CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 19th JULY, 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
The Lord Chief Justice
Lord Justice Fulford (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
Sue Gadd
Alison Pople QC
Nathaniel Rudolf
Paul Harris
Shade Abiodun
Assistant Commissioner Nick Ephgrave
Jodie Blackstock

Also attending
Catherine O'Neill, Intermediaries for Justice
Kerry Chatterje, Triangle
Professor Cheryl Thomas QC, UCL Judicial Institute
Professor David Ormerod QC, Law Commission
Sophie Marlow, Legal Secretary to the Lord Chief Justice
Alyson Sprawson, Legal Secretary to the Senior Presiding Judge
Siân Jones, Justices' Clerks' Society
David Barnes, Justices' Clerks' Society
James Jenkins, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Ceri Hopewell, Serious Fraud Office
Helen Chaytor, HM Courts and Tribunals Service
Helen Measures, HM Courts and Tribunals Service
Alison Mead, HM Courts and Tribunals Service
Vicki Sheppard-Jones, Criminal Appeal Office
Umar Al Azmeh, Criminal Appeal Office
Matthew Gould, Ministry of Justice
Julie Clouder, Ministry of Justice
Richard Chown, Ministry of Justice
Harriet Miskin, Ministry of Justice

Polly Newman, Ministry of Justice
Olga Kostiw, Ministry of Justice
Mario Gibezzi, Ministry of Justice
Cathy Dilks, Criminal Cases Review Commission
Jonathan Solly (Committee secretariat)

1. Welcome, apologies for absence and announcements

The Lord Chief Justice introduced Lord Justice Fulford to Committee members as deputy chairman in succession to Sir Brian Leveson. This being the last meeting that Nathaniel Rudolf and Paul Harris would attend as members, the Chief Justice thanked them both for their Committee service.

Chairing the meeting, Lord Justice Fulford welcomed Committee members and all those who usually attended. He extended a particular welcome to Catherine O'Neill, of Intermediaries for Justice, and Kerry Chatterje, of Triangle, attending for the discussion of agenda item 5; and to Professor Cheryl Thomas QC, of the University College, London, Judicial Institute, attending for the discussion of agenda item 9.

The chairman reported apologies for absence from HH Judge Picton and David Kenyon; and among those who usually attended, from the Chief Magistrate and Talwinder Buttar.

2. Draft minutes of the meeting held on 7th June, 2019

The draft minutes of the meeting on 7th June, 2019, were approved. There were no matters arising.

3. Case management group report

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

1) the group would consult on amendments to the magistrates' courts Preparation for Effective Trial form and on a new youth court version of that form.
2) the group had noted the introduction of a revised Crown Court Plea and Trial Preparation Hearing form and had expressed its thanks to HH Judge Edmunds QC, to Alyson Sprawson and to all those who had participated in its preparation.
3) the group had discussed with representatives of Attorney General's office a paper submitted by that office proposing an amendment to the timetable for the Crown Court Plea and Trial Preparation Hearing the better to accommodate prosecution disclosure. The group had not felt able to endorse the proposed amendment but had observed that a comparable effect could be achieved by other means.
4) the group had discussed a number of other suggested amendments to forms, some of which would require further consideration in the autumn.

The Director of Public Prosecutions explained that the proposal to adjust the timing of the Plea and Trial Preparation Hearing had not emanated from the Crown Prosecution Service. However, he acknowledged the Attorney General's concerns with the prosecution workload before the date of the PTPH and observed that what the CPS wanted to avoid was any reduction in the period between sending for trial and the PTPH, which some local arrangements permitted.

4. Part 2 Powers of authorised court officers: consultation responses

CrimPRC(19)39

The chairman remarked the rewarding number of responses received, all of which were helpful and some challenging. The use of court officers to exercise some judicial functions

clearly gave rise to strong feelings and to concerns that that would lead to a diminution in judicial authority, but in his view some of that passion was misdirected. He cited the maxim that sometimes things had to change for them to remain the same; and observed that the provisions to be made already existed, for the most part, and had operated unobjectionably hitherto.

The chairman suggested that the Committee should reconvene the working group chaired by HH Judge Edmunds QC which had superintended the preparation of the consultation draft rules; perhaps as two groups to consider separately the provision for the Crown Court, on the one hand, and, on the other, the provision for magistrates' courts. In principle the rules should be settled by the end of the November Committee meeting, so he suggested that the group, or groups, should be asked to report to the Committee meeting in October. Paper (19)39(c) identified the principal issues for resolution and suggested some potential amendments. Any immediate observations would be welcome, but he suggested delegating detailed discussion to the working group, or groups.

Judge Edmunds agreed, and suggested that he and District Judge (Magistrates' Courts) Snow should discuss between them how best to approach discussion, whether jointly or separately. In either event, two significant issues arose with which the Committee's views at once would be helpful. First, the Council of HM Circuit Judges had comprehensively rejected the exercise by authorised court officers of judicial functions in the Crown Court. Did the Committee wish to accede to that rejection, or were members content for the working group to review and amend the relevant draft rule? Second, the consultation draft rule for magistrates' courts had included alternative versions of the provision for functions exercisable by legally qualified court officers. The balance of respondents' opinions seemed to favour what had been called Version B. Did the Committee agree with that?

Lord Justice Haddon-Cave agreed firmly that Version B should be adopted. That formulation of the rule made crystal clear what court staff could do. The Director of Public Prosecutions agreed. In the absence of any opposing view, the Committee also agreed.

The chairman doubted whether the views of the Council of HM Circuit Judges reflected the views of the entire Circuit bench, and in any event doubted that the proposal reasonably could be seen as eroding judicial authority. Lord Justice Haddon-Cave agreed. Judge Edmunds also agreed, observing that the court officers who would exercise such functions would require authority to do so and could be directed by a judge in their exercise.

Recognising the strength of opinion in the Council, the Director of Public Prosecutions asked whether it would assist to distinguish in the Crown Court between legally qualified court officers and others. Judge Edmunds explained that the proposals assumed no lawyers would be employed, the intention being merely to allow experienced case progression officers to do some things themselves and to allow listing officers to permit the use of live links: which in practice often was done now. Mr Rudolf added that in the Crown Court there would be an automatic right of review by a judge of a court officer's decision.

In general discussion it was agreed that working group members would meet as a single group in time to settle recommendations to the Committee meeting in October.

5. Part 3 Case management: intermediaries for defendants **CrimPRC(19)40**
CrimPRC(19)32
CrimPRC(19)41

The chairman introduced the papers for the Committee and again welcomed Catherine O'Neill and Kerry Chatterje. He invited them briefly to summarise the concerns expressed in paper (19)32.

Catherine O'Neill explained that intermediaries felt passionately about the provision of assistance for defendants who needed it. The main problem that they encountered was having their findings accepted, despite their qualifications and years of experience. The appointment of intermediaries was unpredictable in both family and criminal courts. It was uncomfortable to find oneself retained as a registered intermediary for a witness and seeing a defendant who needed assistance too but who received none. In cases in which an intermediary was retained only for the duration of the defendant's evidence it was common to find that the defendant did not understand what was going on. There was a marked contrast with the retention of interpreters who were appointed readily and for the duration of proceedings. It was a myth that intermediaries wanted the money and needed work; the truth was that most were already working to full capacity.

Kerry Chatterje added that she acted only as an intermediary for defendants, not as a registered intermediary. She endorsed Catherine O'Neill's remarks. On only three occasions had she been referred a defendant who in her view did not need assistance throughout the trial.

Catherine O'Neill added that it was sheer chance whether an intermediary would be appointed for the whole trial or only for evidence. She reported a case in which a judge had refused to hear representations from her and had identified no criteria for his decision to restrict her appointment to the defendant's evidence; yet another judge subsequently had directed her appointment for the whole trial.

The chairman thanked both for their observations. He asked Matthew Gould to elaborate on the review to be undertaken by the Ministry of Justice.

Matthew Gould explained that the Ministry agreed that the work done by intermediaries was hugely valuable and that they assisted very vulnerable people. It was agreed also that the availability of intermediaries for defendants needed to be improved, and work was continuing region by region to recruit more registered intermediaries before the end of the year. A review of overall provision had now begun, enquiring into whether current arrangements were acceptable and sustainable and, if not, what arrangements should be made in their place. It was expected that that review would take a year to complete.

Ms Blackstock reminded the Committee of the points made at previous meetings about the effect of the current practice directions on the appointment of intermediaries and on the variation of appointment decisions. She welcomed the Ministry's review and hoped that all those with an interest in the provision of intermediaries would be consulted so that the result would be sound. However, in the meantime it still was necessary to consider the practice directions and the problem of discrepancy between the advice of intermediaries and judicial decisions.

The chairman also welcomed the Ministry review. He remarked the lack of criteria for the making of judicial decisions and the unsatisfactory nature of current arrangements. He suggested that pending the outcome of the review the Judicial College might be asked to formulate guidance to assist judges, and that the Committee should consider identifying criteria for the appointment of intermediaries for defendants and for the extent of such appointments.

Mr Justice William Davis observed that if the practice directions were to be reviewed then that should be done in consultation with judges and others. The chairman agreed, and reported that he had asked the judge to convene a judicial working group, comprising a range of views, which could contribute to the Ministry review. Mr Justice William Davis added that such a working group could work in parallel with that review; which was a worthwhile step but which he doubted would find anyone in favour of the current

arrangements and should best start from the proposition that current arrangements were wrong.

District Judge (Magistrates' Courts) Snow observed that intermediaries were frequently needed in magistrates' court cases and asked that District Judges should participate in the proposed working group.

Mr Harris pointed out that in youth courts large numbers of defendants experienced learning difficulties and adequate provision of intermediaries was needed for those courts. In one of his own cases recently he had commenced a judicial review of the inadequacy of provision.

Professor Ormerod QC reminded the Committee that primary legislation providing for the appointment of intermediaries already existed but remained unimplemented. He asked whether the review would consider its implementation.

Matthew Gould replied that the two questions posed for the review were likely to take different times to answer. He agreed that the question whether current arrangements were satisfactory answered itself, in the negative. The second question, about how things could be improved, required more thought. It was essential to consider how capacity could be improved.

Lord Justice Haddon-Cave observed that the criminal courts now had extensive experience of using intermediaries and he firmly favoured canvassing judges' views. He would be concerned if judicial discretion were to be confined.

HH Judge Edmunds QC commented that the paper contributed by Intermediaries for Justice gave examples of things going wrong from which it was not easy to tell whether the failure had been in the process or in the application of that process. The chairman agreed, observing that training would remain important.

Mr Rudolf asked that those conducting the Ministry review should also consult barristers and solicitors, who received instructions from defendants and who dealt with the important and difficult initial stages of helping those clients before an intermediary could be appointed.

Catherine O'Neill commented that the problem was systemic and despite the training received by police officers, for example, things frequently went wrong during the interview of a vulnerable defendant if no intermediary was present to assist. Intermediaries for Justice would like to take part in any working group that discussed the current arrangements.

Drawing the discussion to a conclusion, the chairman again thanked Catherine O'Neill and Kerry Chatterje for sharing their views and experience with the Committee. Their contribution had been important and their further views would be sought in due course.

6. Part 3 Case management: criminal court performance statistics

CrimPRC(19)42

Introducing the paper for the Committee, the chairman observed that this was simply to note; but if Assistant Commissioner Ephgrave or Matthew Gould wished to add comments then those would be received gratefully.

Matthew Gould observed that it was helpful for the Committee to see these figures. Since the last meeting the 9% fall in the proportion of alleged offences charged had been widely publicised, and the reported reduction in the number of rape cases reaching court was worrying. No criticism of the police should be implied. A government spending review was looming and an approach to that review which treated these figures as a problem for the criminal justice system as a whole was essential.

Assistant Commissioner Ephgrave drew attention to the changing nature of crime, the steady rise in recorded crime and the change in the type of cases coming to the fore – notably cases of domestic and sexual abuse, and cases involving modern slavery. Overall, police forces' detection rates had dropped, and changes to PACE Code B had led to a reduction in arrest rates. Sir Brian Leveson once had aptly described the police as the 'hopper' that fed cases into the court system, and the fall in the charging rate had resulted in a decrease in the number of such cases. Were charging rates now to return to those of 2015, that would require an increase of 31% in the number of court sitting days required; whereas if the workload continued to fall, it would lead to a 31% decrease in court sittings. Police forces were actively lobbying for some changes to the bail legislation, and suggestions that more police officers were to be recruited meant that more cases might begin to reach court. In Mr Ephgrave's view, the decrease in charging probably now had reached its nadir and planning should assume an increase in cases reaching court in future.

Mr Harris drew the Committee's attention to the substantial reduction in the number of duty solicitors, from 6,341 in 2016 to 4, 637 in 2019. The average age of such solicitors now was 50. These figures illustrated the pressing need for adequate resources also for the defence, also an integral part of the criminal justice system.

Ms Abiodun agreed, and pointed to the substantial number of defendants presently released under investigation which itself was likely to lead eventually to an increase in the number of cases reaching court. Matthew Gould also agreed, reporting that the Criminal Justice Board was concerned about the phenomenon of release under investigation. Police forces were complying with what the legislation required but the legislation required review.

District Judge (Magistrates' Courts) Snow asked whether reliable statistics were available for the number of defendants released under investigation. Helen Measures replied that because there was no requirement to record the numbers the national figure was unclear. Ms Abiodun commented that in her experience release under investigation sometimes was used unnecessarily, when the available evidence was quite clear and prosecution without delay would be possible. Mr Ephgrave added that the number of defendants awaiting charge at any given time might not change very significantly but now there were far more such defendants released otherwise than on bail; with the disadvantage that the preparation of such cases attracted no regular scrutiny in the way that bail required.

Professor Ormerod QC remarked on the incidence of cases recorded as unable to be tried and questioned the surprisingly high proportion. The Director of Public Prosecutions suggested that it might include absence as well as incapacity. Siân Jones agreed.

7. Part 24 Trial and sentence in magistrates' courts; Part 25 Trial and sentence in the Crown Court: explanations of procedure for defendants CrimPRC(19)43

The chairman introduced the paper for the Committee, observing that the completion of the proposed leaflets now was imminent and inviting any further, final, comments.

Ms Pople QC drew attention to the proposed explanation of nationality, which was incorrect, and offered to assist in the reformulation of some other explanations of legal terms.

In general discussion it was observed that the illustrations of judges all appeared hostile. Professor Thomas QC offered to provide an alternative. HH Judge Edmunds QC reminded the Committee that the illustrations used in the requisition form created for the National Police Chiefs' Council were neutral ones.

Matthew Gould reported that the Ministry of Justice was pleased with the progress made, but had struggled to find acceptable illustrations and in some instances had had to revert to using Tippex and a photocopier to edit what was available.

The Committee again endorsed the importance of this initiative. Committee members agreed to send any further, and final, written observations to the Committee secretary.

8. Part 24 Trial and sentence in magistrates' courts; Part 25 Trial and sentence in the Crown Court: pre-sentence reports **CrimPRC(19)44**

Introducing the paper for the Committee, the chairman remarked the apparent reduction in the number of pre-sentence reports requested by courts and suggested that this was likely to be a matter of concern to the Sentencing Council especially. The Director of Public Prosecutions agreed, reporting that the Council intended to consider the provision of reports to ensure that adequate assistance for sentencing courts was available.

HH Judge Edmunds QC observed that during the introduction of the Better Case Management initiative guidance was issued to magistrates' courts that resulted in fewer requests for reports being made where a case was committed for sentence. The judge understood that that guidance now was under review.

District Judge (Magistrates' Courts) Snow considered the report cited by the Committee paper to have been unfair and misleading, in that it ignored the many fast delivery reports that were delivered orally. The judge would oppose any suggestion that the power to impose a custodial sentence could not be exercised unless a report had been received.

Mr Justice William Davis agreed that while in the past every pre-sentence report had been written now many were received orally.

Sophie Marlow reported that the Ministry of Justice was conducting a review of the reasons for the diminution in the number of reports which review was due to report in the autumn. A failure to note the receipt of an oral report was one of the possible reasons under review; as was the suggestion that courts had been discouraged to adjourn sentencing in order to obtain a written report. She suggested that the Committee might wish to return to the subject once that review had reported.

Siân Jones observed that the review would need to keep in mind the possibility that in a case in which a defendant had been sentenced to imprisonment where no report had been received it might be because a custodial sentence had been inevitable; not because there had been no report.

Ms Blackstock drew attention to the figures given in the reports cited by the Committee paper which showed a reduction in the number of community sentences imposed, and especially in the incidence of mental health disposals, suggesting an insufficiency in provision for such disposals. Judge Snow agreed, adding that adequate mental health provision was required to permit the making of such orders.

9. Part 26 Jurors: report on use of juror notice and associated matters
CrimPRC(19)45
CrimPRC(19)46

The chairman invited Professor Thomas QC to introduce the paper for the Committee.

Professor Thomas thanked HH Judge Edmunds QC for having suggested that she undertake a review. She spoke routinely to judges and had received few reports from them, or from court staff, of difficulties in using the current notice or in giving the associated guidance to jurors in the judge's introductory remarks at trial. Moreover, recent enquiries showed that since the introduction of the current notice jurors' understanding of

their obligations had continued to improve; which did not mean that in future problems never would occur, or that no juror now would deliberately ignore the prohibitions imposed by the Juries Act 1974, but certainly no amendment to the notice seemed to be required.

Lord Justice Haddon-Cave asked whether more clarity was required about what jurors could and could not discuss after the end of a trial. Professor Thomas agreed, explaining that the current notice was addressed primarily to events during the course of the trial and it was indeed concerning that 10% of jurors surveyed still thought that it was permissible to discuss anything with anyone after it was over. It might be that at the end of the trial the judge should remind jurors of their continuing obligations. Lord Justice Haddon-Cave agreed, but suggested that something more in the written notice might assist.

Judge Edmunds suggested that the guidance about concluding remarks issued by the Judicial College might be amended to the necessary effect. Professor Ormerod QC agreed. Ms Pople QC remarked that that guidance was indeed helpful.

James Jenkins reported that on several occasions the Registrar of Criminal Appeals had drawn the Attorney General's attention to letters sent by jurors to trial judges which had revealed details of jurors' discussions inappropriately. He agreed that more guidance for jurors on their post-trial obligations seemed desirable.

Judge Edmunds suggested that HM Courts and Tribunals Service usefully might publish in one place, online, all the guidance for jurors, as Professor Thomas recommended. Helen Measures replied that HMCTS was taking steps to do so.

The chairman drew members' attention to an interesting leaflet published in the United States of America offering jurors guidance on how to conduct deliberations. Professor Thomas explained that 82% of jurors recently surveyed had replied that such guidance would assist, and the subject had been considered by the editors of the Judicial College Crown Court Compendium. The guidance used in the USA had been adopted and adapted in a number of other jurisdictions.

The chairman observed that jurors needed guidance at the beginning of a trial, immediately before they retired to deliberate, and at the end of the trial. He invited members' views on whether deliberation guidance should be produced. No member objected. Helen Measures also agreed, but asked that those producing such guidance should work with HMCTS on arrangements for the production and distribution of such guidance. Professor Thomas agreed to pursue the matter and to report again in due course.

Summing up, the chairman noted that the Committee welcomed the very encouraging results of Professor Thomas' review and endorsed the proposals for potential amendments to judicial guidance to jurors at the end of a trial; the preparation of guidance for jurors on how to conduct effective deliberations; and a further review and report in due course.

10. Part 31 Behaviour orders: knife crime prevention orders CrimPRC(19)47

The chairman introduced the paper for the Committee. He understood that the Crown Prosecution Service had concerns with the proposed provision for the reviews of orders required by the new legislation.

The Director of Public Prosecutions explained that it would be important for the prosecutor to apply for such a knife crime prevention order in an appropriate case, but the burden imposed by the proposed rule about reviews simply could not be met. Siân Jones agreed that it ought not be the responsibility of the prosecutor to initiate the review.

The Committee directed that the draft rule amendments should be revised to accommodate Crown Prosecution Service concerns with the proposed rule about the review of orders, but in other respects endorsed the draft.

11. Part 39 Appeal to the Court of Appeal about conviction or sentence: Easy Read form NG **CrimPRC(19)48**

The chairman introduced the paper for the Committee and invited Vicki Sheppard-Jones to explain the proposal.

Vicki Sheppard-Jones reported that the use of an Easy Read version of appeal Form NG for use in an application for permission to appeal against conviction had been tested by the Criminal Appeal Office this year, with the assistance of the Criminal Cases Review Commission, in cases in which the applicant to the Commission had not previously appealed. In the event, the form had been well completed in most cases, and applicants' comments on its utility had been positive. In response to those tests some adjustments would be made both to the text and to the illustrations and steps would be taken to devise an Easy Read version of the form for use in an application for permission to appeal against sentence.

In general discussion it was observed that the illustrations of defendants usefully might be made to appear less condemnatory.

The Committee noted the test and endorsed the proposal to adopt Easy Read versions of both the conviction and sentence appeal notices.

12. Part 28 Sentencing procedures in special cases: medical reports for prisons **CrimPRC(19)49** **CrimPRC(19)36**

The chairman introduced the paper for the Committee, observing that it now should be possible for the Committee to consider revised draft rules in the autumn.

HH Judge Edmunds QC expressed gratitude to HM Courts and Tribunals Service for their very positive and helpful response to the Committee's concerns. He agreed that it would be helpful for the proposed electronic Prisoner Escort Record and the warrant for imprisonment to record appropriate warnings about the defendant's physical and mental health. However, what still was lacking was information about what HM Prison Service intended to do to address the concerns expressed to the judge by prison reception staff about failures of communication within prisons; and suggestions for what might be done to ensure that significant changes in administrative practice in court offices were brought promptly to judges' attention. The judge recently had discovered that court staff had assumed that members of the judiciary had access to the HMCTS intranet and thus to notices published by that means: but that was not so.

Helen Measures agreed, reporting that HMCTS was considering how to improve the communication to judges of messages intended primarily for court staff. She also would enquire into what action was being taken by HMPS to improve communication among prison staff.

Summing up, the chairman noted that the Committee (i) welcomed the helpful HM Courts and Tribunals Service response in paper (19)49(a), (ii) sought more information about the handling within HM Prison Service of medical reports and comparable information received from courts, and (iii) directed the preparation of draft rules for consideration at the next meeting.

13. Any other business

No other business was raised. The secretary recorded members' profound gratitude to Nathaniel Rudolf and Paul Harris for their Committee service.

14. Dates of next meetings: Friday 4th October, 2019, and
Friday 8th November, 2019

The meeting closed at 3.25 pm.