IN THE SUPREME COURT OF BERMUDA
CRIMINAL JURISDICTION

PRACTICE DIRECTION
(GUIDANCE NOTES AND CASE MANAGEMENT FORMS)

ISSUED BY THE REGISTRAR

Ref. A/50

Monday 3 January 2017

CIRCULAR No. 1 of 2017

GUIDANCE NOTES

1. The aim of these Guidance Notes is to introduce Counsel to the annexed Case Management Notice Forms (the Forms) and to provide assistance with their proper use. These Guidance Notes also offer a summary outline of the law which may apply throughout the pre-trial stage process and the various duties of the Prosecution and the Defence before the start of a trial. The following rules and enactments refer:

(i)	Criminal Jurisdiction and Procedure Act 2015	(CJPA)
(ii)	Disclosure and Criminal Reform Act 2015	(DCR)
(iii)	Criminal Procedure Rules 2013	(CPR)
(iv)	Police and Criminal Evidence Act 2006	(PACE)
(v)	Criminal Code Act 1907	(CC)
(vi)	Evidence Act 1905	(Evidence Act)

2. The Forms are as follows:

(i)	FORM 1 -	The Prosecution Disclosure Notice
(ii)	FORM 2 -	The Defence Pre-arraignment Notice
(iii)	FORM 3 -	The Defence Statement
(iv)	FORM 4 -	The Defence Statement (Trial Timetable)
(v)	FORM 5 -	The Prosecution Statement (Trial Timetable)

3. These Guidance Notes should be thoroughly read prior to completion of the Forms. FORM 1 and FORM 5 are to be filed by the Prosecution and FORMS 2-4 by the Defence.

4. Where an Accused is unrepresented by Counsel or pleads guilty to the offence(s) charged, the Court will direct which of the Forms need be filed by the Defence.

5. Unless the Court otherwise directs, the Prosecution must file FORM 1 and FORM 5 with the Court. Where the Accused is unrepresented, service of the Forms must be made on the Accused person directly.

CONSULTATION PROCESS

6. The consultation process began with the distribution of a draft copy of these Guidance Notes together with FORMS 1-5 to the Director of Public Prosecutions and to members of the Bermuda Bar Association. A copy was also published on the Supreme Court website for the benefit of access by any other interested departments or members of the public.

7. The consultation period ran from 3 October 2016 to 2 December 2016. An open discussion meeting to hear ideas and/or concerns from the said stakeholders was held on Friday 2 December 2016 at 12:30pm in Supreme Court #3. A roster of attendance and a record of the meeting were prepared for reference purposes.

8. Responses obtained through the consultation process were not treated confidentially and were made available at the discretion of the Registrar for further reference and wider discussion.

9. All input received was reviewed carefully and taken into consideration prior to the issuance of this Circular.

THE FORMS ARE MANDATORY

10. The Forms shall be used in respect of every criminal matter sent by the Magistrates' Court to the Supreme Court on and after 3 January 2017.

11. Part XXIVA of the Criminal Code (CC) outlines the scope of case management hearings and the powers of the Case Management Judge.

12. Section 540 CC provides for the establishment of the Criminal Procedure Rules which governs practice and procedure. *Inter alia*, section 540(2)(a) CC permits such rules to '*prescribe the manner in which applications and notices or notifications may be made or given (including whether orally or in writing) and the manner in which they may be responded to*'.

13. The Criminal Procedure Rules 2013 (CPR) at 3.2 imposes an express duty on the Court to actively manage its cases and each party has an express duty to assist the Court in actively managing its cases.

14. Rule 3.10 (1) provides:
'*Case management forms and records: The case management forms set out in any practice direction must be used, and where there is no form then no specific formality is required.*'

15. Part 1 of the CPR outlines the overriding objective. The Court is duty bound under rule 1.3 to apply the overriding objective:
'The Court must further the overriding objective in particular when-
(a) exercising any power given to it by legislation (including these Rules);
(b) applying any practice direction; or
(c) interpreting any rule or practice direction.'

THE GENERAL FORMAT OF FORMS

16. Most of the questions in the Forms simply require a 'YES', 'NO' or N/A selection. However, where a question calls for a fuller response, Counsel are expected to either (i) provide a number-specific typed answer as an appendix to the relevant Form; or (ii) type/print in clear block capitals in the space provided in the Form.

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CORRESPONDENCE WITH THE REGISTRY

17. When corresponding with the Registry, Counsel must adhere to the following practice:

    (i) Subject only to (v) below, all correspondence sent to the Registry should be directed to the Registrar. Correspondence from Counsel should not be directed to other members of the Registry. This reinforces *Practice Direction No. 21 of 2015 paragraph 4*: "*It has been noted that correspondence is being addressed to Administrative Assistants and not to the Registrar. Then a query is posed for which the Registrar has no knowledge. Please refrain from addressing correspondence in this manner and address* ***all*** *correspondence to the attention of the Registrar.*";

    (ii) Counsel should never copy the Registrar or members of the Registry to party correspondence. This reinforces *Practice Direction No. 6 of 2011*: '*Normal party and party correspondence should not be copied to the Registry. The only correspondence which should be directed to the Registry is that which covers a filing, seeks a date or seeks some other form of action from the Registrar.*';

    (iii) All communications to the Registry should be made in the form of a letter properly filed at the Registry subject only to the exceptions listed below at (iv)-(vi);

    (iv) Emails may be sent to the Registrar where the course of action requested is in respect of an urgent fixture for hearing within the next 7 days;

    (v) Counsel may use email correspondence when it is in reply to any email correspondence from the Registrar or member of the Registry on behalf of the Registrar;

    (vi) Email correspondence is also acceptable where it is merely intended to stand as a notice or '*heads up'* on pending correspondence soon to be filed at the Registry; and

    (vii) When seeking a hearing date, Counsel should send one letter to the Registrar advising on proposed hearing dates as agreed by both sides. (Separate letters from Counsel stating their individual calendar availabilities will not be considered in the absence of good reason for so doing).

18. Correspondence which does not conform to these rules of practice may not receive a reply or action by the Registry.

LIAISING WITH THE REGISTRAR PURSUANT TO COURT DIRECTION

19. Where the Court directs for Counsel to liaise with the Registrar for a hearing date to be fixed, this should be done within 2 days of the order unless otherwise directed by the Court. Where Counsel do not make contact by written correspondence, a hearing date may be fixed by the Registrar without regard to Counsel's calendar availability. In such circumstances, the vacating of the listing may only be achieved by an adjournment from the Court.

FILING JOINT HEARING BUNDLES

20. Where either party to the proceedings intends to make an application to the Court aided by a skeleton argument, written submissions and /or case law, the Court will require Counsel for the Defence and the Prosecution to liaise with one another to compile a joint hearing bundle which is to contain all reading material intended for the Judge's consideration.

21. A joint bundle will be required whether it contains one or several cases or documents for the Judge's attention.

22. Provisions of legislation need not be included in a joint bundle.

23. Where five (5) or more cases and/or documents are included in the joint bundle, it must be tabulated and indexed so that the reading material is easily identifiable.

24. The front cover of the bundle should carry a label which clearly identifies the nature of the application to which the bundle refers.

25. The party who is making the application is responsible for filing the joint bundle.

26. The Court may at any time issue additional or alternative case management directions in respect of the joint hearing bundle.

THE CASE MANAGEMENT NOTICE FORMS

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

GENERAL

27. The Prosecution's statutory duty to disclose its case and all relevant unused material is stated in sections 3 and 4 of the Disclosure and Criminal Reform Act 2015 (DCR).

28. FORM 1 is now the prescribed Notice which must be filed and served by the Prosecution in order to comply with sections 3(3) and 4(2) DCR.

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

COVER LETTER TO THE REGISTRAR

29. FORM 1 must be filed under a cover letter to the Registrar stating the following:

    (i) compliance (or non-compliance) with the required timeframe for filing- (where there is non-compliance, an explanation should be included in the cover letter);

(ii) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

(iii) with the exception of *ex parte*[1] hearings, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 30 day period from the filing date; and

(iv) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

FORM 1 (PROSECUTION DISCLOSURE NOTICE)

JOINT HEARING BUNDLES

30. Where the Prosecution intends to make a written or oral application, a copy of any skeleton argument and related case law which the Prosecution intends to place before the Court shall be served (not filed) on the Defence on the same day that FORM 1 is filed and served.

31. The Defence will then have 3 days thereafter within which to serve the Prosecution with a copy of any skeleton argument and /or case law in reply.

32. Within 2 days of receipt of the Defence's reply (or in the case where there is no reply from the Defence: no less than 5 days but no more than 7 days after serving the Defence with the Prosecution's skeleton argument and / or case law), the Prosecution shall file all of the reading material in the form of a joint hearing bundle for the Court.

FORM 1 (PROSECUTION DISCLOSURE NOTICE)

TIMELINE TO FILE AND SERVE

33. FORM 1 must be filed and served by the Prosecutor no later than within 70 days from the day on which the Accused person was sent to the Supreme Court from the Magistrates' Court (see section 29(3) Criminal Jurisdiction and Procedure Act 2015 (CJPA)).

34. While FORM 1 has an ultimate 70 day deadline, it should be remembered that section 29(1) CJPA requires the Prosecution to '*disclose its case…as soon as is reasonably practicable'*.

35. The reference in section 29(1) CJPA: '…*the* ***prosecution must disclose its case in accordance with section 4*** DCR (unused material)…*as soon as is reasonably practicable*' is plausibly a drafting slip as the Prosecution's duty to disclose ***its case*** arises under section 3 DCR. Section 4 imposes a duty on the Prosecution to disclose all relevant unused material in the Crown's possession.

[1] An ex parte hearing is permissible in the most limited circumstances eg. when the Court has granted leave for an application under section 8 DCR (Public Interest) to be made on an ex parte basis.

36. In any event, the statutory duty for the Prosecution to disclose *as soon as is reasonably practicable* its case and all relevant unused material in the possession of the Bermuda Police Service or the Prosecution is clear.

37. The 70 day deadline should not be treated as an opportunity for the Crown to move at a molasses pace in filing FORM 1. Section 29(3) CJPA allows for compliance with the Crown's disclosure obligations no later than 70 days after the date on which the person was sent for trial. However, this should not prevent the Crown from taking all reasonable steps to file FORM 1 sooner than the 70 day timeframe.

38. The Prosecutor should also appreciate the potential impact of delayed disclosure, which may lead to:

(i) delay in arraigning the Accused as a measure of caution that the Defence may wish to make a section 31 CJPA application after service of '*copies of the documents containing the evidence on which the charge or charges are based*[2]';

(ii) obstruction to the administrative efficiency of listing a section 504 application in the same hearing as a section 31 CJPA application, as the latter can only be made after evidence has been served;

(iii) delay in the fixing of a trial date;

(iv) delay in proceeding to case management directions;

(v) prolongation of the remand period for Accused persons not on bail; and

(vi) prolongation of the period within which the Accused is charged with an indictable offence but has no knowledge of the evidence against him/her:

(Under the old committal inquiry regime, an Accused person would be served in the Magistrates' Court with a schedule of Prosecution witness names and exhibits which served as notice of the evidence which the Crown intended to rely on.

Under the new '*sending*' regime, the said schedule of information is no longer required to be served on the Defence at the Magistrates' Court stage of the committal process.

Therefore, when disclosure of the Crown's case is delayed it potentially prolongs the period of time within which an Accused person is wholly unaware of the evidence against him/her in support of the charge.

Notably, the Director of Public Prosecution is required under section 37 PACE to be satisfied on the sufficiency of the evidence before an Accused is charged with an offence.)

[2] See section 31 CJPA which allows the application to be made after the Crown has effectively discharged its section 3 DCR duties.

39. It should ultimately be remembered that section 6 of the Bermuda Constitution Order 1968 gives every person charged with a criminal offence the right to be afforded a fair hearing within a reasonable time.

40. Hence, all reasonable efforts should be made to avoid delay disclosures.

FORM 1 (PROSECUTION DISCLOSURE NOTICE)

(Questions 1-8)

DISCLOSURE OF CROWN'S CASE CHECKLIST

41. This portion of FORM 1 applies to the Prosecution's section 3 DCR duty to disclose its case.

42. Section 3(1) DCR calls for the Prosecutor to serve on the Accused:

(a) a written summary of the prosecution case;
(b) a written copy of the charges that are to be pursued…at trial;
(c) a written copy of the evidence on which the prosecutor intends to rely at trial; and
(d) such other particulars or materials as may be required under regulations and which reasonably relate to disclosure by the prosecution

43. It must be remembered that the Prosecutor has a right under section 3(4)(a) DCR to amend the Crown's case (provided that an amended written summary is served). Such an amended summary should be made in writing and it should be filed and served as soon as is reasonably practicable in all circumstances.

44. Section 3(4)(b) DCR allows the Crown to seek leave of the Court to pursue fresh charges notwithstanding the case originally disclosed to the Defence in accordance with sections 3(1) and 3(3) DCR.

FORM 1 (PROSECUTION DISCLOSURE NOTICE)

(Questions 9-22)

DISCLOSURE OF UNUSED MATERIAL CHECKLIST

45. This portion of FORM 1 relates to the Prosecution's statutory duty to disclose all relevant unused material pursuant to section 4 DCR.

46. Unused material is defined in section 2 DCR:
"Material" means materials of all kinds, including but not limited to information and objects

"Unused material" means material that the prosecutor does not intend to use as evidence in the trial of the accused person.

"Relevant unused material" means any unused material that might reasonably be considered capable of-

(a) Undermining the case for the prosecution against the accused person; or
(b) Assisting the case of the accused person

47. Late or non-disclosure of the following categories of unused material has previously provoked trial delays, adjournments and even the exclusion of evidence:

(i) police notes;
(ii) search reports;
(iii) custody records;
(iv) notes/records of exculpatory statements made by the accused;
(v) expert notes and unused reports;
(vi) unused photographs;
(vii) warrants and underlying information and documentation;
(viii) police disciplinary records
(ix) antecedent records in relation to civilian witnesses
(x) details surrounding mental or psychological history of witnesses[3]

48. Questions 9-22 require the Prosecution to specify its position on these various types of unused material as an alert to both sides to consider and hopefully resolve any such issues well in advance of the start of the trial.

49. Of course, it should not be forgotten that the Crown has a continuing duty to disclose unused material under section 6 DCR. The Prosecutor must, therefore, keep under review the question whether there is relevant unused material which has not been disclosed to the Defence.

50. Any further unserved relevant unused material which is identified by the Prosecution must be served as soon as is reasonable practicable or within such time as the Court may order.

51. Section 6 applies continuously throughout the process until the conclusion of the case against the Accused.

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

(Questions 23-24)

PUBLIC INTEREST NOTICE

52. Questions 23-24 call for the Crown to state whether it is asserting Public Interest (PI) under section 8 DCR. Where the Prosecution is asserting PI, the Prosecutor must make an application to the Court for an order that the relevant material in its possession shall not be disclosed to the Defence (ie the Accused and his/her legal representative(s)).

53. The Prosecutor is required to give the Defence prior notice of the application in compliance with section 8(2) DCR, unless the Court otherwise orders.

54. Where the Court has granted such an order relieving the Prosecution of its section 8(2) notice obligation, the Prosecutor may select N/A (*not applicable*) in answer to question 23. The N/A reply in these circumstances would not expose the Crown's reprieve by the Court as N/A is also what would otherwise be selected where the Crown does not intend to assert PI.

[3] See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014 paras20-26*

55. Where the Prosecution is seeking a Court order to be excused from having to give notice of a s.8 application, the Prosecutor should make all reasonable attempts to be heard before a Judge well in advance of the the day on which FORM 1 is due to be filed and served.

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

(Questions 25-29)

APPLICATION FOR EXTENSION OF TIME

56. Questions 25-29 relate to section 30 CJPA applications by the Prosecution for an order allowing the Prosecution more time to comply with its disclosure duties as required by section 29 CJPA: "…*the prosecution must* ***disclose its case in accordance with section 4*****(DCR)** *as soon as is reasonably practicable…. The prosecution duty of disclosure mentioned in subsection (1) must be complied with no later than 70 days after the date on which the person was sent for trial.*"

57. As previously stated, the Prosecution's duty to disclose its case arises under section 3 DCR not section 4 DCR. Hence, the underlined wording in the preceding paragraph, as extracted from section 29 CJPA, is an anomaly. It follows that section 29 is, by intention, a reference to both the Prosecution's duty under section 3 DCR (the Prosecution's case) and under section 4 DCR (unused material).

58. Section 30 is effectively a request by the Crown for an extension of the 70 day deadline. Section 30(2) CJPA requires the Crown to put the Defence on notice (at the same time as notice is given to the Court) if a s. 30 application is to be made.

59. The notice by the Prosecution may be made orally in Court or in writing. Section 30(3) CJPA requires all written applications to specify the grounds for which the extension is being sought.

60. The Defence should be mindful of the 3 day deadline under section 30(3) CJPA to respond to a written application by the Prosecution for an extension of time for service to be made.

61. Any Notices of Additional Evidence for filing after the stated 70 day deadline should only be filed with leave of the Court order under section 30 CJPA.

62. In any event, the Prosecutor should have continuous regard to the points outlined in paragraphs 38-40 above on the potential impact of delayed disclosure.

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

(Questions 30-33)

JOINDER OF CHARGES APPLICATION

63. Supporting affidavit evidence must be filed with FORM 1 where the Prosecution seeks to be heard on a joinder application.

64. This part of FORM 1 is intended to prompt the Prosecution to give early notice of any joinder applications. Early notice of joinder applications is crucial for two principal reasons:

(i) Trial date fixtures are often withheld or unconfirmed until after the disposition of the joinder application and

(ii) Disclosure obligations may be unclear prior to the order allowing or disallowing the joinder application.

65. Joinder applications under section 480 CC permit charges to be joined in the same Indictment with other charges (where they may otherwise be lawfully be included) if:

(a) those charges are founded on the same act or omission; or

(b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or

(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character.

Where the grounds for a joinder of charges are discovered not to be founded on any one of the above, the joinder application will not be allowed.

66. Section 481 CC:
'*A person who counsels or procures another person to commit an offence, or who aids another person in committing an offence, or who becomes an accessory after the fact to an offence, may be charged in the same indictment with the principal offender, and may be tried with him or separately, or may be indicted and tried separately, whether the principal offender has or has not been convicted, or is not amenable to justice*.'

67. Section 482 CC:
'*Any number of persons charged with committing or with procuring the commission of the same offence, although at different times, or with being accessories after the fact to the same offence, although at different times, may be charged with substantive offences in the same Indictment, and may be tried together notwithstanding that the principal offender is not included in the same indictment, or is not amenable to justice*.'

68. See section 483 for specific reference to joinder of charges with respect to stealing and receiving.

FORM 1 **(PROSECUTION DISCLOSURE NOTICE)**

PROSECUTOR'S SIGNATURE

69. The Prosecutor's signature, which must be placed at the bottom of FORM 1, certifies the fullness, accuracy and veracity of each reply made. The signature is made on behalf of the Crown altogether and not merely the individual prosecutor who affixed it. Therefore, it is crucial that the Prosecutor who signs FORM 1 is satisfied that all of the replies have been correctly and fully entered.

70. Prosecuting Counsel must apply a great level of care and attention to ensure that FORM 1 is a true representation of the Crown's position.

FORM 1 must be completed separately in respect of each Accused person

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FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

GENERAL

71. FORM 2 must be filed and served by the Defence within 7 days of the Defence having been served with FORM 1, unless otherwise directed by the Court.

72. The aim behind FORM 2 is to prompt the Defence to give early notice of any of the following applications which it may pursue:

(i) Application for Dismissal of Charges under section 31 CJPA;
(ii) Motion to Quash Indictment under section 504 CC; and
(iii) Application for finding that the Accused is unfit to plead to the Indictment under section 514 CC[4]

73. FORM 2 stands as the Notice of Application and/or Notice of Motion to be filed for the listing of an application to dismiss or quash the charges. However, Counsel should be made to clearly understand that FORM 2 must be filed whether or not any of the above applications are intended to be made.

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

COVER LETTER TO THE REGISTRAR:

74. FORM 2 must be filed under a cover letter to the Registrar confirming the following:

(i) compliance (or non-compliance) with the required timeframe for filing; (where there is non-compliance, an explanation should be included in the cover letter);

[4] A jury must be empaneled forthwith where there is uncertainty whether the Accused is capable of understanding the proceedings at trial and where a finding on such capability is to be made under section 514 CC.

(ii) the date on which the Accused will or did first appear in the Supreme Court and whether or not the Accused has been arraigned;

(iii) if the Accused has been arraigned, a specification of the pleas entered (eg. not guilty to all counts/guilty to counts 1 and 2 but not guilty to counts 3 – 5.);

(iv) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

(v) where a hearing date is requested, specification of hearing dates mutually available to the Defence and to the Prosecutor covering a 30 day period from the filing date. (Dates covering a 90 day period are required for hearings under section 514 where a jury is required to be empaneled.); and

(v) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

JOINT HEARING BUNDLES

75. Where the Defence intends to make a written or oral application (in respect of section 31 CJPA or section 504 CC), a copy of any skeleton argument and related case law which the Defence intends to place before the Court shall be served (not filed) on the Prosecution on the same day that FORM 2 is filed and served.

76. The Prosecution will then have 3 days thereafter within which to serve the Defence with a copy of any skeleton argument and /or case law in reply.

77. Within 2 days of receipt of the Prosecution's reply (or in the case where there is no reply from the Prosecution: no less than 5 days but no more than 7 days after serving the Prosecution with the Defence skeleton argument and / or case law), the Defence shall file all of the exchanged materials as a joint hearing bundle for the Court.

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

TIMELINE TO FILE AND SERVE FORM 2

78. As a necessary component of effective case management, the Court should be put on notice as early as is reasonably practicable where the Defence intends to make any of the applications specified in FORM 2.

79. In any event, FORM 2 must be filed and served by the Defence no later than within 7 days after the Defence has been served with FORM 1, unless otherwise directed by the Court.

80. FORM 2 must be filed whether or not the Defence intends to rely on any of the sections specified therein, namely sections 31 CJPA, 504 CC or 514 CC.

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

STATUTORY TIMEFRAME FOR NOTICE OF S. 31 CJPA APPLICATION

81. Section 31(3) CJPA:
'*No oral application may be made under subsection (1) unless the applicant has given to the Supreme Court written notice of his intention to make the application*'.

82. FORM 2 is the notice of intention requisite to the making of a section 31 CJPA application. FORM 2 must be filed within 7 days of the Defence having been served with FORM 1.

83. Section 31(1) CJPA:
'*A person who is sent for trial under section 23 or 24 on any charge or charges may, at any time-*
(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and
(b) before he is arraigned (and whether or not an Indictment has been preferred against him) apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed'.

84. While it has been argued that a section 31 CJPA application may be made at any stage leading up to the start of a trial, the prevailing and accepted practice has been for the Accused to make the application prior to the first occasion on which the Accused is arraigned.

85. The timeline for making a section 31 CJPA application is expressly contemplated by the Act to be made *after* the Defence is served with '*copies of the documents containing the evidence on which the charge or charges are based*' (ie. under section 3 DCR).

86. The statutory timeframe for making a section 31 CJPA application therefore accords with the deadline for filing FORM 2 as it is envisaged that the Defence will have been served with disclosure of the Crown's case at this point but not yet have been arraigned.

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

STATUTORY TIMEFRAME FOR NOTICE OF S. 504 CC APPLICATION

87. A motion to quash an Indictment may be made by the Defence prior to the Accused entering of a plea.

88. Section 504(1) CC:
'*The accused person may before pleading apply to the Supreme Court to quash the indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge, or that it is formally defective.*'

89. The timing for a section 504 CC application parallels a section 31 CJPA application only to the extent that both applications should be made prior to the arraignment of the Accused. However, the timeframe for making a section 504

CC application, unlike a section 31 CJPA application, is untied to service of prosecution evidence. Thus, a section 504 CC application can be made before the Defence has been disclosed with copies of the Crown's evidence.

90. This allows the Defence the opportunity to provide the Court with early notice of a section 504 application even before FORM 2 is due to be filed. Such early notice can be stated in Court at the first arraignment session or sent by letter to the Registrar.

91. In any event, FORM 2 is the formal notice of application for a section 504 CC application.

92. FORM 2 must be filed no later than within 7 days after the Defence has been served with FORM 1, irrespective of the applicability of section 504, unless the Court orders otherwise.

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

STATUTORY TIMEFRAME FOR NOTICE OF S. 514 CC

93. Like an application made under either section 31 CJPA or 504 CC, a section 514 concern should be made known to the Court before the Accused is called upon to enter a plea.

94. Section 514(1) CC provides:
'*If, when an accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, the jury shall be empanelled forthwith, who shall be sworn to find whether he is capable or not.*'

95. Unlike a section 31 CJPA application but similar to a section 504 CC application, service of prosecution evidence is not a pre-condition of section 514. Therefore, the Defence should not tarry in making it known to the Court if there are concerns that the Accused is unfit to plead. Such an indication may be communicated to the Court in advance of the filing of FORM 2 by letter to the Registrar.

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

BREACH OF FORM 2 FILING DEADLINE

96. FORM 2 must be filed and served whether or not any of the applications specified therein are intended to be made.

97. Where the Defence fails to promptly file FORM 2, the Court will be moved to consider whether to proceed to arraign the Accused.

98. In circumstances where the Court proceeds to arraign the Accused and the Accused stands mute, the Court will have regard to its section 509 CC powers to consider and treat the non-reply as a not-guilty plea.

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

(Questions 1-10)

SECTION 31 CJPA APPLICATION FOR DISMISSAL

99. Historically, the committal process in the Magistrates' Court in Bermuda provided for the option of a Short Form Preliminary Inquiry (SFPI), a Long Form Preliminary Inquiry (LFPI) and/or a hybrid inquiry most commonly referred to as a 'SFPI with submissions'. These Magistrates' Court preliminary inquiries have now been repealed by the Criminal Justice and Procedure Act 2015 (CJPA). (Also see *The Queen v Daymon Simmons and Sabian Hayward [2016] SC (Bda) 74 Crim (18 July 2016*).

100. The current *sending* regime now tasks the determination of evidential sufficiency to the Supreme Court under section 31 CJPA. As section 37 PACE requires the Director of Public Prosecutions to determine that there is sufficient evidence *before* charging a person with an offence, section 31 operates as a review of the DPP's determination on sufficiency under section 37 PACE.

101. Questions 1-6 of FORM 1 serve as a broad inquiry into whether (or to what extent) disclosure has been made in order for a section 31(1) CJPA application to be made. As the test is based on the lower evidential threshold of *sufficiency*, the disclosure questions which appear in questions 1-6 require less detail than the disclosure questions found in FORM 3.

102. Questions 7 – 10 simply seeks confirmation on whether or not a section 31 application will be made and, if so, whether Counsel have properly liaised with one another.

FORM 2

(Questions 11-14)

MOTION TO QUASH INDICTMENT

103. Section 488(2) CC:
"(2) An objection to an indictment or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused person enters a plea, and, after the accused person has entered a plea, only by leave of the court before which the proceedings take place.
(3)The court before which an objection is taken under this section may, if it considers necessary, order the indictment or count to be amended to cure the defect."

Section 504(1) CC:
"*The accused person may before pleading apply to the Supreme Court to quash the Indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge, or that it is formally defective*."

Section 506(1) CC:

"*If the accused person does not apply to quash the Indictment, he must either plead to it, or demur to it on the ground that it does not disclose any offence cognizable by the Supreme Court.*"

104. Questions 11-12 prompt the Defence for notice of whether an application to quash the Indictment will be made.

105. FORM 2 is the notice of motion required for the listing of an application to quash the Indictment under section 504 CC.

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

(Questions 15-18)

NOTICE ACCUSED UNFIT TO PLEAD

106. Questions 15-18 are as an inquiry into whether the Defence has concerns that the Accused is unfit to plead.

107. Section 514 CC:
"Want of understanding of accused person
(1) If, when an accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, the jury shall be empaneled forthwith, who shall be sworn to find whether he is capable or not.
(2) If the jury find that he is capable of understanding the proceedings, the trial shall proceed as in other cases.
(3)If the jury find that he is not so capable, the finding shall be recorded, and the Supreme Court shall order the accused person to be kept in strict custody in such place and in such manner as the Court thinks fit, until the pleasure of the Governor, acting in his discretion, is known.
(4) A person so found to be incapable of understanding the proceedings at the trial may be again called upon to plead to the indictment and to be tried for the offence."

FORM 2 **(DEFENCE PRE-ARRAIGNMENT NOTICE)**

(Questions 19-22)

INDICATION ON PLEAS TO BE ENTERED

108. Questions 19-22 are included as a measure to assist the Court in managing the trial calendar. Where the Defence are well aware of an intention by the Accused to enter a guilty plea(s), early notice should be given to the Court through this section of FORM 2.

109. An Accused, whose intention to plead guilty is confirmed on FORM 2, has the benefit of clear and easy reference to proof of an early indication of a guilty plea. This is, of course, most significant during the sentence stage when considering mitigating factors.

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

SIGNATURE OF COUNSEL OR ACCUSED REQUIRED ON FORM 2

110. The Signature portion of FORM 2 requires the signature of either the Accused or Defence Counsel.

FORM 2 must be completed separately in respect of each Accused person

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FORM 3 (DEFENCE DISCLSOURE STATEMENT)

GENERAL

111. FORM 3 is the Defence Disclosure Statement which must be filed and served in accordance with section 5 DCR. FORM 3 is principally divided into two parts:

(i) Questions 1-51 inquire into the Defence's position on the Prosecution's level of compliance with its disclosure duties under sections 3 and 4 DCR (as reported by the Prosecution in FORM 1); and

(ii) Questions 52-71 relate to the Defence case and the Defence's general duties to assist the Court in its case management duties (see rule 3.3 of the Criminal Procedure Rules 2013 (CPR)) and section 5 DCR.

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

COVER LETTER TO THE REGISTRAR

112. FORM 3 must be filed under a cover letter to the Registrar confirming:

(i) the enclosure of both FORM 3 and FORM 4[5];

(ii) compliance (or non-compliance) with the required timeframe for filing; (where there is non-compliance, an explanation should be included in the cover letter);

(iii) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

(iv) where an oral hearing is requested, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 30 day period from the filing date; and

(vi) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

[5] FORM 3 and FORM 4 are to be filed together under the same filing cover letter

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

JOINT HEARING BUNDLES

113. Where the Defence intends to make a written or oral application, a copy of any skeleton argument and related case law which the Defence intends to place before the Court shall be served (not filed) on the Prosecution on the same day that FORM 2 is filed and served.

114. The Prosecution will then have 3 days thereafter within which to serve the Defence with a copy of any skeleton argument and /or case law in reply or in objection to the application.

115. Within 2 days of receipt of the Prosecution's reply (or in the case where there is no reply from the Prosecution: no less than 5 days but no more than 7 days after serving the Prosecution with the Defence skeleton argument and / or case law), the Defence shall file all of the exchanged materials as a joint hearing bundle for the Court.

A **FORM 3 (DEFENCE DISCLSOURE STATEMENT)**

TIMELINE TO FILE AND SERVE:

116. FORM 3 is the Defence Statement which must be filed and served within 28 days of the Defence having been served with FORM 1 by the Prosecution.

117. The Defence disclosure obligations under section 5 DCR are statutorily triggered upon the Prosecution's compliance with sections 3(1) and 4(1) DCR.

Section 5(1) DCR:
"5(1) Provided the prosecutor has-

a. complied with his obligations under section 3(1); and
b. complied with his obligations under section 4(1),

an accused person, shall be obligated to serve a defence statement on the prosecutor and the court within 28 days after the prosecutor complies with its duty to disclose under section 3."

118. The kick-start to the 28 day countdown is contingent on the Prosecution having complied with its duty to disclose its case and any relevant unused material in its possession under sections 3(1) and 4(1) DCR, respectively.

119. However, under section 5 the computation of the 28 day timeline oddly starts from service of a section 3(1) notice alone. This has provoked some confusion.

120. For the avoidance of doubt, the 28 day timeframe for filing and serving FORM 3 starts once the Prosecution has verified the discharge of its 3(1) and 4(1) obligations through the filing and service of FORM 1.

121. Plainly put, **the Defence has 28 days within which to file and serve FORM 3 once the Prosecution has filed and served FORM 1**.

122. While the DCR does not specify a provision under which the Defence may apply to the Court for an extension of time to file its section 5 notice (ie FORM 3), leave of the Court should be sought nonetheless where the Defence require additional time to file and serve FORM 3.

123. Counsel should refer to sections 10 and 11 DCR as a reminder of the Courts statutory powers which apply where the Defence fails/refuses to comply with its disclosure obligations under the DCR.

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 1-38**)**

DEFENCE CHECKLIST FOR DISCLOSURE OF CROWN'S CASE:

124. Questions 1 – 38 relate to used material and give the Defence the opportunity to confirm the parts of the Crown's case which have been disclosed. The Defence is also required to report any undisclosed parts of the Crown's case, to the extent that it is known.

125. Disclosure of the Crown's case must be distinguished from disclosure of unused material (which is addressed by Questions 39-51). The distinction between used and unused material is set out in section 2 DCR. See paragraph 46 above.

126. The categories of used material under which the questions are arranged are as follows:
    (i) police and civilian witness statements;
    (ii) expert evidence;
    (iii) exhibits and aid memoires; and
    (iv) statements made by the Accused

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 39-51**)**

DEFENCE CHECKLIST FOR DISCLOSURE OF UNUSED MATERIAL:

127. This part of FORM 3 focuses on what the Defence has to say about service or non-service of relevant unused material in the possession of the Crown. Again, section 2 DCR is the starting point for reference to the meaning of relevant unused material. (See paragraph 46 above).

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 52-56**)**

NOTICE OF NATURE OF DEFENCE CASE

128. The answers to be provided in this portion of FORM 3 are intended to bring the Defence in compliance with section 5(2)(a) DCR.

129. The Defence must outline the nature of the Accused's defence including any particular defences on which the Accused intends to rely. Questions 52-54 in FORM 3 call for the Defence to fulfil its section 5(2)(a) DCR obligations.

130. Examples of defences for specification in FORM 3 include, *inter alia*:

(i) Statutory defence of **intoxication** under sections 42-43 CC;

(ii) Statutory defence of **necessity/duress** under section 39 CC (Extraordinary emergencies). (See *Billy Odoch v The Queen [2016] SC (Bda) 61 App* where the Learned Chief Justice, Ian Kawaley, cited *Daniels-v-R [2006] Bda LR 78*: "*in this case the accused in interview claimed that he had purchased a firearm to prevent it being sold to a young boy and intended to hand it in to the Police. Leading counsel at trial applied to vacate the plea on the grounds that he had not appreciated the Bermudian equivalent of the common law defence of duress. As trial judge, I refused leave. The Court of Appeal held that I ought to have permitted the plea to be vacated.*);

(iii) Statutory defence of **mistake of fact** under section 38 CC. (However, see *Kristopher Gibbons v The Queen and the Attorney General [2015] CA (Bda) 5 Crim* where the appellant filed a notice of motion under sections 1 and 6 of Schedule 2 to the Bermuda Constitution Order 1968 before the trial judge submitting that the effect of section 190(4)(aa) as read with sections 323 CC and/or 325 CC unfairly created an absolute liability offence where a defendant over 21 years had reasonable cause to believe and genuinely believed the victim to be 16 or older.);

(iv) Statutory defence of **provocation** (see sections 254-255 and 295 CC); and

(v) Statutory defence of **self defence** (see sections 257-259 CC) (see section 253 CC for defence of a dwelling house; sections 260-264 for defence of property). Section 269 outlines use of excessive force.

131. Section 5(2)(b)-(c) DCR requires the Defence to indicate (with reasons) factual portions asserted in the prosecution case which are disputed. Question 55 appears for this reason.

132. Question 56 appears as an alert to the Court and to the Crown on any defences which put in issue the Accused's lack of mental competency or a defective state of mind.

133. Examples of defences which put in issue the Accused's lack of mental competency or a defective state of mind:

(i) Statutory defence of **insanity** under section 41 CC (Also see section 546 CC on an acquittal on ground of insanity and the common law M'Naghten Rules HL (1843));

(ii) Statutory defence of **diminished responsibility** under section 297A CC; and

(iii) Common law defence of **automatism** (a rare defence which is more likely to arise in strict liability cases where the *actus reus* is denied on account of dissociation or hypo/hyperglycemia or sleepwalking) See *Bratty v A.G. for Northern Ireland (1963) A.C. 386* and *R v Quick/Paddison [1973] 3 WLR 26;* (In *R v Quick* (ante) an analysis of the distinction between insanity and automatism was broadly compared to the difference between 'disease of mind' and 'defect of reason'.)

134. Notably, section 33 and 38 applications under the Mental Health Act 1968 only arise post-conviction and refer to the Court's powers to authorize the admission to and detention in a hospital.

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 57-58**)**:

NOTICE OF ALIBI DEFENCE

135. Section 30 of the Evidence Act 1905 (Notice of alibi) was repealed by section 17 DCR.

136. Questions 57-58 on alibi evidence arise out of the obligations imposed by section 5(3) DCR which provides as follows:

"*A defence statement that discloses an alibi defence shall give particulars of the alibi defence, including-*
the name, address and date of birth of any witness the accused person intends to call to give evidence in support of the alibi, or as many of those details as are known to the accused person when the statement is given;
any information in the accused person's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused person when the statement is given."

137. An alibi defence envisages the commission of an offence which necessarily involves the Accused being present at a particular place and at a particular time. (See *R v. Hassan, 54 Cr. App. R. 56, CA.*)

138. Evidence which merely indicates the Accused was not present at the scene of the crime, with no positive assertion (or suggestion) as to where he/she was, is not alibi evidence for the purpose of section 5(3) of the DCR. (Also see Archbold 2009 edition para 4-317). Further, alibi evidence is irrelevant where the Crown's case does not depend on the Accused being present at the crime scene. For example, where the Crown alleges that a Defendant ordered an unlawful killing as opposed to having committed the act itself, alibi evidence is of no use.

(See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014 paragraph 44* and *Devon Hewey and Jay Dill v The Queen [2016] CA (Bda) 9 Crim*; and *R v Lesley* [1996] 1 CR APP R 39 and *Blakeney and Grant v The Queen [2014] Bda LR 32*).

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 59-65**)**:

NOTICE OF DEFENCE EXPERT REPORTS

139. The Defence is required to disclose any expert reports which are intended to form part of the Defence case. Ultimately, the Court must be made aware of any pending expert evidence from the Defence.

140. This is consistent with:
   (i) the overriding objective in rule 1.1 CPR;
   (ii) the parties' obligations to assist the Court in its case management duties under rule 3.3 CPR; and
   (iii) the intention underlying section 5 DCR for the Defence to disclose its case.

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Question 66**)**:

RIGHTS OF THE ACCUSED (DECISION TO GIVE EVIDENCE)

141. Question 66 is an important reminder to Defence Counsel to refer to *Practice Direction (Supreme Court of Bermuda) No. 7 of 2008* which, in summary, requires Counsel to make a written record of the facts surrounding an Accused's decision not to give evidence in his own defence:

PD No. 7 of 2008:
"*Counsel are reminded that where it is decided that the defendant will not give evidence, this should be recorded in writing, along with a brief summary of the reasons for that decision. Wherever possible, the record should be endorsed by the defendant. This statement of principle is taken from the judgment of the Privy Council in Ebanks v* R *[2006] UKPC 16, at [18].*

Indeed, defending counsel should as a matter of course make and preserve a written record of all the instructions he receives, including a witness statement: Ibid. [17], quoting and applying Bethel v The State (1998) 55 WIR 394, at 398.

These principles are of universal application and are not limited to capital cases or to England & Wales: Ebanks v R *(supra) at [17].*

The practice has recently been reinforced by several cases in Bermuda Court of Appeal, and should now be well understood by the profession. In view of that, in future Counsel who fail to comply may be subject to disciplinary proceedings."

142. An Accused person should also be clear on his/her right to call witnesses in his own defence. Those witnesses may include expert witnesses. (See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014*).

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Question 67**)**:

ACCUSED AND WITNESSES SUBJECT TO CROSS-EXAMINATION

143. Question 67 applies to the rule that any Defence witness who gives evidence in Court is liable to be cross-examined by the Prosecutor. In multi-defendant trials, the Accused should also be made aware of the Co-Accused's right to cross-examine under section 529 CC:

"*Where during a joint trial one of the accused persons gives evidence, and by such evidence to incriminates one of the Co-accused persons, then that co-accused person shall be entitled to cross-examine him, and such cross-examination shall take place before cross-examination by Counsel for the Prosecution.*"

144. Further, on the subject of cross-examination, the Accused should be made to understand that the Prosecutor is likely to assert fabrication if any disputed fact stated by the Accused in evidence was not previously put by Defence Counsel during cross examination of the Crown witnesses (See *R v Kiana Trott-Edwards CA (Bda) Nos. 14 and 20 of 2015*);

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Question 68**)**:

ADVISING ACCUSED ON RULES ON CHARACTER EVIDENCE

145. Question 68 is intended to ensure the Accused understands the basic framework of the law on character evidence. Prior to trial, an Accused should be made aware of his right to decide whether to adduce character evidence as part of his defence.

146. The Accused should also be clear that the Prosecutor is likely to seek the Court's leave for the Accused to be cross-examined on any previous convictions where the Accused speaks to his/her own good character or impugns (attacks) the character of a Crown witness.

147. Counsel should refer to the principles laid down in *Makin v The Attorney General for New South Wales [1894] AC 57*. (Also see *Jamar Dill v The Queen [2013] CA (Bda) 7 Crim*).

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Questions 69-70**)**:

CLIENT INSTRUCTIONS / SHARING DISCLOSURE WITH ACCUSED

148. Questions 69 and 70 are aimed to eliminate (or at least reduce) complaints on appeal that Defence Counsel failed to take full instructions or make the Accused aware of all the evidence served. (See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014*).

149. The signature requirements at the end of FORM 3 are a further safeguard in this respect. (See paragraphs 152-153 below).

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

(Question 71**):**

JURY SELECTION AND ACCUSED'S RIGHT TO CHALLENGE

150. Question 70 is included to ensure that the Accused is aware of the jury selection process and specifically of the right to challenge 3 jurors selected.

151. Notwithstanding, it is the Court's duty to inform the Accused in open court of his/her right to challenge up to three jurors before the jury is sworn. (See sections 517 and 519-520 CC and the Jurors Act 1971) (Also see *R v Julian Washington (Court of Appeal) No. 8 of 2014* on the subject of jury eligibility.)

FORM 3 (DEFENCE DISCLSOURE STATEMENT)

SIGNATURES:

152. The signature portion at the end of FORM 3 requires the signature of the Accused, personally. This is in line with section sections 5(5) and 5(6) DCR.

153. Where the Accused is represented, Defence Counsel is also required to sign FORM 3.

FORM 3 must be separately completed in respect of each Accused person

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FORM 4 (DEFENCE TRIAL TIMETABLE) and FORM 5 (PROSECUTION TRIAL TIMETABLE)

GENERAL

154. FORM 4 and FORM 5 are the trial timetable notices. The intention is for these two forms to assist in preventing trial delays / adjournments occasioned by Counsel seeking to:

(i) consider the late disclosure of unused material or additional evidence;
(ii) liaise with one another in respect of pre-trial applications and objections;
(iii) exchange skeleton arguments and/or case law for legal arguments;
(iv) edit transcripts and video / audio footage by agreement;
(v) edit photo albums by agreement;
(vi) consider witnesses whose evidence may be read in;
(vii) view exhibits in Court; and/or
(viii) obtain electronic equipment or other aids for the presentation of evidence

155. Adjournments or delays for any of these reasons are most often avoidable where both sides have applied adequate thought and attention to these issues prior to trial.

FORM 4 (DEFENCE TRIAL TIMETABLE)

COVER LETTER TO REGISTRAR

156. FORM 4 is to be filed together with FORM 3 under a cover letter to the Registrar. See FORM 3 cover letter requirements above.

FORM 4 (DEFENCE TRIAL TIMETABLE)

JOINT HEARING BUNDLES

157. Where the Defence intends to make a written or oral application, a copy of any skeleton argument and related case law which the Defence intends to place before the Court shall be served (not filed) on the Prosecution on the same day that FORM 4 is filed and served.

158. The Prosecution will then have 3 days thereafter within which to serve the Defence with a copy of any skeleton argument and /or case law in reply or in objection to the application.

159. Within 2 days of receipt of the Prosecution's reply (or in the case where there is no reply from the Prosecution: no less than 5 days but no more than 7 days after serving the Prosecution with the Defence skeleton argument and / or case law), the Defence shall file all of the exchanged materials as a joint hearing bundle for the Court.

FORM 4 (DEFENCE TRIAL TIMETABLE)

TIMELINE FOR FILING AND SERVICE

160. FORM 4 is the Trial Timetable Notice and it must be filed and served by the Defence simultaneously with FORM 3. Therefore, like FORM 3, FORM 4 must be filed and served within 28 days from the date on which the Prosecution files and serves FORM 1.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 1-4**)**

NOTICE OF PRE-TRIAL APPLICATIONS

161. The Defence is also required under section 5(2)(d) to give an indication on any point of law (including admissibility of evidence or an abuse of process) which is intended to be taken. Further, any case law which is intended to be used for that purpose should be stated. Compliance with section 5(2)(d) is achieved through FORM 4 which must be filed and served at the same time as FORM 3.

162. Notice of a pre-trial application must include notice of any of the following applications, *inter alia*:

(i) **applications for further particulars of indictment** (see section 490 CC) (requests for further particulars of indictment often arise in multi-defendant cases where the issue of joint enterprise comes into play under sections 27 and 28 CC: *R Cox, Hewey and Washington SC*; and *Bean and Simons v The Queen [2014] Bda LR 30*; *Eberly v R 1999 Criminal Appeal No. 11 Pitcher v R 1999 Criminal Appeal No. 7; Stacy Robinson v The Queen [2015] Bda LR 119; R v Searle* [1971] Crim LR 592; *Sidney O'Neil Gibbons And Ronald O'Neal Beach v The Queen [2009] Bda LR 41; Sousa, Tucker and Simons v The Queen [2010] Bda LR 76*

(ii) **applications in relation to the Prosecutor's opening speech at trial** Defence Counsel should give early consideration to any areas of evidence which are objectionable and which ought not to be included in the opening speech from its perspective. Counsel for both sides should attempt to resolve any such points arising well in advance of the start of the trial. Where an agreement has not been obtained, concerns by Defence Counsel should be included in this part of the pre-trial application questions.

(iii) **severance applications** (see section 515 CC)

(iv) **applications for order requiring prosecutor to elect between charges** on indictment (see section 480 (2)(a) CC)

(v) applications relating to **alternative counts on indictments or lesser included offences** (see sections 492-497CC)

(vi) **application for site visits** (see section 531 CC)

(vii) **adjournment applications** (see sections 489A CC and 501 CC and Practice Direction issued 18 May 2004 by former Chief Justice, Richard Ground)

(viii) **applications for reporting restrictions** (see section 476K CC)

(ix) **abuse of process applications** (see *The Queen v N.M. [2015] CA (Bda) 13 Crim; The Queen v Durrant and Gardner CA (Bda) LR 85*; *Aaron O'Connor v The Queen [2015] CA (Bda) 30 Crim*) and *The Queen v Rabain 2001 Criminal Jur. No. 12 [2001] SC (Bda) LR 21 and 2001 Crim App No. 5 [2001] CA (Bda) LR 10)*

(x) **bias applications / conflicts of interest points** (see *Frederick Matthews v Amy Trott et al [2015] Bda LR 40 F v F [2015] Bda LR 66 paras 44-51)*; *Pintori [2007] EWCA Crim 1700*; *Terrence Smith [2007] Bda LR 80*; *R v Julian Washington [2016] CA (Bda) 10* and *Porter v Magill [2001] UKHL.69 para 103*: "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*."

(xi) **constitutional motions** (see *Kristopher Gibbons v The Queen and the Attorney General [2015] CA (Bda) 5 Crim)*

(xii) **jurisdictional points** *R v Anthony Seymour [2004] CA (Bda) LR 62* and *[2007] UKPC 59*

(xiii) **application for an order appointing commissioner to take the evidence of a witness** (PART XXVIA Sections 543A-543D CC)

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 5-10**)**

ADMISSIBILITY OBJECTIONS

163. Section 93 of PACE grants the Court the power to exclude any evidence on which the Prosecution propose to rely if it appears to the Court, having regard to all circumstances, including the circumstances in which the evidence was obtained, that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

164. The Supreme Court and Court of Appeal has considered the issue of **admissibility of gang evidence** in the following cases: *Brangman v R [2011] Bda LR 64*; *Myers v R [2012] Bda LR 74*; *Cox v R [2012] Bda LR 72*; *Muhammad v R [2014] Bda LR 27; Blakeney and Grant v R [2014] Bda LR 32* and *Warner v R [2012] Bda LR 73*.

165. The Privy Council then went on to review and uphold the Court of Appeal's decisions on **admissibility of gang evidence** in *Meyers v R, Brangman v R and Cox v R [2015] UKPC 40*. Thereafter, with the benefit of the *Meyers* and *Cox* judgments, the Court of Appeal went on to consider and approve the admission of gang evidence in *Julian Washington v The Queen [2016] CA Crim (Bda) 10* and *Devon Hewey and Jay Dill v. The Queen [2016] CA Crim (Bda) 9*.

166. The Court of Appeal disapproved the **admission of GSR particle evidence** and **collateral fact evidence** on the grounds of **propensity** in *Wolda Gardner v The Queen [2016] CA Crim (Bda) 10*.

167. See sections 90(2) and 93 of PACE and *R v Darronte Dill [2010] (SC Bda) LR 4* and *McQueen v Raynor (Police Constable) [2007] Bda LR 63* on **admissibility of confession statements by the Accused**. For pre-PACE decisions where the Judges' Rules 1964 were engaged, see *The Queen v Paco Fubler [2000] (SC Bda) LR 35*; *The Queen v Albert Allen [2004] (SC Bda) LR 38; Tucker v R, Dill v R [2005] Bda LR 9;* and *R v Ronald Mapp [2004] (SC Bda) LR 61.*

168. See *Sousa v R, Tucker v R, Simons v R [2010] (CA Bda) LR 76* on the **admissibility of evidence of out of court statements** in a multi defendant trial.

169. In *John Malcolm White v The Queen [2003] (SC Bda) Unreported*; *Smith v Osborne (Police Sergeant [1987] Bda LR 28* and *Neville Junior Simons v The Queen [1988] Bda LR 6* the **admissibility of similar fact evidence** was considered. (See also leading UK case law *Boardman v DPP (1970) 60 Cr App R 165* and *R v Chauhan (1981) 73 Cr App R 232*).

170. Section 81 of PACE on the **admissibility of expert reports** renders an export report admissible whether or not the person making it attends Court to give oral evidence so long as leave has been given by the Court.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 11-14**)**

PROOF BY FORMAL ADMISSIONS

171. Proof by formal admission is made under section 30 of the Evidence Act 1905:

"*(1)…any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or the accused person, and the admission by any party of any such fact under this section shall as against that party be conclusive in those proceedings of the fact admitted.*

(2) Any admission under this section-

(a) may be made before or at the proceedings;

(b) if made otherwise than in open court, shall be in writing;

(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk; or some other similar officer of the body corporate;

(d) if made on behalf of an accused person who is an individual, shall be made by his counsel;

(e) if made at any stage before the trial by an accused person who is an individual and who is represented at his trial by counsel, must be approved by his counsel (whether at the time it was made or subsequently) before or at the proceedings in question.

(3) An admission under this section for the purpose of the proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including an appeal or retrial).

(4) An admission under this section may, with leave of the court, be withdrawn in the proceedings for the purpose of which it was made or any subsequent criminal proceedings relating to the same matter."

172. Questions 11-14 in FORM 4 are intended to prompt Counsel to identify, as part of the pre-trial court management process, any non-contentious evidence which can be placed before the Court by way of formal admission. Counsel should take all reasonable steps to avoid leaving consideration of formal admissions to the mid-trial stage.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 15-19**)**

READ-INS/TENDER OF WITNESS STATEMENTS:

173. Section 29(1) of the Evidence Act makes proofs by written statement just as admissible as oral evidence in respect of any person where the following conditions are satisfied under 29(2):

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true;

(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(d) none of the other parties or their counsel, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that the conditions mentioned in paragraph (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

174. Section 29(3)(d) provides that where a statement tendered in evidence refers to any other document as an exhibit, the copy served on any other party to the proceedings shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it was served to inspect that document or a copy thereof.

175. Also see section 29(4)(b): …*the court may, of its own motion or on the application of any party to the proceedings, require that person to attend before the court to give evidence*.

176. Part VIII of PACE covers documentary evidence in criminal proceedings. Section 75(1) allows for the admission of first-hand hearsay evidence: *a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if-*
(a) the requirements of one of the paragraphs of subsection (2) are satisfied; or
(b) the requirements of subsection (3) are satisfied

The subsection (2) requirements mentioned in section 75(1)(a) are:
(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
(b) that-
(i) the person who made the statement is outside of Bermuda; and
(ii) it is not reasonably practicable to secure his attendance; or
(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

The subsection (3) requirements mentioned in section 75(1)(b) are:
(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

177. Section 77 of PACE gives the Supreme Court the authority to direct the exclusion of a statement that is otherwise admissible under the above provisions if it is of the opinion that in the interests of justice it ought not to be admitted. (See section 77(2) for a list of the considerations to which the Court must have regard in deciding whether to exclude such a statement.)

178. Section 78 uniquely applies to statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations:
Where a statement which is admissible in criminal proceedings by virtue of section 75 or 76 appears to the court to have been prepared…for the purposes-
(a) pending of contemplated criminal proceedings; or
(b) of a criminal investigation,
the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard-
(i) to the contents of the statement;
(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any one of them; and
(iii) to any other circumstances that appear to the court to be relevant.

179. For examples of cases where the Court relied on sections 75 and 78 of PACE see: *Lorenzo Lottimore and Craig Hatherley v The Queen [2013] CA Crim (Bda) 1 Criminal Appeals Nos 12 of 2012 & 1 of 2013 (paras 39-40)*; and *Devon Hewey and Jay Dill v The Queen [2016] CA (Bda) 9 Crim*.

180. Section 79 refers to proofs of statements contained in documents:
Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved-
(a) by the production of that document; or
(b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,
Authenticated in such manner as the court may approve; and it is immaterial for the purposes of this section how many removes there are between a copy and the original.

181. Also see section 34 CJPA which contemplates circumstances when depositions may be read in as evidence on order of the Court

182. Counsel should fully consider the applicability of the above provisions and collaborate with the other side on whether any statements are likely to be tendered or whether the Court needs to be addressed in this regard as part of pre-trial case management.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 20-25**)**

TENDER OF WITNESS FOR CROSS-EXAMINATION:

Witnesses on Back of Indictment

183. In the UK, the significance of the term '*witnesses whose names are on the back of the Indictment*' is explained as follows:

"*Having opened his case, prosecuting counsel calls his witnesses and reads out any written statements admissible under exceptions to the rule against hearsay. As a matter of practice, he should call, or read the statements of, all witnesses whose statements have been served, or, to use the traditional phrase 'witnesses whose names are on the back of the indictment'.*

(This terminology derives from the former UK practice of listing the Prosecution witness names on the back of the Indictment)

Although counsel has a discretion not to call a witness on the back of the indictment, he must exercise his discretion in a proper manner and not for what Lord Thankerton in Adel Muhammed El Dabbah v A-G for Palestine [1944] AC 156 described as 'some oblique motive' (e.g., unfairly so as to surprise or prejudice the defence)." (See Blackstone's Criminal Practice 2010 edn D14.6)

184. For the purpose of determining the Bermuda version of the '*witnesses whose names are on the back of the Indictment*' the Court will look to those witnesses who gave statements which were served on the Defence in compliance with section 3 DCR.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 26-37**)**

EDITING EVIDENCE

185. Counsel ought to engage in discussions with one another as early as possible on whether there is a mutual need or a unilateral request for the editing of evidence. This may include, but is not limited to:

(i) evidence in video/audio format;
(ii) transcripts of evidence; and
(iii) photographs

186. Trials ought not to be interrupted or delayed due to late discussions between Counsel on editing.

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 38-50**)**

ESTIMATING DURATION OF EVIDENCE

187. Counsel are duty-bound to assist the Court under the various stated CPR provisions. As such the Defence are expected to advise the Court as prudently as they are able on the likely duration of their witnesses in chief. The Court should also be made aware of the precise duration of any video or audio footage which is intended to be put in evidence.

188. Questions 47-50 call for notice of a requested site visit for the same reason. (See section 531 CC on the Court's authority to direct the jury to view any place or thing which the Court thinks desirable.)

FORM 4 (DEFENCE TRIAL TIMETABLE)

(Questions 51-52**)**

COURT SECURITY

189. Both Counsel for the Prosecution and for the Defence have ultimate responsibilities to the Court as officers of the Court themselves. As such, any issues or concerns which may effectively compromise the security of the Court should be made known to the Court promptly.

FORM 4 (DEFENCE TRIAL TIMETABLE)

SIGNATURES

190. Unlike FORM 3, FORM 4 does not require the signature of the Accused personally in circumstances where the Accused is represented by Counsel.

FORM 4 must be separately completed in respect of each Accused person

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FORM 5 (PROSECUTION TRIAL TIMETABLE)

COVER LETTER TO THE REGISTRAR

191. FORM 5 must be filed under a cover letter to the Registrar stating the following:

(vii) compliance (or non-compliance) with the required timeframe for filing- (where there is non-compliance, an explanation should be included in the cover letter);

(viii) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

(ix) where a hearing date is requested, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 60 day period from the filing date; and

(x) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

JOINT HEARING BUNDLES

192. Where the Prosecution intends to make a written or oral application, a copy of any skeleton argument and related case law which the Prosecution intends to place before the Court shall be served (not filed) on the Defence on the same day that FORM 5 is filed and served.

193. The Defence will then have 3 days thereafter within which to serve the Prosecution with a copy of any skeleton argument and /or case law in reply or in objection to the application.

194. Within 2 days of receipt of the Defence's reply (or in the case where there is no reply from the Defence: no less than 5 days but no more than 7 days after serving the Defence with the Prosecution's skeleton argument and / or case law), the Prosecution shall file all of the exchanged materials as a joint hearing bundle for the Court.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

(Questions 1-4**)**

PRE-TRIAL APPLICATIONS

195. While section 3 of the DCR does not expressly confer an obligation on the Crown to give notice of any prosecution pre-trial applications, all other principles and rules of law do (including the CPR).

196. Compliance with notice requirements is achieved through FORM 5 which must be filed and served within 14 days from the day on which the Prosecution was been served with FORM 4.

197. The pre-trial application question here is aimed to include notice of any range of applications including, *inter alia*:

(i) **applications to amend the indictment** (section 489 of the CC)

(ii) **applications for the clearance of the Court while a child is giving evidence** (see section 542 of the CC)

(iii) **applications for the clearance of the Court** during taking of other evidence in particular cases (section 543 of the CC)

(iv) **applications for Complainant to testify outside the Courtroom** (section 542A of the CC)

(v) **applications for an order appointing commissioner to take the evidence of a witness** (PART XXVIA Sections 543A-543D of the CC);

(xiv) **applications for site visits** (see section 531 of the CC)

(xv) **applications for an order for a statement to be read in as evidence** (section 34 of the CJPA, section 29 of the Evidence Act and sections 75,78-79 of PACE) ; and

(xvi) **applications for admission of similar fact evidence** (*John Malcolm White v The Queen [2003] (SC Bda) Unreported*; *Smith v Osborne (Police Sergeant [1987] Bda LR 28* and *Neville Junior Simons v The Queen [1988] Bda LR 6*; *Boardman v DPP (1970) 60 Cr App R 165* and *R v Chauhan (1981) 73 Cr App R 232*).

FORM 5 (PROSECUTION TIMETABLE)

(Questions 11-16**)**

NOTICES OF ADDITIONAL EVIDENCE

198. Notices of Additional Evidence relate only to evidence which the Crown intend to rely on. Section 3 of the DCR states the Prosecutions duty to disclose its case. Section 29 of the CJPA provides an ultimate 70 day deadline from the *sent* date for service of used and unused evidence.

199. Accordingly, any Notices of Additional Evidence for filing after the said section 29 deadline should only be done after leave of the Court is issued under section 30 of the CJPA (applications for extension of time).

200. While a literal interpretation of the wording of section 30 unintentionally suggests a need for the Crown to obtain leave in order to *disclose* evidence beyond the section 29 deadline, in practice the application for leave of the Court is actually for the allowance of the admission of the evidence in question. Whether the not the Crown obtain leave under section 30, **the duty to disclose that evidence to the Defence is absolute**.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

(Questions 17-20**)**

CONTINUING DUTY TO DISCLOSE RELEVANT UNUSED EVIDENCE

201. The requirement for the Crown to obtain leave under section 30 for an extension of time is not to be confused with the Crown's continuing duty to disclose unused material. (See section 6 and 7 of the DCR).

202. The Prosecutor should also refer to section 9 DCR for reference to the potential consequences of failure to disclose relevant unused material. (Notably section 9 refers to the Prosecutor's failure to '*disclose relevant unused material as required by sections 5* (sic) *and 7'*. The reference to section 5 appears to be a draftsman's slip as the Prosecutor's duty to disclose unused material arises under section 4.)

203. Ultimately, the Court may stay proceedings where the prosecutor's failure to disclose relevant unused material amounts to the accused being denied a fair trial.

204. The Crown is duty bound to disclose all relevant evidence whether it proposes to rely on that evidence or not.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

(Questions 21-22**)**

ORDER OF WITNESSES/ SCHEDULE OF EXHIBITS

205. The Prosecution is expected to prepare and produce a list outlining the order of Crown witnesses and a schedule of Crown exhibits as part of the case management process.

206. Where changes are made in this regard, the Prosecution will be expected to make the Court and the Defence aware of those changes without unwarranted or unreasonable delay.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

(Questions 23-31**)**

TRIAL TIME ESTIMATES

207. The Prosecution is required to assist the Court on the likely duration of the Crown's case. This may include the need for an indication of the number of Crown witnesses who will be giving *viva voce* evidence and the likely duration of their evidence in chief. This would also include notifying the Court of the duration of any video or audio evidence to be played in Court.

208. Further, the Crown is expected to give the earliest notice practicable of a request for the jury to attend any particular place for viewing under section 531 CC.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

(Questions 32-37**)**

CROWN WITNESS READ-INS

209. It is the Prosecutor's responsibility to prepare and serve a list of the Crown witnesses proposed to be read into evidence. Once this list is served, the ball is in the corner of the Defence.

210. See paragraphs 173-182 above for the provisions of law on reading in statements.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

COURT SECURITY

211. See paragraph 189 above.

FORM 5 (PROSECUTION TRIAL TIMETABLE)

SIGNATURES

212. The signature boxes at the end of FORM 5 are subject to the same requirements as those for FORM 1 (see paragraphs 69-70 above).

FORM 5 must be separately completed in respect of each Accused person

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Dated this 3 day of January 2017

Shade Subair Williams
REGISTRAR

To: The Director of Public Prosecutions
All Barristers and Attorneys