CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 3rd MAY, 2019 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
Sue Gadd
Alison Pople QC
Nathaniel Rudolf
Paul Harris
Assistant Commissioner Nick Ephgrave
Jodie Blackstock

Also attending
Senior District Judge (Magistrates' Courts) Arbuthnot, the Chief Magistrate
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
Nigel Gibbs, Crown Prosecution Service
Ceri Hopewell, Serious Fraud Office
Ray Dhanowa, Criminal Appeal Office
Robert Pryke, Criminal Appeal Office
Alison Mead, HM Courts and Tribunals Service
Matthew Gould, Ministry of Justice
Richard Chown, Ministry of Justice
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 Robert Pryke of the Criminal Appeal Office, attending for the discussion of items 7 and 11; and extended the Committee's congratulations to Nigel Gibbs on his recent marriage.

The chairman reported apologies for absence from the Director of Public Prosecutions; from Shade Abiodun, who had taken part in the recent London Marathon; and from David Kenyon.

2. Draft minutes of the meeting held on 22nd March, 2019

The draft minutes of the meeting on 22nd March, 2019, were approved, with corrections proposed by HH Judge Edmunds QC and Mr Rudolf. 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 continued its review, completing an amended version of the form for use in adult magistrates' courts and now expecting to complete at its next meeting a version for use in youth courts.
2) the case management group had settled two new forms of application to vary a restraining order, one for use by a protected person and one for use by a defendant.
3) the case management group had discussed the draft procedural guidance published with the Sentencing Council's consultation draft guideline on sentencing offenders with mental health conditions and disorders. The group recommended that the Council's attention should be drawn to some discrepancies between that draft guidance and the now current Criminal Practice Directions and associated directions forms which had been only recently promulgated, following lengthy consideration by the case management group and approval by the Committee.
4) the case management group had agreed to discuss the form recently promulgated by HM Courts and Tribunals Service for use on an application to vacate a forthcoming trial, and a proposed new form of single justice procedure notice.

4. Part 3 Case management: intermediaries for defendants CrimPRC(19)19

The chairman thanked Ms Blackstock for her paper and asked her to introduce the subject.

Ms Blackstock reminded the Committee that at the previous meeting members had discussed the decision in the case of *Biddle* and the guidance published by Communicourt. JUSTICE had convened a meeting with intermediaries' representatives which had coincided with events in a case at Wood Green Crown Court exemplifying the difficulties with, in particular, the criteria for an initial decision about engaging an intermediary to attend only during the defendant's evidence or during the whole trial, and the criteria for the variation of such a decision once made. Problems arose where an intermediary advised participation throughout the trial but the court disagreed, in which circumstances intermediaries were reluctant to assist. The events, and the perceived threat of contempt proceedings, in the case at Wood Green, made providers of intermediaries reticent about offering help at all.

Ms Blackstock suggested that it would assist the Committee to hear from intermediaries themselves rather than relying on her own indirect reports, perhaps at the next Committee meeting or at a separate meeting. The variation of a decision already made was a particular problem and perhaps the Rules should prescribe criteria for such a decision. Were the unimplemented primary legislation to be brought into force that would prescribe criteria. Rules also could and should require the giving and announcement of the reasons for a decision about the engagement of an intermediary. She accepted that there were problems with resources and sometimes problems with the qualifications of intermediaries, so the

backdrop was complicated; but the need to do something about the recurring problems had become acute.

Matthew Gould replied that the provision of intermediaries was problematic. There was a two-tier system in operation, with one part regulated and the other not, and most of the provision in the latter made by Communicourt. The near monopoly presented difficulties for government, and many judges had reported experiencing difficulties in obtaining any assistance at all, or with the quality and the cost of what was available. Registered intermediaries could be engaged to assist defendants, but because judges could require the provision of such an intermediary for a witness that affected their availability. Recently, however, capacity had improved by 25%. Perhaps the time had come to consider making registered intermediaries more widely available, and to review the wisdom of maintaining the current arrangements.

Lord Justice Haddon-Cave found it hard to understand the reluctance of some intermediaries to assist during evidence only. During the last 10 years huge advances had taken place in the support available for vulnerable participants and some advocates had developed a formidable expertise. Complaints occasionally were made that intermediaries impeded communication instead of assisting it. The standards of intermediaries varied, in his experience, as did the approaches taken by judges and advocates. He would be very happy to take part in a meeting such as Ms Blackstock suggested.

HH Judge Edmunds QC commented that he was disappointed to read in Ms Blackstock's paper that some intermediaries had felt excluded during ground rules hearings. That had not been the judge's own experience. He noted, however, that some intermediaries' reports were expressed in general terms, sometimes at some length, with recognisably standard recommendations rather than recommendations specific to the case.

HH Judge Picton agreed. He hoped that the treatment of intermediaries described in Ms Blackstock' paper were rare.

The Chief Magistrate reported that the quality of defendants' intermediaries varied, in her experience.

Mr Harris suggested that the Ministry of Justice should implement the statutory provision for defendants. The difficulties that had been described were exacerbated by a lack of solicitors' staff now available to help defendants at trial. It was simply not right that there should be different provision for witnesses and defendants. If there were improved provision then the relevant criteria and guidance could be improved.

Matthew Gould reiterated that the Ministry of Justice already now was increasing recruitment and training, though he accepted that still more was needed. The gradual increase would allow for the possibility of making registered intermediaries more widely available.

Ms Pople QC asked how many more intermediaries would be required, in the Ministry's assessment, before they could be made available to defendants. Matthew Gould replied that more were required in each area of the country and that it was not yet possible to assess exactly how many would be needed before the provision could be extended. Ms Pople observed that the Bar and bench needed to know how much longer the present unsatisfactory situation would continue.

Mr Justice William Davis observed that intermediaries needed to recognise that the conduct of a trial was a matter for judicial decision, which all the participants needed to accept. He assumed that they realised that their function was to advise and to recommend, not to decide.

Drawing the discussion to a conclusion, the chairman proposed that intermediaries' representatives should be asked to prepare something in writing for the Committee to read in advance of holding a meeting at which they would be welcome. He asked that the Ministry of Justice should then respond so that the Committee received a balanced view. He was pleased to hear that the Ministry was working to increase numbers, which he hoped would lead to a fully regulated system. Whether the proposed meeting could take place in June or July would depend on when papers from both sides could be supplied. The Committee would look for compelling reasons to change any rule, but if such reasons emerged then it would be very willing to review the present position. He directed that the secretary should assist Ms Blackstock in identifying topics that intermediaries should be asked to address. It was regrettable that events at Wood Green Crown Court had reached the point they had. Ultimately, however, it had to be understood that the judge was responsible for the conduct of a trial.

5. Part 25 Trial and sentence in the Crown Court: avoiding mistakes in indictments
CrimPRC(19)20

The chairman introduced the paper for the Committee, observing that this discussion had been prompted by the decision in *Johnson and Burton*. It was not desirable to impose undue technicality, but it was of great importance to avoid sloppiness. He reported having dealt only recently with an appeal in the course of which it had emerged that the defendant had been sent for trial and convicted without having been arraigned.

HH Judge Edmunds QC observed that rule 10.3 was a provision for the future, the present need being to ensure a proper use of the Crown Court Digital Case System. Where an indictment existed, the prosecutor might apply to amend it. However, it might be that two existing indictments were to be joined in a combined version for trial. The judge suggested that the proposed amendment to rule 25.2 ought to make clear that it applied where the court was proceeding to trial. He suggested that rule 3.24 should be similarly amended to include the proposed requirement to explain. He reported that in the United States of America when a guilty plea was entered the judge would go through the allegations with the defendant to ensure that they were understood and accepted, and suggested that there might be a case for closer judicial scrutiny.

HH Judge Picton asked what would be the consequence of a court's failure to comply with the additional obligations proposed. The secretary suggested that unless a significant unfairness ensued, such as to call into question the safety of any conviction, there would be none: because these would be procedural, not jurisdictional, requirements.

The chairman suggested that exhortations to follow good practice might be better placed in the Criminal Practice Directions than in the Rules. Lord Justice Haddon-Cave agreed. He suggested that the rule should require only that the indictment be identified as the correct one.

Judge Picton urged that each iteration of an indictment should indicate its date. At present that was not always clear.

Mr Rudolf observed that if good practice were removed from the Rules to the Practice Directions, few rules would remain. He approved of the proposal that the rule should require the court to satisfy itself that the allegations had been explained to the defendant.

Following further discussion, the Committee agreed (i) to amend CrimPR 3.24 (Arraigning the defendant on the indictment) to include an obligation to ensure that the defendant understood the allegations, and (ii) to amend CrimPR 25.2 (Trial and sentence in the Crown Court; General powers and requirements) as proposed, subject to those requirements being expressed to apply, 'Before proceeding to trial'.

6. Part 25 Trial and sentence in the Crown Court: terms of explanation of right to give evidence **CrimPRC(19)21**
CrimPRC(19)15

The chairman thanked HH Judge Picton and the editors of the Crown Court Compendium for the documents that they had produced. He invited the judge to describe what was proposed.

HH Judge Picton explained that the draft explanation of trial procedure for defendants would be amended with the assistance of Ms Blackstock and an intermediary and would be published in the next edition of the Compendium, for use by trial judges. However, copies of that explanation would not be distributed and therefore more by way of simple explanation would be required, including a corresponding explanation of procedure at magistrates' courts. As to the explanation of the right to give evidence required by section 35 of the Criminal Justice and Public Order Act 1994, the judge suggested that, if approved, that should be substituted for the present text in the Criminal Practice Directions, as proposed by the previous Committee paper.

Lord Justice Haddon-Cave commended the proposals, which he described as excellent.

Mr Harris also thought the draft explanation brilliant. He suggested that it should include a reference to potential eligibility for legal aid; adding that the Ministry of Justice ought to review legal aid provision, the withholding of which from defendants was a false economy. No matter how well explained, legal procedure always would be fairer and more efficient where the defendant was represented professionally.

Mr Justice William Davis commented that at Birmingham Crown Court he had encountered only a few types of unrepresented defendant, namely those who were unrepresented for financial reasons, those who had applied unsuccessfully to have their legal aid representation transferred, and those who had chosen voluntarily to proceed without a representative. He asked whether any other reasons for a lack of representation might arise.

HH Judge Edmunds QC volunteered the additional category of those who were convinced that they could do better than any professional advocate. He observed that to offer appropriate guidance tailored to each individual case would be impracticable. What was required was a suitable generic document, and what Judge Picton proposed would be a huge help. The judge suggested that there should be added a clear warning that this was explanation and guidance but not the law; and that it should encourage defendants to take independent legal advice wherever possible.

Judge Picton added that any defendant who lacked representation, even if that were a deliberate choice, should have access to an intelligible explanation of procedure.

Ms Gadd observed that magistrates' courts saw very many unrepresented defendants and the sort of material proposed would assist greatly. She suggested that the material should include an explanation of credit for a guilty plea. Judge Picton agreed, commenting that something might be included along the lines of what a legal representative would say to a client defendant.

District Judge (Magistrates' Courts) Snow added that many defendants were unrepresented in London magistrates' courts. In some cases this was because legal aid had been refused for financial reasons, but many chose not to be represented. A practical problem in London, therefore, would be the printing of large numbers of documents for defendants. The Chief Magistrates agreed, observing that if, as now, there were not the

resources available even to print a record for the defendant of bail conditions imposed then it was inconceivable that written explanations could be printed.

Judge Picton explained that it would be essential to give defendants something written to take away. Any explanation of procedure, even a simple explanation, would be too much to absorb if it was only read out. Moreover, it would be helpful if any written explanation of procedure in the Crown Court could be given to a defendant before the first appearance in that court where he or she was sent for trial.

Siân Jones agreed that defendants would need time to absorb such explanations. In her experience many of those charged with offences of domestic violence were ineligible for legal aid on financial grounds and would benefit from a leaflet explaining the procedure – in particular, the difference between a legal representative and a cross-examination advocate.

Sue Gadd suggested that explanatory material could be made available online to reduce the need to rely on printed documents. Judge Picton agreed.

Matthew Gould reported that the Ministry of Justice now had prepared paper posters explaining some basic points for the benefit of defendants and were in the process of completing explanatory leaflets that would be distributed. The Ministry would be happy to help in providing other means of communication. He suggested that the majority of unrepresented defendants would be those charged with comparatively low-level offending.

Sue Gadd reported that she had seen the new posters, of which she approved. The Committee should be invited to comment on the draft leaflets.

Judge Edmunds commented that if explanatory documents were to be issued both by judges and by the Ministry of Justice then care should be taken to ensure that the two did not conflict. Matthew Gould agreed, emphasising that the explanatory leaflets proposed were still in preparation.

Judge Picton invited views on the proposed section 35 explanation. The Chief Magistrate asked whether it should refer to the possibility of calling defence witnesses other than the defendant. Judge Picton replied that this particular explanation was intended only to deal with the statutory requirement but the general explanation would refer to other defence witnesses.

Mr Rudolf suggested that the reference to inferences could be omitted, so that the second sentence would read, 'If you do not give evidence the jury may hold it against you'. Lord Justice Haddon-Cave agreed.

Drawing the discussion to a conclusion, the chairman asked that any other suggestions should be sent to Judge Picton for him to relay to the editors of the Compendium. He again commended the clarity of the proposed new texts.

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

CrimPRC(19)22

The chairman introduced the paper for the Committee. He was clear that the rule should require the public announcement of a sentencing variation decision, as proposed.

HH Judge Edmunds QC added that the rule should codify the case law to the effect that the court making the announcement need not comprise the same member or members as the court by which the decision to be announced had been made. In general discussion the Committee agreed, and endorsed the suggested new practice directions subject to including criteria for the circumstances in which the public announcement of a sentencing variation decision might be made by a court constituted differently to the court which had made that decision.

The chairman then invited Mr Rudolf to introduce the proposal that the rule should allow the Crown Court to extend the 56-day period for a sentence variation set by section 155 of the Powers of Criminal Courts (Sentencing) Act 2000.

Mr Rudolf explained that for the reasons outlined in the Committee paper he was of the view that the Rules lawfully could do what was suggested. If that proposition was accepted, then he would wish to impose more detailed criteria for the use of the power than were suggested by the paper. First, the 56-day time limit should continue to apply to any variation that would be adverse to the defendant, meaning adverse in the same sense as applied to the determination of an appeal by the Court of Appeal, criminal division. That would meet the concerns expressed to the Law Commission by the London Criminal Courts Solicitors' Association. Second, there should be no time limit for the correction of an obvious error, for example in the crediting of time on remand in custody or under curfew, or the imposition of the victim surcharge in an incorrect amount. That would relieve the Court of Appeal of the burden of such errors, no matter how efficiently that court might dispose of them. Third, an application to vary a sentence made after 56 days had expired should be allowed to proceed only with the permission of the Crown Court, so as to impose a filter on the cases that would be re-opened for further argument. The overall advantage of the proposal was that it avoided the inflexibility of the current time limit. It would remain the case that there could be no variation where an appeal, or application for permission to appeal, against sentence had been determined.

The chairman was sceptical. In his view, finality was important, subject only to appeal, and it was undesirable to allow for the possibility of what amounted to an indefinite extension of time. He observed that the Court of Appeal could deal swiftly and efficiently with appeals brought to correct errors not noticed until 56 days had expired.

Ray Dhanowa and Robert Pryke reported that the Criminal Appeal Office would be grateful for a power in the Crown Court to correct obvious errors not noticed until 56 days had passed, though acknowledged that errors detected out of time could be speedily corrected on appeal.

Nigel Gibbs pointed out that section 155(1) referred to sentence, but sentence was not mentioned in section 155(7)(b). Mr Rudolf observed that the first subsection referred also to 'other order'.

HH Judge Picton pointed out that the former 28-day time limit had been extended to 56 days by Parliament and he doubted that it was appropriate for the Rule Committee to extend it further. In the judge's experience, most clear errors were noticed and were corrected within 56 days.

HH Judge Edmunds QC observed that the 56-day period was well known and that it would be undesirable to impose different time limits for different categories of variation. He suggested that section 155(7)(b) of the 2000 Act had been intended to allow for the variation of orders other than sentences.

Mr Justice William Davis doubted the Committee's power to extend the 56-day time limit and suggested that the only power exercisable might be to reduce that time limit in specified circumstances. It appeared that the Law Commission had not thought that the deadline could be extended, and that had the benefit of ensuring finality.

Lord Justice Haddon-Cave agreed with that interpretation, adding that to extend the time limit might have unforeseen consequences for sentencing practice.

Siân Jones reminded the Committee that the time limit that had once applied to an application under section 142 of the Magistrates' Courts Act 1980 had been removed in order to spare the Crown Court the burden of avoidable appeals. In her view, a longer

period than 56 days would be helpful in the Crown Court, for example where an unlawful order had been made in mistaken substitution for one that would have been lawful.

Drawing the discussion to a conclusion, the chairman observed that a Sentencing Code Bill might soon, at long last, progress, and that that would be a more appropriate means of changing the law, were that thought desirable, than would be a rule of the sort proposed.

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

CrimPRC(19)23
CrimPRC(19)24

The chairman reminded members of Mr Justice William Davis' report of the case management group discussion and directed the secretary to write to the office of the Sentencing Council. He drew attention to the paper submitted by HH Judge Edmunds QC and asked the judge to explain the safeguarding concerns that that paper identified.

The judge reported that he recently had visited HM Prisons Wandsworth and Bronzefield where he had had the opportunity to discuss with reception staff the availability of information about defendants supplied by courts. As a result, he was concerned that while important information about a defendant's health might be sent by email it was not reaching the staff who most needed it at the time it was most needed. A service level agreement reached last August between HM Courts and Tribunals Service and HM Prison Service was understood by HMCTS to cover these needs satisfactorily, but it seemed to be the case that critical information reached the right people in HMPS only sporadically, and this was of especial concern where a defendant was first remanded in custody. The documents carried by the prison escort service contractor were annotated with a warning of any known suicide risk and any other such critical warning, and that arrangement had proved itself effective; but the new email arrangements appeared not to be working as well. The judge suggested that the rule should apply to a pre-trial remand in custody as well as to a committal to custody after sentencing, and that it should explicitly require the transmission of the relevant reports and other information to reception staff. The arrangements needed to be as reliable and effective as could be devised. The judge understood that in response to his paper HMCTS had asked for an opportunity to review the present arrangements.

Assistant Commissioner Ephgrave pointed out that other bodies with responsibilities for avoiding deaths in custody might well share the Committee's concerns and that they, too, should be able to assist.

District Judge (Magistrates' Courts) Snow expressed concern that information sent electronically might be sent or passed on to what turned out to be the wrong prison. Siân Jones observed that HMPS might mislay paper documents as easily as an email.

Judge Edmunds observed that the single most important step to take was the appropriate marking of the prison escort service document that accompanied the defendant.

The chairman shared the concerns that had been expressed. He directed the secretary to draw them to the attention of HMCTS and invite their views on Judge Edmunds' proposals before any rule amendment was settled finally.

9. Part 34 Appeal to the Crown Court: time limit for appeal against conviction

CrimPRC(19)25

The chairman introduced the paper for the Committee and invited views.

HH Judge Picton favoured the suggestion that the 21-day time limit for appeal against conviction should run from the date of committal to the Crown Court for sentence, where

that occurred. In some cases it was essential to deal with any appeal against conviction that there might be before sentencing in the Crown Court on a committal for sentence there. HH Judge Edmunds QC added that case law encouraged the Crown Court to postpone sentencing after a committal for sentence where an appeal against conviction was to proceed. On one occasion the judge had rescinded a sentence passed on a committal for sentence before dealing with an appeal against conviction. However, cases involving an appeal against conviction brought only after sentencing on a committal were very rare. On balance, the judge would prefer to maintain the consistency of the status quo, with the time limit running from sentence even after committal for sentence. Siân Jones agreed.

Mr Harris observed that although sentence ought not to be a consideration in making a decision about appeal against conviction the reality was that sentence sometimes was influential for some defendants, among other factors.

In general discussion, Committee members agreed that there would be some advantage in imposing a different time limit where the defendant was committed for sentence, but acknowledged that that would introduce other potential complexities. Different views were expressed. In the absence of a majority in favour of changing the rule, the Committee agreed to maintain the status quo.

10. Part 35 Appeal to the High Court by case stated: authentication of stated case **CrimPRC(19)26**

In the absence of sufficient time for discussion, this item was postponed to a future meeting.

11. Part 39 Appeal to the Court of appeal; Part 3 Case management: skeleton arguments **CrimPRC(19)27**

The chairman observed that, tempting sometimes as it might be to adopt the same sanction for prolixity as that described in the *Mylward* case, courts were required to exercise discretion.

Ray Dhanowa explained that the Registrar favoured directions to make it clear that excessively long written submissions would be returned. The chairman cautioned against the exclusion of any flexibility, preferring 'may return' to 'will return' in the draft direction.

Mr Rudolf commented that a long skeleton argument could and should include an application for a judicial direction permitting its use.

District Judge (Magistrates' Courts) Snow asked that the same prohibition and warning should apply in extradition proceedings in magistrates' courts. HH Judge Edmunds QC observed that the proposed arrangements to enforce the prohibition would be impracticable in the Crown Court.

The Committee endorsed the proposal in principle, subject to review of precisely how the suggested practice direction amendments should be expressed and subject to the application of the directions in extradition proceedings in magistrates' courts and in the High Court as well as in the Court of Appeal.

12. Part 47 Investigation orders and warrants: overseas production orders **CrimPRC(19)28**

The chairman introduced the paper for the Committee and invited views.

Mr Ephgrave was content with the proposed rules. He reported that the National Crime Agency was working hard to ensure that effective cross-border arrangements for criminal investigations could be maintained notwithstanding withdrawal from the European Union.

The Committee endorsed the proposed rules.

13. Content of June 2019 statutory instrument **CrimPRC(19)29**

The Committee endorsed the list of rule amendments to include in the next statutory instrument, subject to the omission for the time being of rules about the transmission of medical reports to prisons (see item 8 above).

14. Any other business

The Committee agreed to recommend to the Lord Chief Justice the removal of the requirements, in paragraphs 4 and 5 of annexe 3 to CrimPD XIII, for justices' clerks to report to Presiding Judges whenever a case liable to result in a substantial fine was allocated to a District Judge (Magistrates' Courts) for adjudication. The requirements were no longer considered necessary.

15. Dates of next meetings: Friday 7th June, 2019, and
Friday 19th July, 2019

The meeting closed at 3.50 pm.