

CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 20th MARCH, 2020 at 1.30 p.m.

MEETING CONVENED BY TELEPHONE CONFERENCE

DRAFT MINUTES

Present

Committee members

Lord Justice Fulford (chairman of the meeting)
HH Judge Picton
HH Judge Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
The Director of Public Prosecutions, Max Hill QC
Sue Gadd
Alison Pople QC
Paul Jarvis
Edmund Smyth
Assistant Commissioner Ephgrave
Jodie Blackstock
David Kenyon

Also attending

Matthew Bell, The National Archives
Professor David Ormerod QC, University College, London
Hanna van den Berg, Lord Chief Justice's Office
Alyson Sprawson, Senior Presiding Judge's Office
Richard Sampson, Chief Magistrate's Office
Siân Jones, Justices' Clerks' Society
Sophie Marlow, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Ceri Hopewell, Serious Fraud Office
Helen Measures, HM Courts and Tribunals Service
Alison Mead, HM Courts and Tribunals Service
Matthew Gould, Ministry of Justice
Richard Chown, Ministry of Justice
Jonathan Solly (Committee secretariat)

Apologies are offered to any present whose names were missed.

1. Welcome, apologies for absence and announcements

Chairing the meeting, Lord Justice Fulford welcomed Committee members and all those who usually attended, thanking all for their participation by telephone conference in the difficult circumstances of the public health emergency. He extended a particular welcome to Matthew Bell, Head of Legislation Services at The National Archives, attending for the discussion of agenda item 4. He reported apologies for absence from Lord Justice Haddon-Cave, Mr Justice William Davis and Shade Abiodun; and from among those who usually attended the Committee's meetings, the Chief Magistrate.

2. Draft minutes of the meeting held on 7th February, 2020

The draft minutes of the meeting on 7th February, 2020, were approved. There were no matters arising.

3. Case management group report

The chairman reported that the group had not met on this occasion. Group members' views would be canvassed as soon as possible by email on (i) the government's proposed revisions of the disclosure Code of Practice and the Attorney General's Guidelines on Disclosure, and a new form of Standard Disclosure Certificate; and (ii) potential amendments to the rules and costs practice directions about private prosecutions.

4. Criminal Procedure Rules 2020: electronic publication

CrimPRC(20)11

Introducing Matthew Bell of The National Archives, the chairman observed that the decision to publish secondary legislation in the same way as primary legislation, showing amendments made to the legislation as first promulgated, had come at an ideal time for the Criminal Procedure Rules, now that the Committee had affirmed its 2016 decision to publish this year a fresh legislative consolidation. He asked Matthew Bell to describe the plans.

Mathew Bell explained that National Archives staff for some years now had been applying amendments to primary legislation published at legislation.gov.uk and it had been decided to begin to apply the same techniques to secondary legislation. Not all secondary legislation would be within scope of the new work to begin with, but the Criminal Procedure Rules would be included. Previously published secondary legislation would be included gradually, working backwards from the present and including first anything relevant to the past implementation of European Union law. It followed that in due course the Criminal Procedure Rules 2015 would be updated with all the amendments made to them; but in the meantime the Criminal Procedure Rules 2020 would become at once part of the normal business of updating, and would be presented in exactly the same way as Acts of Parliament now were presented.

HH Judge Edmunds QC welcomed this information. He asked whether rule amendments would appear at legislation.gov.uk when they came into force. Matthew Bell replied that that would depend on how soon they came into force after being laid before Parliament and published. It might take as much as 2 months for amendments to be applied, but he understood that amendments to Criminal Procedure Rules usually took effect a couple of months or so after publication anyway and in those circumstances their appearance would indeed coincide with, or antedate, their taking effect.

The Director of Public Prosecutions also welcomed the initiative. He asked whether the legislation could be published in Word as well as in pdf. Matthew Bell replied that although that was not presently offered he would consider whether it could be done.

The chairman recorded the Committee's thanks to The National Archives and to Matthew Bell himself for their timely and helpful work and for this report.

5. Criminal Procedure Rules 2020: introductory notes

CrimPRC(20)12

The chairman introduced the paper for the Committee, thanking all those who had contributed suggestions for amendments. He mentioned that the secretary had tentatively proposed publishing the notes on the Ministry of Justice website but not, after all, in the statutory instrument, to avoid any possible controversy about their effect on the interpretation of the rules.

Ms Blackstock reported that she had sent the secretary some further suggestions for the amendment of the notes.

The chairman asked members to ensure that the secretary had received any other suggested amendments. Under his supervision amendments would be incorporated without further reference to the Committee unless they appeared to raise matters of significant controversy.

6. Parts 2, 3 and 18: live links – emergency powers

CrimPRC(20)13

The chairman introduced the paper for the Committee, drawing attention to the fact that what was proposed had been before the Committee in 2017. He invited members' comments on the draft rules.

HH Judge Edmunds QC suggested that the title to Part 18 should become, 'Measures to assist a witness, defendant or other person to give evidence or otherwise participate'; new rule 3.2(4)(a) should be reworded consequentially; and rules 18.23, or 18.24, or both, should be amended to make it clear that the court could give a live link direction without requiring a detailed application merely because, for example, counsel was to attend a pre-trial hearing by live link. Ms Blackstock observed that although rule 18.23 anticipated the possibility of the court making a direction without an application, it set out no criteria for doing so. She suggested incorporating the criteria listed as procedural requirements in rule 18.24. The Committee agreed that such criteria should be incorporated, by reference or otherwise.

District Judge (Magistrates' Courts) Snow expressed concerns about some of the terms of the anticipated primary legislation and about whether adequate live link technology would be available.

The Director of Public Prosecutions welcomed the anticipated statutory provision for live links but expressed a concern that the terms of the legislation might impede the passing of sentence by a court, for example where disqualification from driving was proposed. He suggested that rule 18.23 should require the court to give reasons for not making, where it could, a publicity direction under the anticipated section 85A of the Courts Act 2003. The section itself did not require such reasons to be given, by contrast with requirements in the new legislation about live links.

Judge Edmunds QC agreed with the Director, as did Ms Blackstock and Nigel Gibbs. The chairman observed that courts could be expected to give short reasons for such a decision anyway. Siân Jones questioned the desirability of adding an obligation that had been omitted from the primary legislation. Judge Snow observed that the burden of giving reasons in every case in which a potential direction was not made would be considerable. The Director accepted Judge Snow's reservation, but doubted that the burden would be too onerous.

Following further general discussion, the Committee agreed that reasons should be required in those cases in which the court declined to make a section 85A publicity or recording direction when it could have done so.

Ms Pople QC suggested that there should be an obligation to record the attendance by live link of an advocate, to ensure that that person's participation could be demonstrated. Judge Edmunds QC agreed that current arrangements for recording advocates' attendance at Crown Court hearings, by the entry of information at a terminal in the court building, could not be used where attendance was by live link. The Committee agreed that such provision should be included, perhaps in rule 5.4.

Ms Blackstock asked whether the proposed rule amendments would be incorporated within the main rules or contained in separate legislation. The chairman replied that the amendments would need to be applied only temporarily. The secretary observed that the necessary legislation would perhaps be made by the Lord Chancellor under the powers conferred on ministers by the anticipated new primary legislation.

7. Parts 7, 9 and 10: low-level shoplifting charges in the Crown Court

CrimPRC(20)14

The chairman introduced the paper for the Committee.

Nigel Gibbs reported that the Crown Prosecution Service had issued a reminder to prosecutors when settling indictments to keep in mind the special provisions for low-level shoplifting. He agreed that the proposed rule amendments reflected what was already the usual current practice.

Siân Jones indicated that the recording in a magistrates' court of a defendant's decision to choose Crown Court trial for low-level shoplifting might cause difficulties in practice but thought that any such difficulties could be overcome.

Mr Jarvis asked whether it was desirable to require particulars of value only where that would affect the exercise of the magistrates' court's powers. He suggested that such particulars always should be included. Nigel Gibbs added that no very specific statement of value was needed for the information to be useful nonetheless.

HH Judge Picton suggested that the requirement should be to give particulars of the value of any theft or damage 'where known'. Mr Jarvis agreed.

HH Judge Edmunds QC pointed out that the proposed reformulation of rule 10.2(4)(b) as a prohibition against the inclusion in an indictment of a summary offence other than one permitted by section 40 of the Criminal Justice Act 1988 might invite argument about the validity of an indictment which failed to comply. He suggested omitting the prohibition and rephrasing it as an explicit discretion to include such an offence.

The Committee approved the proposed rule amendments, subject to (i) the addition to rule 7.3(1)(b) of the words, 'including the value of any damage or theft alleged where that is known and where it affects the exercise of the court's powers'; and (ii) the retention of current rule 10.2(4), with the addition to paragraph (4)(c) of the words, 'including a summary offence to which section 40 of the Criminal Justice Act 1988 applies'.

8. Parts 7 and 14; CrimPD II and III: first appearance of defendants in custody

CrimPRC(20)15

The chairman recorded the Committee's gratitude to the Chief Magistrate for having superintended the development of this proposal. He suggested that the directions as now formulated should be endorsed and submitted to the Lord Chief Justice for his approval. The Committee agreed.

HH Judge Edmunds QC asked that the provision proposed for voluntary attendance at a court after failure to attend in breach of bail should be expressed to apply also in the Crown Court.

9. Part 18 Measures to assist a witness or defendant to give evidence: special measures directions without application

CrimPRC(20)16

The chairman introduced the paper for the Committee, observing that the proposal had been suggested by Lord Justice Haddon-Cave. He invited comments.

The Committee approved the proposal. Mr Kenyon emphasised the importance of making the court aware of the witness' own views and the vital need to identify the witness' individual needs.

**10. Part 25 Trial and sentence in the Crown Court: jurors –
emergency arrangements**

CrimPRC(20)17

The chairman introduced the paper for the Committee, observing that the suggestions made in the paper had been superseded by the temporary arrangements made to accommodate the public health emergency.

HH Judge Picton doubted whether a jury of 10 would have any better chance of reaching a conclusion under current circumstances than would a jury of 12; and a jury of 14 would merely exacerbate the current health risks. In his view, the rule proposed would not help.

The judge added that a reduction in the number of jurors to 7, as had occurred during World War II, would be radical. He suggested that the legislation for trial in cases of jury tampering might be extended to allow trial by judge alone. Certainly if the current public health emergency were to last for another 3 to 6 months it would pose very significant difficulties for jurors.

The chairman agreed that such provisions might be adopted, but that they were beyond the Committee's powers.

HH Judge Edmunds QC agreed with Judge Picton that the proposed rule would not help. To begin a trial with only 10 jurors would increase the jury's fragility under current circumstances and would be too radical a change to make without consultation though he agreed that it should be given further consideration in future. He agreed, too, that it would be useful to consider allowing greater flexibility in the current provision for additional jurors. Before the present rule was adopted it had been the practice at some courts to start with 15 jurors. The criteria for temporarily retaining the additional two jurors allowed by the present rule were worth reconsidering, but that could be for the future. For the time being, he opposed the suggested changes to the rules.

Ms Pople QC, Mr Jarvis, Mr Smyth, Ms Blackstock, Mr Kenyon, Nigel Gibbs and the chairman each endorsed what Judge Picton and Judge Edmunds QC had said. Summing up, the chairman observed that under current circumstances the proposal would not assist and that the rule would not be changed.

11. Parts 31, 34 and 39: domestic abuse protection orders

CrimPRC(20)18

The chairman introduced the paper for the Committee, observing that the proposed rule amendments were to note only at this stage and suggesting further discussion once the Domestic Abuse Bill had progressed. The Committee agreed.

12. Part 32 Breach, revocation and amendment of community and other orders;

CrimPD XIII Listing: venue for breach proceedings

CrimPRC(20)19

13. Part 34 Appeal to the Crown Court; CrimPD XIII Listing: venue for appeal

CrimPRC(20)20

The chairman introduced the paper for the Committee, thanking Alyson Sprawson for having brought these circumstances to the Committee's attention. The Committee endorsed the suggested practice directions.

**14. Part 47 Investigation orders and warrants: applications for search warrants
by telephone CrimPRC(20)21**

The chairman introduced the paper for the Committee. The Committee agreed that the current provision was lawful and that that conclusion would not be affected by the provisions of the Coronavirus Bill.

15. Part 47 Investigation orders and warrants: disclosure orders CrimPRC(20)22

The chairman introduced the paper for the Committee. The Committee agreed that no rule amendment was required and approved the proposed amendments to forms.

**16. Part 48 Contempt of court: consultation by the Civil Procedure Rule Committee
CrimPRC(20)23**

The chairman introduced the paper for the Committee. The Committee agreed that members should submit to the consultation any responses they wished to make as individuals; and that no amendment to Part 48 of the Criminal Procedure Rules was required.

17. Any other business

No other business was raised.

**18. Dates of next meetings: Friday 1st May, 2020, and
Friday 12th June, 2020**

The meeting closed at 3.06 pm.