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CPM 1 GENERAL MATTERS - REGISTRARS' JURISDICTION AND BAIL

Summary: *This Circular¹ sets out the District Court's practices for the exercise of criminal jurisdiction by registrars. It also deals with variations to bail.*

1.1 Introduction

1.1.1 A reference in this Circular to a registrar is to a legally qualified Registrar.

1.1.2 The *Criminal Procedure Act 2004 (WA) (CPA)* s 124(5) and *Criminal Procedure Rules 2005 (WA) (CPR)* r 5A, delegate the criminal jurisdiction of the court (including under any other written law) to registrars, except the jurisdiction to:

- a) find a person guilty or not guilty of an offence;
- b) discharge an accused from a charge;
- c) consent to the discontinuance of a charge in a case where the accused does not consent to the discontinuance;
- d) stay a prosecution;
- e) set aside a committal; and
- f) find a person guilty of a contempt of the court.

1.1.3 A registrar may:

- a) refer any proceedings before him / her to a Judge who may deal with the proceedings or refer them back with or without directions: CPR r 5B(1); and
- b) make an interim order, pending the determination of the proceedings: CPR r 5B(1).

1.1.4 In practice, the exercise of the court's criminal jurisdiction by registrars tends to be limited, as set out further below.

1.2 Sentence mention hearings

1.2.1 Sentence mention lists (SMLs) will ordinarily be before a registrar.

1.2.2 Practices in relation to SMLs are set out in CPM 4 – *Sentencing Mention Hearings*.

1.3 Consent orders

1.3.1 Registrars may make directions and orders by consent: CPR r 5A and r 25A.

1.3.2 However, registrars:

- a) cannot make a consent order that would finally determine a prosecution: CPR r 25A(6) – this includes an order discontinuing a prosecution;
- b) as a matter of practice, will
 - i) only deal with consent orders concerning matters that a registrar might otherwise deal with in open court; and
 - ii) not deal with a consent order to edit a record of interview or visually recorded interview.

1.4 Bail and surety matters

1.4.1 Applications to vary bail by consent may be dealt with by a registrar. As a matter of practice:

¹ Formerly CP (Crim) 7.

- a) only minor variations will usually be dealt with by a registrar, with other variations being referred to judge; and
- b) in particular, any variation to bail involving home detention must be referred to a judge for a report to be requested.

1.4.2 When bail is varied, the variation will not take effect unless and until any required bail and surety undertakings are re-signed, and the surety is approved.

- a) The usual order made to vary bail will set a time by which the bail undertaking must be signed: see UOM 1.1. The variation will remain in draft on the Court file until the earlier of:
 - i) the required bail and surety undertakings being re-signed – upon which, the variation takes effect and becomes a permanent record on the file; or
 - ii) the expiration of the time allowed - upon which, if the variation has not taken effect, the draft variation will be removed from the Court file.
- b) Any application to extend the time allowed for re-signing must be made before the time has expired.
- c) If a draft variation has been removed from the Court file pursuant to sub-paragraph (a)(ii) above, further application must be made for bail to be varied.
- d) If a surety is required, the surety must sign the relevant undertaking and must be approved before the accused can sign the bail undertaking.

1.4.3 Registrars are persons before whom bail undertakings may be entered into, and who can approve a surety: *Bail Act 1982*, ss 29, 35-36. In practice, registrars:

- a) perform this function (between 9 am and 4 pm on Court days) only if the accused (and surety, if required) attend in person at the DCB;² and
- b) may refer any such matter to a Judge or Judge's associate (for any reason).

1.5 Appeals

1.5.1 A person dissatisfied by a decision made by a registrar in the exercise of their delegated jurisdiction may appeal to a Judge of the Court: CPA s 124(6). An appeal:

- a) cannot, without leave of a judge, be commenced more than 21 days after the date of the registrar's decision: CPA s 124(7); and
- b) will be conducted, in accordance with the rules of court, by a judge by way of a new hearing of the issue that was before the registrar: CPA s 124(8)-(9). In practical terms, this means that:
 - i) the party appealing the decision need not demonstrate error in the registrar's decision; and
 - ii) the parties may introduce new information, materials and/or argument in the appeal proceeding.

1.5.2 The appeal must be commenced by filing and serving a notice that:

- a) is in the form of FM 1;
- b) pursuant to CPR r 5C(1), sets out:
 - i) the particulars of the registrar's decision or that part of it to which the appeal relates; and

² In the event that a surety is interstate, the matter will usually be attended to by a Judge's associate by video link.

ii) the final orders that it is proposed the Court should make on the appeal.

1.5.3 The Court will ordinarily list the appeal for a hearing before a judge in the General Duties list, with the appearance (if required) of an accused in custody by video link.

1.5.4 An appeal does not operate as a stay of proceeding unless a judge orders otherwise: CPR r 5C(2).

CPM 2 MANAGEMENT OF INDICTMENTS AND NOTICES OF DISCONTINUANCE

Summary:¹ *There is an agreed protocol agreed between the District Court and the two prosecuting agencies regarding the management of indictments and notices of discontinuance. A notice of discontinuance is not required when a charge is amended.*

2.1 Introduction

2.1.1 The District Court, Office of the Director of Public Prosecutions for Western Australia (**ODPP**) and the Commonwealth Director of Public Prosecutions (**CDPP**) have agreed to put in place protocols for the management of indictments and notices of discontinuance.

- a) The primary aim of the protocols is to ensure that there is a distinct audit trail of how each charge the subject of a prosecution notice has been dealt with.
- b) The protocols are published to ensure that the Court's practices are transparent and are set out at CPM 2.2 below.

2.1.2 The protocols do not have statutory or regulatory force. A breach of the protocols does not in itself affect the validity of the indictment or notice of discontinuance to which it relates.

2.2 Protocols for the management of indictments and notices of discontinuance

2.2.1 The protocol reflects the policy that each prosecution notice charge committed to the District Court needs to be finalised by way of:

- a) a CPR Form 13, including where the charge has been discontinued; or
- b) remittal back to the court of summary jurisdiction pursuant to the CPA.

2.2.2 Where a prosecution notice charge is transferred to the Supreme Court, the charge will be formally finalised by way of CPR Form 13 from the Supreme Court at the conclusion of the relevant proceedings.

2.2.3 When an accused is properly committed to the District Court on any charge which does not become the subject of a count on an indictment:

- a) that charge must either be the subject of a notice of discontinuance or the subject of an application pursuant to CPA s 86A; and
- b) at the time of lodging the indictment, the prosecution will also lodge a notice of discontinuance for the charges being discontinued.

2.2.4 The prosecution will include the prosecution notice charge number for each count in the "Details of Charges" column on any indictment which is lodged with the District Court and in the 'Committal Details' column of any notice of discontinuance which is lodged with the Court. When an ex officio charge is contained on an indictment, the indictment will refer to 'CPA s 83(6)' in substitute of a prosecution notice/charge number (see the examples attached).

2.2.5 When the prosecution intends to apply to remit any prosecution notice charge to the court of summary jurisdiction pursuant to CPA s 86A, the prosecution will lodge:

- a) a Form 1 application which identifies those charges which are the subject of the application; and
- b) if the charge to be remitted is a count in an indictment, a new version of the indictment containing only those charges which the prosecution intends to proceed with (in compliance with CPA s 132(7)).

¹ The subject matter of this CP was previously dealt with in CP (Crim) 8.

- 2.2.6 When the prosecution intends to discontinue any charges on an indictment which has previously been lodged, the prosecution will lodge:
- a) a notice of discontinuance for the charges being discontinued;
 - b) if the matter is proceeding to trial, a new signed and dated indictment containing only those charges which the prosecution intends to proceed with.
- 2.2.7 When the prosecution intends to join further charges on an indictment which has already been lodged, the prosecution will lodge:
- a) a CPR Form 1 application for the an order permitting the joinder of the further charges; and
 - b) a new signed and dated indictment which contains all charges the prosecution then intends to proceed with.
- 2.2.8 When the prosecution intends to make an application to amend a charge on an indictment, pursuant to CPA s 132 (eg to correct a typographical error or to correct a particular) the prosecution will lodge:
- a) a CPR Form 1 application which identifies the amendments for which the application is being made; and
 - b) a new signed and dated indictment containing the amendments which are the subject of the application.
- 2.2.9 Where the prosecution lodges a new signed and dated indictment as set out in these protocols:
- a) if a count is removed, the counts on the new version of the indictment are to be renumbered; and
 - b) any amendments are not to be marked up.
- This is so that if the indictment goes to a jury it is not apparent that any amendments have been made.
- 2.2.10 An application in accordance with this protocol may be dealt with by consent order, in accordance with CPR r 25A and Practice Direction 8 'Consent Orders'. In this case:
- a) the consent order is filed in lieu of the CPR Form 1; and
 - b) at the same time as filing the consent order, the prosecution will file a new signed and dated indictment.
- 2.2.11 A CPR Form 1 application made in accordance with these protocols will be dealt with at the next listed hearing of the matter before a judge unless the prosecution or defence requests the Court to list it for earlier determination.
- 2.2.12 Where not all accused on a joint indictment are proceeding to trial, the prosecution will have available for the Judge and accused a version of the indictment with the references to the accused who are not proceeding to trial removed. This is so that there is a version of the indictment which can be given to the jury which is limited to the charges which the jury will need to determine.

CPM 3 CRIMINAL TRIAL LISTINGS

Summary: This Circular¹ applies to all criminal matters with their first appearance in the District Court and should be read with PDM 5 – Criminal Trial Listings.

3.1 Introduction

3.1.1 The first appearance of an accused in the District Court will be before a Judge in a list to be referred to as a 'Trial Listing Hearing' (TLH).

3.2 Committals for trial – documents to be filed

3.2.1 Each matter committed for trial will be allocated a TLH date in the District Court no earlier than 12 weeks after the date of committal.

3.2.2 The prosecution must comply with its disclosure obligations by no later than 42 days after the date on which the accused is committed for trial: CPA s 95; CPR r 20.

3.2.3 The indictment is to be lodged and served no later than 42 days after the date on which the accused is committed for trial or sentence: PDM 5.

a) If necessary the Court may extend this time.

b) If the prosecution complies with this requirement and its disclosure obligations under CPA s 95, the accused should have ample time to consider their position prior to the first appearance in the District Court.

3.2.4 The prosecution should lodge and serve its listing certificate at the same time as it lodges and serves the indictment (PDM 5), but in any event not later than 2 clear days prior to the TLH.

3.2.5 The accused should lodge and serve their listing certificate no later than 28 days after the date on which the indictment is lodged, but in any event not later than 2 clear days prior to the TLH.

3.2.6 A notice of acting must be filed at least 2 clear days prior to the TLH.

3.3 Committals for trial – first appearance

3.3.1 Practitioners are required to robe for a TLH before a Judge.

3.3.2 The Judge will endeavour to allocate trial dates at the first TLH.

3.3.3 Trial dates:

a) will not be allocated prior to the prosecution filing an indictment; and

b) may not be allocated if a listing certificate or notice of acting has not been filed at least 2 clear days prior to the TLH.

3.3.4 If trial dates are allocated but there is an outstanding issue that needs to be resolved prior to trial, the Judge may also allocate a pre-trial hearing pursuant to CPR r 34.

3.3.5 The Court endeavours to accommodate the availability of counsel of choice for the accused, but this may not always be possible.

3.4 Attendances and appearances

3.4.1 The Court's practice is generally that an accused person:

¹ The subject matter of this Circular was previously contained in CP (Crim) 9, 11 and 12.

- a) in custody and represented by counsel (who has filed a notice of acting) will not have to appear by video link from the prison; and
- b) on bail, who has answered bail and is represented by counsel (who has filed a notice of acting), will not have to appear in the proceedings; and
- c) on bail and not represented by Counsel must appear at the courtroom (in Perth or the circuit location).

3.4.2 Notwithstanding the above:

- a) the Court, of its own motion, may order that the accused appear in person; or
- b) the prosecutor or defence counsel may apply to the Court for an order that the accused in person; and
- c) practitioners may request that their client appear by video link.

3.4.3 Practitioners should communicate with their client immediately prior to any hearing.

Circuit

3.4.4 A circuit TLH will usually be conducted by video link from the DCB to the circuit location.

3.4.5 Unless otherwise ordered, counsel:

- a) for the prosecution and the defence based in Perth are to participate in proceedings in person in a courtroom at Perth; and
- b) for the defence based in the circuit location are to participate in proceedings in person in a courtroom at the circuit location.

3.5 Summary

3.5.1 Following from the above, the 'timetable' for criminal trial listings is summarised below:

Timeline	Party	Source	Action
Week 0			Accused committed for trial
Committal plus 6 weeks (42 days after committal)	Prosecution	CPA s 95 CPR r 20	Comply with disclosure obligations
Committal plus 6 weeks (42 days after committal)	Prosecution	PDM 5	Lodge and serve indictment
Committal plus 6 weeks (42 days after committal) No later than 2 clear days prior to TLH	Prosecution	PDM 5 CPM 3.2	Lodge and serve Listing Certificate
Committal plus 9 weeks (21 days after indictment)	Accused	CPR r 16	At least 21 days to consider indictment before accused can be asked to plead.
Committal plus 10 weeks (not later than 28 days after the indictment is lodged) No later than 2 clear days prior to TLH	Accused	PDM 5 CPM 3.2	Lodge and serve Listing Certificate (if accused proceeding to trial). File any notice of acting
Committal plus 12 weeks	All parties		TLH

CPM 4 SENTENCE MENTION HEARINGS

Summary: *This Circular¹ applies to the sentencing of all offenders in the District Court and should be read with PDM 7 – Sentencing Hearings.*

4.1 Introduction

4.1.1 All matters committed for sentence to the District Court will be listed into a 'Sentencing Mention' list (SML) no earlier than 9 weeks after the committal hearing, generally on the following days:

- a) for Perth matters, Friday; and
- b) for regional matters, Tuesday (Kimberley) or Wednesday (other regional courts).

4.1.2 The SML will be before a registrar. Practitioners are not required to robe.

4.2 Committal for sentence

4.2.1 The purpose of the SML is to ascertain whether the matter is ready for a sentencing hearing date to be allocated.

- a) No sentencing date will be allocated until an indictment has been filed and court ordered reports have been received.
- b) If no indictment has been filed, the matter may be adjourned to a further SML or, where circumstances warrant it,² be referred to a general duties judge.

4.3 Attendances and appearances

4.3.1 The Court's practice is generally that an accused person:

- a) in custody and represented by Counsel will not have to appear by video link from the prison;
- b) on bail, who has answered bail and is represented by Counsel (who has filed a notice of acting), will not have to appear in the proceedings; and
- c) on bail and not represented by Counsel must appear (in Perth or in the circuit location).

4.3.2 Practitioners should communicate with their client immediately prior to any hearing.

4.3.3 If an accused has not answered bail, the registrar will issue a bench warrant.

4.4 Court ordered reports

4.4.1 The following considerations are relevant to the exercise of the Court's discretion to order a report for the purposes of sentencing:

- a) Is the offender is remanded in custody (and, if so, for this and/or another offence)?
- b) How long will the offender have spent in custody before sentencing (including the time period required for the preparation of the report)?
- c) Is the report required to address issues related to the offender's fitness?
- d) Is a sentence other than an immediate term of imprisonment likely to be considered?
- e) Does the offender intend to make an application for bail prior to sentence?

Counsel should be ready to address the Court in relation to these considerations.

¹ The subject matter of this Circular was previously contained in CP (Crim) 10, 11, 12.

² For example, if there has been a long delay and/or if the accused is in custody awaiting sentencing.

4.5 Summary

4.5.1 The 'timetable' for sentencing hearings is summarised below:

Time	Party	Source	Action
Not less than 42 days after committal	Prosecution	PDM 5	Indictment to be filed
At or before the sentencing mention	Offender - Committed for sentence	PDM 7	Lodge and serve Form 11 – s 32 <i>Sentencing Act 1995 (SA)</i> request.
At or before the sentencing mention	Prosecution - Committal for sentence	PDM 7	Lodge criminal history report
At least 28 days before the sentencing hearing	Offender - Committed for trial	PDM 7	Lodge and serve Form 11 – SA s 32 request.
At least 28 days before the sentencing hearing	Offender	PDM 7	Request the prosecution to lodge a notice pursuant to SA s 79 (suspended sentence), s 84 (conditional suspended sentence) or s 129 (conditional release order or community order) to be relied on at the sentencing hearing.
At least 14 days before the sentencing hearing	Prosecution	PDM 7	Lodge any notice pursuant to SA s 79 (suspended sentence), s 84 (conditional suspended sentence) or s 129 (conditional release order or community order) to be relied on at the sentencing hearing.
At least 14 days before the sentencing hearing	Prosecution	PDM 7	Lodge and serve Form 12 – SA s 32 consent.
At least 7 days before the sentencing hearing	Prosecution	PDM 7	Lodge: <ul style="list-style-type: none"> • submissions • criminal history report • victim impact statements (if any) • photos or videos (or excerpts) • any other materials to be relied on at the sentencing pursuant to SA s 45.
At least 2 clear days before the sentencing hearing	Offender	PDM 7	Lodge any materials to be relied on at the sentencing pursuant to SA s 45, including written submissions.

CPM 5 CEASING TO ACT BEFORE A CRIMINAL TRIAL

Summary: *This Circular¹ sets out the practices adopted by the District Court to manage the situation which arises when a legal practitioner wishes to cease to act for an accused whose criminal matter has been listed for trial.*

5.1 Introduction

5.1.1 A legal practitioner who ceases to be instructed to act for an accused in any capacity:

- a) must lodge, and serve on the DPP, a Form 3 Notice of Ceasing to Act at least 21 days before the date when the next court proceedings involving the accused is listed: CPR r 11(1); and
- b) if compliance with CPR r 11(1) is not possible, the practitioner must apply for leave to cease to act: CPR r 11(2).

5.1.2 In addition, legal practitioners have an obligations under the:

- a) *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (USCR)* r 13; and
- b) *Legal Profession Uniform Conduct (Barristers) Rules 2015 (UBCR)* r 107.

5.1.3 Under the USCR, solicitors must 'ensure completion' of the legal services for which they have responsibility unless, amongst other things, the engagement is terminated for 'just cause and on reasonable notice'. Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement unless the practitioner:

- a) a reasonable time before the hearing, serves a notice on the the client and provides the client with at least 7 days to make 'satisfactory arrangements' for payment; and
- b) gives 'appropriate notice' to the Principal Registrar.

5.1.4 Under the UBCR, counsel must not return a brief to defend a charge of a serious criminal offence unless:

- a) the barrister believes on reasonable grounds that the circumstances are exceptional and compelling, and there is enough time for another legal practitioner to take over the case properly before the hearing; or
- b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the relevant terms of the USBR r 107.

5.1.5 The Court expects practitioners to structure their costs affairs with respect to a client charged with a serious criminal offence in a manner that allows them to comply with these requirements.

5.2 Lodgement of notices under CPR r 11(1)

5.2.1 Where a criminal matter has been listed for trial and:

- a) a practitioner lodges a notice of ceasing to act (in circumstances in which leave is not required pursuant to CPR r 11); and
- b) a notice of acting is not filed by another practitioner at the same time,
the Court will:
- c) ordinarily list the prosecution for mention in the general duties list;

¹ Previously CP (Crim) 13.

- d) write to the practitioner requiring their attendance at the mention; and
- e) summons or bring up the accused to attend the mention.

5.2.2 At the hearing, the practitioner should be in a position to satisfy the Court:

- a) that they have satisfied their obligations under USCR r 13 and/or UBCR r 107; and
- b) in particular, in relation to whether the termination was with reasonable notice, whether the accused was given a reasonable opportunity to engage another practitioner and for that practitioner to master the matter.

5.2.3 The fact that the notice of ceasing to act was lodged not less than 21 days prior to the date of commencement of the trial (in compliance with CPR r 11) does not necessarily constitute compliance with USCR r 13.

5.3 Applications for leave under CPR r 11(2)

5.3.1 This part applies where, in relation to a criminal matter that has been listed for trial, a practitioner lodges an application for leave to cease to act pursuant to CPR r 11(2).

5.3.2 At the hearing of the application, and without limiting the discretion in CPR r 11(3), the practitioner should be in a position to satisfy the Court:

- a) that they have satisfied their obligations under USCR r 13 and/or UBCR r 107; and
- b) in particular, in relation to whether the termination was with reasonable notice, whether the accused was given a reasonable opportunity to engage another practitioner and for that practitioner to master the matter; and
- c) that the accused is aware of the application.

5.3.3 If the accused:

- a) is in custody, the Court will bring up the accused for the hearing of the application;
- b) is on bail, the practitioner must:
 - i) notify the accused of the application, and the date on which the application is listed to be heard; and
 - ii) endeavour to secure the attendance of the accused at the hearing of the application;
- c) does not attend the hearing of the application, Court may adjourn the application and summons the accused to attend the hearing.

CPM 6 MANAGEMENT OF UNASSIGNED TRIALS

Summary: *This Circular¹ outlines the manner in which the Court deals with trials that remain unassigned at the trial starting date*

6.1 Introduction

6.1.1 The District Court operates an extensive trial list, some of which do not proceed. For this reason, to maximise the use of judicial resources, the Court:

- a) over lists a number of criminal trials in the expectation that some trials (civil and criminal) will not proceed and judges will be available to hear the over-listed trials; and
- b) for most trials, assigns the presiding judge fairly close to the date of trial.

6.1.2 The Court recognises that, despite its best endeavours, there are occasions where the number of trials proceeding exceeds the number of judges available.

6.1.3 This Circular:

- a) outlines the procedure adopted by the Court to ensure, as far as possible, unassigned trials are allocated to a judge and to minimise the number of trials that are marked as unreachd; and
- b) applies to all criminal trials listed in Perth.

6.2 Procedure

6.2.1 The procedure for Perth trials is as follows:

- a) In the event there are trials proceeding for which no judge is available, the Court Listing Coordinator is to advise the respective parties that their trial is unassigned.
- b) Due to constant movement in the trial list, it is the Court's expectation that unassigned trials will be reached at the scheduled start time or very soon thereafter. Therefore, parties and other participants to unassigned trials must attend the court and be ready to commence the trial at the scheduled start time (usually 10am).
- c) If a trial remains unassigned, counsel must contact the Court Listing Coordinator prior to 9.30am on the first scheduled trial day for directions.

¹ Previously CP (Crim) 14.

CPM 7 MANAGEMENT OF TRIALS – PORNOGRAPHY AND OBJECTIONABLE MATERIAL

Summary: *This Circular¹ outlines the pre-trial obligations on counsel in trials relating to offences relating to pornography and other objectionable material.*

7.1 Introduction

- 7.1.1 This Circular applies to all trials relating to *Classification (Publication Films & Computer Games) Enforcement Act 1996 (WA)* and *Censorship Act 1996 (WA)* offences in Western Australia (for convenience, these will be referred to as 'offences relating to pornographic material').
- 7.1.2 The prosecution of offences relating to pornographic material may give rise to logistical issues which need to be resolved prior to trial. Such issues include:
- a) the optimal way to show the jury images which are not appropriate to show to members of the public in the gallery;
 - b) identifying a suitable computer for the jury to use to view images stored in electronic format (as opposed to other media such as video tape or DVD); and
 - c) the location of viewing screens in court to ensure that all parties can see the material but that it is not visible to members of the public in the gallery.
- 7.1.3 The objective of the Court is to ensure that the accused receives a fair trial in an open court but that sensitive material is not shown to the public gallery.

7.2 Court facilities

- 7.2.1 Each court in which criminal trials are conducted is equipped, in both open court and jury rooms, to:
- a) play video and DVD material; and
 - b) present material on a computer screen.

7.3 Requirement to seek directions

- 7.3.1 Where there is a plea of not guilty to an offence relating to pornographic material, the Court's expectation is that the prosecution will initiate a discussion with the defence about the issues set out in CPM 7.4 (**Schedule**) below. This discussion should be initiated at least 14 days prior to the hearing at which the matter will be listed for trial.
- 7.3.2 At the time the matter is to be listed for trial, counsel for the prosecution is to inform the Court:
- a) that the trial concerns offences relating to pornographic material;
 - b) of the outcome of the discussions referred to in CPM 7.3.1 above;
 - c) whether the accused has made or proposes to make a formal admission that the material is pornographic or objectionable as defined; and
 - d) of any outstanding logistical issues relating to the matters set out in the Schedule.
- 7.3.3 If the Court is of the view that there are outstanding logistical issues, the Court will list the matter for a pre-trial hearing (CPR r 34) to resolve those issues – that hearing to be before the duty judge about 2 months prior to trial.

¹ Previously CP (Crim) 15.

7.4 Schedule – case management issues

- 7.4.1 Is there any issue with the form of the indictment?
(eg in some indictments each count will relate to a single image and in others each count may relate to a group of images – are particulars required?)
- 7.4.2 In relation to each count does the accused propose to formally admit the element that the material is pornographic or objectionable as defined?
- 7.4.3 What material does the prosecution propose to show to the jury?
- 7.4.4 In what format is the material to be presented to the court?
(eg printed photos, DVD video, digital images [including type], downloaded website material to be viewed on a computer)
- 7.4.5 What quantity of material is proposed to be shown?
(eg 456 photos, 2 hours of video, 30 mins of DVD, “captured” computer website)
- 7.4.6 How is it proposed that the material will be presented to the jury?
(eg in a booklet form of selected images, on the large video screen in court, on individual computer screens for jurors, as a group in the file in which it is stored on the accused’s computer including the accused’s grouping and labelling of the material)
- 7.4.7 Does the prosecution allege that the material has any particularly offensive attributes which would make it inappropriate to be viewed in open court?
(eg images of children) If so, what arrangements are proposed so that the material can be viewed without being visible in the public gallery?
- 7.4.8 Are there any other logistical issues that will need to be considered?
(eg if the indictment relates to a circuit court, are there any difficulties in the trial proceeding in a regional court or does an application to change the venue need to be considered?)

CPM 8 WITNESS SUMMONSES – PROTECTED COMMUNICATIONS

Summary: *This Circular¹ sets out the Court's practice where a party applies for a summons to produce records or things which may include protected communications under the Evidence Act 1906 (WA).*

8.1 Introduction

- 8.1.1 The *Evidence Act 1906* (WA) (EA) protects certain communications from disclosure: EA s 19A - s 19M (**protected communications**).
- 8.1.2 From time to time, parties seek to issue summonses which appear to include records or things containing protected communications (eg a request for a 'patient file' from Graylands Hospital or a 'student file' from a school).
- 8.1.3 The leave of the Court is required before a protected communication may be required to be disclosed by a witness summons: EA s 19C(1).
- 8.1.4 A subpoena which purports to require disclosure of a protected communication without the leave of the Court is of no effect (EA s 19C(2)).

8.2 Summonses which appear to require production of protected communications

- 8.2.1 The power to issue a witness summons is delegated to 'prescribed court officers' (which includes both senior registry staff and registrars). The Court will not issue a witness summons which appears to require production of a protected communication.
- 8.2.2 To ensure uniformity of approach:
- a) practitioners should lodge all witness summonses to produce directly with the Perth registry – this can be done by email to: districtcourt@justice.wa.gov.au;
 - b) all summonses of this type lodged at a circuit registry of the Court will be forwarded to the Perth registry for processing.
- 8.2.3 Where registry staff have a concern that the witness summons might require production of a protected communication, the summons will be referred to a legally qualified registrar for review.
- a) The registrar will decline to issue the summons if he or she forms the view that the records or objects required under the summons appear to include protected communications.
 - b) The applicant will be notified of this decision by letter.
- 8.2.4 The requesting party can either:
- a) resubmit the summons with an amended description of the records or objects sought; or
 - b) apply to the Court for leave to require production of the protected communications pursuant to EA s 19C; or
 - c) expressly exclude protected communications from the scope of the documents sought under the witness summons by:
 - i) inserting the following words:

Except for any document, recording or evidence which is a protected communication as defined in s 19A and s 19B of the Evidence Act 1906 (WA), a copy of which is annexed to this summons.

and

¹ Previously CP (Crim) 17.

- ii) attaching to the summons an annexure in the form of CPM-A1.

8.3 Requests to Courts

- 8.3.1 There is a rule of practice or comity that a court will not issue a witness summons or a subpoena to another court.
 - a) This rule is reflected in *Rules of the Supreme Court 1971 (WA)* O 36B r 13. Although there is no equivalent rule in the *Criminal Procedure Act 2004 (WA)*, the District Court will exercise its discretion to decline to issue a witness summons to another court.
 - b) Instead, a registrar will write to the Principal Registrar of the other court to request that the relevant documents be provided to the District Court.
- 8.3.2 The District Court's standard request letter will exclude protected communications from the request. It will, however, request that the other court to identify the date and type of document excluded in a covering letter when providing the balance of the documents. A copy of the letter of request will be provided to the party on whose behalf the request is made.
- 8.3.3 Documents received from another court will be treated in the same manner as documents received under a witness summons. That is, upon receipt of the documents, the District Court will notify the parties and list the matter before a registrar or general duties judge to make orders regarding custody and access.
- 8.3.4 Courts for these purposes include the Supreme Court, Family Court and Magistrates Court. The District Court also treats the Coroner's Court, the State Administrative Tribunal and the Chief Assessor of Criminal Injuries Compensation as courts.

CPM 9 CHILDREN AND PERSONS WITH A MENTAL DISABILITY - GUIDELINES FOR CROSS-EXAMINATION

Summary: *This Circular¹ is intended to assist rather than restrict counsel in their approach to cross-examining child witnesses or witnesses with a mental disability in criminal proceedings.*

9.1 Introduction

9.1.1 This Circular is not intended to:

- a) operate as a rule of court; or
- b) limit the ability of counsel to represent the interests of their client.²

9.2 Guidelines

9.2.1 Counsel should address the witness by the name the witness prefers.

- a) For a young child this will usually be the child's first name.
- b) Counsel calling the witness should generally inform the Court and opposing counsel of the name the witness prefers before the witness is called.

9.2.2 Questions should be short and simple.

- a) Terminology used in questions should be age or mental capacity appropriate.
- b) 'Legalese' is to be avoided (eg: 'I put it to you', 'my learned friend', 'His Honour').

9.2.3 The tone of questions should not be intimidating, annoying, insulting or sarcastic. Likewise the volume of counsel's voice should not be intimidating.

9.2.4 Counsel should take account that a child witnesses or witness with a mental disability may require greater leeway in formulating an oral response to a question.

- a) The witness should be given an adequate opportunity to consider the question, formulate a response and then give an answer. Quick fire questions are to be avoided.
- b) The witness should not be interrupted when answering a question, except where it is necessary to ensure the witness responds to the question or to prevent the witness giving inadmissible evidence.

9.2.5 Counsel should:

- a) avoid unduly repetitive questioning;
- b) not mix topics or switch between topics; and
- c) deal with issues and events in a logical and/or chronological sequence.

9.2.6 A young child should not be accused of 'lying' except where the defence case is that the child is deliberately telling lies.

- a) An unnecessary allegation that a witness is 'lying' may cause distress.
- b) Rather, counsel should suggest the witness' version is 'not correct' or is 'wrong', or the child should be asked whether something different (an alternative version of events) occurred.

¹ Previously CP (Crim) 18.

² Such restrictions may derive from other sources such as, for example, s 26 of the *Evidence Act 1906* (WA), other rules of evidence and rules of professional conduct.

- 9.2.7 In cases where the witness clearly is incapable of understanding inconsistencies and the inconsistencies only go to the issue of reliability, counsel should:
- a) consider limiting or abandoning cross-examination on otherwise proven inconsistencies; and
 - b) seek a ruling from the trial judge as to whether proven inconsistencies can be relied upon in the closing address without comment that the inconsistencies were not the subject of cross-examination.

CPM 10 GROUND RULES HEARINGS

Summary: *This Circular¹ outlines the Court's practice where a 'ground rules' hearing is ordered.*

10.1 Introduction

10.1.1 The purpose of a 'ground rules' hearing is to discuss and address:

- a) difficulties that may be experienced in the taking of evidence in child sexual abuse prosecutions – in particular, the questioning of prosecution witnesses with specific communication needs; and
- b) rules and procedures to be followed to facilitate the taking of the evidence.²

10.2 When a ground rules hearing may be ordered

10.2.1 On its own motion or on application by the prosecution or defence at a Trial Listing Hearing (TLH) the Court may order that a ground rules hearing take place prior to a pre-recording of evidence.

10.2.2 Although the category of cases is not closed, ground rules hearings will generally be ordered where:

- a) the witness is a child aged six years or under;
- b) a special witness requires a communicator: *Evidence Act 1906 (WA) (EA) s 106R(4)*; or
- c) on application by the Director of Public Prosecutions, a 'substantial need is demonstrated.

10.3 Procedure

10.3.1 Ground rules hearings will generally be ordered at a TLH when a pre-recording of the evidence of a vulnerable witness is listed.

10.3.2 When the Court orders a ground rules hearing, it is usually on the basis that:

- a) counsel appearing on the pre-recording will need to be available in the preceding week to attend a ground rules hearing;
- b) the associate to the presiding judge will contact counsel and arrange a listing of the ground rules hearing on a morning (generally at 9:15 am) in the week prior to the pre-recording;
- c) the accused is not required to attend and the witness will not attend the ground rules hearing.

10.3.3 The Court may request a report from the Child Witness Service (CWS) or a qualified medical practitioner, such report to be provided to counsel for the parties, addressing any difficulties that may be experienced in the taking of the evidence from the witness. The Court may also request a representative of the CWS to attend the ground rules hearing.

10.3.4 Prior to the ground rules hearing, counsel must have viewed any visually recorded interviews and be fully prepared.

10.3.5 The ground rules hearing will be conducted relatively informally. The CWS officer and any communicator will be asked to address the witness' communication needs and counsel will be given the opportunity to ask questions of them.

10.3.6 The judge and counsel will discuss the conduct of the pre-recording and the Court may make directions establishing ground rules relating to the conduct of the pre-recording and questioning of the witness.

¹ Previously CP (Crim) 19.

² See *Royal Commission into Institutional Responses to Child Sexual Abuse (2017)*, recommendations 53, 59, 60.

10.4 Orders

10.4.1 At a ground rules hearing, the Court may make or vary any orders within its power for the fair and efficient conduct of the pre-recording.

10.4.2 Without limitation, the Court may make directions for the conduct of the questioning of the witness, which may include:

- a) directions permitting the witness to have with him or her in the remote room a special toy or comforter;
- b) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
- c) directions about the frequency and duration of breaks;
- d) directions about the manner of questioning, including a word limit on questioning (depending on the age or intellectual capacity of the witness);
- e) directions about the duration of questioning;
- f) if necessary, directions about the questions that may or may not be asked;
- g) where there is more than one accused, the allocation among them of the topics about which the witness may be asked;
- h) limiting the extent to which cross-examination can take place on inconsistencies (with appropriate directions to be given to the jury: see CPM 9.2.7);
- i) limiting the extent to which counsel may put the defence case to the child (with appropriate directions to be given to the jury); and
- j) requiring counsel to submit their proposed list of questions in advance of the pre-recording or trial.

CPM 11 EMERGENCY MEASURES - ADAPTED CRIMINAL PROCEDURE

Summary: *In response to the COVID-19 pandemic, the Court adapted its processes to facilitate the continuation of proceedings. This Circular¹ sets out a number of those adaptations, which may be employed as emergency measures in appropriate circumstances in the future.*

11.1 Introduction

- 11.1.1 The District Court provides an essential service by upholding the rule of law within its jurisdiction. The delivery of that service must in certain circumstances be restricted and/or adapted to promote the safety of officers and stakeholders of the Court.
- 11.1.2 Where necessary, priority will be given to those proceedings affecting the liberty or personal safety and well-being of an individual, and proceedings that are time critical.
- 11.1.3 The Court may, when circumstances warrant it, employ all or some of the following emergency measures. In those circumstances, the Court will issue a Notice to Practitioners and/or Public Notice advising that (and which) emergency measures are in place.

11.2 Sentence mention hearings

- 11.2.1 Sentence mention hearings will be conducted by audio link.
- 11.2.2 The list will be staggered at 'not before' times in accordance with paragraph 20.6.4 of this circular.
- 11.2.3 An accurate notice of acting must be filed by email not less than two clear days before the hearing.
- 11.2.4 The defence lawyer will be called on the telephone number provided in the notice of acting. The defence lawyer must ensure that the audio appearance takes place in a quiet location. The defence lawyer must be available to receive the audio call in the allocated time period.
- 11.2.5 The prosecution must inform the court by email no later than 24 hours prior to the hearing of its telephone number. The prosecution must also ensure that it is available in the allocated time period.
- 11.2.6 An accused in custody will not be brought up, or video or audio linked, unless unrepresented.
- 11.2.7 Subject to any order made by the registrar, an accused on bail may answer their bail by attending court, or by attending at their lawyer's office in person or by telephone to their lawyer at a designated time, in which case the lawyer will be required to confirm, as an officer of the court that the offender has attended.
- 11.2.8 At the hearing the defence lawyer must be able to answer the following questions:
 - a) Has the defence received the brief for prosecution?
 - b) Have instructions been taken on the brief for prosecution?
 - c) Are there any factual issues that may require a trial of issues?
 - d) Has defence received all court-ordered reports and taken instructions on their contents?
 - e) How many sentencing time slots are required for sentence (taking into account the complexity of the matter, any need for an interpreter, or any other issues)?
 - f) What are the defence lawyer's unavailable dates for sentence?

11.3 Sentencing hearings

- 11.3.1 The prosecution and defence counsel may appear by video link at a sentencing hearing.

¹ Previously CP (Crim) 20.

- 11.3.2 Counsel appearing by video link are not required to robe, but must wear business attire.
- 11.3.3 No bring up order will be made for accused in custody unless the court otherwise orders. Any application for a bring up order should be made to the sentencing judge. If a hearing is necessary to determine the issue it will be in chambers by audio link with both parties.
- 11.3.4 Accused who are bailed to appear must attend court unless the sentencing judge has ordered otherwise. The accused is not required to report to detention.

Social distancing and hygiene

- 11.3.5 Where the emergency circumstances require social distancing and hygiene (such as hand sanitation and/or wearing of masks), the following will apply.
- 11.3.6 Social distancing of 2 metres will be maintained in the courtroom as much as it is reasonably practicable to do so. This may require co-accused to be separated or to be called separately as directed by the court. The court may limit the number of persons who are admitted to the gallery. Where practicable the court will admit representatives of established news-media organisations and supporters of an accused or a victim. Other persons may be admitted with the approval of the judge's associate. At the court's discretion a transcript may be supplied to any person with an interest in a matter who has been excluded from the court for public health reasons
- 11.3.7 Where there is a list of sentencing hearings, the list will be staggered as the sentencing judge directs. Lawyers, accused and any other persons may not be permitted to enter the court until the preceding matter is finished and all persons involved in that hearing have left the courtroom.
- 11.3.8 Documents are not to be handed up at the sentencing hearing. All sentencing materials must be lodged electronically not less than two clear days prior to the sentencing hearing. Any documents, such as references, that have not been lodged electronically can be read aloud to the court.
- 11.3.9 If an interpreter is required a social distance of 2 metres between the interpreter and the accused must be maintained. The preferred position is the use of a hearing loop or attendance by the interpreter in the remote room.
- 11.3.10 Sentencing orders (and bail papers where applicable) are to be signed after the court has risen. The accused (if on bail) will be required to sit at the bar table while the order is explained by the clerk of arraigns. The order will be handed by the usher to the offender for signature. The usher will retain a signed copy. Hygiene should be observed. (For example, the usher should have a break after each offender is dealt with and address hand hygiene before dealing with the next matter.)
- 11.3.11 If an accused appearing from custody is to be released on an order then the judge, before rising, should direct the dock guard that the accused is to remain in the dock until the order has been issued and signed. Hygiene should be observed.
- 11.3.12 Counsel shall undertake to place the court reports into a secure bin after the sentencing hearing. If counsel cannot undertake to do this, court reports should be left on the bar table to be removed by the usher after the sentencing hearing for that accused. Hygiene should be observed.

11.4 Trial listing hearings (TLH)

- 11.4.1 The prosecution may appear by video or audio link.
- 11.4.2 Defence lawyers may appear by video or audio link, provided that they have advised the judge's associate by email of their telephone number not less than two clear days prior to the hearing and are able to be contacted on that number.
- 11.4.3 Subject to any order, an offender on bail may answer their bail by attending court, or by attending at their lawyer's office in person or by telephone to their lawyer at a designated time, in which case the lawyer will be required to confirm, as an officer of the court that the offender has attended.

11.5 Call-over of listed trials

- 11.5.1 As a consequence of the announcement on 16 March 2020 to suspend jury trials, all matters currently listed for trial will be listed for a call-over hearing.
- 11.5.2 The purpose of the call-over hearing is to formally vacate the listed jury trial. Trials that are vacated at the call-over will be identified in ICMS as being vacated due to emergency issues.
- 11.5.3 At the call-over hearing, the court will hear applications for judge alone trials in substitution for vacated jury trials. If an order is made for a judge alone trial, the trial will be listed on the same dates as the previously listed trial, if practicable.
- 11.5.4 The court will also hear applications for pre-recording of evidence for the vacated jury trial. If such an order is made the pre-recording of evidence will generally be conducted within the dates of the vacated trial.
- 11.5.5 All matters that are vacated will be listed for a compulsory case conference (CCC) unless the accused is unrepresented, in which case it will be adjourned to a TLH. Accused will be bailed or remanded to a TLH.

11.6 Compulsory case conferences (CCC)

- 11.6.1 A CCC will be conducted pursuant to s 137(3)(a)(i) of the *Criminal Procedure Act 2004* in matters where the trial has been vacated due to any emergency and a further trial date has not been allocated.
- 11.6.2 The purpose of a CCC is to encourage the defence and prosecution to resolve issues so that a trial is not required; alternatively, to reduce the length of the trial by reaching agreement on the matters in issue and the witnesses required to be called.
- 11.6.3 The CCC will be conducted by a judge, or a person appointed by the court, as a mediator. Once the CCC is concluded, the mediator will have no further involvement in the matter.
- 11.6.4 The CCC does not form part of the trial process. No transcript or other record of the CCC will be made, unless orders by consent are made.
- 11.6.5 An accused is not to attend a CCC.
- 11.6.6 The CCC may be conducted in person or, by audio or video link if both parties agree. If the CCC is conducted in person, it will be convened in a secure courtroom around the bar table. Counsel are not required to robe.
- 11.6.7 No less than two clear days before the CCC:
- a) the defence shall lodge and serve a notice of the factual elements of the offence that the accused may contend cannot be proved (similar to the requirement by s 96(3)(c) of the *Criminal Procedure Act 2004*);
 - b) the prosecution shall lodge and serve on the accused a list of facts that it expects will not be in issue; and
 - c) the accused shall lodge and serve on the prosecution a list of any formal admissions that he or she may be prepared to make.
- 11.6.8 A CCC may include discussion about:
- a) the strength of the prosecution case;
 - b) whether the evidence in the prosecution brief supports the count(s) as pleaded;
 - c) the real matters in issue;
 - d) whether agreement may be reached on matters that are not in issue;

- e) whether the defence is prepared to make any formal admission(s);
- f) the benefit to the State and the witnesses of a plea of guilty; and
- g) any matters relevant to case management.

11.6.9 To facilitate meaningful discussion of the issues the following rules apply:

- a) Any agreement or indication on behalf of an accused to plead guilty will not deprive the accused of their right to plead not guilty should they change their mind after the CCC and before entering a plea. In that event, the prosecution would not be bound by any agreement made in reliance on a plea of guilty being entered.
- b) Nothing said on behalf of an accused during a CCC may be used against them in proceedings to which the CCC relates, or in any related criminal proceedings (other than in a trial for a criminal offence which is allegedly committed during a CCC).
- c) If an accused does not wish the prosecution to know their defence, or to investigate their defence before trial, defence counsel should ensure that it is not disclosed during the course of the CCC.
- d) There is no obligation on a party to disclose privileged or confidential information at a CCC.

11.6.10 A mediator may adjourn a CCC where:

- a) defence counsel requires further instructions from the accused; or
- b) counsel for the prosecution needs to confer with the investigating officer; or
- c) counsel for the prosecution requires time to consult a complainant, or a senior prosecutor; or
- d) for any other reason.

11.6.11 If a plea of guilty is indicated the matter will be listed for sentence as soon as practicable.

11.7 Trials by judge alone

11.7.1 The accused is to surrender into custody no later than 9.00 am on the morning of trial.

11.7.2 The judge must ensure social distance guidelines of a minimum of 2 metres for all persons in the courtroom and ensure that strict hygiene protocols are followed.

11.7.3 The judge will apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury pursuant to CPA s 119(1).

11.7.4 The conduct of the trial is a matter for the judge's discretion. The judge may determine where the parties sit, which witnesses appear by video link or audio link and how bail matters will be dealt during the course of the trial.

11.8 Remote room / pre-recording of evidence

11.8.1 The District Court Building remote rooms are a minimum of 12 square metres. This is sufficient to accommodate a child witness, support person and a court officer in accordance with the social distancing guidelines of 4 square metres per person.

11.8.2 Child Witness Service staff will explain to the child what a distance indicated to be approximately 2 metres is and the distance that must be kept between the child and any other person entering the room or present in the room in order to comply with any public health requirements.

11.8.3 The judge will ensure a social distancing space of a minimum of 4 square metres for all persons in the remote room.

11.8.4 The document camera should be used to show a document to a child or special witness. Any party seeking to use an original document or to have an original document passed around a courtroom must make an application to the presiding judge prior to the commencement of the hearing.

11.8.5 Any document to be shown to the child or special witness must be scanned and emailed to the court and printed by the court.