

# CRIMINAL PROCEDURE RULE COMMITTEE

## CRIMINAL PROCEDURE RULES: PART 28

### A PROPOSAL TO REVISE RULES ABOUT WITNESS SUMMONSES

#### INVITATION TO COMMENT

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## CRIMINAL PROCEDURE RULE COMMITTEE

### A proposal to revise rules about witness summonses

#### Invitation to comment

##### Introduction

1. The Criminal Procedure Rule Committee is considering a proposal to revise and simplify the rules in Part 28 of the Criminal Procedure Rules (witness summonses and orders). The new rules would be in substitution for the present rules. They would apply in magistrates' courts as well in the Crown Court. They would affect, in particular, all those who hold documents the production of which in evidence may be sought by a party in criminal proceedings. The Committee would be grateful for the views of those now consulted, and the views of any others whom those consulted may know to have an interest in the proposal.
2. With this invitation are:
  - a) the proposed new rules;
  - b) the present Part 28 rules;
  - c) the text of the relevant statutory provisions, namely section 97 of the Magistrates' Courts Act 1980; sections 2 - 4 of the Criminal Procedure (Attendance of Witnesses) Act 1965 ; and sections 3, 6 and 7 of the Bankers' Books Evidence Act 1879;
  - d) paragraphs 185 – 190 of Chapter 10 of Lord Justice Auld's *Review of the Criminal Courts of England and Wales*;
  - e) a list of those to whom this invitation has been sent.
3. The Committee is the body appointed under section 70 of the Courts Act 2003 to make rules governing the practice and procedure to be followed in the criminal courts. The first rules to be made by the Committee, the Criminal Procedure Rules 2005, came into force on 4<sup>th</sup> April, 2005. Information about the Committee and about the Criminal Procedure Rules, including the full text of the Rules, may be found on the website of the Department for Constitutional Affairs.
4. The Committee invites comments on the proposal generally or on any aspect of it. A list of some questions that those consulted may wish to consider in particular is at the end of this note. **Please reply to the Criminal Procedure Rule Committee Secretariat at the Department for Constitutional Affairs by 22<sup>nd</sup> September 2006.**
5. Although the Committee does not intend to publish a list of those who comment or the content of their comments, respondents are asked to bear in mind that responses will be treated as public documents in accordance with the Freedom of Information Act 2000 and may be made available to enquirers on request.

## **Background**

6. The application of the rules about witness summonses in Part 28 of the Criminal Procedure Rules, and the application of the statutory provisions that they supplement, causes difficulty evidenced by a number of reported cases. In the Crown Court those difficulties have concerned the records of health, social services and education authorities, held in confidence, that relate to the complainant. In magistrates' courts comparable difficulties have concerned CCTV recordings held by local authorities or private land owners, and material held by the manufacturers of breath and blood testing devices.
7. Where such material forms part of the prosecution case, or has been acquired in the course of the investigation so that it constitutes unused material, the difficulties are obviated (or at least reduced). But the disclosure provisions of the Criminal Procedure and Investigations Act 1996 do not apply to such so-called 'third party' material (see *DPP v Wood*; *DPP v McGillicuddy* [2005] EWHC 2986), nor, therefore, the rules in CrimPR Parts 25 and 26 that supplement some provisions of that Act. By contrast with civil proceedings (see section 34 of the Supreme Court Act 1981, section 53 of the County Courts Act 1984 and CPR 31.17), there is no specific procedure governing the disclosure of material held by third parties in criminal proceedings. The provisions of section 97 of the Magistrates' Courts Act 1980 and of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 can be used to obtain such material. However, the test to be applied is not the same as the test under the CPIA 1996. The material in question must be expected to be 'material evidence', i.e. immediately admissible in evidence in the proceedings (see *R v Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr. App. R. 239; *R v Derby Magistrates' Court, ex parte B* [1996] AC 487, [1996] 1 Cr App R 385; *R v Alibhai and others* [2004] EWCA Crim 681), and it must be 'in the interests of justice' for the court to require the production of that material: section 97(1), Magistrates' Courts Act 1980; section 2(1) Criminal Procedure (Attendance of Witnesses) Act 1965.
8. In his *Review of the Criminal Courts of England and Wales*, Lord Justice Auld recommended that consideration be given to a new statutory scheme for the disclosure of third party material. The Committee understands that that recommendation is under active consideration by the government. If a scheme such as that were to be introduced then it is likely that these new rules would need to be reconsidered. But in the meantime the Committee believes it would be worthwhile to simplify the rules that supplement the existing statutory scheme.

## **General features of the proposed new rules**

9. The new rules would apply in magistrates' courts and in the Crown Court. But the primary legislation that applies in those two courts is different. In particular, section 97 of the Magistrates' Courts Act 1980 makes no distinction between the procedure on an application to require a witness to give oral evidence and the procedure on an application for a witness to produce documents. Nor does section 97 make any explicit provision for a witness summons to be set aside. And in

general the 1965 Act, that applies in the Crown Court, contains more specific procedural provisions than does the 1980 Act.

10. As secondary legislation Criminal Procedure Rules must be consistent with the primary legislation that applies. However, there seems no obvious reason why the procedures that apply in both courts should not be the same, provided they are not inconsistent with either the 1965 or the 1980 Act and provided they are both fair and convenient. So where a particular procedure is required in the Crown Court because of the 1965 Act, that procedure is not inconsistent with the 1980 Act, and there is no obvious reason not to apply that procedure in magistrates' courts, too, then the new rules would do so. But subject to that it is not intended that the new rules should change the essential elements of what is already required by the relevant Acts, by the present procedure rules and by the case law.
11. The new rules are shorter than those they would replace. In part, this is attributable to redrafting. But it is also a consequence of being able to rely on Criminal Procedure Rules other than those contained in Part 28 for the imposition of obligations and for the provision of powers and procedures. The Criminal Procedure Rules contain, in Part 1, an overriding objective – to deal with cases justly – that the court must apply when interpreting other rules and when exercising any power. They contain also, in Part 3, general powers of case management and general provisions about applications and directions in preparation for trial. For that reason the proposed rules can abbreviate or omit some of the detailed provisions contained in the present rules.

#### *Bankers' books*

12. The entries in documentary or electronic records maintained by a 'deposit taker' within the meaning of the Bankers Books Evidence Act 1879 are a special case and one for which there are at present no procedure rules at all. Nothing is known to suggest that applications under that Act routinely, or ever, cause difficulties, perhaps because the test for obtaining copies is less prescriptive than that which applies to witness summonses under the 1965 or 1980 Acts – or, for that matter, to prosecution disclosure under the 1996 Act. Access may be ordered 'for any of the purposes of' the proceedings. It seems appropriate and opportune, however, to accommodate such applications within the provisions of Part 28.

#### *Public interest immunity*

13. Sections 3(6) (initial disclosure), 7A(8) (continuing duty to disclose) and 8(5) (defence application for disclosure) of the Criminal Procedure and Investigations Act 1996 each provides in terms that material is not to be disclosed by the prosecution if the court concludes that it is not in the public interest to do so and so orders. The rules in CrimPR Part 25 supplement those provisions with a procedure for applications for such orders.
14. There is no such provision in the legislation that Part 28 supplements. The statutory tests for the issue of a summons are, and are only, (1) that the proposed witness is likely to be able to give or produce evidence likely to be material evidence; and (2) that it is in the interests of justice to issue a summons to secure the attendance of that person to give or produce that evidence. However, case law supports the proposition that the recipient of a witness summons may object to producing what is required of him on the ground that it would not be in the public

interest to do so. If he raises that objection the court must consider two questions. Is there a public interest in upholding that objection? If so, should that objection be overridden nonetheless in the interests of justice? – see *R v Cheltenham Justices, ex parte Secretary of State for Trade* [1977] 1 W.L.R. 95.

15. Like the present rules the new rules make no explicit reference to public interest immunity. Though that is an objection that a proposed witness is likely to raise to an application for the production of confidential documents, it is one among other possible objections – including, notably, their irrelevance. The applicant will anticipate that objection, not least because the making of an application for a witness summons presupposes that a request for voluntary production has been refused. The assertion of public interest immunity will be a matter on which the proposed witness can be expected to make representations in response to the service of the application. In these circumstances, specific procedural provision seems unnecessary.

### Notes on the proposed new rules

16. The following table shows the destination of the present rules:

<i>Present rule</i>		<i>Destination (numbers refer to new rules)</i>
28.1		28.2
28.2		Omitted: s.97A MCA due to be repealed
28.3	(1), (2), (3), (4)	28.2
	(5), (6)	28.3
	(7)	28.7
	(8)	Omitted: new rule 28.3 applies only where documents are sought so does not need to be disapplied in other cases; CrimPR Part 3 allows a direction to be made without a hearing.
	(9), (10)	28.6
28.4		28.5
28.5		28.5
28.6		28.5

### *New rule 28.1*

17. The regime for witness orders in the Court of Appeal is contained in Part 68.

18. At present the rules that apply in magistrates' courts are vestigial (and due to become even more so on the anticipated abolition of committal proceedings by the Criminal Justice Act 2003). In the Crown Court, there are no procedure rules governing an application for a warrant. No separate rules are now proposed, save such as are by implication imported by the requirement of section 4(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965 that there must be 'in force' a summons before a warrant may be issued.

*New rule 28.2*

19. The time limit proposed – ‘as soon as reasonably practicable’ after the listed events – is dictated by the 1965 and 1980 Acts.
20. The proposed essential requirements for an application correspond substantially with what now applies, save for the requirement to propose a person to help the court: as to which, see the notes on new rule 28.4, below.
21. The present rules distinguish between applications for summonses requiring oral evidence and those requiring the production of documents. They distinguish also between applications made at the proper time and those made very shortly before trial, or at trial. The requirements in each case differ. The new rules would require in every case a written application save where new rule 28.6 applies, as described below. And except in that case the new rules always would require service of that written application on the proposed witness.
22. The new rules correspond with the present rules in requiring service on the proposed witness and on the court, only, as routine. The Committee has considered enlarging that requirement to service on other parties as routine. Where an application concerns the production of documents, it has considered a routine requirement that the person to whom those documents relate also should be served. But there appear to be significant difficulties with such an extension of the routine service requirements.
23. An application for a witness summons may not succeed. If it does not (and perhaps even if it does) then an unfair advantage may have been given to other parties through disclosure of more about the preparation of the applicant’s case than otherwise he would have been required to disclose. The new rules make no explicit provision for service on other parties but they do not prohibit it, subject to the overriding objective, if there is some reason to require it. The court may direct such service in order to obtain the assistance of prosecuting counsel under new rule 28.4(3)(c), for example. Or the court may invoke its general discretion under CrimPR 3.5(1) to direct service on another party if appropriate.
24. Although the rights of those to whom documents relate must be respected, that does not necessarily require service of applications on such persons in every case. There may be unusual cases, perhaps where medical or social services records are concerned, in which mere service of the application on that person may inflict disproportionate damage on the relationship between that person and the proposed witness, even if no summons then is issued. Instead, the Committee proposes dealing with the rights of those to whom documents relate under new rule 28.3, described below.
25. No prescribed application form is proposed. None presently exists and it seems unnecessary to introduce one now. On the other hand, if one were to be prescribed it would encourage adherence to the correct procedure (because the form would allude to it); and in that event the required elements of the application could be removed from the rules to that form, further shortening the rules.

26. The requirement of the present rules that an application to the Crown Court must be supported by an affidavit has been retained (and by these rules would be extended to applications in magistrates' courts). The Committee considered the removal of this requirement but was persuaded that it continued to serve a useful purpose in reminding applicants of the gravity of the process being commenced. There seems no obvious reason to distinguish, therefore, between different categories of case, some calling for an affidavit and others not.

*New rule 28.3*

27. This rule preserves the distinction in the present rules between applications concerning oral evidence and those concerning documents. In the latter case only, under the present rules, is a proposed witness given any opportunity at all to make representations before a summons is issued. The new rules would permit the making of representations by the proposed witness in any case; but only in a case concerning documents must a prescribed minimum period for doing so be allowed (a period subject to abbreviation by the court if appropriate, under new rule 28.6, described below).

28. As has been remarked above, predictably the Convention and other rights of a person to whom a document relates may be engaged by an application for the production of documents. Criminal Procedure Rule 1.1(2)(d) itself may require that such rights should be taken into account. The potential difficulties with the routine service of applications on such persons are noted above. The new rule would give the court an explicit discretion to consider how best to take account of those rights. It is reasonable to assume that the possessor of documents that contain confidential personal information will assert that confidentiality, and explain how it arises, in response to an application for production. So representations by a proposed witness will contain to be the principal source of information for the court, as they are now. However, on occasions it may be they are not adequate. On those occasions the court may need to call for information or representations from others, perhaps from the prosecutor (if the application is made by a defendant) or from the person him or herself to whom a document relates. That is the intention of proposed rule 28.3(1)(b)(ii).

29. The rule does not apply to warrants. In the Crown Court no warrant may be issued unless there has first been issued a summons: section 4 of the 1965 Act. In magistrates' courts the conditions for the issue of a warrant, if they are met at all in a case concerning documents, are inconsistent with the giving of notice of the application: section 97(2) of the 1980 Act.

*New rule 28.4*

30. This rule has no precedent in the present rules but represents an attempt to provide for a practice which has received judicial approval.

31. In *R v W(G) and W(E)* [1997] 1 Cr. App. R. 166 the Court of Appeal endorsed the decision of the trial judge to accept the views of counsel for the proposed witness, an officer of a local social services authority, about the materiality of documents sought to be produced:

“What the judge did in this case was, in effect, to say, ‘I will accept the assurance of the local authority that some of these documents are irrelevant if it is based on the opinion of counsel whom they instruct.’ That was a perfectly proper exercise of his discretion, and sensible too.”

32. In that case counsel in fact had been instructed for the local authority, and in fact had been informed in sufficient detail of the issues in the criminal proceedings. Those circumstances may not always obtain, bearing in mind especially that proposed witnesses may not be able to recover their costs.

33. In *R v Brushett*, CA 21/12/2000, prosecuting counsel had conducted a preliminary review of the social services documents that were in issue in that case. The Court of Appeal again approved:

“We would wish to commend the prosecution on the thoroughness and sensitive manner in which they went about their task. They must have anticipated that the judge was in danger of being caught on the horns of a dilemma. The steps the Crown took were, in our judgment, a model which others, faced with a similar situation, would be well advised to follow. The prosecution has a heavy burden to discharge in the sense that they have to ensure the privacy or confidentiality of the person whose name is on the file, the need to identify those matters which were subject to PII and, on the other hand, to ensure that as far as possible the defence has a fair crack of the whip. We are satisfied that no possible criticism can be levied against the prosecution and that it paved the way for the judge to approach the problem in the manner in which he did.”

34. It seems desirable that the court should be able to call on assistance to identify potentially relevant material from among what may be volumes of documents, albeit that the decision ultimately is for the court. In *R v W(G) and W(E)*, cited above, the Court of Appeal said:

“If it is proposed that the decision as to relevance should be taken in that sort of way in the first instance, the judge can give directions, impose conditions, and monitor the process as he thinks fit. However, at the end of the day the judge, in his discretion, may either accept an assurance by, or on behalf of, the possessor of the documents that they are irrelevant, or else look at them and decide for himself.”

35. This delegation applies only to the question of materiality. The question of whether there should be produced documents that are likely to constitute material evidence but to the production of which their possessor objects on the ground of public interest is a question that must be answered by the court itself reviewing those documents: see *R v K* [1993] 97 Cr. App. R. 342.

#### *New rule 28.5*

36. This rule condenses the corresponding present rules for the Crown Court without changing their substance. The 1965 Act limits the circumstances in which a summons may be revoked in effect to those in which the reasons for its issue no longer apply. The power to revoke a summons issued under section 97 of the 1980 Act is not made similarly explicit. However, it is difficult to see what useful

purpose could be served by insisting that a witness should attend to give evidence at trial where it is already known that that witness cannot, after all, give material evidence. This rule, like the other new rules, would apply in magistrates' courts as well in the Crown Court.

*New rule 28.6*

37. The Committee considers it of the greatest importance actively to discourage late or speculative applications for witness summonses. It hopes that clear rules and active case management in advance of trial will secure that objective. However, it accepts that occasionally there will arise compelling reasons for a late application where to refuse it would be inconsistent with the overriding objective. This new rule makes explicit the court's discretion to consider an application that has not been made within the time prescribed by new rule 28.2(1), and to consider it orally, subject to the overriding objective. However, it still requires the applicant to give notice to the proposed witness – whether in writing of any kind or orally – which is a requirement not imposed by the present rules.

*New rule 28.7*

38. The new rule preserves the presumption under the present rules for the Crown Court. That court in any event has discretion to hear such applications in private, under CrimPR rule 16.11, but the nature of any matters likely to be discussed at any hearing of an application under these rules suggests that the presumption of privacy still is appropriate.

39. The new rules do not require an application to be considered at a hearing at all unless, under Part 3 of the Criminal Procedure Rules, the court should require it. The present rules allow a proposed witness from whom documents are sought to require an oral hearing of that application. It is unlikely that the court would refuse such a hearing if a proposed witness asked for one. But, unlike the present rules, the decision is left to the discretion of the court: consistently with CrimPR 3.2(2)(f) and 3.5(2)(e).

*New rule 28.8*

40. Unlike almost every other application or notice for which the Criminal Procedure Rules provide, an application under new rule 28.2 ordinarily will be served on someone who is not already a party to the proceedings. In due course the Committee intends to formulate a service rule applicable to all documents. In the meantime, however, explicit provisions for service are needed to make clear by what means effective service may be achieved. These rules are identical to those contained in CrimPR Part 15.

**Questions for consideration**

41. The Criminal Procedure Rule Committee invites those consulted to comment on any aspect of this proposal, general or specific. It seems to raise the following questions in particular:

1. Is it permissible to have the same rules for magistrates' courts and for the Crown Court even though the provisions of the 1965 and 1980 Acts differ ?

2. If it is permissible, are these rules appropriate both for magistrates' courts and for the Crown Court ?
3. Should applications be served routinely on other parties as well as on a proposed witness (e.g. on all defendants, if the prosecutor applies; on the prosecutor and any co-defendants, if a defendant applies) ?
4. Should the court have a discretion to order service on another party ?
5. Should the court have a discretion to order service on a person to whom a document to be produced relates if that person's rights are not adequately dealt with by other means ?
6. Should that discretion arise only after the proposed witness has had an opportunity to make representations ?
7. Should the rules refer explicitly to that possibility ?
8. Should the rules prescribe a standard period (subject to abbreviation by the court) for a proposed witness to make representations about producing documents ?
9. Is 7 days the right standard period ?
10. Is it appropriate always to serve or give notice of an application for a witness summons to the proposed witness, even if the trial is imminent or in progress ?
11. Is it helpful to have a rule that makes explicit the existing practice of calling for help in determining the relevance of documents that an applicant wants a witness to produce ?
12. Should there be explicit provisions for dealing with objections to producing documents founded on public interest immunity ?
13. Should there be a prescribed application form for use by an applicant for a witness summons ?
14. Should the rules require affidavits in all except late or oral applications ?
15. Is it appropriate actively to discourage late applications for witness summonses ?
16. If so, do the new rules do so to an appropriate extent ?
17. Should notice of a late application be given to the proposed witness no matter what the circumstances may be ?

18. Are there circumstances in which an oral hearing of an application for a witness summons under the new rules should be made obligatory ?

Criminal Procedure Rule Committee  
June 2006

## PROPOSED NEW PART 28 RULES

### Part 28

#### Witness summonses, warrants and orders

##### Contents of this Part

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*[Note. The rules in this Part derive in part from those formerly contained in rule 107 of the Magistrates' Courts Rules 1981 and rules 23, 23ZA, 23ZB and 23ZC of the Crown Court Rules 1982.]*

*A magistrates' court may require the attendance of a witness to give evidence or to produce in evidence a document or thing under section 97 of the Magistrates' Courts Act 1980. The Crown Court may do so under sections 2, 2D, 3 and 4 of the Criminal Procedure (Attendance of Witnesses) Act 1965. Either court may order the production in evidence of a copy of an entry in a banker's book without the attendance of any officer of the bank under sections 6 and 7 of the Bankers' Books Evidence Act 1879.*

*See Part 3 for the court's general powers to consider an application, with or without a hearing, and to give directions.]*

#### **When this Part applies**

28.1 (1) This Part applies in magistrates' courts and in the Crown Court where a party applies for a witness summons, warrant or order under -

- (a) section 97 of the Magistrates' Courts Act 1980;
- (b) section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965; or
- (c) section 7 of the Bankers' Books Evidence Act 1879

or where the court issues such a summons, warrant or order on its own initiative.

(2) A reference to a 'witness' in this Part is a reference to a person to whom such a summons, warrant or order is directed.

*[Note. See section 2D of the Criminal Procedure (Attendance of Witnesses) Act 1965 for the Crown Court's power to issue a witness summons on the court's own initiative.]*

### **Application for summons, warrant or order**

28.2 (1) A party applying must do so in writing as soon as reasonably practicable after -

- (a) in a magistrates' court, the defendant pleads not guilty;
- (b) in the Crown Court -
  - (i) service of copies of the documents containing the evidence on which the charge or charges are based, where the defendant is sent for trial,
  - (ii) a High Court judge gives permission to serve a draft indictment,
  - (iii) the Court of Appeal orders a retrial, or
  - (iv) the committal or transfer of the defendant for trial.

(2) The application must be served on –

- (a) the court officer; and
- (b) the proposed witness, unless it is an application for a warrant.

(3) The application must -

- (a) identify the proposed witness by name, address and occupation (if relevant);
- (b) explain -
  - (i) what evidence the proposed witness can give, or what document or thing he can produce,
  - (ii) why it is likely to be material evidence, and
  - (iii) why the applicant does not expect him to give or produce it without a summons, order or warrant as appropriate;
- (c) state at what place and time the applicant wants the proposed witness to produce any document or thing under section 2A of the Criminal Procedure (Attendance of Witnesses) Act 1965 before it is produced in evidence;
- (d) for the benefit of the proposed witness, explain that he may make representations to the court about the application;
- (e) propose a person to help the court, if the applicant expects rule 28.4 to apply; and
- (f) list those on whom it is served.

(4) The application must be in the form of, or be accompanied by, an affidavit declaring that the maker believes the statements made in the application to be true.

*[Note. Under section 2A of the Criminal Procedure (Attendance of Witnesses) Act 1965 the Crown Court may order a witness to produce a document or thing for inspection by the applicant before producing it in evidence.*

*Section 1(3) of the Perjury Act 1911 makes it an offence to make a statement on oath for the purposes of proceedings which the person making it knows to be false or does not believe to be true.]*

### **Summons or order to produce a document or thing**

28.3 (1) The court must not issue a witness summons or order that requires the production of a document or thing unless -

(a) the proposed witness has had at least 7 days within which to make representations; and

(b) the court is satisfied that it has been able to take adequate account of the rights (including rights of confidentiality) of any person to whom the document or thing relates –

(i) by means of representations by the proposed witness, or

(ii) by any other means.

(2) This rule does not apply if the document to be produced is a copy of an entry in a banker's book.

### **Court's power to require assistance to determine relevance**

28.4 (1) This rule applies where a proposed witness objects to producing a document or thing on the ground that it is not likely to be material evidence.

(2) The proposed witness must make that document or thing available to the court.

(3) The court may require –

(a) the proposed witness;

(b) any representative of the proposed witness;

(c) a party's representative

to help the court consider the objection, in particular by giving an impartial opinion on the likely materiality of that document or thing.

### **Application to revoke a summons, warrant or order**

28.5 (1) The court may revoke a witness summons, warrant or order -

(a) if the party who applied for it applies for its revocation on the grounds that -

(i) it requires the witness to produce a document or thing,

(ii) the witness has done so before producing the document or thing in evidence, and

(iii) the applicant has concluded that the summons, warrant or order is no longer needed;

(b) if the witness applies for its revocation on the grounds that –

(i) he was not aware of any application for it, and

(ii) he cannot give evidence, or produce any document or thing, likely to be material evidence.

(2) A person applying under this rule must –

(a) do so in writing as soon as reasonably practicable;

(b) explain why he wants the summons, warrant or order revoked; and

(c) serve the application on the court officer and on the witness, or the party who applied for the summons, warrant or order, as the case may be.

*[Note. See sections 2B, 2C and 2E of the Criminal Procedure (Attendance of Witnesses) Act 1965 for the Crown Court's powers to revoke a witness summons, including the power to order costs.]*

### **Court's power to vary requirements under this Part**

28.6 (1) The court may -

(a) shorten or extend (even after it has expired) a time limit under this Part; and

(b) allow an application to be made orally.

(2) An applicant who wants the court to consider an oral application must –

(a) apply as soon as he becomes aware of the grounds for doing so;

(b) give as much notice to those on whom he would have served a written application as the urgency of his application permits; and

(c) in giving notice, explain the reasons for the application and for wanting the court to consider it orally.

## **Hearing of application under this Part**

28.7 A hearing under this Part must be in private unless the court otherwise directs.

## **Service**

- 28.8 (1) For the purposes of this Part, an application, summons or order may be served on any person by any of the following methods -
- (a) personally on that person or their solicitor;
  - (b) by first class post to, or by leaving it at -
    - (i) that person's usual or last known residence or place of business in England and Wales,
    - (ii) in the case of a company, that company's registered address in England and Wales, or
    - (iii) the business address of that person's solicitor;
  - (c) by fax or other electronic means, but only if the person has agreed to accept service by that method;
  - (d) where the person or their solicitor has given a number of a box at a document exchange and has not indicated that they are unwilling to accept service through a document exchange, by leaving it at the document exchange addressed to the box number.
- (2) Where an application, summons or order is served under this Part by any method other than personal service it is deemed to be served—
- (a) if left at an address, on the next business day after the day on which it was left;
  - (b) if sent by first class post, on the second business day after the day on which it was posted;
  - (c) if transmitted by fax or other electronic means—
    - (i) on a business day before 5 p.m., on that day, and
    - (ii) at any other time, on the next business day after the day on which it is transmitted; and
  - (d) if left at a document exchange, on the second business day after the day on which it was left.
- (3) In this rule, 'business day' means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday.

## PRESENT PART 28 RULES

### Part 28

#### Witness summonses and orders

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Application to set aside witness summons issued of Crown Court's own motion	rule 28.6

#### **Application to a magistrates' court for summons to witness or warrant for his arrest**

- 28.1 (1) An application for the issue of a summons or warrant under section 97 or 97A of the Magistrates' Courts Act 1980 or paragraph 4 of Schedule 3 to the Crime and Disorder Act 1998 may be made by the applicant in person or by his counsel or solicitor.
- (2) An application for the issue of such a summons may be made by delivering or sending the application in writing to the magistrates' court officer.

*[Note. Formerly rule 107 of the Magistrates' Courts Rules 1981.]*

#### **Taking a deposition in a magistrates' court**

- 28.2 (1) Where a person attends before a justice of the peace in pursuance of section 97A of the Magistrates' Courts Act 1980 or paragraph 4 of Schedule 3 to the Crime and Disorder Act 1998 the justice shall—
- (a) where that person attends for the purpose of giving evidence, cause his evidence to be put in writing;
  - (b) where that person attends for the purpose of producing a document or other exhibit, cause the document or exhibit to be handed over for examination and any evidence given by that person in respect of it to be put in writing;

(c) where that person refuses to have his evidence taken or to produce the document or other exhibit, as the case may be, explain to him the consequences of so refusing without just excuse, and ask him to explain why he has so refused; and

(d) cause a record of any such refusal to be made in writing.

(2) As soon as practicable after the examination by the prosecutor of a witness whose evidence is put in writing the justice shall cause his deposition to be read to him, and shall require the witness to sign the deposition.

(3) Any such deposition shall be authenticated by a certificate signed by the justice.

(4) Subject to rule 10.5 (material to be sent to Crown Court following committal) the court officer, on sending a copy of any deposition or documentary exhibit to the prosecutor under section 97A(9) or (10) of the 1980 Act, as the case may be—

(a) shall retain the original deposition or documentary exhibit; and

(b) may retain any other exhibit produced in pursuance of that section.

*[Note. Formerly rule 4A of the Magistrates' Courts Rules 1981.]*

### **Application to the Crown Court for witness summons**

28.3 (1) This rule applies to an application under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 for the issue of a witness summons and in this rule references to “the application” and “the applicant” shall be construed accordingly.

(2) Subject to paragraphs (8) to (10), the application shall be made in writing to the Crown Court officer and shall—

(a) contain a brief description of the stipulated evidence, document or thing;

(b) set out the reasons why the applicant considers that the stipulated evidence, document or thing is likely to be material evidence;

(c) set out the reason why the applicant considers that the directed person will not voluntarily attend as a witness or produce the document or thing; and

(d) if the witness summons is proposed to require the directed person to produce a document or thing—

(i) inform the directed person of his right to make representations in writing and at a hearing, under paragraph (5), and

(ii) state whether the applicant seeks a requirement also to be imposed under section 2A of the 1965 Act (advance production) and, if such a requirement is sought, specify the place and time at which the applicant wishes the document or thing to be produced.

(3) The application shall be supported by an affidavit—

(a) setting out any charge on which the proceedings concerned are based;

(b) specifying the stipulated evidence, document or thing in such a way as to enable the directed person to identify it;

(c) specifying grounds for believing that the directed person is likely to be able to give the stipulated evidence or to produce the stipulated evidence or thing; and

(d) specifying grounds for believing that the stipulated evidence is likely to be material evidence or, as the case may be, that the stipulated document or thing is likely to be material evidence.

(4) A copy of the application and the supporting affidavit shall be served on the directed person at the same time as it is served on the court officer.

(5) The directed person may, within 7 days of receiving a copy of the application under paragraph (4) above, inform the court officer whether or not he wishes to make representations, concerning the issue of the witness summons proposed to be directed to him, at a hearing and may also make written representations to the court officer.

(6) The court officer shall—

(a) if the directed person indicates that he wishes to have the application considered at a hearing, fix a time, date and place for the hearing;

(b) if the directed person does not indicate in accordance with paragraph (5) that he wishes to make representations at a hearing, refer the application to a judge of the Crown Court for determination with or without a hearing; and

(c) notify the applicant and, where paragraph (6)(a) above applies, the directed person of the time, date and place fixed for any hearing of the application.

(7) Any hearing under this rule shall, unless the judge directs otherwise, take place in private and the proceedings at the hearing shall be recorded.

(8) In the case of an application for a witness summons which it is proposed shall require the directed person to give evidence but not to produce any document or thing, that application may be made orally to a judge or in writing and, in such a case—

(a) paragraphs (3) to (7) shall not have effect; and

(b) the application shall, in addition to the matters set out in paragraph (2)(a) to (c), specify—

(i) any charge on which the proceedings concerned are based, and

(ii) the grounds for believing that the directed person is likely to be able to give the stipulated evidence.

(9) Subject to paragraph (10), in the case of an application for a witness summons which it is proposed shall require the directed person to produce any document or thing and which is made within 7 days of the date fixed for trial, the court officer shall refer the notice of application to the trial judge, or such other judge as may be available, to determine the application or to give such directions as the judge to whom the notice is referred considers appropriate, and paragraphs (2)(d)(i) and (4) to (6) shall not have effect.

(10) In the case of an application for a witness summons which it is proposed shall require the directed person to produce any document or thing and which is made during the trial, such application shall be made orally to the trial judge, to determine the application or to give such directions as he considers appropriate, and in such a case—

(a) paragraphs (3) to (7) shall not have effect; and

(b) the application shall, in addition to the matters set out in paragraph (2)(a) to (c), specify the grounds for believing that the directed person is likely to be able to produce the document or thing.

(11) In this rule references to “the directed person” and “the stipulated evidence, document or thing” shall be construed in accordance with section 2(10) of the 1965 Act.

*[Note. Formerly rule 23 of the Crown Court Rules 1982.]*

### **Application to set aside Crown Court witness summons where no longer needed**

28.4 (1) This rule applies to an application under section 2B of the Criminal Procedure (Attendance of Witnesses) Act 1965 and references in this rule to “the applicant” and “the application” shall be construed accordingly.

(2) The application shall be made in writing to the Crown Court officer as soon as reasonably practicable after the document or thing has been produced for inspection in pursuance of a requirement imposed by the witness summons under section 2A of the 1965 Act.

(3) The application shall state that the applicant concludes that the requirement imposed by the witness summons under section 2(2) of the 1965 Act is no longer needed.

(4) If a direction is given under section 2B of the 1965 Act following the application, the court officer shall notify the person to whom the witness summons is directed as to the effect of the direction.

*[Note. Formerly rule 23ZA of the Crown Court Rules 1982.]*

### **Application to set aside witness summons issued on application to the Crown Court**

28.5 (1) This rule applies to an application under section 2C of the Criminal Procedure (Attendance of Witnesses) Act 1965 and in this rule references to “the application” and “the applicant” shall, unless the contrary intention appears, be construed accordingly.

(2) The application shall be made in writing to the Crown Court officer and shall—

(a) state that the applicant was not served with notice of the application to issue the summons and that he was neither present nor represented at any hearing of that application; and

(b) set out the reasons why the applicant considers that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence.

(3) On receiving the application, the court officer shall serve notice of the application on the person on whose application the witness summons was issued.

(4) The court shall not grant or, as the case may be, refuse the application unless the applicant and the person on whose application the witness summons has been issued have been given an opportunity of making representations, whether at a hearing or (where they agree to do so) in writing without a hearing.

(5) In a case where the witness summons to which the application relates imposed a requirement to produce any document or thing, then if—

(a) the applicant can produce that document or thing; but

(b) he seeks to satisfy the court that the document or thing is not likely to be material evidence,

the applicant must, unless the judge directs otherwise, arrange for the document or thing to be available at the hearing of the application.

(6) Any hearing under this rule shall, unless the judge directs otherwise, take place in private and the proceedings at the hearing shall be recorded.

(7) The court officer shall notify the applicant and the person on whose application the witness summons was issued of the decision of the court in relation to the application.

*[Note. Formerly rule 23ZB of the Crown Court Rules 1982.]*

### **Application to set aside witness summons issued of Crown Court's own motion**

28.6 (1) Rule 28.5 shall apply to an application under section 2E of the Criminal Procedure (Attendance of Witnesses) Act 1965 as it applies to an application under section 2C, subject to the following modifications.

(2) Paragraphs (2)(a) and (3) shall be omitted.

(3) In paragraphs (4) and (7), the words “and the person on whose application the witness summons was issued” shall be omitted.

(4) In paragraph (4), for the words “(where they agree to do so)”, there shall be substituted the words “(where he agrees to do so)”.

*[Note. Formerly rule 23ZC of the Crown Court Rules 1982.]*

## Section 97, Magistrates' Courts Act 1980

### Summons to witness and warrant for his arrest

97. (1) Where a justice of the peace is satisfied that—

(a) any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at the summary trial of an information or hearing of a complaint or of an application under the Adoption and Children Act 2002 (c 38) by a magistrates' court, and

(b) it is in the interests of justice to issue a summons under this subsection to secure the attendance of that person to give evidence or produce the document or thing,

the justice shall issue a summons directed to that person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing.

(2) If a justice of the peace is satisfied by evidence on oath of the matters mentioned in subsection (1) above, and also that it is probable that a summons under that subsection would not procure the attendance of the person in question, the justice may instead of issuing a summons issue a warrant to arrest that person and bring him before such a court or justice, as the case may be, as aforesaid at a time and place specified in the warrant; but a warrant shall not be issued under this subsection where the attendance is required for the hearing of a complaint or of an application under the Adoption and Children Act 2002 (c 38).

(2A) A summons may also be issued under subsection (1) above if the justice is satisfied that the person in question is outside the British Islands but no warrant shall be issued under subsection (2) above unless the justice is satisfied by evidence on oath that the person in question is in England or Wales.

(2B) A justice may refuse to issue a summons under subsection (1) above in relation to the summary trial of an information if he is not satisfied that an application for the summons was made by a party to the case as soon as reasonably practicable after the accused pleaded not guilty.

(2C) In relation to the summary trial of an information, subsection (2) above shall have effect as if the reference to the matters mentioned in subsection (1) above included a reference to the matter mentioned in subsection (2B) above.

(3) On the failure of any person to attend before a magistrates' court in answer to a summons under this section, if—

(a) the court is satisfied by evidence on oath that he is likely to be able to give material evidence or produce any document or thing likely to be material evidence in the proceedings; and

(b) it is proved on oath, or in such other manner as may be prescribed, that he has been duly served with the summons, and that a reasonable sum has been paid or tendered to him for costs and expenses; and

(c) it appears to the court that there is no just excuse for the failure,

the court may issue a warrant to arrest him and bring him before the court at a time and place specified in the warrant.

(4) If any person attending or brought before a magistrates' court refuses without just excuse to be sworn or give evidence, or to produce any document or thing, the court may commit him to custody until the expiration of such period not exceeding one month as may be specified in the warrant or until he sooner gives evidence or produces the document or thing or impose on him a fine not exceeding £2,500, or both.

(5) A fine imposed under subsection (4) above shall be deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction.

**Sections 2, 2A, 2B, 2C, 2D, 2E, 3 & 4, Criminal Procedure (Attendance of Witnesses) Act 1965**

*This text incorporates amendments by the Criminal Justice Act 2003 that are expected to come into force on 6/11/2006.*

**Issue of witness summons on application to Crown Court**

**2.** (1) This section applies where the Crown Court is satisfied that—

(a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and

(b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing.

(2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to—

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) give the evidence or produce the document or thing.

(3) A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(4) Where a person has been sent for trial for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after service on that person, in pursuance of regulations made under paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998, of the documents relevant to that offence.

(5) Where the proceedings concerned have been transferred to the Crown Court, an application must be made as soon as is reasonably practicable after the transfer.

(6) Where the proceedings concerned relate to an offence in relation to which a bill of indictment has been preferred under the authority of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill preferred by direction of Court of Appeal, or by direction or with consent of judge) an application must be made as soon as is reasonably practicable after the bill was preferred.

(7) An application must be made in accordance with Criminal Procedure Rules; and different provision may be made for different cases or descriptions of case.

(8) Criminal Procedure Rules—

(a) may, in such cases as the rules may specify, require an application to be made by a party to the case;

(b) may, in such cases as the rules may specify, require the service of notice of an application on the person to whom the witness summons is proposed to be directed;

(c) may, in such cases as the rules may specify, require an application to be supported by an affidavit containing such matters as the rules may stipulate;

(d) may, in such cases as the rules may specify, make provision for enabling the person to whom the witness summons is proposed to be directed to be present or represented at the hearing of the application for the witness summons.

(9) Provision contained in Criminal Procedure Rules by virtue of subsection (8)(c) above may in particular require an affidavit to—

(a) set out any charge on which the proceedings concerned are based;

(b) specify any stipulated evidence, document or thing in such a way as to enable the directed person to identify it;

(c) specify grounds for believing that the directed person is likely to be able to give any stipulated evidence or produce any stipulated document or thing;

(d) specify grounds for believing that any stipulated evidence is likely to be material evidence;

(e) specify grounds for believing that any stipulated document or thing is likely to be material evidence.

(10) In subsection (9) above—

(a) references to any stipulated evidence, document or thing are to any evidence, document or thing whose giving or production is proposed to be required by the witness summons;

(b) references to the directed person are to the person to whom the witness summons is proposed to be directed.]

### **Power to require advance production**

**2A.** A witness summons which is issued under section 2 above and which requires a person to produce a document or thing as mentioned in section 2(2) above may also require him to produce the document or thing—

(a) at a place stated in the summons, and

(b) at a time which is so stated and precedes that stated under section 2(2) above, for inspection by the person applying for the summons.

### **Summons no longer needed**

**2B.** (1) If—

(a) a document or thing is produced in pursuance of a requirement imposed by a witness summons under section 2A above,

(b) the person applying for the summons concludes that a requirement imposed by the summons under section 2(2) above is no longer needed, and

(c) he accordingly applies to the Crown Court for a direction that the summons shall be of no further effect,  
the court may direct accordingly.

(2) An application under this section must be made in accordance with [Criminal Procedure Rules]; and different provision may be made for different cases or descriptions of case.

(3) Criminal Procedure Rules may, in such cases as the rules may specify, require the effect of a direction under this section to be notified to the person to whom the summons is directed.

**Application to make summons ineffective**

**2C.** (1) If a witness summons issued under section 2 above is directed to a person who—

- (a) applies to the Crown Court,
  - (b) satisfies the court that he was not served with notice of the application to issue the summons and that he was neither present nor represented at the hearing of the application, and
  - (c) satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence,
- the court may direct that the summons shall be of no effect.

(2) For the purposes of subsection (1) above it is immaterial—

- (a) whether or not Criminal Procedure Rules require the person to be served with notice of the application to issue the summons;
- (b) whether or not Criminal Procedure Rules enable the person to be present or represented at the hearing of the application.

(3) In subsection (1)(b) above “served” means—

- (a) served in accordance with Criminal Procedure Rules, in a case where such rules require the person to be served with notice of the application to issue the summons;
- (b) served in such way as appears reasonable to the court to which the application is made under this section, in any other case.

(4) The Crown Court may refuse to make a direction under this section if any requirement relating to the application under this section is not fulfilled.

(5) An application under this section must be made in accordance with Criminal Procedure Rules; and different provision may be made for different cases or descriptions of case.

(6) Criminal Procedure Rules may, in such cases as the rules may specify, require the service of notice of an application under this section on the person on whose application the witness summons was issued.

(7) Criminal Procedure Rules may, in such cases as the rules may specify, require that where—

- (a) a person applying under this section can produce a particular document or thing, but
  - (b) he seeks to satisfy the court that the document or thing is not likely to be material evidence,
- he must arrange for the document or thing to be available at the hearing of the application.

(8) Where a direction is made under this section that a witness summons shall be of no effect, the person on whose application the summons was issued may be ordered to pay the whole or any part of the costs of the application under this section.

(9) Any costs payable under an order made under subsection (8) above shall be taxed by the proper officer of the court, and payment of those costs shall be enforceable in the same manner as an order for payment of costs made by the High Court in a civil case or as a sum adjudged summarily to be paid as a civil debt.

### **Issue of witness summons of Crown Court's own motion**

**2D.** For the purpose of any criminal proceedings before it, the Crown Court may of its own motion issue a summons (a witness summons) directed to a person and requiring him to—

- (a) attend before the court at the time and place stated in the summons, and
- (b) give evidence, or produce any document or thing specified in the summons.]

### **Application to make summons ineffective**

**2E.** (1) If a witness summons issued under section 2D above is directed to a person who—

- (a) applies to the Crown Court, and

(b) satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence,

the court may direct that the summons shall be of no effect.

(2) The Crown Court may refuse to make a direction under this section if any requirement relating to the application under this section is not fulfilled.

(3) An application under this section must be made in accordance with Criminal Procedure Rules; and different provision may be made for different cases or descriptions of case.

(4) Criminal Procedure Rules may, in such cases as the rules may specify, require that where—

- (a) a person applying under this section can produce a particular document or thing, but

(b) he seeks to satisfy the court that the document or thing is not likely to be material evidence,

he must arrange for the document or thing to be available at the hearing of the application.]

### **Punishment for disobedience to witness order or witness summons**

**3.** (1) Any person who without just excuse disobeys a . . . witness summons requiring him to attend before any court shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.

(1A) Any person who without just excuse disobeys a requirement made by any court under section 2A above shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.

(2) No person shall by reason of any disobedience mentioned in subsection (1) or (1A) above be liable to imprisonment for a period exceeding three months.

(3) . . .

#### **Further process to secure attendance of witness**

**4.** (1) If a judge of the Crown Court is satisfied by evidence on oath that a witness in respect of whom a . . . witness summons is in force is unlikely to comply with the . . . summons, the judge may issue a warrant to arrest the witness and bring him before the court before which he is required to attend:

Provided that a warrant shall not be issued under this subsection . . . unless the judge is satisfied by such evidence as aforesaid that the witness is likely to be able to give evidence likely to be material evidence or produce any document or thing likely to be material evidence in the proceedings.

(2) Where a witness who is required to attend before the Crown Court by virtue of a witness summons fails to attend in compliance with the . . . summons, that court may—

(a) in any case, cause to be served on him a notice requiring him to attend the court forthwith or at such time as may be specified in the notice;

(b) if the court is satisfied that there are reasonable grounds for believing that he has failed to attend without just excuse, or if he has failed to comply with a notice under paragraph (a) above, issue a warrant to arrest him and bring him before the court.

(3) A witness brought before the court in pursuance of a warrant under this section may be remanded by that court in custody or on bail (with or without sureties) until such time as the court may appoint for receiving his evidence or dealing with him under section 3 of this Act; and where a witness attends a court in pursuance of a notice under this section the court may direct that the notice shall have effect as if it required him to attend at any later time appointed by the court for receiving his evidence or dealing with him as aforesaid.

## **Sections 3, 6 & 7, Bankers' Books Evidence Act 1879**

### **Mode of proof of entries in bankers' books**

**3.** Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.

### **Case in which banker, etc, not compellable to produce book, etc**

**6.** A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or under the Civil Evidence (Scotland) Act 1988 or Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 or Schedule 8 to the Criminal Procedure (Scotland) Act 1995, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

### **Court or judge may order inspection, etc**

**7.** On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.

**REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES  
OCTOBER 2001**

**CHAPTER 10, PARAGRAPHS 185 - 190**

“The prosecutor’s obligation under the 1996 Act is to disclose material which is in his possession, and came into his possession in connection with the case for the prosecution against the accused or which he has inspected in connection with that case. In the case of material not in the possession of the police but which they and the prosecutor believe to be in the possession of a third party and of possible relevance, the Attorney General’s Guidelines require them to take reasonable steps to identify and consider it. Where such material is with Government departments or other Crown bodies, there are established procedures for them to co-operate in this respect.

In the case of other third parties, agencies and individuals, for example local authorities, schools, hospitals and doctors, the guidance is that prosecutors and/or the defence should seek the co-operation of the third party concerned. This may involve extensive enquiries and considerable expense to third parties, in particular local authorities and various social services in child abuse cases, both in identifying relevant and possibly relevant material, and in considering its sensitivity. Commendably, in many areas the police have agreed protocols with all social services departments for fair and efficient working of what can be very complicated exercises in co-operation to secure informal disclosure of third party material. The Crown Prosecution Service Inspectorate, in its Report on its recent Thematic Review of Disclosure, recommended national or local protocols wherever possible.

A major problem is late and unspecific requests by the defence for disclosure of third party material. Compliance is often difficult or impossible because of the short time available, the volume of material involved and the fact that those searching often do not know exactly what to look for because they do not know to what issues the request relates.

Failing agreement between the parties and third parties as to what should or can be disclosed (which may be because the third party is unwilling to go to the expense of what seems an extensive and pointless exercise and/or for reasons of public interest), the parties must seek the assistance of the court. But the only means of doing this is under the Criminal Procedure (Attendance of Witnesses) Act 1965 for securing the production of documents as evidence at court, a procedure that has been grafted onto the 1996 Act scheme of pre-trial disclosure of unused material. The applicant (prosecutor or defendant) must obtain a witness summons requiring the third party to attend and to produce document(s) at trial which the applicant believes are likely to be material evidence. Such a summons can now, as a result of amendment made by the 1996 Act, also require production of the document(s) for inspection in advance of trial. If, on inspection, the applicant considers that they are not likely to be material evidence he can ask the court to discharge the summons. If he considers that the documents are likely to be material evidence, then, subject to provisions enabling the

third party to challenge the validity of the summons or the likely materiality of the document(s), or to argue that they are not disclosable on public interest grounds, the summons remains in force and the third party must attend court with the documents. Such issues, though ostensibly about 'likely' material evidence, are, before trial, only about disclosure of documents to see if they are such or have some other forensic use. These issues should be put before the court at the earliest opportunity. All too often they surface late in the day, resulting in costly and disruptive delay for all concerned.

The problem with this adaptation of the 1965 Act procedure is that it is a mix of two quite separate requirements, namely a duty on a body or individual to attend court and produce as evidence documents considered to be "likely material evidence" with the prosecution's earlier obligation to disclose to the defence documents which it does not seek to adduce as evidence but which may be material to an issue in the case. Its materiality could be such that the defence would wish to put the documents in evidence, but not necessarily; they could be material in suggesting a line of cross-examination of prosecution witnesses or of further enquiries. No doubt prosecutors, who use this procedure as an aid to discharging their duty of advance disclosure of unused material, interpret the term "likely material evidence" broadly, but it is unsatisfactory to require them to bend the words of the Act in that way.

In my view, statutory provision should be made for disclosure of third party documents potentially material to an issue in the case, regardless of their likely evidential character. Such an additional restriction on access to relevant matter in the hands of third parties is plainly inappropriate. No doubt, that is why the 1965 Act procedures, even as amended, are little used, and the police and concerned local agencies have turned instead to local protocols. Careful consideration should be given to devising a new statutory scheme for third party disclosure, including its cost implications, alongside and more consistently with the general provisions for disclosure of unused material. No doubt, its mechanics could be guided by the local protocols. Again, I suggest this is a task for a Criminal Procedure Rules Committee.

**I recommend consideration of a new statutory scheme for third party disclosure, including its costs implications to all concerned, to operate alongside and more consistently with the general provisions for disclosure of unused material."**

## **List of those consulted**

### *Criminal justice departments*

HM Attorney General  
The Department for Constitutional Affairs / HM Courts Service  
The Home Office  
The Office for Criminal Justice Reform

### *Prosecuting authorities*

The Crown Prosecution Service  
The Serious Fraud Office  
HM Revenue and Customs Prosecutions Office  
The Whitehall Prosecutors Group

### *Judiciary and judicial bodies*

The Senior Presiding Judge  
The Presiding Judges  
The Rt. Hon. Lord Justice Auld  
The Council of Circuit Judges  
The Senior District Judge (Chief Magistrate)  
The Registrar of Criminal Appeals  
The Judicial Studies Board  
The Magistrates' Association  
The Justices' Clerks' Society

### *Other bodies and authorities*

The Department of Health  
The Department for Education and Skills  
The Department for Communities and Local Government  
The Association of Chief Police Officers  
National Association of Victims' Support Schemes  
National Association for the Care and Resettlement of Offenders  
The Law Commission  
The Criminal Cases Review Commission  
The Legal Services Commission  
The Sentencing Guidelines Council  
The Health and Safety Executive  
The Environment Agency  
HM Revenue and Customs  
The Local Government Association  
The Association of Directors of Social Services  
The General Medical Council  
The British Medical Association

### *Legal professions*

The Bar Council  
The Law Society

The Institute of Legal Executives  
The Criminal Bar Association  
Solicitors in Local Government

*Academics*

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Professor J. R. Spencer  
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Professor D. Birch  
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