CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 22nd MARCH, 2019 at 1.30 p.m.

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

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, Max Hill QC
Alison Pople QC
Nathaniel Rudolf
Paul Harris
Shade Abiodun
Assistant Commissioner Nick Ephgrave
Jodie Blackstock

Also attending
Professor David Ormerod QC, Law Commission
Siân Jones, Justices' Clerks' Society
Sophie Marlow, Legal Secretary to the Lord Chief Justice
Alyson Sprawson, Legal Secretary to the Senior Presiding Judge
Talwinder Buttar, Chief Magistrate's Office
Robert Earl, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Ceri Hopewell, Serious Fraud Office
Richard Chown, Ministry of Justice
Harriet Miskin, Ministry of Justice
Polly Newman, Ministry of Justice
Philip Elvy, Government Legal Department
Cathy Dilks, Criminal Cases Review Commission
Lauren Sharkey, 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 recorded the Committee's congratulations to Assistant Commissioner Ephgrave on his appointment to the Metropolitan Police.

The chairman reported apologies for absence from Sue Gadd and David Kenyon; and, from among those others who regularly attended meetings, the Chief Magistrate and Matthew Gould of the Ministry of Justice.

2. Draft minutes of the meeting held on 8th February, 2019

The draft minutes of the meeting on 8th February, 2019, were approved, subject to any correction that might yet be submitted. There were no matters arising.

3. Case management group report

At the chairman's invitation, Mr Justice William Davis reported that:

1) the Preparation for Effective Trial form working group had met and had begun its review, making substantial progress.
2) the case management group had considered amendments to the current form of application to vary a behaviour order and had concluded that there should be two new forms of application to vary a restraining order, specifically, one for use by a protected person and one for use by a defendant, both expressed in simple and straightforward terms.
3) the case management group had asked for more information to be obtained about the use being made of the recently adopted Crown Court appeal forms.
4) the case management group had discussed arrangements for the conduct of pre-trial recorded cross-examinations of prosecution witnesses under section 28 of the Youth Justice and Criminal Evidence Act 1999, which the group understood would be more widely adopted soon. A particular concern had been the proposed arrangements to check the quality of the recording in advance of the trial.

4. Committee programme for 2019 CrimPRC(19)01

The chairman introduced the paper for the Committee. He drew members' attention to the content of paragraphs 11, 13 and 15 in particular, which listed matters potentially requiring the Committee's consideration during 2019, observing that guidance about access to court rooms during proceedings in public recently had been given in a judgment of the Administrative Court.

District Judge (Magistrates' Courts) Snow added that the rules about extradition in Part 50 might need to be revised if the United Kingdom's withdrawal from the European Union occasioned a significant revision of extradition law.

The Director of Public Prosecutions drew attention to the reference to implementation of the Attorney General's *Review of the efficiency and effectiveness of disclosure in the criminal justice system*, observing that there was no fixed date for the conclusion of the work now under way.

HH Judge Edmunds QC observed that the paper contained no explicit reference to the crime reform programme of HM Courts and Tribunals Service, with which the Committee would need to liaise.

Sian Jones reminded the Committee that members had agreed to assist in the formulation of non-criminal procedure rules for magistrates' courts and the Crown Court.

The Committee adopted the proposed programme and agreed to deal, as necessary, with the other matters raised.

5. Part 2 amendments to accommodate the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018: authorised court officers CrimPRC(19)12

Introducing the paper for the Committee, the chairman observed that it was not a judicial function for court listing officers simply to give effect to what judges told them to do. While the judiciary were adamant that listing is a judicial function, there was an important distinction to be drawn between that which constituted the exercise of a judicial function and that which constituted the implementation of a judicial decision made by a judge, a magistrate or, in magistrates' courts, a justices' legal adviser.

Siân Jones agreed. District Judge (Magistrates' Courts) Snow added that, in extradition cases, the provisions of the Extradition Act 2003 were such that the District Judge dealing with the case necessarily had to fix the date for the extradition hearing her or himself. He suggested that the provision in rule 2.8(2)(c) and 2.8(4) should be repeated in rule 2.9. The Committee agreed.

In discussion about the timetable for the proposed consultation, Siân Jones reported that HM Courts and Tribunals Service hoped to implement the provisions of the new Act in April, 2020. Therefore a consultation that closed in early July this year, leading to the making of rules in the autumn, to come into force next April, would be compatible with those plans.

The Committee accordingly approved the proposed invitation to comment, subject to (i) amendments to the references to listing, in order to distinguish between that which constituted the exercise of a judicial function and that which constituted the implementation of a judicial decision made by a judge, and (ii) amendments to rule 2.9 (extradition cases) more closely to align its expression with rule 2.8 (magistrates' courts); and agreed to consult for a period of 3 months.

6. Part 3 Case management: initiatives, etc. CrimPRC(19)13

The chairman introduced the paper for the Committee, reporting that he was due next week to meet Lucy Frazer QC MP, the Parliamentary Under-Secretary of State for Justice, to discuss case management difficulties and initiatives. He asked whether members had anything to add to the lists in the paper. He observed that he did not approve of different courts adopting different approaches to the same problems.

District Judge (Magistrates' Courts) Snow explained that the case management project at Westminster Magistrates' Court was intended only as an experiment.

Mr Harris asked the chairman to raise costs orders with the minister. There was a legal aid review now under way and it would be reassuring to know that this subject was being considered, with a view to permitting defence representatives to retain the product of successful applications for unnecessary or wasted costs to encourage prosecution compliance with court directions.

HH Judge Edmunds QC observed that the legal aid regime should encourage defence compliance. Mr Harris agreed that it did not presently encourage early and effective engagement.

The Director of Public Prosecutions accepted that there was good reason for defence representatives to welcome a review of legal aid but he hoped that nothing emerging would encourage complaints by one party against another. In his view, current arrangements were adequate. The chairman acknowledged that adverse costs orders might remove resources from the Crown Prosecution Service, but thought the point made by Mr Harris was understandable, too.

In relation to the reference to listing practices at paragraph 7(2) of the Committee paper, Judge Edmunds reported that some Crown Courts in London were reviewing the use of warned lists, which news he thought many would welcome. The chairman observed that the interests of different participants differed and that it was never possible to suit everyone. He suggested that what could be achieved at other Crown Court centres was not necessarily possible in London courts. Judge Edmunds agreed but added that reliance on warned lists had become a serious problem and would make the implementation of s.28 pre-recorded cross-examination across the London cluster particularly difficult. The judge observed that in return for the court moving away from warned lists the expectation of the parties would need to be that they provided reliable time estimates, and arrived at trial on time and ready to start at once.

Mr Justice William Davis reported that at Birmingham Crown Court fixed trial dates had been in use since 2010. Cases were over listed, but experience was that a sufficient number would fail to proceed to allow that arrangement to work. It depended on an efficient list officer and the active participation of the resident judge.

Professor Ormerod QC suggested that the chairman might ask the minister whether funding could be obtained for more effective consultation and communication by the Rule Committee and for its other initiatives. He thought it likely that Committee initiatives and rules in themselves led to efficiency savings, which ought to be encouraged and assisted. In general discussion it was agreed that this would be taken up with Ministry of Justice officials.

The chairman thanked Committee members for the discussion, which would inform his imminent meeting with the minister.

7. Part 3 Case management: intermediaries for defendants **CrimPRC(19)14**
CrimPRC(17)16
Note of 5/6/17

The chairman introduced the paper for the Committee, commenting that the obvious solution to problems with the provision of intermediaries for defendants was for the Ministry of Justice to implement and fund the unimplemented statutory scheme.

Ms Blackstock observed that she had been involved for a long time in discussions about the provision of intermediaries for defendants, though had not been concerned in the case of *Biddle*. She was concerned that in such cases representations were not made about the defendant's Article 6 rights, and his or her right to understand all the allegations and proceedings against him or her. As it seemed to her, there had been a decline in the availability of professional advice about what was required in individual cases. Communicourt now took the stance to which the Committee paper referred. She had arranged a meeting with them and with other providers of intermediary's services to discuss their experiences. She would raise this particular case with them and enquire into it. She observed that courts routinely required and accepted interpretation and other relevant expertise, notably in expert evidence.

The chairman observed that where the defendant spoke no English then the lawyers could not communicate with him or her, but these cases were different. Ms Blackstock disagreed, suggesting that expert assistance often was needed to help the lawyers communicate effectively with their client.

Mr Justice William Davis commented that the Communicourt policy turned the practice direction on its head. Ms Blackstock explained that she could not speak for that company but doubted that that was the intention.

Mr Harris added that the underlying problem was the failure of the Ministry of Justice to provide intermediaries equally, for defendants as well as for witnesses.

HH Judge Picton commented that a concern reported to him was that Communicourt exaggerated the need for an intermediary. Mr Rudolf reported having dealt recently with a case in which the intermediary's daily fee was not very high and she had assisted only with the ground rules hearing and with the defendant's evidence, which in his view had been appropriate. He, too, agreed that the solution was for the Ministry of Justice to implement, and regulate, the provision of intermediaries for defendants as well as for witnesses.

Richard Chown reported that HM Courts and Tribunals Service was making plans to put the current arrangements on a firmer and more consistent national footing. The chairman asked him to relay the Committee's discussion.

HH Judge Edmunds QC observed that the Rules and Practice Directions contained no provisions about the training and qualification needed by those who conducted such cases, which perhaps they should. Mr Harris doubted whether the Committee was the most appropriate body to prescribe appropriate qualifications and experience. In general discussion it was observed that pending amendments to the Crown Court Plea and Trial Preparation Hearing form would ensure the court raised the question of relevant experience, as would the proposed new youth court Preparation for Effective Trial form due to be considered by the Committee's working group.

The chairman suggested that the Committee should return to this subject, with the benefit of a further paper by Ms Blackstock after the JUSTICE meeting with intermediaries to which she had referred. The Committee agreed.

8. Part 25 Trial and sentence in the Crown Court: terms of explanation of right to give evidence **CrimPRC(19)15**

The chairman introduced the Committee paper and asked whether members thought this a desirable amendment.

Lord Justice Haddon-Cave agreed that it was. He remarked the growing need to promote clarity in criminal proceedings.

Mr Harris commented that the need to explain the right to give evidence to an unrepresented defendant arose much more frequently in magistrates' courts than in the Crown Court.

Ms Abiodun reported that in her experience of magistrates' court cases a solicitor who was present in the courtroom in some capacity or other would be asked to explain the position to an unrepresented defendant, which that solicitor would do fully and carefully. In Crown Courts in which she practised leaflets for such defendants had been prepared, which gave straightforward explanations of this and other trial procedures.

HH Judge Picton observed that it was important not to conflate the undoubted desirability of general explanations of procedure with the statutory requirement for a clear explanation of the right to give evidence and of the potential consequence of declining to do so. He suggested that he should ask Professor Thomas QC to assist in formulating a suitable explanation, and should invite the editors of the Crown Court Compendium to include that revised explanation in that publication.

The Committee accepted the judge's suggestion and agreed to return to the discussion when that revised explanation had been devised.

9. Part 25 Trial and sentence in the Crown Court: responding to jury notes

CrimPRC(19)16

The chairman introduced the paper for the Committee, observing that in his view the current rules were adequate and should be followed.

HH Judge Edmunds QC agreed. In his view no additional provision was required. The storage of jury notes in electronic form presented some difficulties at present, but that was under consideration elsewhere.

HH Judge Picton observed that the suggested draft practice direction might not be necessary either, and that in any event the current draft was inaccurate in some respects.

The chairman commented that it was unnecessarily prescriptive. Lord Justice Haddon-Cave agreed. Court ushers should be given suitable training. Judge Edmunds also agreed that more training and guidance for HM Courts and Tribunals staff was needed, consistent with the rules.

The Committee agreed that no rule or practice direction amendment was required, the correct handling of jury notes being properly a matter for training and, if necessary, guidance for court staff.

10. Part 28 Sentencing procedures in special cases: variation of sentence

CrimPRC(19)17

The chairman introduced the paper for the Committee and invited views. He observed that courts should announce decisions to vary sentence in open court.

Mr Justice William Davis agreed, remarking that he, too, had said as much in a recent judgment of the Court of Appeal. The chairman suggested that the requirement should be added to the rules.

HH Judge Picton reminded the Committee that the variation of a sentence had to be made by the sentencing judge. HH Judge Edmunds QC agreed, but added that case law had interpreted the requirement as permitting the announcement of the decision by another judge if need be. Judge Picton expressed concern that in that event the judge who made the announcement would not be able to deal with any complaint or query then raised. Mr Rudolf suggested that rules might be able to provide for such circumstances.

The chairman directed that a draft rule amendment should be prepared and that the discussion should resume at the next meeting.

11. Part 28 Sentencing procedures in special cases: medical reports for prisons

CrimPRC(19)18

The Committee discussed the appropriate description of the reports to be sent to the prison at which the defendant was to be received and agreed that it should correspond with the description in current use by HM Courts and Tribunals Service, namely 'any psychiatric, psychological or other medical report shared with the court for the purposes of the proceedings'. As thus further adjusted, the rule amendment was adopted.

12. Any other business

No other business was raised.

13. Dates of next meetings: Friday 3rd May, 2019, and
Friday 7th June, 2019

The meeting closed at 3.05 pm.