CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 5th OCTOBER, 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)
Lord Justice Haddon-Cave
Mr Justice William Davis
HH Judge Picton
HH Judge Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
The Director of Public Prosecutions, Alison Saunders
Nathaniel Rudolf
Paul Harris
Jodie Blackstock

Also attending
Senior District Judge (Magistrates' Courts) Arbuthnot, the Chief Magistrate
Professor David Ormerod QC, Law Commission
Dr Christina Peristeridou, University of Maastricht
Judge Dorris de Vocht, University of Maastricht
Siân Jones, Justices' Clerks' Society
Sue Gadd, Justices' Clerks' Society
Sophie Marlow, Legal Secretary to the Lord Chief Justice
Alyson Sprawson, Legal Secretary to the Senior Presiding Judge
Michelle Crotty, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Ceri Hopewell, Serious Fraud Office
Richard Chown, Ministry of Justice
Cate Tempest, Ministry of Justice
Tom Ring, HM Courts and Tribunals Service
Sarah Bergstrom, Criminal Appeal Office
Chris Williams, Criminal Appeal Office
Cathy Dilks, Criminal Cases Review Commission
Philip Elvy, Government Legal Department
Leila Nahaboo, Government Legal Department
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 Dr Christina Peristeridou and Judge Dorris de Vocht, both of Maastricht University, attending as observers (Dr Peristeridou having also attended the Committee meeting in February); Sarah Bergstrom and Chris Williams of the Criminal Appeal Office, attending for the discussion of agenda items 4 and 12; Siân Jones in her new capacity as Head of Legal and Professional Services in HM Courts and Tribunals Service and Secretary to the Justices' Clerks' Society; and Tom Ring of HMCTS. He welcomed also the Chief Magistrate, Professor Ormerod QC and Sue Gadd, observing that each of them already had achieved the status of regular participant.

The chairman reported apologies for absence from Alison Pople QC, Shade Abiodun, Chief Constable Ephgrave and David Kenyon; and, from among those others who regularly attended meetings, Matthew Gould.

2. Draft minutes of the meeting held on 13th July, 2018

The draft minutes of the meeting on 13th July, 2018, were approved.

The chairman drew attention to two working group meetings that since had taken place, one concerning initial details of the prosecution case, to which item 12 of the 13th July minutes referred, and the other concerning authorised court officers, the outcome of which would be discussed at item 4 of this meeting's agenda.

At the chairman's invitation Mr Harris reported that the meeting about initial details of the prosecution case had been useful, but it had been disappointing that no real local engagement between the Crown Prosecution Service, the police and defence practitioners had taken place since the previous meeting in January. There were some signs that this was at last beginning to take place, however. The Director of Public Prosecutions added that the Senior Presiding Judge had arranged some useful local events. The Committee secretary reported that, since the working group meeting, the Association of Police and Crime Commissioners had agreed to do what it could to ensure that regular local criminal justice board, or comparable, liaison meetings would take place, at which local defence concerns could be ventilated more effectively than was possible in a national forum.

There were no other matters arising.

3. Case management group report

At the chairman's invitation, Mr Justice William Davis reported that the group had dealt with four matters:

1) the product of consultation with police forces on the group's proposed new Easy Read form of postal requisition. Respondents had been broadly unenthusiastic, with many considering the proposed form simplistic and thus, in the judge's view, missing the point: which was to ensure that the significance of a written requisition would not be lost on those who otherwise would not understand it. The judge had been reminded of the initial reactions of many Circuit judges to the Easy Read form of notice to jurors, which notice had been adopted successfully nonetheless. However, it had emerged that some police forces already were making commendable efforts to improve on the forms they used, and in those circumstances the group had decided to ask the police (i) to adopt a single national form, (ii) to adopt a form consistent with Easy Read principles, and (iii) to report on their progress in time for the group's meeting in December, when the group

would resume its discussion and decide whether its own draft form should be promulgated for national use.

2) the first draft of an Easy Read notice of appeal to the Court of Appeal against conviction, which the group had approved in principle with some suggested amendments;
3) a letter received from Just for Kids Law on the subject of Crown Court directions for the trial of vulnerable defendants, the suggestions contained in which already had been accepted by the judicial group responsible for the maintenance of the plea and trial preparation hearing form and incorporated in the forthcoming revision of that form;
4) a recent controversy about an unauthorised adjustment to the magistrates' courts preparation for effective trial form, which controversy, the group heard, had resolved itself on it being discovered that the adjustment had been an isolated oversight.

4. Part 2 amendments to accommodate the Courts and Tribunals (Judiciary and Functions of Staff) Bill: authorised court officers **CrimPRC(18)56 CrimPRC(18)47 CrimPRC(18)48**

The chairman introduced the paper for the Committee, thanking HH Judge Edmunds QC and the other members of the working group who had contributed to that group's helpful discussion in September. He drew members' attention to the group's conclusions summarise at paragraph 5 of paper (18)56 and to the questions at paragraph 32 of that paper. He invited Judge Edmunds to open the discussion.

Judge Edmunds reported that the working group's discussion had been very constructive, and had proved less difficult than anticipated because of the decision largely to preserve the status quo and to adopt a structure now reflected by the draft rules. Now it would be necessary to examine the detail, with the rules listing tasks, not other rules, as the basis for what would be allowed or prohibited. The group recommended that there should be further working group meetings for that purpose.

Mrs Bryant endorsed the judge's summary of the working group meeting. She agreed that the new rules reflected the structure approved by the group, but remained unsure about the transparency of staff functions in magistrates' courts. The expression 'make a listing decision' to which paragraph 19 of paper (18)56 referred was a matter of particular concern. The expression should be elaborated and would require detailed discussion in the working group. District Judge (Magistrates' Courts) Snow agreed that that, among other things, required working group discussion.

The chairman asked whether members considered that the preparation of the draft rules was now heading in the right direction. Judge Snow, the Chief Magistrate, Siân Jones and Sue Gadd all agreed.

The Director of Public Prosecutions emphasised that the extent of powers conferred on staff must be clear and practical, so that parties were left in no doubt about what staff could and could not do. Mr Harris and Mr Rudolf agreed.

Chris Williams explained that the Criminal Appeal Office would prefer not to distinguish between the powers conferred by the rules on legally qualified staff and on other staff. The chairman added that he understood that the Administrative Court Office, too, would prefer not to distinguish.

Judge Edmunds drew members' attention to the proposal that there should be rights of reconsideration in the Crown Court, the High Court and the Court of Appeal, but not in magistrates' courts. That would be subject to primary legislation in any event, but if members held strong views then it would be helpful to be aware of them.

The Committee discussed the likely date of the next Parliamentary stage of the Bill, and its likely subsequent progress.

Drawing the discussion to a conclusion, the chairman repeated the Committee's thanks to the working group and asked its members to resume their consideration of the details of the draft rules.

5. Part 3 Case management; Part 24 Trial and sentence in a magistrates' court; Criminal Practice Directions: trial postponement and adjournment

CrimPRC(18)57
CrimPRC(18)49

The chairman introduced the paper for the Committee, thanking District Judge (Magistrates' Courts) Snow, Louise Bryant, Siân Jones and Sue Gadd for the very substantial work that their working group had done; not least in interpreting judgments of the Divisional Court many of which these draft directions reflected.

Judge Snow explained that the group now was content with the product of their discussions, save for three points that remained outstanding: (i) he preferred the previous version of paragraph 24C.5; (ii) in paragraph 24C.20 a case citation was required; and (iii) paragraph 24C.25 required further amendment. Sue Gadd added that in her opinion paragraph 24C.18 restricted the court's discretion excessively.

Mrs Bryant expressed her gratitude to all who had worked on the draft practice directions but asked that magistrates should have ready access to them when handed down. The tablet computers supplied to magistrates needed a link giving them direct access to the Criminal Procedure Rules and Criminal Practice Directions; or at least to these new directions. Tom Ring agreed that HM Courts and Tribunals Service would arrange for such links to be included.

Nigel Gibbs reported that he had been unable to find the case of *Douglas* referenced without citation at paragraph 24C.20, and added that that paragraph should refer also to section 78 of the Police and Criminal Evidence Act 1978 as the source of the court's power to exclude evidence. The Committee discussed generally the status of practice directions and the extent to which such a direction could supersede and depart from case law.

HH Judge Edmunds QC suggested that paragraph 24C.4 should oblige a party who is not at fault to notify the court of another's procedural default. In his view it was important to reinforce the message that parties were obliged promptly to report procedural non-compliance by others and to make clear that all were responsible for ensuring that case preparation proceeded as directed by the court. The chairman agreed, but added that he thought there should be no encouragement to correspond prematurely. Judge Snow added that subsequent paragraphs of the draft directions made clear the parties' respective responsibilities. Lord Justice Haddon-Cave agreed that to send too many reports of non-compliance might overwhelm the court office. If no such letter were sent a procedural default still would be apparent after the event.

Mr Harris observed that in cases with which he dealt he rarely received letters from the Crown Prosecution Service acknowledging default or delay where that had occurred. On a recent occasion he had felt obliged to report such a prosecution default himself in

circumstances in which a District Judge (Magistrates' Courts) had directed explicitly that the case should be listed for a hearing in the event of default, but his letter had been ignored by the court. It appeared to him that courts received too many messages to deal with. Where the CPS missed a procedural time limit his own usual practice was to send a reminder to them immediately but to report the default to the court only after a week or so.

The Director of Public Prosecutions replied that the CPS wrote frequently to courts to advise them of delays where those occurred, but she accepted that those letters might not always be copied to the defence as they should be. She would be concerned if cases routinely were listed merely in order to explain what had been a short delay in complying with a direction subsequently met.

Judge Edmunds reiterated that the obligation on all parties to engage with case progression should be made clear. The chairman suggested that the direction at paragraph 24C.12 might be replicated at paragraph 24C.4.

Concluding the discussion, the chairman invited the working group to send to the Committee secretary their preferred final formulation of those few paragraphs that had been discussed.

6. Part 4 Service of documents: court office address for service CrimPRC(18)58

The chairman introduced the paper for the Committee. No observations were offered and the Committee approved the proposed rule amendments.

7. Part 4 Service of documents: service by first or second class post CrimPRC(18)59

The chairman introduced the paper for the Committee. He asked what cost now was attributable to requiring the dispatch of court letters by first class post, and what the practical advantage of the proposal was perceived to be.

Siân Jones explained that the proposal had been prompted by plans for the CJS Common Platform Programme in future to facilitate bulk postal dispatch from a single central point; though already such bulk dispatch was a feature of many court offices. The Criminal Procedure Rules should reflect the reality that court office post was dispatched in bulk, automatically, and that nobody would be able to certify that a single specific item had been posted as the rules seemed to contemplate.

The chairman suggested that the rules might be satisfied by a certificate to the effect that an automated dispatch system had been used and that it had been functioning correctly at the relevant time. He expressed concern that some documents might require delivery more quickly than second class post would accommodate.

Siân Jones agreed that the rules should allow for time-sensitive documents to be sent by first class post. Those working on the Common Platform Programme had been asked to supply more information about how the dispatch system might be required to distinguish between letters that could be sent by second class post and those that should be sent first class. It ought to be possible to differentiate.

The chairman asked what costs were involved. Tom Ring explained that 1.8 million cases were processed each year in which a notice of fine was issued and, at present, sent by first class post. Given that there was no compelling reason for sending such a notice first class, even if the saving were to be only 5p per item that would amount to a saving of £90,000 per year: and in relation to that one category of document alone. The chairman asked what the cost would be of having a bulk despatch system distinguish between more and less

urgent documents. Tom Ring explained that urgent documents might simply be withheld from the bulk system.

Mr Harris asked whether there had been a reduction in the need for post given the widespread use of email, including by defendants. Tom Ring pointed out that notices of fines would not be sent by email, and that in many cases no email address for a defendant would be known.

District Judge (Magistrates' Courts) Snow asked whether it was necessary or desirable to change the rule before being sure that it was necessary to do so. Siân Jones explained that it would be necessary to negotiate relevant contracts with bulk dispatch suppliers on the basis of what the Rules required, rather than on the basis of what it was hoped that the Rules might allow (but might not).

The chairman observed that it still would be important to know what was said to be technically feasible, and what the cost would be of distinguishing between different types of post. Tom Ring speculated that it might be possible to differentiate different letter types. The chairman suggested that that then might require two or more dispatch contracts. He acknowledged that certainty was needed for the contracting purposes, but thought that the Committee should have more information about how the dispatch system might work.

Professor Ormerod QC asked whether it was obligatory for any reason to use the Royal Mail. HH Judge Edmunds QC observed that rule amendments in theory could allow for the use of an equivalent of second class post.

Drawing the discussion to a conclusion, the chairman asked for more work to be done on the proposal before it was resubmitted to a future meeting.

8. Part 5 Forms and court records: written information from court records

CrimPRC(18)60

The chairman introduced the paper for the Committee. He summarised the object of the proposal as the reduction to a necessary minimum of the number of occasions on which judges in the Crown Court, and legal advisers in magistrates' courts, should be required to authorise the supply of information to the public and to journalists.

HH Judge Edmunds QC agreed that the proposal was worthwhile but observed that court staff would need job cards and other guidance to help them to apply the rules and practice directions. Tom Ring agreed that the rules and directions would serve their purpose only to the extent that staff complied with them. Mr Justice William Davis added that court staff were not alone in failing to adhere to the rules and practice directions; recently he had come across a case of a judge refusing to allow the names of counsel to be given to the press.

Sarah Bergstrom reported that court staff sometimes were deterred from giving information to which an applicant was entitled by a fear of disciplinary sanctions should the staff make a mistake. The departmental conduct policy was widely understood to forbid staff from talking to journalists under any circumstances. Siân Jones agreed that such perceived inhibitions often impeded the supply of information required or permitted by the Rules.

In general discussion reference was made to the imminent publication by HM Courts and Tribunals Service of new staff guidance on how to deal with media enquiries and help journalists.

Drawing the discussion to a conclusion, the chairman asked whether any member opposed the proposed rule change. None did and the Committee approved the proposed amendments accordingly; but recommended strongly that HMCTS should ensure that staff

received sufficiently clear and sufficiently detailed guidance to give them confidence in applying the relevant rules and practice directions.

9. Part 5 Forms and court records: publication of forthcoming case lists
CrimPRC(18)61
CrimPRC(13)55

The chairman introduced the paper for the Committee. No observations were offered and the Committee approved the proposed rule amendments.

10. Part 7 Starting a prosecution in a magistrates' court: application for issue of summons or warrant – obligations of private prosecutor CrimPRC(18)62
CrimPRC(18)50

The chairman introduced the paper for the Committee, observing that helpful responses had been received from the Criminal Law Committee of the Law Society and from the Private Prosecutors' Association, and recording the Committee's gratitude to both. Having had the benefit of those responses he thought the proposal now sound. The Committee agreed and approved the proposed amendment to CrimPR 7.2(5) that would have the effect of requiring all private prosecutors to supply the information required by rule 7.2(6).

The chairman drew attention to the Private Prosecutors' Association's suggestion that the requirement of rule 7.2(6)((b)(ii) to disclose 'details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made' was unclear and should be elaborated, in that it did not explain whether the prospective private prosecutor was expected to make enquiries, and if so how. He asked whether members agreed that the addition of any further qualification would be unnecessary, given that rule 7.2(6)(c) required only that the details supplied were declared true 'to the best of the applicant's knowledge, information and belief'.

Lord Justice Haddon-Cave agreed that no amendment to that requirement should be made. To change it would imply that some sort of enquiry was expected, when in fact that was not the case.

The Committee decided to make no such additional amendment.

11. Part 19 Expert evidence: expert's duty of disclosure CrimPRC(18)63

The chairman introduced the paper for the Committee, recording members' gratitude to the Forensic Science Regulator and her staff. He was concerned, however, about whether expert witnesses should be expected to reveal only very serious criticism or should also report a court's rejection of the expert's evidence. He recalled a case in which it had emerged that an expert witness had been criticised severely by a court on a previous occasion, though she had not revealed that; and when challenged had replied that she was unaware of it.

Lord Justice Haddon-Cave commented that there was an increasing problem with unreliable experts and that criticism should be revealed.

Mr Harris thought that any such expert's name ought to be removed from any list of those approved to be consulted, for example the Legal Aid Agency panels. No defence practitioner wanted to commission an expert witness who had been severely criticised by the Court of Appeal or another court, but the problem was that the defence practitioner was unlikely to be aware of any such criticism.

The Director of Public Prosecutions observed that the Crown Prosecution Service experienced similar difficulties. No register of criticisms was kept, and in practice the CPS

relied upon police investigators to identify suitable expert witnesses and, if applicable, to warn prosecutors of any adverse comment on that expert's previous evidence.

HH Judge Picton saw no present reason for an expert to reveal anything that did not undermine that expert's credibility, pointing out that a single instance of rejection of an expert's conclusions in an individual case could not usually be described as having that consequence. Mr Justice William Davis added that the problem often lay with the expertise itself and not with the witness' credibility in the strict sense.

Professor Ormerod QC suggested that an expert should be required to disclose any case in which adverse judicial comment had been made about either credibility or expertise. That which should be disclosed ought not be confined only to that which undermined credibility, as the current rule required.

Nigel Gibbs suggested that perhaps what should be disclosed should be confined to any adverse judicial finding for which reasons had been given, rather than extended to any criticism at all.

Lord Justice Haddon-Cave proposed that what should be disclosed was anything adverse to credibility, competence or expertise. The chairman agreed, adding that the suggested requirement to disclose information to the party commissioning the expertise should correspond with the extent of that party's own obligation, namely to disclose that which substantially undermined the expert.

Mr Rudolf suggested that the information to be disclosed should include any regulatory sanction imposed upon the expert by any relevant professional body, where such a body existed. Nigel Gibbs added that the Criminal Practice Directions might give examples of what could detract from credibility, in order to elaborate on the rule.

Mr Justice William Davis pointed out that in the Family Division courts on occasion would order that the judgment was to be sent to the expert. He suggested that criminal courts might do the same. The chairman agreed, adding that a court which was minded to criticise an expert could give advance warning to ensure that that expert was alerted to the need to consider the judgment. Lord Justice Haddon-Cave also agreed, but added that a judge should take care not to be drawn into an iterative discussion of what the judgment should or should not say: that was for the judge.

Siân Jones accepted that expert witnesses were unlikely to receive copies of judgments in criminal cases but thought that they could be expected to be aware if a finding against them personally had been made. She suggested that thought should be given to the creation of some sort of register of unsatisfactory experts, akin to the register of those litigants who had been declared vexatious.

Drawing the discussion to a conclusion, the chairman directed the preparation of revised rule amendments and draft practice directions accordingly, for further consideration at the next meeting.

12. Part 38 Appeal to the Court of Appeal against ruling adverse to prosecution: giving notice of intention to appeal **CrimPRC(18)64**
CrimPRC(18)66

The chairman introduced the papers for the Committee. He noted that although the Rule Committee could not construe primary legislation authoritatively, the Court of Appeal could; and given that another appeal concerning these provisions was due to be heard soon he suggested that the Committee should postpone its discussion until after judgment in that case. The Committee agreed.

Nigel Gibbs added that the issue in the pending case was whether the prosecutor's 'acquittal agreement' must be announced in open court.

13. Part 47 Investigation orders and warrants: overseas production orders

CrimPRC(18)65

The chairman introduced the paper for the Committee. He observed that the proposed rules could not be made until the Crime (Overseas Production Orders) Bill had passed, but invited provisional views.

Ceri Hopewell reported the view of the Serious Fraud Office that the procedure rules governing applications for domestic production orders operated satisfactorily and that corresponding rules such as those proposed therefore should operate satisfactorily in this new context, too. She suggested that the note to draft rule 47.67 should include also references to the legislative definition of communications data in clause 3 of the Bill.

The Committee approved in principle the proposed rule amendments, subject to an amendment to the note to draft rule 47.67 and subject to the progress of, and any amendment to, the Bill.

14. Any other business

The chairman drew members' attention to concerns that Crown Court judges still were being asked to approve requests for the supply of transcript in circumstances in which that was unnecessary. Redaction was not usually required; could not be carried out by court staff; and should not be expected of judges. Every transcript now included the warning to recipients required by the Criminal Practice Directions. The chairman would write to the Chief Executive of HM Courts and Tribunals Service.

The chairman reminded members that this would be the last meeting to be attended by Alison Saunders as Director of Public Prosecutions. He expressed the Committee's gratitude to the Director for her service. Committee members joined him in thanking her.

15. Dates of next meetings: Friday 9th November, 2018, and
Friday 7th December, 2018

The meeting closed at 3.20 pm.