



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

GUIDANCE NOTES

FORM 2

(DEFENCE PRE-ARRAIGNMENT NOTICE)

GENERAL

1. FORM 2 must be filed and served by the Defence within 7 days of the Defence having been served with FORM 1, unless otherwise directed by the Court.
2. The aim behind FORM 2 is to prompt the Defence to give early notice of any of the following applications which it may pursue:
 - (i) Application for Dismissal of Charges under section 31 CJPA;
 - (ii) Motion to Quash Indictment under section 504 CC; and
 - (iii) Application for finding that the Accused is unfit to plead to the Indictment under section 514 CC¹
3. FORM 2 stands as the Notice of Application and/or Notice of Motion to be filed for the listing of an application to dismiss or quash the charges. However, Counsel should be made to clearly understand that FORM 2 must be filed whether or not any of the above applications are intended to be made.

COVER LETTER TO THE REGISTRAR:

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

¹ A jury must be empaneled forthwith where there is uncertainty whether the Accused is capable of understanding the proceedings at trial and where a finding on such capability is to be made under section 514 CC.

- (i) compliance (or non-compliance) with the required timeframe for filing; (where there is non-compliance, an explanation should be included in the cover letter);
- (ii) the date on which the Accused will or did first appear in the Supreme Court and whether or not the Accused has been arraigned;
- (iii) if the Accused has been arraigned, a specification of the pleas entered (eg. not guilty to all counts/guilty to counts 1 and 2 but not guilty to counts 3 – 5.);
- (iv) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;
- (v) where a hearing date is requested, specification of hearing dates mutually available to the Defence and to the Prosecutor covering a 30 day period from the filing date. (Dates covering a 90 day period are required for hearings under section 514 where a jury is required to be empaneled.); and
- (i) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

JOINT HEARING BUNDLES

5. Where the Defence intends to make a written or oral application (in respect of section 31 CJPA or section 504 CC), a copy of any skeleton argument and related case law which the Defence intends to place before the Court shall be served (not filed) on the Prosecution on the same day that FORM 2 is filed and served.
6. The Prosecution will then have 7 days thereafter within which to serve the Defence with a copy of any skeleton argument and /or case law in reply.
7. Within 5 days of receipt of the Prosecution's reply (or in the case where there is no reply from the Prosecution: no less than 5 days but no more than 7 days after serving the Prosecution with the Defence skeleton argument and / or case law), the Defence shall file all of the exchanged materials as a joint hearing bundle for the Court.

TIMELINE TO FILE AND SERVE FORM 2

8. As a necessary component of effective case management, the Court should be put on notice as early as is reasonably practicable where the Defence intends to make any of the applications specified in FORM 2.
9. In any event, FORM 2 must be filed and served by the Defence no later than within 14 days after the Defence has been served with FORM 1, unless otherwise directed by the Court.
10. FORM 2 must be filed whether or not the Defence intends to rely on any of the sections specified therein, namely sections 31 CJPA, 504 CC or 514 CC.

STATUTORY TIMEFRAME FOR NOTICE OF S. 31 CJPA APPLICATION

11. Section 31(3) CJPA:
'No oral application may be made under subsection (1) unless the applicant has given to the Supreme Court written notice of his intention to make the application'.
12. FORM 2 is the notice of intention requisite to the making of a section 31 CJPA application. FORM 2 must be filed within 14 days of the Defence having been served with FORM 1.
13. Section 31(1) CJPA:
'A person who is sent for trial under section 23 or 24 on any charge or charges may, at any time-
(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and
(b) before he is arraigned (and whether or not an Indictment has been preferred against him) apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed'.
14. While it has been argued that a section 31 CJPA application may be made at any stage leading up to the start of a trial, the prevailing and accepted practice has been for the Accused to make the application prior to the first occasion on which the Accused is arraigned.

15. The timeline for making a section 31 CJPA application is expressly contemplated by the Act to be made *after* the Defence is served with ‘*copies of the documents containing the evidence on which the charge or charges are based*’ (ie. under section 3 DCR).
16. The statutory timeframe for making a section 31 CJPA application therefore accords with the deadline for filing FORM 2 as it is envisaged that the Defence will have been served with disclosure of the Crown’s case at this point but not yet have been arraigned.

STATUTORY TIMEFRAME FOR NOTICE OF S. 504 CC APPLICATION

17. A motion to quash an Indictment may be made by the Defence prior to the Accused entering of a plea.
18. Section 504(1) CC:
‘The accused person may before pleading apply to the Supreme Court to quash the indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge, or that it is formally defective.’
19. The timing for a section 504 CC application parallels a section 31 CJPA application only to the extent that both applications should be made prior to the arraignment of the Accused. However, the timeframe for making a section 504 CC application, unlike a section 31 CJPA application, is untied to service of prosecution evidence. Thus, a section 504 CC application can be made before the Defence has been disclosed with copies of the Crown’s evidence.
20. This allows the Defence the opportunity to provide the Court with early notice of a section 504 application even before FORM 2 is due to be filed. Such early notice can be stated in Court at the first arraignment session or sent by letter to the Registrar. Where a letter is sent accordingly, it should specify that FORM 2 will be filed thereafter.
21. In any event, FORM 2 is the formal notice of application for a section 504 CC application.
22. FORM 2 must be filed no later than within 14 days after the Defence has been served with FORM 1, irrespective of the applicability of section 504, unless the Court orders otherwise.

STATUTORY TIMEFRAME FOR NOTICE OF S. 514 CC

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

24. Section 514(1) CC provides:

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

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

FORM 2 (DEFENCE PRE-ARRAIGNMENT NOTICE)

BREACH OF FORM 2 FILING DEADLINE

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

27. Where the Defence fails to promptly file FORM 2, the Court will be moved to consider whether or not it will hear a FORM 2 application.

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

(Questions 1-10)

SECTION 31 CJPA APPLICATION FOR DISMISSAL

29. Historically, the committal process in the Magistrates' Court in Bermuda provided for the option of a Short Form Preliminary Inquiry (SFPI), a Long Form

Preliminary Inquiry (LFPI) and/or a hybrid inquiry most commonly referred to as a ‘SFPI with submissions’. These Magistrates’ Court preliminary inquiries have now been repealed by the Criminal Justice and Procedure Act 2015 (CJPA). (Also see *The Queen v Daymon Simmons and Sabian Hayward [2016] SC (Bda) 74 Crim (18 July 2016)*.

30. The current *sending* regime now tasks the determination of evidential sufficiency to the Supreme Court under section 31 CJPA. As section 37 PACE requires the Director of Public Prosecutions to determine that there is sufficient evidence *before* charging a person with an offence, section 31 operates as a review of the DPP’s determination on sufficiency under section 37 PACE.
31. Questions 1-6 of FORM 1 serve as a broad inquiry into whether (or to what extent) disclosure has been made in order for a section 31(1) CJPA application to be made. As the test is based on the lower evidential threshold of *sufficiency*, the disclosure questions which appear in questions 1-6 require less detail than the disclosure questions found in FORM 3.
32. Questions 7 – 10 simply seeks confirmation on whether or not a section 31 application will be made and, if so, whether Counsel have properly liaised with one another.

(Questions 11-14)

MOTION TO QUASH INDICTMENT

33. Section 488(2) CC:

“(2) An objection to an indictment or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused person enters a plea, and, after the accused person has entered a plea, only by leave of the court before which the proceedings take place.

(3) The court before which an objection is taken under this section may, if it considers necessary, order the indictment or count to be amended to cure the defect.”

Section 504(1) CC:

“The accused person may before pleading apply to the Supreme Court to quash the Indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge, or that it is formally defective.”

Section 506(1) CC:

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

34. Questions 11-12 prompt the Defence for notice of whether an application to quash the Indictment will be made.
35. FORM 2 is the notice of motion required for the listing of an application to quash the Indictment under section 504 CC.

(Questions 15-18)

NOTICE ACCUSED UNFIT TO PLEAD

36. Questions 15-18 are as an inquiry into whether the Defence has concerns that the Accused is unfit to plead.
37. Section 514 CC:

“Want of understanding of accused person

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

(2) If the jury find that he is capable of understanding the proceedings, the trial shall proceed as in other cases.

(3) If the jury find that he is not so capable, the finding shall be recorded, and the Supreme Court shall order the accused person to be kept in strict custody in such place and in such manner as the Court thinks fit, until the pleasure of the Governor, acting in his discretion, is known.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again called upon to plead to the indictment and to be tried for the offence.”

(Questions 19-22)

INDICATION ON PLEAS TO BE ENTERED

38. Questions 19-22 are included as a measure to assist the Court in managing the trial calendar. Where the Defence are well aware of an intention by the Accused to enter a guilty plea(s), early notice should be given to the Court through this section of FORM 2.
39. An Accused, whose intention to plead guilty is confirmed on FORM 2, has the benefit of clear and easy reference to proof of an early indication of a guilty plea. This is, of course, most significant during the sentence stage when considering mitigating factors.

SIGNATURE OF COUNSEL OR ACCUSED REQUIRED ON FORM 2

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

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