It also binds any other judge who may become responsible for the case.
- 3.19** It is envisaged that where a defendant accepts the indication, the court will proceed to take the plea and at that stage lift reporting restrictions. However, the guidelines allow a defendant "a reasonable opportunity" to consider his/her position but provides no indication as to what would amount to "reasonable" although this is likely to be considered on a case-by-case basis.
- 3.20** If after a "reasonable opportunity" the defendant does not plead guilty, the indication will cease to have effect.

Dangerous Offenders

- 3.21** In *R v Kulah [2007] EWCA Crim 1701*, the Court of Appeal (Criminal Division) made the following observations about the relationship between the "dangerous offender" provisions of the Criminal Justice Act 2003 and the procedure in cases where a **Goodyear** indication might be sought:
- 3.22** As a matter of general principle, the guidance set out in Goodyear holds good, notwithstanding the introduction of the dangerous offender provisions of the Criminal Justice Act 2003.
- 3.23** At the point (before plea) when a sentence indication would be sought, it would often be the case that the judge would not be in possession of the information necessary to enable him/her to make the assessment of risk required by sections 225,226,227 or 228 of the Criminal Justice Act 2003.

- 3.24** As **Goodyear** makes clear, the judge is under no obligation to give an indication, and has an unfettered right in this regard.
- 3.25** If the judge decides to give an indication where an assessment of future risk remains to be made, he should make the following matters clear:
- a. The offence (or one or more of them) is a specified offence listed in Schedule 15, Criminal Justice Act 2003, bringing into operation the “dangerous offender” provisions contained in Part 12 Chapter 5 of that Act.
 - b. The information and materials necessary to undertake the assessment of future risk which is required by those provisions are not available and that the assessment remains to be conducted.
 - c. If the defendant is later assessed as “dangerous”, the sentences mandated by the provisions – an indeterminate or extended sentence – will be imposed.
 - d. If the defendant is not later assessed as “dangerous”, the indication relates in the ordinary way to the maximum determinate sentence which will be imposed.
 - e. If the offender is later assessed as “dangerous”, the indication can only relate to the notional determinate term which will be used in the calculation of the minimum specified period the offender would have to serve before he may apply to the Parole Board to direct his release; or, in a case where an extended sentence is the only lawful option, it will relate to the appropriate custodial term within the extended sentence (that is, the indication does not encompass the length of any extension period during which the offender will be on licence following his release).
 - f. If an indeterminate sentence is mandated by the provisions, the actual amount of time the offender will spend in custody is not within the control of the sentencing judge, only its minimum.
- 3.26** The Court pointed out the obligation on the prosecution, imposed in **Goodyear**, to draw to the attention of the judge any minimum or mandatory sentencing requirement. That obligation includes a duty to inform the judge that the offence charged is a specified offence and of the requirement to undertake the risk assessment required by the relevant section of the Criminal Justice Act.
- 3.27** The Court further observed that it would be desirable, wherever possible, that the judge who had given a **Goodyear** indication should himself sentence the defendant. If it was unavoidable that a different judge had to pass sentence, the sentencing judge should be provided with a transcript of the **Goodyear** indication.
- 3.28** When prosecuting any sentencing hearing where the “dangerous offender” provisions apply and where there has been a previous **Goodyear** indication made by a different judge, the prosecuting advocate should ensure that the exact terms of the indication are available to the court. In particular, it will be

important to make it clear whether any indication made had addressed the issue of risk assessment, or had deferred it until the sentencing hearing.

4. ADVERSE JUDICIAL FINDINGS

- 4.1** A duty to reveal and disclose adverse judicial findings arises pursuant to *R v Guney* (1998) 2 Cr. App R 242. The police and CPS have agreed that an adverse judicial finding is **a finding by a court, expressly or by inevitable inference, that a police witness has knowingly, whether on oath or otherwise, misled the court. This applies to civil and criminal proceedings where a finding is made.**
- 4.2** It is the duty of an advocate prosecuting on behalf of the CPS to record any potential adverse judicial finding in full.
- 4.3** If there is any room for ambiguity in interpreting the intended status of adverse comments made by the court of a witness, the advocate must seek to clarify specifically any criticism at the time it is made.
- 4.4** Where adverse comments are made that may amount to an adverse judicial finding as set out at **4.1** above, the advocate must make a note on the brief and thereafter provide a **full note** to the CPS Unit Head or Special Casework Lawyer.

5. ANTI-SOCIAL BEHAVIOUR ORDERS ON CONVICTION

- 5.1** Under Section 1C(2) of the Crime and Disorder Act 1998, as amended by the Anti-social Behaviour Act 2003, an order on conviction may be made by a court if the court considers;
- a.** “that the offender has acted, at any time since [2 December 2002], in an anti-social manner, that is to say in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself, and
 - b.** that an order under this Section is necessary to protect persons in any place in England and Wales from further anti-social acts by him.”
- 5.2** A prosecutor should have considered, in appropriate cases, whether a Section 1C order should be applied for at the time of charging or reviewing the file. In reaching that decision, the prosecutor may have had to liaise with other local agencies, such as the police or the local authority, possibly in accordance with a local protocol.
- 5.3** If an application for a Section 1C order is to be made, the prosecutor should have prepared and served a notice of intention to apply in accordance with Rule 50.3 of the Criminal Procedure Rules 2005. The defendant should have served written notice of any evidence they wish to rely on, attaching written statements that have not already been served pursuant to Rule 50.3(4) of the Rules. The Advocate should not find that the matter is raised for the first time after

conviction.

- 5.4** If an Advocate is instructed to apply for such an order, the Advocate must read the guidance issued by CPS Policy on Section 1C orders, which can be found on the CPS Infonet, and which incorporates amendments to Part 50 of the Criminal Procedure Rules 2005 (civil behaviour orders after verdict or finding) which came into force on 7 April 2008.
- 5.5** Such an order may only be made in addition to a sentence or conditional discharge (Section 1C(4)). It follows that it may not be combined with an absolute discharge nor be imposed at the same time as the court defers sentence (see *Blackstone's* (2004) E23.10).
- 5.6** An anti-social behaviour order on conviction lasts for a minimum of 2 years (s 1(7), as applied to orders under Section 1C by Section 1C(9)).
- 5.7** If an application for a Section 1C order is refused, the reasons for the court's decision should be endorsed on the brief.

6. BAIL

Electronic Tagging

- 6.1** The advocate is informed that in October 2005, the Court Service circulated guidance that electronic tagging is available as a condition of bail and, where appropriate, reminds the court that such a condition can be imposed as an alternative to custody.
- 6.2** With the possibility of electronic tagging combined with other conditions, remands in custody should only be sought when only absolutely necessary in circumstances when bail conditions cannot meet the bail objections.
- 6.3** In considering electronic tagging, prosecutors should bear in mind:
- Section 25 Criminal Justice and Public Order Act 1994 for the offences of murder, attempted murder, manslaughter, rape and attempted rape, i.e. bail can only be granted in exceptional circumstances if a defendant has been charged with one of these offences and has a previous conviction for one or more of these offences; and
 - Paragraph 2A Schedule 1 Bail Act 1976 which provides that a defendant need not be granted bail if the offence for which the person is before the Court is an indictable only or either way offence and it appears to the Court that the defendant was on bail in criminal proceedings on the date that the current offence was allegedly committed.

Breach of Bail

- 6.4** The advocate is referred to Amendment no 3 to the Consolidated Practice Direction.

- 6.5** The disposal of proceedings under s6(1) or s6(2) Bail Act 1976 should not be deferred. Defendants who breach bail should expect a custodial sentence for the breach which should be served consecutively to any custodial sentence. Courts should consider whether bail for any other offences should continue in the light of the failure to surrender, bearing in mind the guidance above.
- 6.6** If an advocate is dealing with a Bail Act offence (which may occur if the defendant commits another offence outside the jurisdiction of the bail court), then a court should be reminded of the requirements of the Practice Direction, namely:
- To deal with the Bail Act offence as soon as reasonably practicable
 - Not to defer the Bail Act offence until the proceedings for the substantive offences have been concluded
 - To consider whether bail should continue in the light of failure to surrender.

7. CONFISCATION

- 7.1** Generally, advocates are instructed to apply to the Crown Court following conviction for a confiscation order in cases in which a defendant has benefited from particular or general criminal conduct and there are available assets. Each case must, however, be considered on its merits and advocates should bring to the Reviewing Lawyer's attention any circumstances that might make the application inappropriate in a particular case. Advocates should ensure that a realistic timetable is set for the service of the Prosecutor's Statement and Reply

Training

- 7.2** Advocates are expected to have attended an approved *Proceeds of Crime 2002 (POCA 2002)* course prior to undertaking work on behalf of the Crown Prosecution Service.

Choice of Legislation

- 7.3** If all of the offences indicted in the proceedings in respect of which the prosecution intend to ask the court to consider for confiscation took place after 23 March 2003, then *POCA 2002* will apply. If not, then either the *Drug Trafficking Act 1994 (DTA 1994)* or the *Criminal Justice Act 1988 (CJA 1988)* will apply and prosecutors should refer to the paragraphs relating to the pre-POCA legislation below. TICs do not affect the choice of legislation and may date from before or after the commencement of *POCA 2002*.
- 7.4** In the event that the *CJA 1988* applies, advocates are reminded of the need to give written notice. Please see below.

Offers of Pleas

- 7.5** The number, the value and the dates of offences may affect whether particular or general benefit, or even which statutory scheme will apply. Advocates are

specifically instructed not to enter into any agreements with the defence affecting confiscation without first obtaining the approval of the Reviewing Lawyer dealing with the confiscation aspect of this case.

- 7.6** If a basis of plea is advanced, it is necessary to consider what if any admission is being made (in relation to the basis of plea) which would apply to the confiscation inquiry. It may be possible to say no more than that for the purposes of sentence the prosecution does not and cannot dispute a particular assertion made by a defendant, but the prosecution cannot say what information may arise in any subsequent confiscation (see *R –v- Lazarus* [2004] EWCA Crim 2297).

CONFISCATION UNDER THE PROCEEDS OF CRIME ACT 2002

- 7.7** The Crown Court must proceed under *section 6 of POCA 2002* to consider confiscation if the defendant is due to be sentenced for an offence in the Crown Court and the prosecutor asks the court to proceed, or the Court believes it appropriate. The Court must decide whether the defendant, has a criminal lifestyle. If it decides that he or she does have a criminal lifestyle then the Court calculates the benefit from general criminal conduct using the assumptions set out in POCA 2002, unless they are shown to be incorrect or there would be a serious risk of injustice. If the Court decides that the defendant does not have a criminal lifestyle, it must instead calculate the benefit from particular criminal conduct (the actual offences of which the defendant is convicted).

Civil Proceedings

- 7.8** When considering whether to make a confiscation order, the Crown Court may take into account any information that has been placed before it showing that the victim of an offence to which the proceedings relate has instituted or intends to institute civil proceedings against the Defendant in respect of loss, injury or damage sustained in connection with the offence. In these limited circumstances, the Crown Court has discretion whether to make a confiscation order.

Postponed Determinations

- 7.9** The Court may deal with confiscation under Section 6 of the Act either before or after dealing with sentence. However if the court is minded to postpone the confiscation hearing it must do so for a specified period Section 14(1)(b) and in any event should not exceed two years starting from the date of conviction Section 10(5) of the Act.
- 7.10** The advocate is instructed to ensure that the confiscation hearing is fixed for a date as soon as is practicable and in any event within two years of the date of conviction and that any application to extend the time limit is made before the expiry of the two year time limit and that the application is made in open court rather than administratively.

Criminal Lifestyle

- 7.11** Criminal lifestyle assumptions may be triggered by virtue of section 75 of POCA 2002, if the actions of the defendant constitute conduct forming part of a course of criminal activity, or if the offence(s) were committed over a period of at least six months and in either case that the defendant has benefited by at least £5,000, or if the defendant has been convicted of a Schedule 2 offence of any value.
- 7.12** If the Court accepts that criminal lifestyle is proven to the civil standard, Advocates are instructed to invite the Court to proceed under Section 10 of the Act and apply the relevant assumptions when assessing the defendant's benefit and recoverable amount. Should the Court not make the assumptions it must state its reason (*section 10(7)*) and advocates are asked to ensure that this is done in the event of the assumptions not being made

The Recoverable Amount

- 7.13** The Crown Court will order the Defendant to pay the recoverable amount, which is defined as an amount equal to the Defendant's benefit from the conduct concerned, unless the Defendant is able to prove that the available amount is less than the benefit (*section 7(2) POCA*). The advocate is requested to ensure that the Crown Court completes a 5050 form and states what property is being taken into account when assessing the amount to be recovered in respect of this defendant.

The Available Amount

- 7.14** *Section 9 of POCA 2002* defines the available amount as the aggregate of
- a. the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
 - b. the total of the values (at that time) of all tainted gifts.

Section 16 Statement of Information and Section 17 Response

- 7.15** Section 16 of the Act requires the prosecutor to give the Crown Court a statement detailing whether the Defendant has benefited from the offences for which he has been convicted, any TICs and with an assessment of Defendant's benefit from those offences and TICs.
- 7.16** The Crown Court may require the Defendant to indicate the extent to which he accepts any allegation in the Section 16 Statement and, if he does not accept the allegation, to provide particulars of any matter upon which he wishes to rely, section 17 of the Act.
- 7.17** The Defendant may accept the allegations in the Section 16 Statement, and for the purpose of determining whether the Defendant has benefited from the offences of which he has been convicted and any TICs, or of determining the

value of the benefit, the Crown Court may treat his acceptance as conclusive of the matters to which it relates.

- 7.18** For the purposes of considering the question of confiscation at a confiscation hearing, the Crown Court can have regard to any evidence given in the trial; the contents of the Section 16 Statement and any defence statements; any evidence given in the confiscation hearing, *Dickens [1990] 2 WLR 1384*, in making the determinations above.

Standard of Proof

- 7.19** The standard of proof required determining any question arising under the confiscation determination, as to whether the Defendant has benefited from any offence, or the amount he has to pay, is the civil standard, section 6(7) of the Act.

Third Parties

- 7.20** The advocate will be aware that there is no locus standi for third parties to make representations to the Crown Court during the course of the confiscation proceedings, except when they are called by the defendant. If there is a dispute as to the defendant's interest in the property (such as a claim from a third party of a beneficial interest in property), it is for the Crown Court to make a determination as to the amount by which the defendant has benefited and the amount that might be realised at the time the confiscation order is made as best it can on the information available to it.
- 7.21** Under the *POCA 2002*, the Crown Court is the appropriate forum to determine the ownership or interests of third parties in the property. Full opportunity will be given to the third parties to make representations as to their interest in the property in the restraint proceedings or at the enforcement stage, either of their own application or when a receiver is appointed to sell sufficient of the defendant's assets to pay the confiscation order.
- 7.22** The matrimonial home may constitute part of a Defendant's realisable property provided that he has an interest in it. The value of the Defendant's beneficial interest in the property is the open market value of his/her interest, i.e. not one that is affected by the residency or other interest of a wife or other third party.

Confiscation Order

- 7.23** Once the Crown Court has considered any representations made by the Defendant, the Crown Court may make a confiscation order of up to either the amount of the benefit or the amount that the Defendant can pay, whichever is the less.

Time to Pay

- 7.24** The advocate should be aware that Section 11 of *POCA 2002* requires a Defendant to pay a confiscation order immediately, unless he or she shows the court that time to pay is required, in which case up to six months may be

allowed, extendable on further application in exceptional circumstances to maximum of 12 months.

- 7.25** Advocates should resist applications to allow time to pay unless there are strong arguments to the contrary so as to deprive the defendant of the benefit of any subsequent interest or capital appreciation that accrues on his assets. There is no provision for such interest or appreciation to be confiscated because the order has to be an order for a definite sum of money.
- 7.26** The Crown Court may express concern that the Defendant needs time to sell property. However, it is sometimes more practical and efficient for the CPS to apply for a receiver to be appointed by the Crown Court to sell property.

Default Sentence

- 7.27** Additionally, the Crown Court must settle a term of imprisonment in default of payment of the confiscation order. The terms to be served are the same as those applicable to fines, as set out in Section 139(4) of the Powers of Criminal Courts (Sentencing) Act 2000 and paragraph 5-396 of Archbold 2009 edition. The advocate is instructed to ensure that the Crown Court fixes a term of imprisonment in default.

Payment of the Confiscation Order

- 7.28** The Crown Court merely has the power to make a confiscation order in a sum of money. The Crown Court has no power to direct payment from a particular source nor can the Crown Court order confiscation of a particular asset at this stage. The Court does have the power to appoint a receiver to act on behalf of the court on an application by the Crown, Section 50 of the Act. The Crown Court has no discretion to mitigate the confiscation order. For example, if the Defendant has an interest in the family home, its value must be calculated. This is so even if the effect of the confiscation order may be to render the Defendant and dependent relatives homeless.
- 7.29** The confiscation order is enforced either through the Magistrates' Court as though it were a fine (section 35, 36 & 37 of the Act) or by the CPS applying to the Court for the appointment of a receiver.

Inadequacy

- 7.30** Counsel will be aware that if for any reason the realisable property of the Defendant proves inadequate to meet the confiscation order at the time of realisation (for instance, a property may subsequently be sold for a lesser amount or a third party may be held to hold a beneficial interest in the Defendant's assets) then there is provision for the Defendant to apply to the Court for a Variation or discharge of the order on the grounds of inadequacy under section 23 & 24 of the Act.

Confiscation and Sentence

- 7.31** Where a Crown Court makes a confiscation order it must take account of that before imposing any monetary order such as a fine; compensation order under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000; a forfeiture order under section 27 of the Misuse of Drugs Act 2001, a deprivation order under section 143 of the Powers of Criminal Courts (Sentencing) Act, or an order under section 23 of the Terrorism Act 2000 (see section 13 POCA 2002). Additionally, the Crown Court must ignore the fact that a confiscation order has been made when it determines the appropriate sentence.

Confiscation and Compensation

- 7.32** The Crown Court may also wish to consider the question of compensation. Under section 13(6) of the Act it should give reasons, on passing sentence, if it does not make such an order in a case where section 35 of the Powers of Criminal Courts Act 1973 as amended empowers it to do so.
- 7.33** A confiscation order and a compensation order can be made against the Defendant in the same proceedings provided he has the means to pay both orders, Section 13(5). If the Defendant has insufficient means to pay both, then the compensation order can be paid out of the monies recovered under the confiscation order, section 13(6) of the Act.

Confiscation and Deprivation

- 7.34** The Crown Court cannot usually make a deprivation order when it has made a confiscation order. This is because deprivation falls to be considered after confiscation. The value of the asset is usually calculated when the confiscation order is considered. Therefore, it should not be the subject of a deprivation order.
- 7.35** The Crown Court may make a confiscation order and a deprivation order only where the Defendant's benefit from the offences of which he has been convicted, together with any TICs, is less than the value of his realisable property. In such circumstances, the remainder of the realisable property may be liable to deprivation provided that it satisfies the criteria under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. However, this is a rare occurrence. The Crown Court can make a deprivation order where it has decided not to make a confiscation order (for example, because it has decided that the Defendant has not benefited from the offences of which he has been convicted and any TICs).

Restraint orders

- 7.36** Any restraint order in force will usually continue to run until the proceedings are concluded. Proceedings are concluded upon the satisfaction of the confiscation order either by payment in full of the confiscation order or the confiscation order

is reduced or remitted by the Court (s23-25). The CPS will apply to the Court for the discharge of the restraint order at this stage.

- 7.37** If the application for confiscation is unsuccessful an application to discharge the restraint order should be made by the advocate, subject to considerations of appeal.

Enforcement

- 7.38** Whilst defendants are afforded the opportunity to pay their confiscation orders voluntarily, a wide range of powers have been provided to ensure that confiscation orders may be enforced compulsorily, if necessary. A confiscation order may be enforced against any property of the defendant's, whether it has been obtained illegally or not. It may also be enforced against any property in the hands of a person who has received a gift from the defendant, up to the value of the gift.

- 7.39** Enforcement is by way of the prosecutor applying for the appointment of a receiver or the responsibility of magistrates' courts, with the assistance of the prosecutor, using procedures very similar to those employed under the existing legislation.

- 7.40** Where the Magistrates' Court is enforcing a confiscation order, the prosecutor may (as under the pre-POCA legislation) apply, but now to the Crown Court, for the appointment of an enforcement receiver to take possession of and sell realisable property to satisfy the order. Sections 50 and 51 refer. If necessary the advocate will be briefed separately on this matter.

Appeals under POCA 2002

- 7.41** The prosecution has a right of appeal in respect of a confiscation order, or a failure to make a confiscation order to the Court of Appeal. A notice of appeal must be served within twenty-eight days and leave to appeal is required from the Court of Appeal. Any decision by the prosecution to appeal a confiscation ruling should be referred to a level E with advice sought from the Proceeds of Crime Delivery Unit at CPS Headquarters. The right to appeal does not apply to

- applications made to the Crown Court to reconsider the case where no confiscation order was made;
- applications to the Crown Court to reconsider benefit where no confiscation order was made; and
- applications to the Crown Court for confiscation orders where the defendant has absconded (section 31 POCA).

CONFISCATION UNDER CRIMINAL JUSTICE ACT 1988 PART VI

- 7.42** Under the *CJA 1988 Part VI*, the Crown Court can make a confiscation order after conviction for a relevant offence (and any TICs), where the offender has benefited from criminal conduct. All offences before the Crown Court except drug trafficking and terrorism offences (which have their own confiscation legislation) are relevant offences. As with *the DTA 1994*, a confiscation order

under the CJA 1988 is an order to pay a sum of money. It is not an order which transfers the title to property.

7.43 Advocates will be aware that the *CJA 1988* was amended on a number of occasions. It is important to establish which version of the Act applies by reference to the date of offence. What follows relates to offences committed from the 1st November 1995 when *POCA 2002* does not apply.

7.44 The confiscation procedures are similar but not identical to those of the *POCA 2002* and the *DTA 1994* above and can only be commenced by written notice. When written notice is given under the *CJA 1988*, the prosecution advocate should seek an adjournment for service of the prosecutor's statement under Section 73.

Postponement

7.45 The Crown Court is under a duty to consider making a confiscation order. The confiscation hearing must be held within six months of conviction, unless there are exceptional circumstances which justify a later hearing and application to extend should be made within the six-month period [CJA s72A.]. Advocates should ensure that these time limits are observed.

Assumptions

7.46 Under the version of the *CJA 1988* which applies to offences committed from 1st November 1995, assumptions about property may be made if various conditions are met. These are that the prosecution's written notice claims they should apply; the defendant has been convicted of two qualifying offences in the current proceedings (or has a previous qualifying conviction in the last six years), and all of the offences were committed after the 1st November, 1995 [S72AA].

Third Parties

7.47 Under the *CJA 1988*, the High Court is the appropriate forum to determine the ownership or interests of third parties in the property. Full opportunity will be given to the third parties to make representations as to their interest in the property at the enforcement stage, either of their own volition or when a receiver is appointed to sell sufficient of the defendant's assets to pay the confiscation order.

Time to Pay

7.48 The Crown Court should be invited to consider making the confiscation order payable forthwith, unless property is in possession of the police and 28 days are required to make any necessary arrangements. Concern may be expressed that the defendant needs time to sell property. It may sometimes be more practical and efficient for the CPS to apply for a receiver to be appointed by the High Court to sell the property.

- 7.49** If no confiscation order is made, the prosecuting advocate must ensure that CPS Confiscation Unit of the Organised Crime Division is notified immediately, so that any restraint or charging orders may be discharged.

CONFISCATION UNDER THE DRUG TRAFFICKING ACT 1994

- 7.50** Following conviction for a drug trafficking offence committed before 24 March 2003, the advocate is instructed to apply to the Crown Court for a confiscation order against the defendant pursuant to *section 2(1)(a) DTA 1994*. Once this application is made, the Crown Court is under a duty to consider the making of a confiscation order and fix the matter for a confiscation hearing.

Postponed Determinations

- 7.51** If the Crown Court is not minded to delay sentence, then it may sentence the defendant for a non-financial order and then postpone consideration of the making of the confiscation determination for up to six months from the date of conviction, Section 3 DTA 1994. More than one postponement can be made in the same case, but unless there are exceptional circumstances the total postponements should not be for more than six months from the date of conviction.

- 7.52** The advocate is instructed to ensure that the confiscation hearing is fixed for a date within six months of the date of conviction and that any application to extend the time limit is made before the expiry of the six month time limit and that the application is made in open court rather than administratively.

Confiscation Hearing - Determining Benefit

- 7.53** The Crown Court must determine whether the defendant has benefited from drug trafficking. A defendant benefits from drug trafficking if he has at any time received any payment or other reward in connection with drug trafficking carried on by him or another person. This includes any benefit received by the defendant prior to the *DTA 1994* coming into force (3rd February 1995), Section 2(3).

Amount to be recovered

- 7.54** If the defendant has benefited from drug trafficking, the Crown Court must determine the amount to be recovered. This involves the Crown Court applying the assumptions under section 4(2) DTA 1994 and determining the total value of the proceeds of the Defendant's drug trafficking and then calculating the amount that might be realised.
- 7.55** When calculating the proceeds, the Crown Court is concerned with gross receipts, not profit, *Banks [1997] 2 Cr. App. R. (S.) 110* and no account is taken of expenses incurred by the defendant.
- 7.56** In assessing the amount that the defendant can pay, the Crown Court aggregates the gross value to the defendant of his assets, less the value of all transfers made by the defendant to others as "gifts" (see the requirements set

out in *section 8(1)(a) or 8(1)(b)* as to when transfers can qualify as “gifts”). The defendant bears the burden of showing that the amount that might be realised is less than the proceeds of drug trafficking, Section 5.

Third Parties

7.57 Under the DTA 1994, the High Court is the appropriate forum to determine the ownership or interests of third parties in the property. Full opportunity will be given to the third parties to make representations as to their interest in the property at the enforcement stage, either of their own volition or when a receiver is appointed to sell sufficient of the defendant’s assets to pay the confiscation order.

Time to Pay

7.58 The Crown Court should be invited to consider making the confiscation order payable forthwith, unless property is in possession of the police and 28 days are required to make any necessary arrangements. Concern may be expressed that the defendant needs time to sell property. It may sometimes be more practical and efficient for the CPS to apply for a receiver to be appointed by the High Court to sell the property.

8. COSTS

8.1 The advocate is instructed to apply for costs in all cases unless it is considered to be inappropriate, in which case the Crown Prosecution Service representative at court should be informed.

8.2 In the event of an acquittal, the advocate is referred to Sections 16(2), 19 and 19a Prosecution of Offences Act 1985 and regulation 3 of the Costs in Criminal Cases Regulations 1986.

8.3 From the 1 April 2007, where a court deals with a person for one or more offences committed on or after that date, and deals with that person by requiring him to pay a fine, whether or not any other penalty is imposed, the court shall order that person to pay a surcharge. The amount of the surcharge is currently set at £15. (Criminal Justice Act (2003) (Surcharge) (No2) Order 2007 – SI 2007/1079.

9. CRIMINAL PROCEDURE RULES AND CRIMINAL PRACTICE DIRECTION

9.1 The advocate is referred to the Criminal Procedure Rules 2005 (as amended). [http://www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm].

9.2 The advocate will be expected to comply with the various rules contained therein and with the associated Consolidated Criminal Practice Direction [http://www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm].

10. CUSTODY TIME LIMITS

- 10.1** The inappropriate release of a defendant to bail following a failure in a custody time limit is now classified as a major corporate risk for the CPS and details have to be reported to the Director personally. Internal disciplinary action may follow where the act or default of the person responsible is serious enough to merit it following an investigation. Where the advocate is independent counsel and does not comply with the duties in these instructions, it is likely, if the situation merits it, that the matter may be reported to the Head of Chambers.
- 10.2** Any failure will be thoroughly investigated and the advocate will be required to submit a full report and reason for the failure so that this can be considered by local managers in the first instance.
- 10.3** The definition of a failure of a custody time limit has been extended from the failing to make a valid application to a finding by a court that the prosecution has not acted with the necessary due diligence and expedition. These failures must be report by the relevant CPS office to Headquarters.
- 10.4** It is therefore important that the advocate marshals the necessary information to demonstrate acting with due diligence and expedition. This includes compliance with court orders and if this is not immediately obvious from the case papers, enquiries of the caseworker or office dealing with the case will be necessary.
- 10.5** A new protocol for the effective handling of custody time limits has been agreed between the CPS and HMCS and approved by the Senior Presiding Judge. It came into force on the 1 April 2009. Copies have been given to the Secretary of the Criminal Bar Association and a copy is contained on the CPS Website (www.cps.gov.uk) under legal guidance relating to custody time limits. All advocates should make themselves familiar with the requirements of that protocol.
- 10.6** The advocate is reminded that each count on an indictment for which a defendant is remanded in custody carries its own time limit. Where an acceptable plea is given in respect of one count, the custody time limit continues on any others and, if necessary, an application may have to be made to extend the time limit if it is likely that the case against the defendant in these matters may be continued. If not, the defendant should be bailed (technically) on these matters until final disposal.
- 10.7** Where defendants are remanded in custody, the advocate should, at any hearing, request that the trial take place within the custody time limit. If this is not initially possible, the reasons should be thoroughly explored with the court staff and every effort made to delay other non custodial work or seek an alternative venue. If a timely trial is still not possible, the advocate must apply to the court to extend the custody time limit while explaining what efforts have been made to obtain a trial date within the original time limit. Whenever the court makes an order which will result in the custody time limit expiring before the start of the trial, an application must be made to extend or further extend the time limit on that occasion to a date 7 days after the start of the trial. Any refusal by the court to do so, with reasons, should be prominently endorsed on the brief.
- 10.8** When making an application to extend a CTL, the advocate must ensure that s/he is in possession of sufficient information to satisfy the court that the

conditions set out in the Prosecution of Offences Act 1985, Section 22 (3) are met. In particular the advocate should (a) ensure that the court has the chronology of the case (which should have been previously submitted to the court with the notice to extend the custody time limit) to demonstrate that the prosecution has acted with all due diligence and expedition and (b) as pleaded in the notice, demonstrate that there is good and sufficient cause to justify an extension – the case of *R v Manchester Crown Court ex parte McDonald* refers. The chronology should itself demonstrate that the prosecution has acted with all due diligence and expedition. If not, it should be pleaded on the application form. The advocate should also be mindful that the defence will have received a copy of these papers. If, prior to the hearing, the advocate does not believe that s/he has sufficient information to deal fully with application, then the CPS originating office or a CPS representative at court should be contacted as soon as possible.

- 10.9** In the event of a trial being fixed beyond the custody time limit and there is no likelihood of that hearing date being brought forward, in accordance with the protocol, the advocate should seek to extend the custody time limit to the date of the trial to avoid an unnecessary hearing simply to apply for a further extension. Such hearings are unnecessary and costly. The defence may make an application for the case to be listed in the event of a failure of the prosecution to comply with a court order. Such applications are approved within the protocol.
- 10.10** It should be standard practice to check instructions early to see if there are any custody time limits that are relevant and may affect the handling of the case. Do not hesitate to ask the CPS office or caseworker if there is any uncertainty. S/he should be armed with a Custody Time Limit Ready Reckoner to help in the calculations of time limit date extensions (these should be used for a first remand only). S/he will be able to assist in the chronology of the handling of the case and provide further details of any reasons for delay.
- 10.11** The advocate should be thoroughly familiar with the current case law on custody time limits as contained in *Archbold* and on the CPS Website under legal guidance. Further as the advocate will under the protocol have to announce to the court what the expiry dates of the time limits are or will be (this can be particularly problematic in the case of defendants who are released from custody to bail and breach conditions) advocates should familiarise themselves with the mechanics of calculating time limits. Help with some worked examples can be obtained from the legal guidance on the CPS Website.
- 10.12** The advocate should be particularly careful in taking last minute decisions that may give the appearance that the prosecution has not acted with all due diligence and expedition. For example, conceding disclosure of unused material on the morning of the trial of material already considered by the reviewing lawyer and not revealed, especially where no previous application for disclosure to the court had been made. Applications by the defence for an adjournment as a result may lead to the judge refusing to extend a custody time limit in those circumstances. Advocates should be alive to this concern and carefully discuss issues and concerns with a CPS representative in advance of the hearing date.

11. DEPORTATION RECOMMENDATIONS

THE IMMIGRATION ACT 1971

- 11.1** The Immigration Act 1971 gives the Secretary of State power to deport persons who are not 'patrial' if he considers their deportation conducive to the public good.
- 11.2** A person who is not patrial is also liable for deportation if, having attained the age of 17; he is convicted of an imprisonable offence and upon his conviction is recommended for deportation by the sentencing court.
- 11.3** A person shall be deemed to have attained the age of 17 upon conviction if on available evidence; he appears to the court to have done so.
- 11.4** Whether or not an offence is punishable with imprisonment is to be decided without regard to any restriction on the sentencing of young offenders.
- 11.5** For the purposes of deportation a person found to have committed an offence shall be regarded as having been convicted notwithstanding that the court does not proceed to conviction.
- 11.6** A recommendation for deportation may be made in respect of a person sentenced to life imprisonment.
- 11.7** A court shall not recommend deportation of a person unless he has been given not less than 7 days notice in writing of certain rights under the Act. The court may adjourn for this purpose.
- 11.8** A court may recommend the deportation of an 'EEA national' (national of an EU member state other than the UK, Norway, Iceland, Liechtenstein or Switzerland) but these persons have enhanced rights to reside in the UK. Courts should have particular regard in this respect to the Immigration (European Economic Area) Regulations 2006 and the decision of the Court of Appeal in Nelson Carmona –v- The Queen [2006] EWCA Crim 508.

THE DECISION IN CARMONA –v- R.

- 11.9** A recommendation for deportation is not part of the punishment. A recommendation does not therefore justify a reduction in sentence.
- 11.10** The question for the sentencing court is whether the continued presence of the offender is to the detriment of this country [as per Nazari [1980] 1 WLR 1366, (1980) 2 Cr App R (S) 84.
- 11.11** Slightly different considerations apply to 'EEA nationals' upon whom Directive 2004/38/EC confers enhanced rights.
- 11.12** Any 'rule of thumb' as to sentence used by the Secretary of State, in deciding whether or not to order deportation, should not prevent sentencing judges recommending deportation where the sentence falls short of that, provided

that the court is satisfied that the continued presence of the offender would be against the public interest, but courts should be cautious when doing so

- 11.13** There is now no need for the sentencing court to consider the ECHR rights of an offender whose offence justifies a recommendation for deportation.

THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2006 [2006 No. 1003]

- 11.14** The Regulations came into force on the 30th April 2006, implementing EU Directive 2004/38/EC.

- 11.15** A person who is entitled to reside in the UK under the Regulations may only be deported on grounds of public security [the other grounds of public health and public policy will not apply to recommendations by a court]. A person with a permanent right of residence may only be deported on 'serious' grounds. An EEA national who has resided in the UK for a continuous period of at least 10 years may only be deported on 'imperative' grounds.

- 11.16** Deportation must be proportionate, based only upon the deportee's conduct, which must present a genuine, present and sufficiently serious threat to a fundamental interest of society. General considerations and 'general prevention' do not justify deportation. A person's criminal convictions do not in themselves, justify deportation.

PROCEDURE

- 11.17** Prosecutors should identify at the earliest opportunity cases in which deportation may be appropriate. The prospect of deportation may be a factor that a court should take into account when considering whether or not to grant bail.

- 11.18** Form IM3 should be served upon appropriate persons by the police at least 7 days before any recommendation for deportation. If the IM3 has not been served, an adjournment should be sought for this purpose in appropriate cases.

- 11.19** In order to assist the court as to the appropriate threshold for a recommendation prosecuting advocates should ideally have sufficient information as to a defendant's status in the UK.

- 11.20** If the offender's advocate does not address the question of a recommendation for deportation and the sentencing judge is considering making one, he should warn the advocate and allow him the opportunity to make submissions [Nazari].

- 11.21** If a court recommends deportation, the convicted person must be detained, regardless of his sentence, until the Secretary of State has decided whether or not to deport. If the court does not recommend deportation, it is possible that a defendant who has been remanded in custody may be released before

a decision can be made by the Secretary of State. Prosecuting advocates should bring this risk to the attention of the court in appropriate cases.

11.22 Consistent with existing guidance on the role of the prosecuting advocate in sentencing, in particular the Attorney General’s Guidelines on the acceptance of pleas and the prosecutor’s role in the sentencing exercise, prosecutors should be ready to assist a sentencer by drawing the court’s attention to the factors outlined in this guidance and in light of these factors, to assist the sentencer by making submissions as to the appropriateness of a recommendation for deportation.

12. DISCLOSURE/UNUSED MATERIAL

All prosecution advocates must refer to the February 2006 Disclosure Protocol (“Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court”) when dealing with disclosure issues in the context of Crown Court proceedings. Advocates should in particular draw the judge’s attention to the provisions of the Disclosure Protocol when:

There has been a failure by the accused to serve a defence statement, particularly by the time of the PCMH stage of proceedings (where primary/initial disclosure has been served by at least 14 days prior to the PCMH);

The purported defence statement fails to comply with the requisite formalities under Section 5(6) and (7), or Section 6A, of the Criminal Proceedings and Investigations Act 1996 (‘CPIA’) as appropriate;

The defence are seeking an order for disclosure of unused material but have failed to comply with the procedure under rule 25.6 of the Criminal Procedure Rules and Section 8 CPIA;

The court is considering (at the PCMH, or later) whether any action is appropriate in respect of material in possession of third parties;

There are PII issues.

The Disclosure Protocol stresses the need for firm compliance with the statutory provisions regulating disclosure, where these apply to the proceedings, and the need to comply with the “overarching principle” identified in paragraph 4 of the Protocol, namely:

[U]nused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations.

Prosecution advocates must not make disclosure (whether by provision of copy documents, or by allowing inspection of the material) otherwise than in compliance with this overarching principle.

From the 4th April 2005, the disclosure regime set out in the CPIA as amended by the operative provisions of Part 5 of the Criminal Justice Act 2003 (‘CJA’) applies to cases where the relevant criminal investigation started on or after that date (this will be referred to as ‘the new CPIA regime’). A new Code of Practice under s23(1) of the CPIA supplements the new regime, but only applies where the new CPIA disclosure provisions apply.

If the criminal investigation began before 4th April 2005 (but on or after 1st April 1997), then the CPIA without the CJA amendments applies instead (this will be referred to as 'the old CPIA regime'), along with the 1997 version of the Code of Practice.

These instructions for the most part assume that the new CPIA regime applies to the instant case. There are some references to the old CPIA regime, in order to draw attention to specific differences where appropriate, although a general working knowledge of the old CPIA regime and the two versions of the Code of Practice is assumed. However, if further details about the old CPIA regime are required, the advocate should refer to the previous version of these instructions.

12.1 The following rules are set out in order that the prosecuting advocate can assist the court when considering disclosure.

12.2 Under the old CPIA regime, separate disclosure tests are applied at the primary and secondary disclosure stages. Where the new CPIA regime applies, the new unified s3 CPIA disclosure test (see below) must be applied at all relevant stages in the proceedings, rather than applying the separate tests required in the old CPIS regime. The procedure under the new CPIA regime is as follows:

- *Initial disclosure* is defined as disclosure of unused prosecution material which has not previously been disclosed to the accused and which 'might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused'.
- The advocate should therefore resist attempts to obtain disclosure of items that fall outside this statutory test, which is referred to as the *disclosure test* throughout these instructions.
- Initial disclosure of unused material which satisfies the disclosure test must take place as soon as reasonably practicable after:
 1. the accused pleads not guilty in summary proceedings, or
 2. the accused is committed for trial under s6 of the Magistrates' Courts Act 1980, or
 3. proceedings are transferred to a Crown Court under s4 of the Criminal Justice Act 1987/s53 of the Criminal Justice Act 1991, or
 4. case papers are served on the accused in accordance with paragraph 1, Schedule 3 the Crime and Disorder Act 1998 and regulation 2 of the Rules thereunder, or
 5. the matter is added to an indictment under s40 of the Criminal Justice Act 1988, or
 6. a voluntary bill of indictment is preferred.
- Following initial disclosure, the defence have 14 days to provide a defence statement or apply for an extension of time to do so.
- After making initial disclosure, the prosecutor has a continuing duty to review the unused material, applying the disclosure test, until the accused is acquitted, or is convicted, or the prosecutor decides not to continue with the case.

- The prosecutor must particularly review the unused material following service of a defence statement complying with s6A CPIA [or s5(6) and (7) CPIA if the old CPIA regime applies].
- In complying with the continuing duty to review disclosure, the prosecutor must consider whether at any given time (and in particular, following service of such defence statement) there is prosecution material which, in the light of the existing state of affairs at that time, including the case for the prosecution as it then stands, meets the test for disclosure.
- In compliance with the prosecutor's continuing duty to review disclosure, there may be further disclosure of material that satisfies the disclosure test. This should take place as soon as reasonably practicable after the prosecutor becomes aware of such material. The advocate should ensure that any defence statement fulfils the statutory criteria under s6A CPIA [or see the formalities required by s5(6) and 5(7) if the old CPIA regimes applies], namely that it must:
 - a. set out the nature of the defence, including any particular defences relied upon;
 - b. indicate the matters of fact upon which the accused takes issue with the prosecution and the reason why in relation to each;
 - c. identify points of law the accused intends to raise (including matters relating to admissibility of evidence and abuse of process), citing authorities in relation to same; and
 - d. if the defence is one of alibi, give details (including name, date of birth and address if known) of any alibi witnesses or any information of material assistance in identifying or tracing such witnesses.
- The advocate should be alert to any failure in the manner or nature of disclosure by the defendant, whether it concerns:
 1. the failure to serve a defence statement if mandatory under s5(5) CPIA,
 2. serving one outside the time limit for such disclosure,
 3. serving one which sets out inconsistent defences, or
 4. the defence departing at trial from that outlined in the defence statement including calling an alibi witness not mentioned therein, as the advocate may without leave comment upon such matters (although, if the failure concerns a point of law or an authority not mentioned in the defence statement, leave of the court is required) and the court or jury may draw appropriate inferences from such failure in determining whether the accused is guilty of an offence charged.
- If the old CPIA regime still applies, then leave is required before making comment on any failure in defence disclosure, though leave is not required in any event (irrespective of whether the old or new regime applies) for cross-examining the accused on differences between his or her testimony and anything set out in the defence statement: *R v Tibbs* [2002] 2 Cr. App.R. 309, CA.

- The advocate should firmly resist any application for the disclosure of additional material after initial disclosure that does not satisfy the test for disclosure in the light of (i) any relevant change of circumstances in the case, or (ii) the contents of the defence statement served on behalf of the accused.
 - The advocate must also firmly resist the making by the defence of ad-hoc applications for disclosure, as such applications must be made in accordance with s8 CPIA and the formal procedure set out in the Criminal Procedure Rules, rule 25.6.
 - The advocate should be alert to the possibility that further unused material to which the prosecutor's continuing duty to review disclosure applies may come to light or be generated at any point during the course of the proceedings and where this is so, it must be handled and considered in accordance with that duty.
- 12.3** The advocate will be familiar with the House of Lord's decision in *R v H and C* [2004]1 All ER 1269, concerning prosecution applications for withholding from the defence otherwise disclosable material on grounds that disclosure of it would cause a real risk of serious prejudice to an important public interest, such that public interest immunity (PII) applies. The Advocate is instructed to ensure that material is only put before the court for a ruling on PII grounds in accordance with the governing principles as set out in *R v H and C*, namely that the material in question satisfies the test for disclosure by it being reasonably considered capable of undermining the prosecution's case or assisting the case for the accused: neutral material, or material which would strengthen the prosecution's case or undermine that for the accused would not satisfy the disclosure test and should not therefore be put before the court for a PII hearing.
- 12.4** Only if the disclosure test it actually met, or if the decision as to whether the material is disclosable is truly borderline, should such an application be made, and applications must not be made simply on the basis that the defence have not provided sufficient details about the case for the accused: where the defence case is not stated with sufficient clarity, then further particulars should be sought.
- 12.5** If, following a PII application, the court orders material to be disclosed by the prosecution in a redacted form, a decision needs to be made in consultation with the police or the party who are claiming PII whether the prosecution are prepared to disclose the material in that form. If the prosecution are able to make disclosure, the advocate must exercise particular care to ensure that the material is not disclosed to the defence in an unredacted form or in an incompletely or improperly redacted form, so as to avoid the situation which arose in *R v G: R v B* [2004] EWCA Crim 1368.
- 12.6** Should the advocate disagree with any disclosure decisions that have been made, early consultation with the reviewing prosecutor and the disclosure officer is advised.
- 12.7** The advocate will be aware that the defence statement of one defendant may be disclosable to co-defendants in the same prosecution: (*R v Cairns*, [2002] All ER 344) and the prosecutor's duty to review disclosure applies in respect of such statements once they are received. A defence statement must be

supplied to co-defendant if it satisfies the disclosure test, unless it will form the subject of a PII application. A defence statement which may not at first sight help a co-defendant may meet the disclosure test once the co-defendant's defence statement is received. A duty to disclose may also arise when the defendants give evidence, for example where there is a cut-throat defence and a defendant departs from his defence statement.

- 12.8** The CPS and police have agreed joint operational instructions on the disclosure of unused material. These instructions are contained in the 2005 Disclosure Manual (formerly known as the JOPI). The Disclosure Manual has been fully revised and the advocate should be sufficiently aware of the scope and contents of the new edition, which is available on the CPS website. The 2005 edition deals with the new CPIA regime. If the old CPIA regime applies, please refer to the 2002 edition of the JOPI.
- 12.9** The prosecution advocate should ensure that he or she is fully informed about any material that the prosecutor has decided might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused, the prosecutor's views on the defence statement and the prosecutor's comments on any sensitive material. The advocate must therefore request copies of all unused material schedules and any material if these are not forthcoming from the prosecutor.
- 12.10** The advocate should always consider the contents of the CPS disclosure record sheet (DRS) before any court appearance or at case conference. The DRS will not be supplied to the advocate, but will contain an up-to-date record of all disclosure actions events and decisions. It will be kept with the case papers on the CPS file and will be available at any conference or court appearance.
- 12.11** Disclosure schedules and attendant material will be security marked. The advocate must handle all material in accordance with its security marking and ensure that it is stored appropriately. Further details are found in the Disclosure Manual.
- 12.12** Where third party material is supplied to the police, the disclosure test should be applied, and only material that might reasonably be considered capable of undermining the prosecution case or reasonably assisting the case for the accused, should be disclosed. The advocate must bear in mind that (a) where material meets the disclosure test and (b) it has been provided to the police in circumstances where the third party may wish to reserve the right to argue PII, there must be appropriate consultation with the third party and the reviewing lawyer so that the PII issue may be resolved expeditiously, if necessary via an appropriate order of the court. Where third party material exists which is not supplied to the investigator or prosecutor, the advocate should consider the guidance set out in the Attorney General's Guidelines 2005, paragraphs, bearing in mind the "margin of consideration" principle enunciated by the Court of Appeal in the case of *R v Alibhai and others* (2004) LTL 31/3/2004.
- 12.13** The advocate should prepare a written report in any case where a court has ruled that there has been a failure on the part of the prosecution as a whole to make proper disclosure, or the advocate believes there has been such a

failure. The report should be headed 'Disclosure Failure Report' and sent to the CPS Unit Head.

- 12.14** Our previous policy stated that all previous convictions and cautions of prosecution witnesses must be disclosed to the defence save for minor road traffic matters. **This policy has been amended.** The policy now is that the duty to disclose the previous convictions and cautions of prosecution witnesses extends only to those convictions which may fall within the disclosure test under the CPIA, namely whether the conviction may undermine the prosecution case or assists the case for the accused. Consideration must be given as to whether previous convictions for any witness should be disclosed, and if so, which previous convictions should be disclosed.

12A. ATTORNEY GENERAL'S GUIDELINES ON DISCLOSURE

- 12A.1** The Attorney General's Guidelines on Disclosure were revised in 2005. The Guidelines address the roles and responsibilities of the participants in the disclosure process and in some areas address aspects not covered by the Criminal Procedure and Investigations Act 1996. The Guidelines are applicable to all investigations and prosecutions undertaken by the Crown, although specific references to provisions of the amended CPIA regime may not apply if the relevant criminal investigation was commenced prior to 4 April 2005. The prosecution advocate must adhere to these Guidelines at all times.

13. DISQUALIFICATION ORDERS

- 13.1** Sections 26-30 of the Criminal Justice & Court Services Act 2000 gives the court power at conviction to disqualify certain defendants from working with children. A child is someone under 18 unless it is an offence for which a younger age is specified. Schedule 4 to the Act lists the offences to which these Sections apply. These offences are mainly **but not** exclusively offences of a sexual or violent nature. It will be important, therefore, for the advocate to draw to the attention of the court those cases which may attract a disqualification order. The advocate is reminded that *R-v- Field; R-v- Young [2003] 1 WLR 882* held that Section 28 applies to a conviction where the offences were committed **before** the commencement of the 2000 Act on 11 January 2001.
- 13.2** Before a disqualification order can be made, a qualifying sentence (subject to amendments made by the Criminal Justice Act 2003, see paragraph 18.3 below) **or** relevant order must be passed. These are defined in Section 30 of the Act. Suspended sentences of 12 months imprisonment or more also count as qualifying sentences.
- 13.3** Paragraph 2 of Schedule 30 of the Criminal Justice Act 2003 inserts two new Sections, 29A and 29B into part II of the Act. Section 29A gives a discretion to disqualify even where the sentence does not meet the qualifying threshold. Section 29B gives a retrospective power to make an order where for any reason a court has previously omitted to do so.

- 13.4** Both adults and youths can be disqualified. Section 28 provides that where the defendant was aged 18 or over at the time of the offence, the court must impose an order. If, however, the court believes that it is unlikely that the defendant will commit a further offence against a child then there is an option not to impose an order. The reasons for not disqualifying must be stated and recorded. There is, therefore, a presumption in favour of making an order in respect of adults.
- 13.5** Where the defendant was aged under 18 at the time of the offence, the court can impose an order where it believes that there is a likelihood of a further offence being committed against a child. If an order is imposed, the reasons for doing so must be stated and recorded.

14. DNA GUIDANCE

- 14.1** There are three key elements to the Prosecution Team DNA Guidance (issued July 2004, updated January 2006):

14.1.1 The basis for charging has shifted from an “evidential” DNA profile match report, to an “intelligence” DNA profile match report, plus some appropriate supporting evidence. *(See Annex 2 of The Guidance.) After charge, the Match Report will need to be converted into an evidentially admissible document and consideration given to Staged Reporting.*

14.1.2 Staged reporting is now in place and should always be considered in reviewing the case; a first stage abbreviated statement is used to encourage early co-operation/defence identification of issues/guilty plea. Second stage full evidential report is sought only in fully contested cases where the issue is the DNA (or other forensic) evidence. *(See Annex 13 of the Guidance.)*

14.1.3 The Manual of Guidance for police contains dedicated forms for forensic submissions to forensic science laboratories; The Director’s Guidance (Statutory Charging) makes use of the form mandatory; Section 11 of the MoG forensic submission form clearly requires the Prosecution Team (investigating officer and duty prosecutor) to identify the actual forensic issues. *(See Annex 10 of the Guidance.)*

- 14.2** This guidance has been produced to reflect legal, scientific and process changes affecting the recording and use of DNA samples. The purpose is to provide a tool to maximise the benefits of these, whilst maintaining principles of fairness to suspects, victims and witnesses. The changes outlined in Annex 2 of the Guidance build on the CPS role as the national prosecution agency leading the way in efficient and effective case progression. The guidance also takes full account of the legal and process changes resulting from the national implementation of Statutory Charging and the Criminal Procedure Rules 2005, particularly Section 3 (duty of the parties to *identify the issues* in the case, http://www.justice.gov.uk/criminal/procrules_fin/index.htm).

- 14.3** Two-stage reporting is designed to make effective use of resources by

encouraging admissions and issues as early as possible in order to focus on the actual issues in the case. Case building is targeted at the issues rather than producing extensive evidential material covering non-contentious points. These should be proactively dealt with by way of admissions where appropriate.

14.4 These principles and processes can apply to other Forensic areas, depending on local protocol arrangements.

14.5 Home Office Circulars 58/2004 and 16/1995 cover these changes.

DNA Single Kit Testing

14.6 In April 2005, the Association of Chief Police Officers (ACPO) replaced existing DNA 1 and DNA 2 kits with a single evidential test. The single test kits provide an evidential audit trail and the profiles will be loaded onto the National DNA Database. This record will appear on the PNC with a Barcode serial number commencing '96' onwards. In such cases, there is no longer a requirement to take a further DNA sample each time a suspect is arrested, although the Investigating Officer must follow the ACPO Guidance in making this decision.

14.6.1 This of course does not alter the Prosecution Team obligation to provide the relevant continuity evidence, and if necessary appropriate evidence of identity in both the previous and instant case. This may take the form of linking the fingerprint evidence, or photographic evidence obtained on arrest, or possibly the Custody Records.

The Forensic Science Regulator, Low Template DNA Analysis, including Low Copy Number (LCN) and the Caddy Review 2008.

14.7 Following the recommendations of the Science and Technology's Select Committee's seventh report, Forensic Science on Trial, 2005, the office of the Forensic Science Regulator was created in April 2007, see; <http://police.homeoffice.gov.uk/publications/operational-policing/forensic-science-on-trial>

14.8 In September 2007 the Regulator asked Professor Brian Caddy to review Low Template DNA analysis as offered by the main forensic science providers in the UK.

14.9 In December 2007, Mr Justice Wier handed down his judgment in the case of R v Hoey (the Omagh Bombing trial). In this first instance, Northern Ireland case, the police handling of forensic material was criticised, as was the purported validation of the Forensic Science Service's form of Low Template analysis, called LCN, see; http://news.bbc.co.uk/1/hi/northern_ireland/7154221.stm

14.9.1 Note: You should be aware that Low Copy Number (LCN) is the registered trademark of the Forensic Science Service's process called LCN. LCN is not a general term for the analysis of small, partial or mixed samples of DNA. The general term is Low Template Analysis (LTA). Mr Justice Weir did not criticise LTA, his (obiter) comments concerned only the FSS service called Low Copy Number. Other

providers of LTA employ different processes which have all been subject to validation assessment.

- 14.10** In January 2008 the CPS, The Regulator and ACPO produced Prosecution Guidance to LCN and a Prosecutor's Checklist, see http://www.cps.gov.uk/news/pressreleases/101_08.html
- 14.11** The Caddy Report on Low Template analysis was published in April 2008, see: <http://police.homeoffice.gov.uk/publications/operational-policing/response-caddy-dna-review>
- 14.12** Two further suppliers of forensic science analysis also produced their own summary guidance on how their Low Template DNA analysis processes work. These were released by The Regulator, ACPO and the CPS in May 2008; copies of these are available from HQPolicy@cps.gsi.gov.uk.

15. DOMESTIC VIOLENCE

- 15.1** Advocates should ensure that they are familiar with the CPS Policy Statement for Prosecuting Cases of Domestic Violence and the supporting Guidance for Prosecutors, (revised March 2009), which can be obtained from the CPS website. The Guidance is available on the CPS Infonet. Advocates are expected to prosecute cases in accordance with our published policy.
- 15.2** The CPS definition of domestic violence *for the purpose of applying the policy* is:

Any criminal offence arising out of physical, sexual, psychological, emotional or financial abuse by one person against a current or former partner in a close relationship, or against a current or former family member.

It should be noted that this definition applies regardless of the age of the defendant or victim. There exists a separate definition, purely for adults, for the purposes of monitoring and joint working across government departments – this need not concern the advocate.

- 15.3** The CPS recognises that domestic violence is likely to become more frequent and more serious the longer it continues and can result in death. It also recognises that victims of domestic violence – particularly those who may have suffered over a considerable period of time – have difficult decisions to make that will affect their lives and the lives of those close to them.
- 15.4** In some cases, the violence is so serious, or the previous history shows such a real and continuing danger to the victim or children or other person, that the public interest in going ahead with a prosecution has to outweigh the victim's wishes. The safety of these persons will be a prime consideration for the CPS in reaching such decisions.

- 15.5** The Code for Crown Prosecutors, at 5.9(j), lists as a public interest factor in favour of prosecution that “the offence was committed in the presence of, or in the close proximity to, a child”.
- 15.6** It is sometimes suggested that certain types of behaviour are more acceptable within some communities than others. The CPS believes that cultural difference is not a reason for failing to protect minority community victims of domestic violence.
- 15.7** *The advocate is instructed to: take into account any concerns expressed by the victim about the defendant being granted bail and to ensure that the CPS is informed immediately of the outcome of the case and any change in the defendant’s bail or custody status; regard breaches of bail as serious, including those that involve the acquiescence of the victim, and be mindful that new offences may have been committed; ensure any existing civil court orders and bail conditions are consistent, particularly in terms of residence and of child contact; make application (in appropriate cases) for priority listing; and seek an adjournment for the police to take a formal statement where victims appear at court wishing to withdraw their complaint.*

16. FITNESS TO BE TRIED

- 16.1** Should the question of the defendant's fitness to be tried become a live issue, the attention of the trial judge should be drawn to Section 4(2) Criminal Procedure (Insanity) Act 1964 as amended. This enables the court to postpone consideration of the question of fitness to be tried until any time up to the opening of the defence case.

17. FREEDOM OF INFORMATION ACT 2000

- 17.1** On 1 January 2005, the Freedom of Information Act 2000 (“FoIA”) came into force and gives individuals a statutory right to recorded information held by public authorities, such as the Crown Prosecution Service or a police force.
- 17.2** The duties imposed on public authorities are twofold, namely:
- a duty to “confirm or deny” that the information exists; and
 - a duty to communicate information.
- 17.3** The right to access of information is subject to exceptions and exemptions. The exemptions are either absolute or qualified.

Absolute exemptions

- 17.4** The absolute exemptions are either concerned with secrecy, or with information made available under a more specialised disclosure regime.
- 17.5** Where information falls within a provision conferring absolute exemption that will be sufficient to disapply both the duty to confirm or deny the existence of that

information and the duty to disclosure that information.

Qualified exemptions

17.6 The qualified exemptions are either class exemptions, or prejudice based exemptions.

17.7 Qualified exemptions are subject to the application of a public interest test, which is a balancing exercise that determines:

- whether the duty to confirm or deny arises; or
- whether the duty of disclosure arises.

17.8 The balancing exercise is defined in Section 2:

“ .. in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny or in maintaining the exemption outweighs the public interest in disclosing whether the public authority holds the information or in disclosing the information”.

Unused material, CPIA and FoIA

17.9 The Criminal Procedure and Investigations Act 1996 already applies to the disclosure of unused material in criminal proceedings. However, counsel may receive a request for information under the FoIA, when the requested information is unused and properly subject to the Criminal Procedure and Investigations Act 1996 (“CPIA”).

17.10 If faced with such a request at court, counsel should bear in mind the following points:

The FoIA application must be made in the specified manner, namely: in writing (including e-mail and fax);

- state the name of the applicant and a correspondence address;
- describe the information requested.

17.11 It must be considered by the public authority, and this power cannot be delegated to agents, such as counsel.

17.12 Once a FoIA request is properly made, the CPS is duty bound to consider that request and cannot dismiss it by arguing that the CPIA applies instead. However, the defence should be invited to make an application under the CPIA instead of/in addition to the FoIA request.

17.13 The CPS has 20 working days in which respond. This is the period of time as specified by Parliament, and cannot be varied by court order.

17.14 If defence argue that the CPIA should be disapplied in favour of FoIA, then counsel should bear in mind the following points:

17.15 The FoIA creates a general scheme for the disclosure of information held by public authorities, whereas the CPIA creates a specific disclosure regime

applicable to criminal proceedings. This raises a principle of statutory construction, namely “*generalibus specialia derogant*” (special provisions override general ones). Accordingly, it is presumed that such a situation was intended to be dealt with by the specific provision and not be the general enactment.

- 17.16** In the case here, it would be curious, to say the least, if having provided a detailed statutory regime for the purposes of disclosure in criminal proceedings, Parliament had rendered the statutory scheme otiose by providing for a wider entitlement to information under a general Act.
- 17.17** It is also significant to note that disclosure under the Act would circumvent the provisions of Section 17 of the CPIA. Section 17 provides that material disclosed to an accused person under the provisions of the CPIA is confidential, and it may only be used or disclosed for certain specified purposes. The principal purpose for which such material may be used is in connection with the criminal proceedings in which disclosure took place. Section 17 does not apply to information communicated to the public in open court or where a court specifies that the information may be used for a particular purpose.
- 17.18** FoIA and CPIA are to be understood as operating in parallel together, as the two Acts apply in very different circumstances. The FoIA is concerned with the general right of citizens to be provided with information held by public bodies, without reference to the purpose for which the information requested is to be put. The CPIA is concerned solely with the disclosure of information in criminal proceedings, where the disclosure is essential to ensure a fair trial of a criminal charge.

18. HANDCUFFING OF PRISONERS

- 18.1** The Prosecution Advocate may be asked by prisoner escort staff or police officers to apply for handcuffs to restrain the defendant whilst in court. **Custody Management Directions were issued by the Lord Chief Justice in January 2006, a copy of which is available at www.judiciary.gov.uk**
- 18.2** Prisoners appearing before courts may be handcuffed or otherwise restrained in the dock where there is a danger that they may escape or prevent a violent breach of the peace. These are the only two factors which may be taken into account when deciding whether or not to restrain a defendant in the courtroom. Where a defendant appears before a court, it is a matter for the court whether or not he or she should be handcuffed. In a magistrates’ court, it is for the court not the police or prisoner escort, to decide whether it is necessary for a defendant to be handcuffed and in the Crown Court it is the judge.
- 18.3** It is the role of the Advocate to make representations to the court for the handcuffing of a prisoner based on information provided by the police, escort service or court security officers. It is not appropriate for anyone other than the Advocate to make a direct application to the court.

- 18.4** The Advocate should carefully examine such requests for handcuffs in court, and ensure that there are sufficient grounds for making such applications. The Advocate may decline to make an application where he or she is not satisfied that the nature or extent of information provided is sufficient to support such an application. If necessary, the Advocate may call an officer to give evidence in support of the application. Any refusal to make an application should be clearly noted with reasons.
- 18.5** The application should be made, wherever possible, before the defendant is brought into court. There is nothing, however, to prevent an application being made once the court is sitting or the suspect is in the dock.
- 18.6** **A proforma [reproduced at Annex 2 of the Custody Management Directions] should be completed by the prison or escort authorities before an application is made.**

19. HOMOPHOBIC AND TRANSPHOBIC OFFENCES

- 19.1** Advocates should be familiar with the CPS Public Policy Statement on Prosecuting Cases of Homophobic or Transphobic Hate Crime and the accompanying Guidance, which can be obtained from the CPS website. Advocates are expected to prosecute cases in accordance with our published policy.
- 19.2** Hostility based on the sexual orientation, or presumed sexual orientation, of the victim (or on disability or presumed disability of the victim) is a factor that increases the seriousness of an offence (Section 146 of the Criminal Justice Act 2003). Whenever there is evidence of aggravation related to sexual orientation or presumed sexual orientation the advocate **must** bring this to the attention of the court. If the defendant disputes that the offence was aggravated in this way, the advocate must ask the court to consider a Newton hearing. The court must state openly if it finds that the offence was aggravated in this way.
- 19.3** When prosecuting cases with a homophobic or transphobic element, advocates are instructed to:
- 19.3.1** Use appropriate language. If uncertain, ask the person concerned rather than get it wrong.
 - 19.3.2** Challenge inappropriate or prejudicial language if others use it in court.
 - 19.3.3** Challenge material which is unnecessary in itself and may arouse homophobic or transphobic prejudice in the court or amongst the jury.
 - 19.3.4** If the fact that someone is a trans person does not need to come out in evidence, then it does not need to come out in respect of (e.g.) any previous convictions: the name and gender under which they were convicted need not be mentioned.

- 19.3.5** Use the same points (appropriate language etc) in respect of the accused and accused's witnesses as in respect of prosecution witnesses.
- 19.3.6** Bear in mind that the court should be aware of the guidelines provided for judges and magistrates by the Equal Treatment Bench Book in respect of appropriate language and behaviour.
- 19.3.7** Challenge suggestions that being lesbian/gay/bisexual or trans is in some way linked with criminal behaviour such as child molesting, or with public sexual activity.
- 19.3.8** Be aware that it may have taken extreme courage for a witness or victim to come forward if the result is going to be that they are "outed" in court as being lesbian/gay/bisexual or trans.
- 19.3.9** Respect the individuality of each witness, and challenge casual stereotyping (e.g. of lesbians as "butch", or of gay men as promiscuous or effeminate).
- 19.3.10** Be aware that the handling of this case is likely to influence someone present in court or someone who follows media coverage of the case, about whether or not to report a future homophobic or transphobic crime.
- 19.3.11** Consider whether an application under Section 46 of the Youth Justice and Criminal Evidence Act 1999, for a prohibition against the reporting of certain witness details in the media, is appropriate.

20. MEDIA REPORTING

- 20.1** In high profile cases there may be problems which arise from the reporting of cases where part of the proceedings are heard in chambers. In order to ensure accurate press reporting, the judge should be invited in appropriate cases, to:
 - consider announcing the substance of any judgement made in chambers in open court and;
 - give guidance about how the matter should be reported.
- 20.2** Consideration should be given in relevant cases to making orders under Section 39 of the Children and Young Persons Act 1933. The advocate should be familiar with the Contempt of Court Act 1981.
- 20.3** To protect the integrity of trials, reporting restrictions are sometimes required.
- 20.4** However, in many cases the defence apply for reporting restrictions that prosecutors may not consider necessary. Prosecutors should oppose reporting restrictions that they do not feel are necessary for a fair trial.

Prosecutors should not apply for reporting restrictions themselves unless they feel they are essential.

- 20.5** The number of complex cases where there are a number of linked trials is increasing. In complex cases where there is more than one trial, reporting restrictions may be required to protect some of the proceedings, but this may not mean a blanket ban is needed. In these cases, prosecutors should consider carefully just how comprehensive the restrictions need to be.
- 20.6** The CPS has signed a Protocol on the Release of Prosecution Material to the Media, with the Association of Chief Police Officers (ACPO) and media representatives. The overriding objective is to provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity. The aim is to ensure that justice is done and seen to be done – while at the same time balancing the rights of defendants to a fair trial with any likely consequences for victims or their families and witnesses occasioned by the release of prosecution material. The Protocol is published on the CPS website at <http://www.cps.gov.uk/publications/agencies/mediaprotocol.html>
- 20.7** Prosecutors appearing in court on behalf of the Crown Prosecution Service are publicly representing the service and should give their full name to any media representative that asks for it.

21. OFFENCES IN PRISON

- 21.1** Guidance has been issued to prison governors by HM Prison Service to assist with the identification of cases which merit police investigation and, if appropriate, prosecution rather than internal disciplinary action.
- 21.2** Any case which reaches court has already passed through three filters - the prison governor, the police and the Crown Prosecution Service. The public interest now requires a prosecution in a wider range of offences committed in prison than was the case before 1992.
- 21.3** It is important to remember when assessing where the public interest lies that:
- an offence which may otherwise be regarded as minor can assume a much greater significance when committed in an institution, because of the wider impact upon discipline;
 - one public interest factor to be considered, as set out in the Code for Crown Prosecutors, is that the offence was committed against a person serving the public, unless there are public interest factors pointing away from prosecution which clearly outweigh this aggravating factor.

22. PLEA AND CASE MANAGEMENT HEARING

- 22.1** Judges are required to actively manage the case at the PCMH which is to take place in every case in the Crown Court.

- 22.2** The advocate must have a thorough knowledge and understanding of the issues in the case to comply with his or her duty in relation to the case management rules under Part 3 of the Criminal Procedure Rules and Part IV 41.8 of the Consolidated Criminal Practice Direction.
- 22.3** The advocate is referred to Annex E of the Consolidated Criminal Practice Direction which set out the forms for use in criminal proceedings including the form which must be used at the PCMH.
- 22.4** At the conclusion of the PCMH, the advocate should ensure that any directions are clearly endorsed on the brief and that a copy of the directions made by the judge is obtained from the court in accordance with CrimPR Part 3.11.

23. POLICE MISCONDUCT MATERIAL

- 23.1** Details of criminal and disciplinary proceedings against police officers who are prosecution witnesses are usually disclosable under the Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003. In addition, there may be exceptional occasions when the interests of justice require that other adverse information about officers is revealed to the prosecutor and considered thereafter for disclosure.
- 23.2** In order to comply with the duty of disclosure, the police and CPS have agreed that police officers making witness statements (including officers whose statements do not form part of the prosecution case) will reveal to the prosecutor details of all the following matters using form MG6B:
- criminal convictions or criminal cautions for a recordable offence and penalty notices for disorder for recordable offences
 - disciplinary findings of guilt at a misconduct tribunal
 - relevant formal written warnings and relevant disciplinary cautions
 - adverse judicial findings (**see paragraph 24.8 below**)
- 23.3** It is also the responsibility of the police to reveal details of pending disciplinary or criminal matters during the lifetime of a case. The officer concerned should also notify the CPS of any change in circumstances that makes the previous notification of a disciplinary matter/criminal conviction no longer pertinent (e.g. a successful appeal).
- 23.4** Any decision by the police to reveal the material to the CPS, as well as the agreed decision by the police and the CPS to disclose such material, will have been taken in accordance with the Disclosure Manual (formerly known as the JOPI), the joint operating instructions agreed by the police and the CPS. The advocate should familiarise him/herself with the relevant chapter so as to understand the reasoning behind the decision to disclose the material to the defence.
- 23.5** Disclosure of any of this material to the defence does not imply that the Crown

accepts that the material is deployable by the defence during the trial. The advocate should consider, in advance of the trial, whether or not the defence may properly deploy such material, and if so, to what extent it may be deployed.

- 23.6** In considering whether or not such material is deployable the advocate will wish to have regard to the authorities upon the proper extent of cross-examination, both as to an issue
- 23.7** In the case and as to the witnesses' credibility, including, but not restricted to, the cases of *R v Edwards* (1991) 2 All ER 266 and *R v Guney* (1998) 2 Cr App R 242. A more recent example of the approach that ought to be taken to this issue is to be found in the case of *R v. Zomparelli* CA 23 March 2000. This case is of particular assistance since it deals with material (the "General Taint" information), which might hitherto have been considered incapable of being deployed by the defence.
- 23.8** Where officers have been suspended pending the completion of enquiries the defence will be advised of those officers who are suspended but whose evidence is still relied on. Where officers are not charged or suspended but where the interests of justice require revelation of information, then where details have been revealed to the CPS they will be disclosed only in those cases when, and to the extent that, the current law requires it.
- 23.9** The advocate will be familiar with the decision in *R v McCarthy* [1993] 158 JP 283 which was concerned with a situation where criminal proceedings had been instituted against an officer and as a result of those proceedings, the prosecution had decided that the officer would not be called as a witness in another case. It was held that there was a duty to disclose that other case, not simply the fact and substance of the proceedings, but also the nature of the case against that officer. In future similar circumstances, the Service will take steps to ensure that sufficient information is available to enable the defence to be provided with an outline of the nature of the case against the officer.
- 23.10** The advocate's attention is drawn to *R v O'Connor*, unreported, CA 29.10.96. Where serious allegations of misconduct have been made against police officers, the trial judge has discretion to allow in re-examination evidence of absence of previous convictions and disciplinary findings.

24. PROSECUTION RIGHTS OF APPEAL

- 24.1** The provisions of Part 9 dealing with the general right of appeal but excluding appeals concerning evidentiary rulings came into force on the 4 April 2005. The general right of appeal applies to cases which are committed, transferred, sent to the Crown Court under Section 51 of the Crime and Disorder Act 1998, and Voluntary Bills preferred on or after the 4 April 2005.
- 24.2** Part 9 of the Criminal Justice Act 2003 gives the prosecution a right of general appeal. Section 58 of the 2003 Act allows the prosecution to appeal a ruling by a judge in relation to a trial at an applicable time and the ruling relates to one or more offences in the indictment. This allows the prosecution to appeal a ruling that is made either at a pre-trial hearing or during the trial, at any time until the

start of the judge's summing up. The prosecution must decide immediately, following the ruling, whether to appeal the ruling or request an adjournment to consider whether or not to appeal.

- 24.3** The prosecutor must also give the 'acquittal guarantee' required by section 58(8) Criminal Justice Act 2003 '...at or before...' the time when the court is notified of the intention to appeal. It is not sufficient to wait until the service of the written notice of appeal. There is no right of appeal unless the undertaking is given to the court of trial at the time of the announcement of the intention to appeal. Leave will not be granted without it. (R v LSA [2008] EWCA Crim 1034.)
- 24.4** The advocate is referred to the CPS Legal Guidance on prosecution rights of appeal which sets out comprehensively the law and how and in what circumstances the right should be exercised. It is the responsibility of the Chief Crown Prosecutor (CCP) for the Area to decide whether the right of appeal should be exercised, after consultation with the prosecution advocate and any other appropriate person. Where the CCP is not available, a person nominated by them should make the decision. The advocate should always apply for an adjournment where there has been no prior consultation with the CCP or nominated person. In the unlikely event that a judge refused an adjournment and the prosecution advocate is unable to consult with the CCP or nominated person, the advocate must make the decision, following the guidelines set out in the Legal Guidance, whether or not to appeal. The decision of the advocate should be reviewed by the CCP or nominated person as soon as possible to determine whether to proceed with or abandon the appeal.
- 24.5** The CPS Legal Guidance can be accessed on the CPS website at www.cps.gov.uk. If the advocate is unable to access the internet, a copy can be obtained from the lawyer/caseworker at the local CPS office.

25. PROTECTION FROM HARASSMENT ACT 1997

- 25.1** Upon conviction of the defendant for an offence contrary to Section 4(1) and (4) or in the alternative under Section 4(5) of 2(1) and (2) of the Protection from Harassment Act 1997 the advocate is instructed to apply to the court for a restraining order under Section 5 of the Act. Should the court decide not to make such an order the reason should be recorded on the brief.

NB: Similar power if case charged as Racially Aggravated Harassment under Section 32 of Crime and Disorder Act 1998.

26. RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES

- 26.1** Advocates should be familiar with the CPS Public Policy Statement on Prosecuting Racist or Religious Crime and the accompanying Guidance, which was updated and re-launched in March 2008, and which can be obtained from the CPS website. Advocates are expected to prosecute cases in accordance with our published policy.

- 26.2** The Crime and Disorder Act Sections 29-32 created various racially aggravated offences of assault, criminal damage, public order offences and harassment. These offences carry higher maximum penalties than the corresponding basic offences. Part V of the Anti-terrorism, Crime and Security Act 2001 amended the Crime and Disorder Act to include religious aggravation.
- 26.3** Where the aggravated offence is available, (and the case satisfies both tests in the Code for Crown Prosecutors) it must be charged. A court cannot take into account any racially or religiously aggravating factors at sentence if an offence contrary to Sections 29-32 was available, but only the basic version of the offence was charged.
- 26.4** For offences not covered by Sections 29-32 (for example, Section 18 OAPA 1861), racial or religious hostility or motivation is a factor that increases the seriousness of the offence. Whenever there is evidence of racial or religious aggravation, the advocate **must** bring this to the attention of the court. The court must state openly if it finds that the offence was racially or religiously aggravated (Criminal Justice Act 2003, Section 145).
- 26.5** Advocates need to be aware of the problems that exist in relation to the availability of alternative verdicts. These are equally important when settling indictments or considering acceptance of pleas.
- 26.6** Since the implementation of Section 11 of the Domestic Violence, Crime and Victims Act 2004 (on 31 March 2005) it has not been necessary for a count of common assault to be included on an indictment as an alternative to racially aggravated common assault. Section 11 gave juries the power to convict a defendant of common assault as an alternative to any count (except treason or murder) on the indictment. The option of including an alternative count on the indictment does remain but where this is done, it must be made clear to the court and the defence that this is not intended as an invitation to the defendant to offer a plea to the basic offence.
- 26.7** Difficulties can sometimes arise in relation to Section 18 OAPA 1861, which cannot be charged as a specific racially or religiously aggravated offence but where there may be sufficient evidence of racial or religious aggravation to meet the definition in Section 28 of the CDA. Advocates must be cautious when considering a plea to a lesser alternative since a plea to a basic Section 20 would preclude the court from sentencing on the basis that the case was racially or religiously aggravated. The appropriate alternative would be an offence under Section 29(1)(a) of the CDA (in effect a racially or religiously aggravated Section 20), but such an offence would have to appear as a count on the indictment.
- 26.8** On the general question of plea acceptance, advocates should be aware of the CPS response to the Stephen Lawrence Inquiry Report that a plea of guilty should never be accepted against an undertaking that available and admissible evidence of racial or religious aggravation would be excluded. Advocates should also take account of the Attorney General's Guidelines on the acceptance of pleas.

- 26.9** In any offence other than a specific racially or religiously aggravated offence (where the issue of aggravation will be an integral part of the trial), if the defendant disputes that an offence is racially or religiously aggravated, the advocate must ask the court to consider a Newton hearing on the basis that a difference on the facts will be material to sentence.
- 26.10** It is especially important in racially or religiously aggravated offences that the advocate has a statement (where one is available) that sets out the effects of the crime on the victim (Victim Personal Statement).
- 26.11** *R.v.Kelly and Donnelly* [CA] 2001 CLR 411 considered the approach that courts should adopt in sentencing racially aggravated offences. The Court of Appeal endorsed the earlier decision of the court in the case of *R v Saunders* [2000] Crim. L.R. 314 and adopted the recommendations of the *Sentencing Advisory Panel's Advice to the Court of Appeal No. 4 on sentencing racially aggravated crime*.
- 26.12** The Court of Appeal approved the following approach to sentencing racially aggravated offences:
- the sentencer should first arrive at the appropriate sentence without the element of racial aggravation but including any other aggravating or mitigating factor;
 - the sentence should then be enhanced to take account of the racial aggravation;
 - if the offence was one which itself merited custody, the sentence should be enhanced by increasing the notional sentence by an appropriate amount to reflect the degree of racial aggravation;
 - that the judge should say publicly what the appropriate sentence would have been for the offence without the racial aggravation;
 - that the factors set out in the Sentencing Advisory Panel's advice at paragraphs 42 and 43, identifying factors indicating either a high level of racial aggravation, or less serious aggravating factors were factors were factors properly to be taken into account by the court;
 - in cases of racially aggravated assault, the court should take into account the fact that Parliament has added two years to the maximum available for the offence, but the appropriate amount to add for racial aggravation would depend on all the circumstances of the offence.

NB. *R. v Kelly & Donnelly* and the *Sentencing Advisory Panel Advice No.4* were both determined before the addition of religiously aggravated offences by the Anti-terrorism Crime and Security Act 2001. The same principles expressed in respect of racial aggravation should be applied to cases involving religious aggravation.

27. RAPE AND SERIOUS SEXUAL OFFENCES

- 27.1** Advocates should ensure that they are familiar with the CPS Policy Statement for Prosecuting Cases of Rape, (revised and updated March 2009), which can be obtained from the CPS website. The Guidance is available on the CPS Infonet and hard copies from local CPS offices. Advocates are expected to prosecute cases in accordance with our published policy. The principles of this Policy statement will also apply to those cases in which it is alleged that other serious sexual offences have been committed.
- 27.2** The CPS recognises that these offences are a uniquely intimate violation of another, the effects of which can be deeply traumatic upon the victim and others. Stereotypes and misconceptions are often applied a victim's behaviour, and the CPS is committed to challenging these erroneous assumptions by effective presentation and conduct of these cases. Advocates should ensure that inappropriate and irrelevant questioning of a victim is challenged.
- 27.3** At page 30 of the CPS Policy for Prosecuting Cases of Rape, the CPS underlines its commitment to instruct those advocates who have the ability to deal sensitively with victims and witnesses. This includes advocates speaking to victims and witnesses before they give evidence and trying to put nervous witnesses at ease. In addition, proposed decisions should be communicated to victims.
- 27.4** Sections 34 and 35 of the Act (prohibition on cross examination by defendant in person of complainant in proceedings for sexual offences, or of child complainants or other child witnesses) were brought into effect on 4 September 2000.
- 27.5** Sections 41 – 43 of the Act (restriction on evidence or question about a complainant's sexual history) were brought into effect on 4 December 2000. The House of Lords has considered this aspect of the legislation in the case of *R v A* (Judgement 17 May 2001).
- 27.6** In that case, the House held that a prior consensual relationship between the complainant and the defendant might in some circumstances be relevant to the issue of consent. However, all the Law Lords accepted that the complainant must not be treated unfairly. The judgement emphasises "the presumption of exclusion" under the Act. Consequently, advocates should encourage the court to consider Section 41 in the context of the judgement overall. To do otherwise may lessen the practical effect of the reforms contained in Section 41.
- 27.7** In *R v Roderick F* [2005] EWCA Crim 493 the Court of Appeal held that if the criteria for admitting evidence under Section 41 are met, then the court have no discretion and must admit that evidence and cannot limit evidence that is properly admissible. Once the criteria for admissibility are established, all the evidence relevant to the issues may be adduced. It is therefore essential that advocates are fully prepared to contest the admissibility of any material that the defence seek to adduce under Section 41 at the appropriate hearing.
- 27.8** It is essential that advocates are robust in dealing with applications under Section 41 and that the court procedure is followed to ensure that inappropriate

questioning does not take place. Advocates should raise the issue at Plea and Case Management hearing and press for adherence to the timetable for written applications contained in Rule 36 of Criminal Procedure Rules. Applications to delay under Rule 36.1 (a) (v) and late oral applications under Rule 36.1 (13) should be challenged and resisted if appropriate.

- 27.9** Advocates are reminded of their duty to inform the witness of the result of any Section 41 application.
- 27.10** If the court grants leave to cross-examine a complainant about previous sexual behaviour, it will be essential to review the position relating to special measures. Advocates must consider whether it is appropriate to seek an adjournment for the proper consideration of issues relating to witnesses. It may be necessary to make an application to the court for one or more of the special measures provided by the Act or to apply to vary a pre-existing direction.

Requests for written report in rape trials

- 27.11** The advocate will be aware of HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary Report on their *Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape* which was published in April 2002. In accordance with a key recommendation of the Report, the advocate is instructed that a conference should be held in every case involving an allegation of rape, as soon as reasonably practicable.
- 27.12** The CPS is committed to ensuring that the issues, which may have led to an acquittal in rape cases are analysed fully. The advocate is, therefore, required to provide the CPS with written reasons in any rape cases that ends in an acquittal. The advocate should set out the legal and factual reasons for the acquittal and provide appropriate written advice as necessary. Depending on the circumstances of the acquittal, this may be a brief note or a more formal written advice.
- 27.13** In a case where a prosecution child witness has received pre-trial therapy, the advocate should be aware of the Practice Guidance: Provision of Therapy for Child Witnesses Prior to a Criminal Trial.
- 27.14** In a case where a prosecution vulnerable or intimidated adult witness has received pre-trial therapy, the advocate should be aware of the Practice Guidance: Provision of Therapy for Vulnerable or intimidated Witnesses Prior to a Criminal Trial.

28. SENTENCING ISSUES

- 28.1** Paragraph 11.1 of the Code for Crown Prosecutors requires the prosecution advocate to draw to the court's attention factors which might reasonably be expected to affect sentence, including:
- any aggravating or mitigating factors disclosed by the prosecution case;
 - any victim personal statement;

- where appropriate, evidence of the impact of the offending on a community;
- any statutory provision or sentencing guidelines which may assist;
- any relevant statutory provisions relating to ancillary orders (such as anti-social behaviour orders).

28.2 The Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise [2005] sets out clearly the prosecutor's responsibility to assist the court to reach its decision as to the appropriate sentence. Paragraph B4 requires the prosecutor to draw the court's attention to:

- any victim personal statement or other information available to the prosecution advocate as to the impact of the offending on the victim;
- where appropriate, any evidence of the impact of the offending on a community;
- any statutory provisions relevant to the offender and the offences under consideration;
- any relevant sentencing guidelines and guideline cases; and
- the aggravating and mitigating factors of the offence under consideration.

28.3 The advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range. There is a further duty to apply for appropriate ancillary orders.

28.4 Procedures for dealing with antecedent information are set out in the Consolidated Criminal Practice Direction paragraph III.27.

28.5 Advocates are under a positive duty to draw to the judge's attention any failure to give adequate and proper directions on the law, and to ensure that the judge gives all essential directions to the jury in summing up the case.

28.6 The advocate must be in a position to assist the court in relation to its sentencing powers and where there is a 'victim' statement to ensure that any relevant matters are brought to the court's attention.

28.7 The advocate must draw to the attention of the sentencing judge any relevant sentence guideline case or to the appropriate SGC Guidance that may assist the court at arriving at the appropriate sentence. The advocate should ensure that copies of the case relied upon are available for the court, (***R v Webb, Attorney General's Reference No 52 of 2003*** [2003] EWCA Crim 3731; ***R v Pepper and Others*** [2005] EWCA Crim 1181).

28.8 The advocate will be provided with a copy of the pre-sentence report (PSR) by virtue of Section 156 of the Powers of Criminal Courts (Sentencing) Act 2000. Section 156(5) sets out strict parameters within which the information derived from the PSR can be used or disclosed. The information "shall only be used or disclosed for the purposes of (a) determining whether representations as to matters contained in the report need to be made to the court or (b) making such representations to the court". The PSR must be returned to the CPS with the brief at the conclusion of the case.

- 28.9** If in mitigation the defence make assertions which are unfair or run contrary to the Crown's case, the advocate should object and if the defence persist, invite the court to rule on the issue, holding a Newton Hearing if the case had been a guilty plea. Where relevant the advocate should direct the court's attention to the provisions of Section 58 - 61 of the CPIA 1996 and notify the Crown Prosecution Service whenever an order is made.
- 28.10** The advocate is instructed to note any exceptional or particular circumstances found by the court for not imposing a mandatory or minimum sentence under the Powers of Criminal Courts (Sentencing) Act 2000, Sections 109, 110 and 111 and whether the sentence was unduly lenient.
- 28.11** The advocate remains instructed throughout the case and must attend any sentence hearing.

29. SEXUAL OFFENCES ACT 2003

- 29.1** The Sexual Offences Act 2003 (the 2003 Act) repeals all of the previous legislation governing sex offenders and re-introduces most of the previous provisions with some amendments.
- 29.2** Advocates should be particularly alive to the issue of consent, the freedom and the capacity of the victim to do so (Section 74).
- 29.3** In appropriate cases, advocates should ensure that the evidential presumptions in Section 75 of the 2003 Act are correctly relied upon by the prosecution.
- 29.4** Schedule 3 lists the offences which trigger the notification requirements of Part 2 of the 2003 Act. Although the requirements to register is an automatic requirement arising from a conviction or finding of a sexual offence (the court has no power to remove or change the requirement), the advocate may wish to assist the court in determining whether a disposal threshold has been met and the offender is required to register.

Sexual Offences Prevention Order

- 29.5** A Sexual Offences Prevention Order (SOPO) and an interim SOPO require the offender to register their details to the police in accordance with Part 2 of the 2003 Act.
- 29.6** A SOPO may be imposed by a court, from the point of sentence, to restrict the offender's behaviour towards the public in general or particular persons in cases where it is necessary to protect them from the possibility of serious sexual harm from him. A SOPO may also be made by way of complaint to the magistrates' court.
- 29.7** Although an application is not necessary for the court to make an order, the advocate is instructed to remind the court of its power to make a SOPO. A court may make an order in respect of an offender who has been sentenced in the court of an offence listed in Schedules 3 or 5. Providing that the

sentence the offender receives meets any sentence threshold in Schedule 3 a SOPO may be made.

29.8 The court may make an order if it is satisfied that an order is necessary to protect the public or any particular members of the public from serious sexual harm from the offender. The order, whether full or interim, can only prohibit the offender from doing anything described in the order. The minimum duration of the order is 5 years – there is no upper limit.

29.9 The advocate is reminded that an application for the other civil preventative orders (foreign travel orders and the risk of sexual harm orders) may only be made by the police, by way of complaint to the magistrates' court.

30. SPECIAL MEASURES

30.1 Advocates should ensure they are familiar with the measures introduced by the Youth Justice and Criminal Evidence Act 1999, (the "1999 Act").

30.2 Witnesses other than the defendant will be eligible for "special measures" to help them give evidence in criminal proceedings under the Youth Justice and Criminal Evidence Act 1999 if:

- they are under 17; or
- they suffer from a mental disorder, or a significant impairment of intelligence and social functioning (includes learning disability) or have a physical disability or suffer from a physical disorder that the court considers may diminish the quality of their evidence;
- they are in fear or distress in connection with testifying in the proceedings so that the quality of their evidence is likely to be diminished [victims of sexual offences are presumed eligible unless they decline – s.17(4)].

The court may grant special measures either on application by a party or of the court's own motion.

30.3 The special measures available to vulnerable and intimidated witnesses, with the agreement of the court, include:

- screens, (section 23);
- live link, (section 24);
- evidence given in private, (section 25);
- removal of wigs and gowns, (section 26);
- a video-recorded interview, (section 27);
- video-recorded cross examination, (section 28);
- examination of the witness through an intermediary, (section 29);
- aids to communication, (section 30).

30.4 Advocates are instructed to refer to the CPS website for details as to the availability of the special measures for vulnerable and intimidated witnesses.

- 30.5** Some of the special measures have not yet been implemented. Advocates must be aware of the partial or non-availability of the following special measures:
- Video recorded evidence in chief, (section 27)
Section 27 IS available at the Crown Court for children and vulnerable adults;
Section 27 IS available at the Crown Court for complainants in sexual offence cases for investigations commencing on or after 1 September 2007;
Section 27 IS available at the Magistrates' Court for child witnesses in need of special protection, as defined by section 21 of the 1999 Act;
Section 27 IS NOT available at the Magistrates' Court for vulnerable adults;
Section 27 IS NOT available at the Magistrates' Court for intimidated witnesses.
 - Video recorded cross-examination/re-examination, (section 28)
Section 28 IS NOT available.
- 30.6** Advocates must note that, in addition to special measures, the 1999 Act also contains the following provisions intended to enable vulnerable or intimidated witnesses to give their best evidence:
- mandatory protection of witness from cross-examination by the accused in person, (sections 34 and 35);
 - discretionary protection of witness from cross-examination by the accused in person, (section 36);
 - restrictions on evidence and questions about complainant's sexual behaviour, (section 41);
 - reporting restrictions, (sections 44 – 46).
- 30.7** Special measures for most vulnerable or intimidated witnesses can be authorised only if they are likely to improve the quality of a witness's evidence. The single exception to this general rule is that this requirement is not applicable to children "in need of special protection" (see below).
- 30.8** Sections 16 and 17 of the 1999 Act define the witnesses who are eligible for special measures. *Vulnerable witnesses* are defined by Section 16 of the 1999 Act. Children are defined as vulnerable by reason of their age, [Section 16(1)(a)(i)]. *Intimidated witnesses* are defined by Section 17(1) of the 1999 Act as those suffering from fear or distress in relation to testifying in the case. Complainants in sexual assault cases are intimidated witnesses, [Section 17(4)].
- 30.9** Advocates must note that Sections 21 and 22 of the 1999 Act detail some special provisions for *child witnesses* under the age of 17 years. The provisions create presumptions that apply to different categories of child witnesses and concern how they will give their evidence. Sections 21 and 22 of the 1999 Act also concern *witnesses over 17 years of age*.
- 30.10** Special considerations apply to child witnesses (s.21), with a near mandatory statutory regime for child witnesses "in need of special protection" – defined as sexual offences and offences involving the use or threat of violence

(including neglect and abduction). These child witnesses benefit from the following presumptions:

- evidence in chief will be provided through a video recording (if one exists);
- supplementary evidence and cross-examination will be given by live link;
- in the event of a video recording being ruled inadmissible or partly inadmissible, evidence in chief will be given by live link.

The effect of this is that the court, either on application or of its own motion, is required at a preliminary stage to make the necessary orders for child witnesses in need of special protection.

In the case of all other child witnesses, the statutory presumption is that video evidence in chief and live link will maximise the quality of the child's evidence and that a direction to that effect should be made UNLESS the presumption is displaced. It will be for the party calling the witness in such a case to satisfy the court why the presumption does not apply.

- 30.11** In cases involving children, advocates must be alert to the case of *R v Camberwell Youth Court and Others [2005] UKHL 4*. The House of Lords held that the presumption for children in need of special protection did not breach Articles 6 or 14 of the European Convention of Human Rights. It also clearly stated that the norm for child witnesses giving evidence was by video evidence-in-chief (where one has been recorded) and live link or cross-examination. This applies equally to child witnesses for the prosecution and the defence.
- 30.12** Prosecuting Counsel should be alert for any child witnesses for the Defence where no application for live link has been made. Where this is the case, it should be brought to the court's attention for the Judge to make a live link direction if necessary.
- 30.13** Advocates should ensure that inappropriate cross-examination of a vulnerable or intimidated witness by an unrepresented defendant does not take place (Sections 34-40 Youth Justice and Criminal Evidence Act 1999)
- 30.14** Advocates should be aware that Section 46 Youth Justice and Criminal Evidence Act 1999 (reporting restrictions for adults) came into force on the 7th October 2004 and should consider such applications were appropriate.
- 30.15** The intermediary special measure (section 29 Youth Justice and Criminal Evidence Act 1999) may be made available to vulnerable witnesses to assist them give evidence in court, (see Intermediary Procedural Guidance Manual).
- 30.16** Advocates must note that a witness may be eligible for special measures, but the measures will not be automatically available at the trial. The advocate must make an application to the court for special measures. The application must be made within set timescales. Advocates are instructed to refer to Rules 29 – 31 of the Criminal Procedure Rules for further details.

- 30.17** Advocates should ensure that details of all special measures applications are noted on the PCMH questionnaire.
- 30.18** Advocates should also be alert to the possibility that witnesses may become eligible for special measures at any stage of the proceedings. In such situations, it may be necessary to make application to the court out of time (the Rules of Court specify that applications must be made within 28 days of committal/sending for trial, with provision for late/out of time applications).
- 30.19** Advocates are reminded that a special measures direction can only be discharged or varied if there has been a material change in circumstances.
- 30.20** In some cases, the advocate may be expected to attend an early special measures meeting, at which the police and the CPS will discuss which special measures should be applied for in relation to a vulnerable or intimidated witness. Additionally, and wherever practicable, the advocate will be expected to attend any subsequent meeting held by the CPS with the witness where special measures will be discussed. (See “*Special Measures meetings between the Crown Prosecution Service and witnesses: Practice Guidance*”).
- 30.21** Where there is video recorded evidence, the Crown Prosecution Service will not release video tapes without a written undertaking from the defence to comply with the undertaking contained in “*Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures*” (2007).
- 30.22** The Crown Court has some limited inherent powers to make measures available to assist witnesses who do not qualify as eligible or who need special measures for reason other than age, incapacity, fear or distress. These powers pre-date the 1999 Act and are untouched by it.
- 30.23** Advocates must note that it is CPS policy that a video-recorded interview may be shown to the witness before the trial for the purpose of refreshing memory, unless the video has been ruled inadmissible.
- 30.24** Further information concerning the use of special measures is contained in “*Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures*”, which can be accessed via the CPS website.
- 30.25** Advocates are recommended to view the NSPCC’s videos “*A Case for Balance – demonstrating good practice when children are witnesses*” (1997) and “*A Case for Special Measures*” (2003).

31. TRIALS IN ABSENCE

- 31.1** The advocate is referred to paragraph I.3 in the Consolidated Criminal Practice Direction. Due regard should be had to ***R v Jones*** [2003] AC 1 which sets out circumstances to be taken into account before trying a defendant in absence. Prosecuting advocates should be robust in applying

for a trial in absence where sufficient evidence is available at court but the defendant is not.

32. UNDULY LENIENT SENTENCES

- 32.1** Attention is drawn to the provisions of Section 35 and 36 Criminal Justice Act 1988 as amended by Schedule 32, paragraph 46 of the Criminal Justice Act 2003 i.e. the grounds on which a sentence can be considered to be unduly lenient are extended to include cases in which a court has failed to impose a sentence required by ss 225 to 228 CJA 2003 (dangerous offenders). This does not however extend the list of offences, derived from Section 35 CJA 1988, to which the procedure applies.
- 32.2** Advocates should also be aware of those other offences not listed, but which are nonetheless capable of referral. These include offences which are triable only on indictment as a result of the circumstances in which they were committed (See Schedule 1, paragraph 28 Magistrates' Courts Act 1980) or where there is a mandatory minimum sentence (See sections 110 and 111 Powers of Criminal Courts (Sentencing) Act 2000).
- 32.3** If the advocate does not consider the sentence imposed may be unduly lenient but receives or is made aware of a complaint about the leniency of the sentence from, for example, a victim or victim's family, the complainant should be told that their views will be passed to the Crown Prosecution Service to consider and that if the Crown Prosecution Service does not agree that the sentence may be unduly lenient they can ask, in person, for the Attorney General to consider the case but this must be done within 28 days of the sentence being passed. A representative of the Crown Prosecution Service should be informed forthwith.
- 32.4** When it is considered that the sentence may be unduly lenient, the advocate should provide the CPS with a written advice within 48 hours of sentence. **The advice should be drafted in accordance with the template issued on 24 November 2005.**

UNDULY LENIENT SENTENCE APPEALS – INSTRUCTIONS AND TEMPLATE FOR PROSECUTION COUNSEL

Counsel will know that there is a mandatory time limit of 28 days in which to apply for a reference. If he takes the view that the sentence should be appealed he must contact the Crown Prosecution Service unit manager as a matter of urgency to discuss the matter and agree time scales.

Counsel will need to draft an advice in the format set out hereunder and ensure that the following issues are carefully considered.

The following headings set out issues to be considered.

1. SENTENCE

(In the event of a guilty plea)

- Any relevant discussion as to plea or sentence with judge in chambers or open court with particular attention paid to the stance taken by the prosecution
- Any relevant discussion with the defence as to how the facts were to be opened
- Any basis of plea
- The history of the case, particularly the date of and the stage at which the plea or pleas were entered – if an offender pleaded guilty it is important to know if on an earlier occasion the offender had pleaded not guilty to the same count
- Any comments made by judge during course of opening or mitigation relevant to sentence
- Full note of the sentencing remarks, including any ancillary orders

2. FACTS

- How the case was opened
- Whether the counts on the indictment were expressed and accepted to be specimens

(In the event of a conviction following trial)

- How the case was opened to the jury
- Whether the offender gave evidence and called other evidence (if so what was its nature e.g. witnesses as to fact or character evidence)
- Whether the evidence left to the jury differed to the evidence in the witness statements
- Whether the judge expressed any views relevant to sentence in the course of the trial or the summing up

3. AGGRAVATING FEATURES

4. SUMMARY OF THE MITIGATION AND MITIGATING FEATURES

5. ANTECEDENTS

- Offender's date of birth
- Summary of any text, victim personal statement, personal letter from the offender, character evidence/references, pre-sentence report, psychiatric or medical report or other documents relevant to sentence
- Any convictions

6. SENTENCING RANGE

- Any sentencing authorities to which reference was made

7. MISCELLANEOUS

- Evidence, submissions and findings during any Newton hearings (and a full note thereof)

8. CONCLUSION

- The reasons why it is considered that the sentence is unduly lenient and the range of sentence which it is suggested should have been applied.

In all cases:

- Detail of any other offences and offenders dealt with on the same occasion and sentence
- Name of Crown Court and sentencing judge
- Details of trial/plea counsel's chambers address and telephone number, mobile telephone and e-mail address

32.5 Following the provision of the above details, if the sentence is referred to the Court of Appeal, the advocate will be contacted by Treasury Counsel to confirm the accuracy of the reference as a matter of urgency.

33. VICTIMS

33.1 In October 2005, the Attorney General introduced *The Prosecutors Pledge*. The 10-point Pledge is a public commitment that clearly outlines the level of service that victims can expect to receive from prosecutors and also applies to independent prosecuting advocates instructed by a prosecuting authority such as the CPS.

33.2 The CPS delivery of the Pledge governs the Services public commitment to victims and must always be followed.

33.3 Prosecuting advocates should familiarise themselves with the Pledge and the CPS delivery of its public commitment and ensure that the principles are always applied in dealing with victims at each stage of the court process.

CPS DIRECT COMMUNICATION WITH VICTIMS

33.4 In order to allow the CPS to meet its obligations under the Direct Communications with Victims (DCV) initiative the advocate is instructed that where he or she offers no evidence on or substantially alters a count on the indictment or where the Crown Court orders that a charge lie on file, he or she should make a full note of the reasons for the decision so that the CPS, in due course, can provide a meaningful and reasonable explanation to the victim in writing. This should be done whether or not the decision has been explained to the victim at court. Where practical the advocate should speak and explain the decision to the victim or the victim's family.

33.5 Standard for Communication Between Victims, Witnesses and the Prosecuting Advocate

Prosecuting advocates will need to familiarise themselves with the Standard and ensure that the principles around engagement with victims and witnesses are applied.

VICTIM FOCUS SCHEME - GUIDANCE ON ENHANCED CPS SERVICE FOR BEREAVED FAMILIES

- 33.6** On 1 October 2007, the Attorney General announced the national roll out, throughout England and Wales, of the CPS ‘Victim Focus’ scheme. The ‘Victim Focus’ scheme allows CPS prosecutors to meet bereaved families in homicide cases to explain the charging decision, court process and procedures and the opportunity to make a victim personal statement.
- 33.7** A police Family Liaison Office appointed at the beginning of the investigation will explain the ‘Victim Focus’ scheme to the family, including the making of a victim personal statement (VPS).
- 33.8** The victim personal statement is served on the defence and the court. Where the defendant has been convicted the bereaved family will have the opportunity to make a further VPS (or, if appropriate make a VPS for the first time) which will also be served on the court and the defence.
- 33.9** The prosecutor will confirm the method of presentation to the court (i.e. handed in to the judge or read out by the trial advocate) and answer any questions that the family member or members may have at this stage in the process. The court receives the finalised VPS before mitigation commences.

The CPS leaflet explaining the ‘CPS Victim Focus Scheme, Service for Bereaved Families’ and the CPS Guidance are available on the CPS website www.cps.gov.uk

34. VIDEO RECORDED INTERVIEWS WITH VULNERABLE AND SIGNIFICANT WITNESSES

- 34.1** Advocates should be familiar with the revised guidance “Video Recording Interviews with Vulnerable and Significant Witnesses”, published on 8 May 2007. The revised guidance has been agreed by the ACPO Investigative Interviewing Steering Group and the CPS.
- 34.2** The revised guidance informs of the use of Records of Video Interviews (ROVIs). The use of ROVIs will apply to all relevant police investigations from 1 September 2007.
- 34.3** A ROVI will be the standard for the interview summary and should be used in the majority of cases, rather than the alternative of a full verbatim transcript, until a clear “not guilty” plea is entered. The Police should compile a ROVI in every case where a vulnerable witness is interviewed on video, irrespective of whether or not a transcript is subsequently created.
- 34.4** Prosecutors should continue to base their decisions on the viewing of the video. The ROVI and/or the transcript if prepared may be used to assist this process.

- 34.5** Where a “not guilty” plea is entered, it is the responsibility of the CPS to send the video recording to a Video Transcription Unit for transcription. Where a “guilty” plea is entered or the case is not proceeded with, the recording will not be transcribed.
- 34.6** Advocates are instructed to make applications to play the video-recording as evidence-in-chief under Section 27 of the Youth Justice and Criminal Evidence Act 1999 and serve the transcript on the defence.
- 34.7** If the application under Section 27 is successful, the video-recording is played as evidence-in-chief. If the application is unsuccessful, the transcript should be used to lead the witness’s evidence-in-chief (consideration may be given to applying for the witness to give evidence via live TV link under Section 24 of the Youth Justice and Criminal Evidence Act 1999).
- 34.8** Advocates must be aware that the CPS Video Transcription Unit(s) (VTU) normal turnaround time for production of a transcript is 7 working days (9 calendar days). It is important to note that if the circumstance of the case change and a transcript is no longer required, the VTU must be notified immediately of the cancellation to avoid any unnecessary work.
- 34.9** Advocates must note that this process, when implemented by Statutory Instrument will also be applicable to other groups of witnesses for video-recorded evidence-in-chief, notably intimidated witnesses (Section 17 of the Youth Justice and Criminal Evidence Act 1999) and significant witnesses (Section 137 of the Criminal Justice Act 2003).

35. WITNESS ISSUES

General

- 35.1** In all cases involving a child victim or witness, or a vulnerable or intimidated victim, the advocate is instructed to use best endeavours to fix an early trial date and to resist attempts to delay the listing of the case.
- 35.2** Where relevant, consideration should be given to the order of witnesses and timing of their attendance. Particular attention should be paid to victims (especially those who are vulnerable or intimidated), child witnesses and professional or expert witnesses. The order of witnesses should be agreed with the defence. If agreement cannot be reached before or at PCMH, the advocate should invite the judge to make a direction that the defence confirm their witness requirements within seven days in writing.
- 35.3** Advocates should also take account of information about the specific needs of a witness and ensure that they are acted on as appropriate (for example the need for regular breaks, or the timing of a witness’s evidence to take account of the effects of medication).
- 35.4** The advocate is reminded that the Code of Conduct permits barristers appearing at court to introduce themselves to witnesses and to explain court

procedures. The CPS regards this personal contact as particularly important so far as victims of crime are concerned.

- 35.5** The advocate's attention is also drawn to the duty imposed by the Code of Conduct to ensure that those facing unfamiliar court procedures are put at ease. This is particularly important in the case of nervous or vulnerable witnesses.
- 35.6** Guidance has been issued by the Lord Chancellor's Department that unless it is necessary for evidential purposes, defence and prosecution witnesses should not be required to disclose their addresses in open court. Exceptionally, it will be appropriate for the defence and prosecution to make application for non-disclosure, in open court, of the names of witnesses.
- 35.7** In a case where a prosecution child witness has received pre-trial therapy, the advocate should be aware of the Practice Guidance: Provision of Therapy for Child Witnesses Prior to a Criminal Trial.
- 35.8** In a case where a prosecution vulnerable or intimidated adult witness has received pre-trial therapy, the advocate should be aware of the Practice Guidance: Provision of Therapy for Vulnerable or Intimidated Witnesses Prior to a Criminal Trial.
- 35.9** Advocates should challenge overly complex, repetitive or aggressive cross-examination by the defence advocate.

Child Witnesses

- 35.10** Advocates should be familiar with the contents of Safeguarding Children: Guidance on children as victims and witnesses and the Guidance on Prosecuting Child Abuse cases both of which can be found on the CPS website.
- 35.11** Complex, multiple questions confuse children. Advocates should avoid jargon and ambiguous questions and should use straightforward sentence construction and words that match the age and abilities of the child witness. Time must be allowed for the child to answer the questions. See Annex 5 of the Safeguarding Children Guidance.
- 35.12** Inappropriate questioning not only prevents the child witness from giving their best evidence but may also cause acute distress to the child. This is unnecessary and avoidable and is therefore to be deprecated. Advocates should be robust in objecting to inappropriate questioning.
- 35.13** In relevant cases, the use of witness profiling, or intermediaries may be helpful in preparing and planning to ensure that questions are asked in a way that best enables the child witness to understand and respond.

36. WORK RELATED DEATHS

- 36.1** Where the case is one involving a work-related death, the prosecuting advocate

should be familiar with the contents of “Work-related Deaths: a Protocol for Liaison [2nd edition, available at www.hse.uk/pubns/misc491.pdf]. Particular attention should be paid to paragraph 9 of the Protocol. This relates to the initiation and management of the prosecution and describes the collaborative approach that should be taken between prosecuting authorities in such cases.

37. YOUTHS

General Guidance

37.1 A Youth will appear in the Crown Court if the youth is:

- Jointly charged with an adult on an indictable offence and the magistrates court considers it necessary in the interests of justice to commit them both for trial (s24(1)(b) Magistrates’ Courts Act 1980) or send them both for trial (s51(5) Crime and Disorder Act 1998)

OR

- Charged with homicide (s24(1) Magistrates’ Courts Act 1980)

OR

- Charged with an offence to which s51A Firearms Act 1968 applies i.e. that the youth is 16 or 17 and the offence attracts the mandatory minimum sentence

OR

- Charged with a “grave crime” as defined in Section 91 Powers of Criminal Courts (Sentencing) Act 2000 and the magistrate’s court decline jurisdiction because they are satisfied that there is a “real prospect of a custodial sentence of 2 years or more or there is an unusual feature of the case that justifies declining jurisdiction” (R on the application of H,A, and O v Southampton Youth Court [2004] EWHC 2912 Admin) and the youth should be sentenced pursuant to the provisions of that Section.

OR

- Charged with a “specified offence” as defined in Section 224 Criminal Justice Act 2003 and he has been sent for trial pursuant to (sec 51A (2) and (3) (d) Crime and Disorder Act 1998) as it appears to the magistrates court that if he is convicted, the criteria for imposing a sentence of indeterminate detention for public protection (sec 226 (3)) or an extended sentence (sect 228(2)) would be met namely that there is “ a significant risk to members of the public of serious harm occasioned by (the defendant) of further specified offences” (section 229(1)(b) Criminal Justice Act 2003).

OR

- Convicted in the magistrates court of a “specified offence” as defined by

Section 224 Criminal Justice Act 2003 and the magistrates court has committed him because the criteria for the imposition of a sentence of indeterminate detention for public protection (sec 226(3)) or an extended sentence (sec 228(2)) appear to be met (sec 3C PCC(S) A 2000).

- 37.2** Advocates should be familiar with CPS legal guidance on youth offenders which is available on the CPS website www.cps.gov.uk and the practice direction applicable to the trial of children and young persons in the Crown Court. Practice Direction (Criminal Proceedings: Consolidation) para 39 [2002] 1 WLR 2870. (Archbold 4-96a).
- 37.3** Advocates are reminded that robes and wigs will not ordinarily be worn. The trial process should be modified where necessary e.g. by using language appropriate for the age of the youth and by taking breaks to enable the youth to participate in the trial.
- 37.4** Advocates must avoid any unnecessary delay in all youth cases as it is important that young people are confronted quickly with the consequences of their offending behaviour.

Reporting Restrictions

- 37.5** Section 49(1) Children and Young Persons Act 1933 applies to appeal hearings from the youth court. This prohibits the publication of the name, address or school of any child or young person concerned in the proceedings or any particulars likely to lead to their identification. The Section also prohibits the publication of the child or young person's picture.
- 37.6** In all other case s39 of the 1933 Act and s45 of the Youth Justice and Criminal Evidence Act 1999 is applicable as set out in the Practice Direction.

Detention under Section 90 and 91 Powers of Criminal Courts (Sentencing) Act 2000

- 37.7** All youths charged with homicide must be tried in the Crown Court. Youths convicted of murder and those convicted of murder committed when under the age of 18, must be sentenced to detention during Her Majesty's Pleasure (Section 90 Powers of Criminal Courts (Sentencing) Act 2000).
- 37.8** Youths aged 16 and 17 who are charged with offences contrary to s5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), 5(1)(c) or s5(1A)(a) Firearms Act 1968 must be tried in the Crown Court (s24 Magistrates' Courts Act 1980) as the minimum sentence of 3 years detention under s91 Powers of Criminal Courts (Sentencing) Act 2000 (s287 Criminal Justice Act 2003) exceeds the sentencing powers of the youth court.
- 37.9** Youths charged with "grave crimes" will be committed to Crown Court if the magistrates decline jurisdiction. "Grave crimes" are defined in s91 Powers of Criminal Courts (Sentencing) Act 2000 as:
- offences that carry a sentence of 14 years imprisonment or more in the case

of adults,

- sexual assault contrary to s3 Sexual Offences Act 2003;
- child sex offences committed by children and young people contrary to s13 Sexual Offences Act 2003;
- familial sexual offences with a child family member contrary to ss25 and 26 Sexual Offences Act 2003.

37.10 Advocates should be familiar with the tests in “R on the application of H, A and O v Southampton Youth Court [2004] EWHC 2912 Admin” as set out in paragraph 38.1 that the magistrates must apply when deciding whether to decline jurisdiction in respect of grave crimes and recent sentencing authorities so that they can explain the presence of a youth at Crown Court if required to do so.

Remittal to Youth Court

37.11 A youth who has been validly committed for trial with an adult must be tried in the Crown Court even if the adult pleads guilty (Archbold 1 – 75t) or if separate trials are ordered (para 39.4 Practice Direction).

37.12 A youth who has been sent to the Crown Court because he or she is jointly charged with an adult may only be remitted for trial in the youth court if there is no longer an indictable offence on the indictment (Schedule 3 para 13 (1) Crime and Disorder Act 1998). The Crown Court may retain jurisdiction in such a case if the remaining offence is a grave crime and detention pursuant to s91 Powers of Criminal Courts (Sentencing) Act 2000 ought to be available or if the youth is jointly tried with an adult and the court considers it in the interests of justice that they be tried together in the Crown Court (Schedule 3 para 13 (2) Crime and Disorder Act 1998).

37.13 A youth must be remitted to the youth court for sentence if a sentence of detention under s90 or 91 Powers of Criminal Courts (Sentencing) Act 2000 is not required unless the court is satisfied that it would be undesirable to do so: s8(1) Powers of Criminal Courts (Sentencing) Act 2000. Guidance on the application of s8 has been given in Lewis (1984) 79 Cr App R 94 in which Lord Lane CJ indicated that reasons for not remitting include:

- a. that in a case where the juvenile pleaded not guilty and was convicted, the Crown Court judge who presided at the trial will be better informed about the facts of the offence and general nature of the case than the youth court could hope to be;
- b. that in a case where an adult and juvenile have been jointly tried on indictment and both convicted, sentencing the juvenile in the Crown Court will avoid the risk of unjustifiable disparity in sentencing that would arise if he were to be remitted to the youth court;
- c. that remitting would cause delay, unnecessary duplication of proceedings and extra expense.

Sentencing

37.14 The age of conviction is the relevant date for determining whether a defendant is eligible for a particular sentence. R v Danga (1991) 13 Cr App Rep (S) 408.

37.15 However, where a defendant crosses an important age threshold between the date of the commission of the offence and the date of conviction, the sentence that the defendant would have been likely to receive if he or she had been sentenced on the date of the offence will be a powerful factor in determining the appropriate sentence, R v Ghafoor [2002] EWCA 1857 and R v Bowker [2007] EWCA Crim 1608.

37.16 On conviction on indictment the Crown Court may impose any of the sentences or orders available for youths (Archbold 5 – 253) except a referral order. If a referral order is considered to be the most appropriate sentence the youth may be remitted to a youth court under section 8(1) Powers of Criminal Courts (Sentencing) Act 2000 or the judge may exercise the powers of a District Judge (Magistrates' Courts) conferred by Section 66 Courts Act 2003 and sit as a youth court (Section 45 Children and Young Persons Act 1933.)

37.17 In the youth court, a referral order **must** be made when a youth who has no previous convictions pleads guilty to all the imprisonable offences with which he is charged (other than those where the sentence is fixed by law) and the court is not proposing to impose a custodial sentence, hospital order or absolute discharge, (s16(2) Powers of Criminal Courts (Sentencing) Act 2000).

37.18 A referral order **may** be made where a youth:

- does not meet the compulsory conditions for a referral order, but pleads guilty to the offence, which may be non imprisonable:

OR

- pleads guilty to one offence but is convicted of other offences and falls to be sentenced for all offences on the same occasion (s16(3) Powers of Criminal Courts (Sentencing) Act 2000);

AND

- has never been convicted by a UK court of any offence, other than for the offences that fall to be sentenced ; or
- has been sentenced in a UK court on one previous occasion, but has not sentenced to a referral order; or
- has been sentenced in a UK court on one or more previous occasions and has been sentenced to a referral order;

AND

- the youth offending team officer or probation officer recommends a

further referral order;

AND

- the court considers that there are “exceptional circumstances” to justify a further referral order. (s17 Powers of Criminal Courts (Sentencing) Act 2000, as amended by s35 Criminal Justice and Immigration Act 2008.)

37.19 The new Community Order introduced by the Criminal Justice Act 2003 is not available for youths because the legislation was only commenced in relation to adult offenders. The Youth Rehabilitation Order is expected to become available from 30 November 2009.

Orders Against Parents and Guardians

37.20 Whenever a youth is convicted of an offence, the court must consider its powers to bind over the parent or guardian and to make a parenting order.

Parental Bindover

37.21 Section 150(2) Powers of Criminal Courts (Sentencing) Act 2000 gives the court a power to order a parent to enter into a recognizance for an amount not exceeding £1,000 to take proper care and control of the convicted youth or to impose a fine that does not exceed £1,000 where the parent refuses and the court considers that refusal unreasonable.

37.22 Where the youth is under 16 when sentenced it shall be the duty of the court to exercise these powers if it is satisfied, having regard to all the circumstances of the case that it would be desirable in the interests of preventing the commission of further offences by the youth. The court must give reasons if it does not make a parental bind over when the youth is under 16, (s150(1)).

Parenting Order

37.23 Section 8 Crime and Disorder Act 1998 gives the court a power to make a parenting order in respect of a parent or guardian of a youth who has been convicted of an offence if the court is satisfied that the order would be desirable in the interests of preventing the commission of any further offences by the youth. The parenting order lasts a maximum of three months. Where the youth is under 16 the court must make an order if it is satisfied that the order is desirable, and must give reasons if it decides that the order is not desirable in the interests of preventing the commission of further offences.