

Changes to Criminal Procedure Rules and Criminal Practice Direction 2015-17

Experts instructed in Criminal cases should be aware of the need to comply with the most recent Criminal Procedure Rules and Criminal Practice Directions.

The full details of these can be found at <https://www.justice.gov.uk/courts/procedure-rules/criminal>.

In this summary we set out 4 sections highlighting changes in the period 2015 - 2017

1. Criminal Procedure Rules 2015 Part 19 Expert Witness Evidence (replacing Criminal Procedure Rules 2014 Part 33).

Expert witnesses giving evidence in Criminal proceedings should note that CrimPR Part 33 has been replaced by CrimPR Part19.

For clarity the CrimPR Part19 are set out below:

PART 19 EXPERT EVIDENCE

Contents of this Part

When this Part applies	rule 19.1
Expert's duty to the court	rule 19.2
Introduction of expert evidence	rule 19.3
Content of expert's report	rule 19.4
Expert to be informed of service of report	rule 19.5
Pre-hearing discussion of expert evidence	rule 19.6
Court's power to direct that evidence is to be given by a single joint expert	rule 19.7
Instructions to a single joint expert	rule 19.8
Court's power to vary requirements under this Part	rule 19.9

When this Part applies

19.1.—(1) This Part applies where a party wants to introduce expert opinion evidence.

(2) A reference to an 'expert' in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.

[*Note. Expert medical evidence may be required to determine fitness to plead under section 4 of the Criminal Procedure (Insanity) Act 1964(1). It may be required also under section 11 of the Powers of Criminal Courts (Sentencing) Act 2000(2), under Part III of the Mental Health Act 1983(3) or under Part 12 of the Criminal Justice Act 2003(4). Those Acts contain requirements about the qualification of medical experts.*]

Expert's duty to the court

19.2.—(1) An expert must help the court to achieve the overriding objective—

(a) by giving opinion which is—

(i) objective and unbiased, and

(ii) within the expert's area or areas of expertise; and

(b) by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—

(i) complying with directions made by the court, and

(ii) at once informing the court of any significant failure (by the expert or another) to take any step required by such a direction.

(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.

(3) This duty includes obligations—

(a) to define the expert's area or areas of expertise—

(i) in the expert's report, and

(ii) when giving evidence in person;

(b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise; and

(c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.

Introduction of expert evidence

19.3.—(1) A party who wants another party to **admit as fact a summary of an expert's conclusions** must serve that summary—

(a) on the court officer and on each party from whom that admission is sought;

(b) as soon as practicable after the defendant whom it affects pleads not guilty.

(2) A party on whom such a summary is served must—

(a) serve a response stating—

(i) which, if any, of the expert's conclusions are admitted as fact, and

(ii) where a conclusion is not admitted, what are the disputed issues concerning that conclusion; and

(b) serve the response—

(i) on the court officer and on the party who served the summary,

(ii) as soon as practicable, and in any event not more than 14 days after service of the summary.

(3) A party who wants to introduce expert evidence otherwise than as admitted fact must—

(a) **serve a report** by the expert which complies with rule 19.4 (Content of expert's report) on—

(i) the court officer, and

(ii) each other party;

(b) serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence;

(c) serve with the report notice of anything of which the party serving it is aware which might reasonably be thought capable of detracting substantially from the credibility of that expert;

(d) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect—

- (i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and
- (ii) anything on which any such examination, measurement, test or experiment was carried out.

(4) Unless the parties otherwise agree or the court directs, a party may not—

- (a) introduce expert evidence if that party has not complied with paragraph (3);
- (b) introduce in evidence an expert report if the expert does not give evidence in person.

[Note. A party who accepts another party's expert's conclusions may admit them as fact under section 10 of the Criminal Justice Act 1967(5). Under section 81 of the Police and Criminal Evidence Act 1984(6), and under section 20(3) of the Criminal Procedure and Investigations Act 1996(7), Criminal Procedure Rules may require the disclosure of expert evidence before it is introduced as part of a party's case and prohibit its introduction without the court's permission, if it was not disclosed as required.

Under section 30 of the Criminal Justice Act 1988(8), an expert report is admissible in evidence whether or not the person who made it gives oral evidence, but if that person does not give oral evidence then the report is admissible only with the court's permission.]

Content of expert's report

19.4. Where rule 19.3(3) applies, an expert's report must—

- (a) give details of the expert's qualifications, relevant experience and accreditation;
- (b) give details of any literature or other information which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and—
 - (i) give the qualifications, relevant experience and accreditation of that person,
 - (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
 - (iii) summarise the findings on which the expert relies;
- (f) where there is a range of opinion on the matters dealt with in the report—
 - (i) summarise the range of opinion, and
 - (ii) give reasons for the expert's own opinion;
- (g) if the expert is not able to give an opinion without qualification, state the qualification;
- (h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;
- (i) contain a summary of the conclusions reached;
- (j) contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and
- (k) contain the same declaration of truth as a witness statement.

[Note. Part 16 contains rules about written witness statements. Declarations of truth in witness statements are required by section 9 of the Criminal Justice Act 1967(9). Evidence of examinations etc. on which an expert relies may be admissible under section 127 of the Criminal Justice Act 2003(10).]

Expert to be informed of service of report

19.5. A party who serves on another party or on the court a report by an expert must, at once, inform that expert of that fact.

Pre-hearing discussion of expert evidence

19.6.(1) This rule applies where more than one party wants to introduce expert evidence.

(2) The court may direct the experts to—

- (a) discuss the expert issues in the proceedings; and
- (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement, the content of that discussion must not be referred to without the court's permission.

(4) A party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under this rule.

[Note. At a pre-trial hearing, a court may make binding rulings about the admissibility of evidence and about questions of law under section 9 of the Criminal Justice Act 1987(11); sections 31 and 40 of the Criminal Procedure and Investigations Act 1996(12); and section 8A of the Magistrates' Courts Act 1980(13).]

Court's power to direct that evidence is to be given by a single joint expert

19.7.—(1) Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.

(2) Where the co-defendants cannot agree who should be the expert, the court may—

- (a) select the expert from a list prepared or identified by them; or
- (b) direct that the expert be selected in another way.

Instructions to a single joint expert

19.8.—(1) Where the court gives a direction under rule 19.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.

(2) A co-defendant who gives instructions to the expert must, at the same time, send a copy of the instructions to each other co-defendant.

(3) The court may give directions about—

- (a) the payment of the expert's fees and expenses; and
- (b) any examination, measurement, test or experiment which the expert wishes to carry out.

(4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.

(5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

Court's power to vary requirements under this Part

19.9. (1) The court may extend (even after it has expired) a time limit under this Part.

(2) A party who wants an extension of time must—

- (a) apply when serving the report, summary or notice for which it is required; and
- (b) explain the delay.

Criminal Practice Direction 2015 Part 19A has replaced Criminal Practice Direction 33A

Note that it is the number of the section has changed and not the content.

2. CrimPR Part 19 Expert evidence CPD V Evidence 19A: EXPERT EVIDENCE (this was formally Part 33A 2014, the content is unchanged the numbering has changed).

19A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary,

- (i) it is relevant to a matter in issue in the proceedings;
- (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and
- (iii) the witness is competent to give that opinion.

19A.2 Legislation relevant to the introduction and **admissibility** of such evidence includes section 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and CrimPR Part 19, which in exercise of the powers conferred by section 81 of the Police and Criminal Evidence Act 1984 and section 20 of the Criminal Procedure and Investigations Act 1996 requires the service of expert evidence in advance of trial in the terms required by those rules.

19A.3 In the Law Commission report entitled 'Expert Evidence in Criminal Proceedings in England and Wales', report number 325, published in March, 2011, the Commission recommended a statutory test for the admissibility of expert evidence. However, in its response the government declined to legislate. The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and CrimPR 19.4 lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

19A.4 In its judgment in *R v Dlugosz and Others* [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a **sufficiently reliable scientific basis** for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

19A.5 Therefore factors which the court may take into account in determining the **reliability of expert opinion**, and especially of expert scientific opinion, include: October 2015 250

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material; (e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

19A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

3. New Practice Direction 19B and 19C added in November 2016.

In November 2016 the Lord Chief Justice handed down a second amendment to the Criminal Practice Directions 2015. This amendment added new practice directions at 19B and 19C.

The full details of this are at <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/criminal-practice-directions-2015-amendment-no2-nov2016.pdf>

Criminal Practice Direction V Evidence 19B provides for statements of understanding and declarations of truth in criminal expert reports. The declaration consists of 14 points. Point 14 only applies to experts instructed by the Prosecution. The text is below and should be added as a declaration to criminal expert witness reports.

CPD V Evidence 19B: STATEMENTS OF UNDERSTANDING AND DECLARATIONS OF TRUTH IN
EXPERT REPORTS **Lord Chief Justice 16th November 2016**

19B.1 The statement and declaration required by CrimPR 19.4(j), (k) should be in the following terms, or in terms substantially the same as these:

'I (name) DECLARE THAT:

1. I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.

2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

6. I have shown the sources of all information I have used.

7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.

10. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.

11. I understand that:

(a) my report will form the evidence to be given under oath or affirmation;

(b) the court may at any stage direct a discussion to take place between experts;

(c) the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;

(d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert.

(e) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.

12. I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.

13. I confirm that I have acted in accordance with the Code of Practice for Experts. *Note this amended on 3rd April 2017 see below.*

14. [For Experts instructed by the Prosecution only] I confirm that I have read guidance contained in a booklet known as **Disclosure: Experts' Evidence and Unused Material** which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:

- (a) I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;
- (b) I have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material;
- (c) in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.'

Criminal Practice Direction V Evidence 19C deals with pre-hearing discussion of expert evidence.

Under CrimPR 19.6 such pre-trial discussions are not compulsory unless directed by the court. However, such a direction is listed in the magistrates' courts Preparation for Effective Trial form and in the Crown Court Plea and Trial Preparation Hearing form as one to be given by default, and therefore the court can be expected to give such a direction in every case unless persuaded otherwise. This Practice Direction sets out the purpose of discussions between experts and how such discussions are to be conducted and recorded.

After paragraph V 19A (Expert evidence) of the Criminal Practice Directions 2015 the following appears and is guidance to experts on the importance of expert witnesses and their role and conduct in expert discussions: It includes a declaration that must go at the end of the joint expert statement.

CPD V Evidence 19C: PRE-HEARING DISCUSSION OF EXPERT EVIDENCE Lord Chief Justice 16th November 2016

19C.1 To assist the court in the preparation of the case for trial, parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts' discussion and, if so, when. Under CrimPR 19.6 such pre-trial discussions are not compulsory unless directed by the court. However, such a direction is listed in the magistrates' courts Preparation for Effective Trial form and in the Crown Court Plea and Trial Preparation Hearing form as one to be given by default, and therefore the court can be expected to give such a direction in every case unless persuaded otherwise. Those standard directions include a timetable to which the parties must adhere unless it is varied.

19C.2 The purpose of discussions between experts is to agree and narrow issues and in particular to identify:

- (a) the extent of the agreement between them;
- (b) the points of and short reasons for any disagreement;
- (c) action, if any, which may be taken to resolve any outstanding points of disagreement; and
- (d) any further material issues not raised and the extent to which these issues are agreed.

19C.3 Where the experts are to meet, that meeting conveniently may be conducted by telephone conference or live link; and experts' meetings always should be conducted by those means where that will avoid unnecessary delay and expense.

19C.4 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone. The experts may not be required to avoid reaching agreement, or to defer reaching agreement, on any matter within the experts' competence.

19C.5 If the legal representatives do attend:

- (a) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and
- (b) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

19C.6 A statement must be prepared by the experts dealing with paragraphs 19C.2(a) - (d) above. Individual copies of the statements must be signed or otherwise authenticated by the experts, in manuscript or by electronic means, at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 5 business days. Copies of the statements must be provided to the parties no later than 10 business days after signing.

19C.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement. The joint statement should include a brief re-statement that the experts recognise their duties, which should be in the following terms, or in terms substantially the same as these:

'We each DECLARE THAT:

1. We individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so.
2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.'

19C.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

4. Criminal Practice Direction March 2017 made a further amendment to 19B and came into immediate effect on 3rd April 2017. The amendment is to point 13 of CPD 19B.

Point 13 previously stated: "*I confirm that I have acted in accordance with the code of practice for experts*"

This has now been replaced by: "*I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely [identify the code]*"

This is a significant change and indicates that experts should check to see if their professional body has a code of practice. The details of this should be entered into the declaration and the expert must comply with this.