CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 9th NOVEMBER, 2018 at 1.30 p.m.

MINISTRY OF JUSTICE
MEDIA ROOM 4, 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 Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
The Director of Public Prosecutions, Max Hill QC
Nathaniel Rudolf
Chief Constable Nick Ephgrave
Jodie Blackstock

Also attending
Senior District Judge (Magistrates' Courts) Arbuthnot, the Chief Magistrate
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
Dominic Alexander, HM Revenue and Customs
Richard Chown, Ministry of Justice
Cate Tempest, Ministry of Justice
Amelia Hammond, Ministry of Justice
Tom Ring, HM Courts and Tribunals Service
Chris Williams, Criminal Appeal Office
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, Max Hill QC, who recently had been appointed as Director of Public Prosecutions; and Dominic Alexander, of HM Revenue and Customs, attending for the discussion of agenda item 9.

The chairman reported apologies for absence from HH Judge Picton, Alison Pople QC, Paul Harris, Shade Abiodun and David Kenyon; and, from among those others who regularly attended meetings, Professor David Ormerod QC and Matthew Gould.

2. Draft minutes of the meeting held on 5th October, 2018

The draft minutes of the meeting on 5th October, 2018, were approved.

Arising from item 14, concerning the submission to judges of excessive numbers of requests to authorise the provision of transcript, the chairman reported that he had written to the Chief Executive of HM Courts and Tribunals Service and had received an apology, with an indication that the relevant staff guidance would be amended. Mr Justice William Davis expressed concern that the revised guidance still was insufficient. The chairman asked to be sent a copy to consider.

There were no other matters arising.

3. Part 2 amendments to accommodate the Courts and Tribunals (Judiciary and Functions of Staff) Bill: authorised court officers **CrimPRC(18)67**
CrimPRC(18)68
CrimPRC(18)69

The chairman introduced the papers for the Committee. He thanked HH Judge Edmunds QC and the other members of the working group who had continued to review the draft rules. He invited the judge to open the discussion.

Judge Edmunds reported that the working group had held a productive meeting, He was grateful to the authors of the papers. Group members had discussed provision for magistrates' courts' staff, both lawyers and others, recalling that what individual staff members were permitted to do would be subject to individual authorisation. The outcome of the previous group meeting had been a decision in principle to deal with the powers of legally qualified staff by way of exclusion, conferring all the court's powers upon them but with specified exceptions. On this occasion, however, the group also had discussed a list of specified functions which could be exercised by such staff. There remained unease about the exclusionary list, and the group would need to do more to identify the functions that would be exercised were that approach to be maintained. The judge expected the group to require at least one more meeting for that purpose.

The chairman reported that the Lord Chief Justice was strongly of the view that to confer some powers on court staff would make a valuable contribution to the prompt and effective delivery of justice for court users. Much of what case progression officers did would be covered by what was under discussion. He asked when it was expected that the Bill would complete its Parliamentary passage and be enacted.

Siân Jones replied that she understood it was hoped that the Bill would become an Act by no later than April, 2019, and that rules could be made in time to come into force in October.

The chairman observed that that coincided with the Committee's own plans. He asked when it was expected that the working group would meet again, and whether that should await the further progress of the Bill – though the only amendments made by Parliament thus far had been those proposed by the government itself, so the Bill seemed unlikely now to change. Judge Edmunds indicated that the group would meet again before Christmas. In his view there was no need to await the Bill's further progress. In general discussion it was agreed that the working group would meet between 9.30 and 11.30am on

Friday 7th December, immediately before the case management group and, later, the Committee met.

The Director of Public Prosecutions commented that he would prefer the rules to provide a list of specified functions rather than an exclusionary list, so that both staff and court users would know exactly what could be done by court staff. The chairman observed that an exclusionary list would be more flexible. Siân Jones asked that the Crown Prosecution Service should provide a list of the functions that the CPS itself would wish to be listed as ones exercisable by court staff. Judge Edmunds added that it would be helpful to have some sort of list of the functions that could be exercised by staff, for educational purposes if for no other, and even if that list were not prescribed. The working group's decision in principle was to maintain the status quo in relation to the functions that staff could exercise, but to describe that status quo using different expressions to those used in the current Justices' Clerks' Rules. The chairman invited members to contribute suggestions for the lists of the functions that should be permitted, on the one hand, or, on the other, prohibited.

The Director of Public Prosecutions expressed concern about the proposed time limits for the exercise of a 'right to reconsideration' in the High Court and the Crown Court. In neither court would what was proposed allow sufficient time for the effective exercise of the proposed right. Judge Edmunds replied that the working group had yet to consider what had been proposed for either court. He observed that the shorter time limits would be in relation to a case in which there was an imminent hearing date that might be affected.

Nigel Gibbs questioned whether draft rule 2.8(4), allowing the reservation of a case to named justices or to a named judge, was likely to be desirable or even practicable. Judge Edmunds replied that the working group had yet to consider that proposal.

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 at their meeting on 7th December.

4. Part 3 Case management: use of the Preparation for Effective Trial form

CrimPRC(18)70

The chairman introduced the paper for the Committee. He understood that Mrs Bryant had a suggested amendment to the Preparation for Effective Trial form in response to the judgment in *Valiati* to which the paper referred.

Mrs Bryant expressed the hope that that judgment would be circulated to magistrates to help all understand the significance of the distinction between case management information and admissions, and the importance of pressing for admissions of all that could be admitted. She suggested that the current PET form should be amended to include another question about the potential for making a formal admission based on the defendant's statements in paragraph 8.

The chairman agreed that the current form usefully might be clarified. Siân Jones suggested that it might include a box to tick to indicate willingness to make an admission of fact.

Mr Rudolf proposed that the PET form should include a suitably formulated warning about the uses to which case management information could and could not be put. The chairman commented that it should not be such as to discourage the defendant from providing any case management information at all.

HH Judge Edmunds QC observed that the Crown Court plea and trial preparation hearing form was subject to the same principles as those considered in *Valiati*. He suggested that

there might be no need for a warning given the caveats as to the use of case management information which the court in that judgment had set out.

Concluding the discussion, the chairman invited the case management group to discuss the potential amendments to the PET form which had been suggested.

5. Part 19 Expert evidence: expert's duty of disclosure **CrimPRC(18)71**
CrimPRC(18)63

The chairman introduced the paper for the Committee, drawing members' attention to the questions at paragraphs 9, 13 and 16.

HH Judge Edmunds QC suggested that the references to 'undermining' and 'detracting' should be qualified by the phrase 'in a material way'.

Mr Rudolf suggested that that would confer too much discretion on the expert witness to decide what and what not to disclose, when it would be preferable to leave that decision ultimately to the court. Lord Justice Haddon-Cave observed that the use of the introductory words 'reasonably … capable of' undermining or detracting served the required purpose. The Director of Public Prosecutions agreed. The responsibility for disclosure to the court rested on the party introducing the evidence and it would not assist to receive a deluge of irrelevant information about the expert. The Chief Magistrate and the chairman also agreed.

Nigel Gibbs reported that expert witnesses not infrequently misunderstood what was required by the current rule and supplied too much information. The CPS practice was to send expert witnesses copies of the rules and practice directions, among other things, so the proposed practice directions would assist.

Chief Constable Ephgrave suggested that it would be helpful in this instance for a note to the rule to cross-reference the practice directions.

The Director of Public Prosecutions pointed out that in draft practice direction paragraph V 19A.7 there was no reference to an adverse regulatory finding, or to regulatory proceedings, which there should be. The chairman agreed.

Drawing the discussion to a conclusion, the chairman invited any further comments. None were offered, and the Committee:

1) approved the proposed rule amendments;
2) endorsed the suggested practice direction amendments, but with the addition of a reference to adverse regulatory proceedings or findings; and
3) agreed to add a note to the rules drawing attention to the provisions of the Criminal Practice Directions which exemplified what should be disclosed.

6. Part 19 Expert evidence: public interest immunity **CrimPRC(18)72**

The chairman introduced the paper for the Committee, observing that in the case of *Kelly* the court had not needed to explore further the details of the expert's extraction of messages because the defendant denied that the device in which they were contained had been in his possession at any material time. A problem would arise if the reason for the confidentiality of the expert's methods were to be commercial sensitivity rather than public interest. However, the rule governed only the procedure, it did not affect the substantive argument.

Mr Justice William Davis agreed that the decision in *Kelly* had been a relatively easy one to reach. In another case the judge would have to consider carefully the extent of public interest immunity. If an expert witness agreed to give evidence at all, that ought to

constitute an implied agreement to tell the court how the work had been done which would not ordinarily be confined by PII. Mr Rudolf agreed, pointing out that CrimPR 19.3 and 19.4 required the giving of relevant information about how the expert had reached his or her conclusion.

Mr Justice William Davis wondered whether rules could specify the reasons for which information lawfully could be withheld. The chairman doubted it, but suggested that a procedure was needed in any event. He observed that as science and expertise advanced so new techniques would emerge, mentioning a recent example which he had encountered of plant material being used to establish that a defendant must have been present at a particular place and in respect of which only two scientists were expert in the techniques used.

The Director of Public Prosecutions commented that if one expert held a patent in respect of a particular technique that would not mean that he could refuse to explain his methods and conclusions. If appropriate, reporting restrictions could be imposed.

The chairman wondered whether a duty of confidentiality in respect of such a technique could be imposed upon those to whom it was explained. Mr Rudolf speculated on whether such a duty in relation to prosecution evidence could be imposed on defence representatives. The area was a very interesting one, and where a court refused to allow information to be withheld in the public interest then, as with disclosure, the prosecution might be compelled not to rely on the expert witness; or even might be compelled to discontinue the prosecution.

Lord Justice Haddon-Cave observed that, as the *Kelly* judgment itself pointed out, all cases to which the principles in question applied would be fact-specific and procedure rules could not be expected to deal with every possible eventuality.

Drawing the discussion to a conclusion, the chairman invited any comments on the suggested procedure. No further observations were offered and the Committee approved the proposed rule amendments.

7. Part 50 Extradition: charges in dual criminality cases **CrimPRC(18)73**
CrimPRC(18)46
CrimPRC(18)22

Observing that extradition law was complex, the chairman introduced the paper for the Committee and invited District Judge (Magistrates' Courts) Snow to comment.

Judge Snow explained that he had prepared the proposed amendment with the participation of the Crown Prosecution Service Extradition Unit in order to deal with the point raised in the *Tamas Biri v Hungary* judgment to which the papers referred. It would impose a modest demand on the CPS. He had been persuaded that the requirements of proposed rule 50.4(5)(b)(i) and (ii) (dual criminality raised by the defence; written charge required by the court) should be cumulative.

The Director of Public Prosecutions agreed, adding that the defendant should not be permitted to require the CPS to produce a charge in English form where dual criminality was not truly in issue.

The Committee agreed that draft rule 50.4(5)(b)(i) and (ii) should be accumulative, not disjunctive. Subject to that adjustment, the Committee approved the proposed rule amendment.

8. Criminal Practice Directions: impact statements for businesses

CrimPRC(18)74
CrimPRC(13)69

The chairman introduced the paper for the Committee. He recalled that community impact statements had been at first devised in order to set in context episodes of violence directed at ambulances and fire engines when specific instances of such behaviour came before the courts for sentencing. He wondered whether comparable impacts on the medical professions, for example, might best be explained by means of such statements rather than by business impact statements; though community impact statements had been intended primarily to describe the effect of offending on a geographical area rather than on an institution.

Chief Constable Ephgrave observed that police forces usually prepared impact statements where they considered it appropriate to submit them and he was confident that all the emergency services would wish to do the same. The police service would certainly not consider it an imposition to be supplied with an appropriate means of doing so. Such a statement would be voluntary, in any event.

Nigel Gibbs suggested that in CrimPD paragraph I.1 to the words 'including a charity' should be added 'or public body' to make clear that such bodies were not excluded.

HH Judge Edmunds QC reported that in past cases he had received statements concerning the effect of offending upon a school.

Ms Blackstock commented that a public body affected in the manner contemplated could not be said itself to be a victim in the usual sense of that expression.

Siân Jones added that in a case affecting a school the impact would be upon that particular school, not necessarily upon all schools in that area; and likewise where the impact of a particular crime was felt by one particular police force, not by all forces. The chairman agreed, observing that an assault on an officer on patrol, for example, might well have an effect on his or her colleagues' morale, a means of explaining which was needed.

Lord Justice Haddon-Cave added that doctors and nurses were affected comparably by assaults upon their colleagues, and a means of conveying such an impact to the sentencing court clearly was needed.

The Chief Magistrate suggested that it would be more appropriate to amend the directions on business impact statements than to amend the directions on community such statements.

The chairman agreed. He summarised the meeting's conclusions as being that the current practice direction paragraphs should be elaborated to make it clear that a statement of the impact of an offence on a public body, including for example a hospital or a school, could be received by the court irrespective of whether that body properly could be described as itself a victim of crime.

9. Criminal Practice Directions: production orders in the Crown Court; first appearance of defendants in custody; youth appeal allocation and listing

CrimPRC(18)75

The chairman introduced the paper for the Committee and asked Sophie Marlow to initiate the discussion.

Dealing first with applications for production orders, Sophie Marlow explained that some Crown Courts had not dealt as efficiently as they might with such applications and the draft practice directions were intended to address those inefficiencies. Circuit judges had been consulted and were content. The question of the secure storage of confidential

information within court buildings remained unresolved pending further discussion with HM Courts and Tribunals Service. She invited the Committee's observations.

The chairman commented that applicants should retain possession of any confidential information on which they relied: it was wrong to expect HMCTS to maintain the type of secure storage that would be needed. As to the arrangements generally for which the draft directions provided, he noted that some judges who had been amenable to dealing with applications made in writing then had become over-burdened. That, too, was wrong. Mr Justice William Davis agreed, citing Liverpool Crown Court as an example of one such court.

HH Judge Edmunds QC observed that the practice directions represented a considerable and welcome step forward. However, he agreed with the chairman that secure storage was a serious difficulty and pointed out that at new paragraph CrimPD XI 47B.9 there was a proposed requirement for the material in support of an oral application to be delivered to the court the preceding day; which would raise precisely that storage difficulty. The chairman agreed, suggesting that the applicant should bring any sensitive material to the court for the hearing.

In general discussion it was agreed that the volume of sensitive material of the sort contemplated rarely would be great, and that such material could be handed to the judge by the applicant and read there and then while the applicant waited. The relevant draft paragraph would be amended accordingly.

District Judge (Magistrates' Courts) Snow raised the question of electronic signature, as one affecting search warrants in magistrates' courts as well as production orders in the Crown Court. The Committee agreed that the notes to production order applications forms contained an accurate summary of the position.

Sophie Marlow agreed that practice directions comparable with those now proposed for production order applications could be prepared for search warrant applications to magistrates' courts, if that was thought likely to be helpful. Siân Jones suggested that it would be helpful to formulate directions governing the procedure on an application under CrimPR 5.7 for access to an application for a search warrant, to deal with the criteria for allowing access and with matters such as redaction of the material that had been submitted in support of the application.

Mr Justice William Davis drew attention to new paragraph CrimPD XI 47B.2 which required an applicant to explain the reasons for submitting an application to the chosen court. He suggested that the proposed prohibition against choice merely by reason of geographical proximity to the applicant should be mandatory.

Chief Constable Ephgrave observed that choosing one's local court should not be prevented where there was no clear link with any other. Ceri Hopewell agreed. Mr Justice William Davis accepted that it should suffice for the practice directions to provide that in case of dispute directions could be given by the Presiding Judge.

The chairman commented that it was no surprise that one court might be preferred to another where it was situated close to the applicant authority's offices and was well-versed in dealing with such applications. Nevertheless, it was not acceptable for judges at what might be more appropriate venues to decline to receive applications. Judge Edmunds pointed out that the proposed directions would allow a court to refuse to consider an application only where 'insufficient justification' was shown for the choice of that court. He reported that applications had been received at Isleworth Crown Court on grounds that another court had refused to entertain an application made by email. Mr Justice William

Davis emphasised that no one court should have an excessive number of applications imposed upon it.

The chairman invited Dominic Alexander to comment. Dominic Alexander replied that HM Revenue and Customs were content with what was proposed. He was confident that the arrangements described by the draft directions would work well, as long as all courts were willing to accept written applications delivered electronically. Ceri Hopewell agreed, observing that applications by the Serious Fraud Office usually were submitted to Southwark Crown Court to which it was useful for the Office to have access. For the Crown Prosecution Service, Nigel Gibbs explained that it was rare for the CPS to be involved directly in an application for a production order. Where a prosecution had been brought, any application for an order would be made to the court before which the case was proceeding.

Mr Rudolf asked whether the practice directions would apply to an application by the Serious Fraud Office for a search warrant under section 2, Criminal Justice Act 1987. If so, then a hearing would be required, under CrimPR 47.25; and the directions should be framed accordingly to avoid confusion. He added that where an application for a production order concerned privileged material the presumption under CrimPR 47.5 was that that, too, should be heard, and that, too, should be acknowledged.

Dominic Alexander asked whether there might be a presumption in favour of the use of a live link or telephone where a hearing was convened. Judge Edmunds pointed out that the case of *R v Clark* [2015] EWCA Crim 2192 had established that evidence could not be received by telephone; though he understood that magistrates' courts dealt with search warrant applications by telephone. Siân Jones confirmed that that was done routinely, there being an established system for verifying the identity of the applicant.

Turning then to the directions concerning the first production of defendants in police custody, Sophie Marlow asked whether there should be consistent national arrangements for the last time of day at which a court would deal with such a case.

Judge Snow doubted that such directions should be made at all. This was not a matter for the exercise of judicial discretion and magistrates were not involved in making such listing decisions. There was a national problem with defendants in custody being brought to court in no fit state to appear and without any case papers. The result was that courts sat for much longer than it was reasonable to expect. A defendant should not be accepted unless and until the case against him or her could be presented properly, and the proposed directions should be reconsidered.

Siân Jones agreed that what took place in practice was disastrous, with everything tending to keep defendants in custody until the next day. However, the law did not provide for inadequacy of case preparation to be a reason to decline to deal with a defendant in custody. The proposed directions would allow courts to insist more vigorously on better preparation in such cases.

Judge Snow observed that such arrangements would make courts hostage to others' inefficiencies, with hearings continuing until late in the evening.

Mr Rudolf suggested that the views of defence practitioners should be sought. Sophie Marlow agreed. She would arrange for discussions also involving HM Courts and Tribunals Service, the police and the CPS before the draft practice directions were completed.

Turning finally to the directions concerning appeals from youth courts, Sophie Marlow explained that the proposed directions had been suggested by Mr Justice William Davis to ensure that the Crown Court was appropriately constituted for the appeal.

The Committee:

1) endorsed the suggested directions about applications for production orders, but asked for (a) amended provision for the receipt of sensitive material, (b) some elaboration of the directions concerning choice of venue, and (c) consideration to be given to guidance on determining an application for the disclosure of an application for a search warrant;
2) considered the suggested directions about the production of defendants in custody and asked that they be reviewed after further discussion with HM Courts and Tribunals Service, the police, the Crown Prosecution Service and defence representatives; and
3) endorsed the suggested directions about appeals from youth courts.

10. Content of December 2018 statutory instrument CrimPRC(18)76

The Committee approved the proposed content of the next Amendment Rules.

11. Any other business

The chairman mentioned the delivery on 8th November of a judgment concerning indictments which the Committee might wish to consider when it next met.

No other business was raised.

12. Dates of next meetings: Friday 7th December, 2018, and Friday 8th February, 2019

The meeting closed at 3.35 pm.