CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 16th MARCH, 2018 at 1.30 p.m.

MINISTRY OF JUSTICE
CONFERENCE ROOMS 1A, B & C, LOWER GROUND FLOOR
102 PETTY FRANCE, LONDON SW1H 9AJ

DRAFT MINUTES

Present

Committee members
Sir Brian Leveson, President of the Queen's Bench Division (chairman of the meeting)
Mr Justice William Davis
Mr Justice Haddon-Cave
HH Judge Picton
HH Judge Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
Siân Jones
The Director of Public Prosecutions, Alison Saunders
Alison Pople QC
Paul Harris
Shade Abiodun
Chief Constable Nick Ephgrave
Jodie Blackstock

Also attending
Professor David Ormerod QC, Law Commission
Sue Gadd, Justices' Clerks' Society
Ray Dhanowa, Criminal Appeal Office
Vicki Sheppard-Jones, Criminal Appeal Office
Sophie Marlow, Legal Secretary to the Lord Chief Justice
Alyson Sprawson, Legal Secretary to the Senior Presiding Judge
Talwinder Buttar, Chief Magistrate's Office
Michelle Crotty, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Matthew Gould, Ministry of Justice
Richard Chown, Ministry of Justice
Roberta Wiafe, Ministry of Justice
Cate Sampson, Ministry of Justice
Ian Wilkinson, HM Courts and Tribunals Service
Philip Elvy, Government Legal Department
Cathy Dilks, Criminal Cases Review Commission
Jonathan Solly (Committee secretariat)

1. Welcome, apologies for absence and announcements

Chairing the meeting, the President of the Queen's Bench Division welcomed the members of the Committee and all those who usually attended. He welcomed in particular Ray Dhanowa and Vicki Sheppard-Jones of the Criminal Appeal Office, attending for the discussion of agenda items 9 and 10; and Ian Wilkinson of HM Courts and Tribunals Service attending in place of Sarah Rose.

The chairman reported apologies for absence from Nathaniel Rudolf and David Kenyon; and from among those others who regularly attended meetings, Sarah Rose.

2. Draft minutes of the meeting held on 2nd February, 2018

The draft minutes of the meeting on 2nd February, 2018, were approved. There were no matters arising.

3. Case management group report

At the chairman's invitation, Mr Justice William Davis reported that the group had settled, with minor amendments, a form of application for the issue of a summons; and had concluded its discussion of new forms for use with the rules about appeal to the Crown Court. That latter discussion had prompted questions about some aspects of the draft new rules, including the rules about the retention or disposal of documents pending appeal, which the Committee would be asked to reconsider at its next meeting. The chairman mentioned a pending judgment of the High Court that would concern the admissibility of copy documents.

The judge reported that the group also had discussed, at length, proposals for a standard national form of written charge and requisition in terms that might encourage more recipients to attend court. The group had agreed that it would be difficult to devise clear written directions that would be understood and acted upon by all potential recipients; and had agreed that in cases involving serious alleged offences it remained preferable that the defendant should be charged at a police station and bailed to attend court. The chairman observed that the increased incidence of defendants' failure to attend the first court hearing in response to a requisition plainly was consequent on the changes to the law about police bail. He asked Chief Constable Ephgrave if he had information about the reduced use of such bail.

Mr Ephgrave reported that in Surrey, his own police force area, the introduction of the new law, the terms of which were very prescriptive, had led to striking reductions in the numbers of defendants charged orally and bailed. During the period July 2016 to February 2017, preceding the implementation of the bail law changes, 88% of defendants against whom serious sexual offences were alleged had been charged and bailed. During the period July 2017 to February 2018, following the implementation of those changes, that percentage had dropped to 42%, thus making such alleged offenders now twice as likely to be released under investigation without bail. Of defendants accused of offences of domestic abuse, the corresponding percentages were 40% before and 18% after the change of law; and of defendants accused of criminal damage, theft or fraud the corresponding percentages were 51% before and 5% after. There had been significant reductions, too, in other categories of case. The chairman commented that the national Criminal Justice Board had been greatly troubled by the effect of the new legislation. Mr Ephgrave offered the assistance of police representatives with the work of the case management group on this subject.

4. Part 3 Case management; Criminal Practice Directions – intermediaries

CrimPRC(18)15

The chairman introduced the letter from Intermediaries for Justice which had been addressed to the Committee and which expressed concerns about the numbers of intermediaries and the training available to them. He suggested that even if those complaints were justified there seemed little that the Committee itself could do to assist. He invited views on behalf of the Ministry of Justice

Matthew Gould explained that the letter received by the Committee had been addressed also to many other recipients. He reported that the Ministry of Justice had replied to it. He reminded members that there existed two schemes under which intermediaries were provided. The Ministry of Justice was responsible for the administration of the Witness Intermediary Service, which scheme provided assistance to prosecution witnesses and the members of which were registered with the ministry as intermediaries. Intermediaries for defendants were supplied by private sector companies. Reactions from police and courts to the assistance given by individual registered intermediaries was for the most part very positive and demand had grown substantially. A recruitment was under way in the East Midlands region, with a view to registering up to 30 more intermediaries. If successful, this would increase the total number of registered intermediaries working in England and Wales by 15%. The ministry intended to conduct a second regional recruitment later in the year in order further to expand numbers. As to training arrangements, the ministry intended to introduce initial training for the new recruits to allow them to start work as quickly as possible; but such arrangements did not yet exist and the details had yet to be settled. However, it was inconceivable that such training would not involve at least some delivered personally by experts in the field. Thereafter arrangements for the continuing professional development of all registered intermediaries would be required, including those already in post as well as those now being recruited.

The chairman observed that registered intermediaries were paid at rates set by the Ministry of Justice while unregistered intermediaries invariably charged much more and usually insisted on being present throughout the trial, not just to help the defendant give evidence. He asked what was being done to address these difficulties.

Matthew Gould replied that the small number of suppliers of defence intermediaries – there were only two companies in the market – gave rise to difficulties, but the current capacity of the Witness Intermediary Service precluded making it available to undertake defence commissions.

Mr Harris commented that the present state of affairs was unfair to defendants. Ms Abiodun agreed. Matthew Gould replied that there had been a challenge to the current arrangements by application for judicial review and the ministry still hoped to extend the Witness Intermediary Service as soon as possible.

Ms Blackstock asked why it was not possible to register those intermediaries who already undertook unregistered work for defendants. Ms Jones observed that in either event it was the Ministry of Justice that met the cost eventually. Matthew Gould reiterated that the solution was to expand the capacity of the Witness Intermediary Service, steps to achieve which were under way as he had described.

Professor Ormerod reminded the Committee that in 2016 the Law Commission had recommended the implementation of the still unimplemented defendant's statutory right to an intermediary. Mr Justice William Davis added that the effect of a judge's order requiring the commissioning on an intermediary had the same effect, but usually at greater expense.

Ms Blackstock explained that the additional cost of retaining an intermediary through a private company was attributable to that company's administration costs, the same costs as were incurred by the Ministry of Justice in the operation of the Witness Intermediary Service. Individual intermediaries were paid no more under the private than under the public scheme. She pointed out that the concerns expressed in the letter were to the effect that training was being reduced and the quality of intermediaries' assistance thereby compromised. Matthew Gould replied that he did not accept the premise for those criticisms. At present there was no training. Training was indeed required, and steps were being taken to supply it; but it was not correct to suggest that what now took place was being withdrawn.

Bringing the discussion to a conclusion, the chairman recorded the Committee's thanks to Intermediaries for Justice for their letter, and that the Committee shared their aspirations for the provision of an effective service to everyone who needed it; but statutory changes were unlikely to be introduced for a long time yet and in the meantime the Criminal Procedure Rules and the Committee had no power to ameliorate those difficulties the responses to which Matthew Gould had described.

5. Part 3 Case management; Criminal Practice Directions – JUSTICE Mental Health and Fair Trial Report recommendations CrimPRC(18)16

The chairman described the JUSTICE report as impressive. He thanked Ms Blackstock for her paper and invited her to introduce it to the Committee.

Ms Blackstock explained that many of the recommendations of the report would require changes of practice or legislation that lay beyond the scope of the Committee's powers, but some could be implemented by the Committee itself.

Her first proposal was to amend the practice directions that provided for live links. To assess the extent of a defendant's mental health and capacity by live link was almost impossible, and the directions should make that clear. The chairman agreed. HH Judge Edmunds QC agreed also in principle but observed that on occasions it might be better for the defendant not to be required to travel. In such cases it was necessary to rely on the advocates to assist the court. Chief Constable Ephgrave also agreed, pointing out that some 40% of those with whom the police dealt had relevant disabilities of one kind or another and that assessment by means of a live link was not always appropriate. However, he added that the police were under great pressure to produce as many defendants as possible at court by live link, raising an obvious possibility of conflicts.

The chairman suggested that the current provision for youths might be extended to those with disabilities. Mr Justice Willian Davis observed that the number of adult defendants with a disability greatly exceeded the number of youths who were likely to be asked to use a live link.

HH Judge Picton commented that some defence practitioners preferred defendants to attend court in order to meet and to take instructions, and those practitioners might be inclined to exaggerate the extent of a disability in order to achieve that end. Mr Harris doubted that defence solicitors would adopt such a device, though he accepted that making arrangements to meet a client in prison had become a significant challenge.

Ms Blackstock emphasised that the proposal was concerned only with the first court attendance and with the opportunity which that presented properly to assess the defendant. Attendance by live link at subsequent hearings might not be objectionable.

The chairman agreed that many defendants had learning or communication disabilities. He suggested that the characteristic to assess should be the capacity effectively to participate in the proceedings. Ms Blackstock agreed.

Ms Jones pointed out that where a defendant attended a first hearing by live link from a police station then his or her capacity to participate would have been assessed there. Ms Blackstock agreed, but added that if the assessment at the police station were that the defendant should not use the live link then the police still might feel obliged to use it, as Mr Ephgrave had observed. Ms Jones agreed that the court would need to be informed of the recommendations of the assessment.

Ms Blackstock explained that her second concern was with the provision of intermediaries for defendants. The JUSTICE report made the point that vulnerable defendants simply could not understand what was happening at trial. It was not possible for courts and advocates to adapt the entire trial process and to conduct the questioning of every witness in a way that the defendant him or herself could follow, and that was why somebody was needed to explain to the defendant what was going on. In some ways the defendant's own evidence was easier to deal with than other aspects of the proceedings. The report's conclusion was that in some cases support of some kind needed to be provided throughout the trial.

Mr Harris reminded the Committee that the reduction in legal aid payments had resulted in fewer solicitors' clerks attending trial with the advocate to liaise with the client. He asked whether the restoration of funding would assist. Ms Blackstock thought the two were distinct: what was needed was someone to sit with the defendant and in effect to interpret what was happening, which was not a lawyer's role. Where interpretation was required, courts would not countenance proceeding without an interpreter. Some defendants needed comparable assistance, whether that was provided by an intermediary or a witness service volunteer or some other such person. The Practice Directions perhaps could better reflect the range of circumstances. She accepted that not every such defendant would require the assistance of a qualified intermediary, but some defendants did need help from somebody.

Mr Justice William Davis reminded the Committee that in the case of *R (OP) v Ministry of Justice* the court had recognised that the assistance of another person might be appropriate. However, the practice directions under discussion concerned intermediaries and he did not think that it was right to extend their scope. Matthew Gould agreed, observing that the intermediary scheme had been established for a specific purpose and was not the solution to a wider need.

The chairman commented that some things might not be susceptible to explanation in the sense now under discussion, for example technical expert evidence. Ms Blackstock agreed but suggested that a support worker's explanation could still assist nonetheless. Judge Edmunds QC remarked that support workers often attended court with vulnerable defendants and their presence was welcome. Perhaps the practice directions could better reflect that. Occasionally questions might arise about coaching the defendant or about security but it should be possible to deal with those case by case and the appropriate adult scheme was well established in police stations. The chairman agreed that more consideration should be given to assistance from others than intermediaries.

Ms Blackstock's third point was directed to the provision of Easy Read material. The JUSTICE report had concluded, as had others before, that that would be very helpful to some defendants; but this was a matter primarily for the Ministry of Justice and HM Courts and Tribunals Service.

Fourth, Ms Blackstock proposed explicit provision for the trial judge to require the prosecutor to review the charging decision where the defendant's mental health made that

appropriate. Some trial judges already did so, but others did not. The Director of Public Prosecutions suggested that this would impinge upon the different constitutional duties of courts and prosecutors. Ms Blackstock explained that it would merely constitute an invitation to reflect in the light of what had emerged since the defendant had been charged. The Director replied that the Crown Prosecution Service already was subject to a duty continually to review the propriety of pursuing proceedings, with which duty it complied.

Ms Pople QC suggested that a requirement for judicial intervention in the manner proposed might prove counterproductive for the defence by raising considerations other than those to the same end on which the defendant wished to rely.

Judge Edmunds QC remarked that the practice directions already provided for the court in a structured way to invite the prosecutor to review the desirability of continuing.

District Judge (Magistrates' Courts) Snow noted that the proposal did not directly address magistrates' courts, which dealt with similar cases. Ms Blackstock confirmed that the intention was for the proposal to apply also to magistrates.

The chairman referred to the fifth point, proposing the preparation of a protocol requiring courts to adhere to the relevant rules and practice directions. In his view, if the requirements and guidance contained in the rules and directions were indeed ignored then it was unlikely to assist to provide yet more written material. Ms Blackstock replied that perhaps clearer indications in the case management forms would suffice. The objective was to ensure that some guidance or requirement would trigger effectively an assessment of mental health where that was needed and thereafter the appropriate conduct of the proceedings.

Drawing the discussion to a conclusion, the chairman summarised the outcome as agreement (a) to settle draft practice direction amendments concerning (i) the use of live links where the defendant had a mental health or learning disability and (ii) the potential use of support workers or others to assist defendants with such disabilities at trial; and (b) to review the sufficiency of the prompts in current trial preparation forms to assess a defendant's capacity to participate. He recorded that the Committee had agreed also to encourage the preparation by others of Easy Read explanations for court users of criminal proceedings.

6. Part 4 Service of documents – service by electronic means CrimPRC(18)17

Introducing the paper for the Committee, the chairman observed that the practical solution appeared to be for notices of appeal and other such documents to be served by email without the supporting material, in order to ensure their successful transmission. The Director of Public Prosecutions agreed, reporting that the Crown Prosecution Service had issued guidance to that effect.

The Committee agreed that no rule amendment was required. Members expressed sympathy with the prosecutor whose attempted electronic service had failed.

7. Part 24 Trial and sentence in a magistrates' court; Criminal Practice Directions – trial adjournment CrimPRC(18)18

The chairman introduced the paper for the Committee. He drew attention to a commentary on the subject published recently by the former Chief Magistrate, Howard Riddle. He invited Mrs Bryant to open the discussion.

Mrs Bryant reported that although she herself had found the proposed practice directions helpful, other Committee members with whom she had discussed them had thought that amendments were desirable. Ms Jones explained that the draft required amendment in

various respects, and that it should be extended to deal also with applications to adjourn the trial made before the trial hearing date.

The Committee directed that members from magistrates' courts should settle amendments and return the draft for discussion by the case management group and the Committee as soon as practicable.

8. Part 29 Road traffic penalties – extended driving tests CrimPRC(18)19

The chairman thanked HH Judge Picton for a commendably short paper. The Committee agreed that the correct legal position, as set out in that paper, should be drawn to the attention of the Driver and Vehicle Licensing Agency. District Judge (Magistrates' Courts) Snow and Ms Jones confirmed that DVLA requests to be supplied with differently, and incorrectly, expressed orders were not encountered in magistrates' courts, as far as either was aware.

9. Part 36 Appeal to the Court of Appeal: General Rules – fresh grounds of appeal CrimPRC(18)20

The chairman introduced the paper for the Committee. He observed that fresh grounds of appeal submitted with applications to renew out of time applications for permission to appeal now consumed disproportionate amounts of court and court staff time. He thanked staff of the Criminal Appeal Office for their assistance with the proposed rule amendments and invited members' views.

Ms Pople QC, Mr Justice William Davis and Mr Justice Haddon-Cave all agreed that what was proposed was desirable. The Committee discussed generally the difficulties peculiar to cases involving a change of law.

Nigel Gibbs suggested that the proposed rule change might not be appropriate to a case involving a prosecution appeal against an adverse ruling, or to the reference of an unduly lenient sentence to the Court of Appeal, or to an application for permission to appeal or refer a case to the Supreme Court. The Committee directed further consideration of the application in those instances of the new rule.

10. Part 39 Appeal to the Court of Appeal about conviction or sentence – service of appeal notice CrimPRC(18)21

The chairman introduced the paper for the Committee and invited comments from Ray Dhanowa and Vicki Sheppard-Jones.

Vicki Sheppard-Jones explained that the intention was to make the process of appealing quicker and more efficient for those appealing against conviction or sentence. In response to a question by Mr Harris she confirmed that the rule amendment, and the associated practical arrangements in the Criminal Appeal Office and Crown Court offices, would mean that when the rule came into force an appellant would need to send his or her appeal notice to the Criminal Appeal Office only.

The Committee approved the rule amendments.

11. Part 50 Extradition – charges in dual criminality cases CrimPRC(18)22

The chairman introduced the paper for the Committee and asked the Director of Public Prosecutions for her views.

The Director acknowledged that the Crown Prosecution Service needed to explain in extradition proceedings how any requirement for dual criminality was satisfied, but doubted the need for a requirement in the terms proposed by the paper. District Judge

(Magistrates' Courts) Snow added that the requesting state would need to demonstrate dual criminality in every case in which the defendant asserted that the alleged offence otherwise would not be an extradition offence.

After general discussion, the chairman directed that the Crown Prosecution Service and Judge Snow should suggest an alternative rule amendment for consideration at a future meeting.

12. Part 50 Extradition – power to withhold defendant's name CrimPRC(18)23

The Committee noted the judgment of the High Court in the case reported and agreed that no rule amendment was required.

13. The Data Protection Bill, etc. CrimPRC(18)24

The Committee agreed that a notice in the terms proposed should be published as suggested.

Philip Elvy suggested that the notice usefully could refer also to the publication of judgments, and to the use of information for research purposes. HH Judge Edmunds QC observed that a comparable notice would be required to alert users of the Crown Court Digital Case System. The Committee agreed with both.

14. Any other business

The chairman drew members' attention to a letter received from Matthew Gould in which it was explained that to accommodate the amendment of procedure rules, including Criminal Procedure Rules, consequent on withdrawal from the European Union the government itself would prepare the necessary rule amendments and would consult the Committee as soon as possible. Matthew Gould emphasised that the Ministry of Justice valued the Committee's work and that these arrangements had been adopted only in the interests of practicality. More information about necessary rule changes would be available at future meetings. The chairman observed that this was plainly the right way to deal with the circumstances.

District Judge (Magistrates' Courts) Snow reminded the Committee that a further discussion of sanctions for procedural default remained outstanding following the February meeting.

15. Dates of next meetings: Friday 4th May, 2018, and
Friday 15th June, 2018

The meeting closed at 3.15 pm.