

CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 12th JUNE, 2020 at 1.30 p.m.

MEETING CONVENED BY VIDEO CONFERENCE

DRAFT MINUTES

Present

Committee members

Lord Justice Fulford (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
The Director of Public Prosecutions, Max Hill QC
Alison Pople QC
Paul Jarvis
Shade Abiodun
Edmund Smyth
Assistant Commissioner Ephgrave

Also attending

Senior District Judge (Magistrates' Courts) Arbuthnot, the Chief Magistrate
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
David Barnes, Justices' Clerks' Society
Sophie Marlow, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Alison Mead, HM Courts and Tribunals Service
Richard Chown, Ministry of Justice
Julie Clouder, Ministry of Justice
Cate Tempest, Ministry of Justice
Jonathan Solly (Committee secretariat)

Apologies are offered to anyone taking part whose name was 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 video conference in the difficult circumstances of the public health emergency. He reported apologies for absence from Jodie Blackstock and David Kenyon; and from among those who usually attended the Committee's meetings, Matthew Gould and Helen Measures.

2. Draft minutes of the meeting held on 1st May, 2020

The draft minutes of the meeting on 1st May, 2020, were approved. Arising from item 7 (intermediaries), the chairman reported the issue on 19th May of the Committee's second invitation to comment on the draft rules. There were no other matters arising.

3. Criminal Procedure Rules 2020: signature of the statutory instrument

CrimPRC(20)31

Each member attending indicated assent (that is, Lord Justice Fulford, Lord Justice Haddon-Cave, Mr Justice William Davis, His Honour Judge Picton, His Honour Judge Edmunds QC, District Judge (Magistrates' Courts) Snow, Mrs Bryant JP, Ms Gadd, the Director of Public Prosecutions, Ms Pople QC, Mr Jarvis, Ms Abiodun, Mr Smyth and Assistant Commissioner Ephgrave). The secretary reported that those absent had indicated their assent separately (the Lord Chief Justice, Ms Blackstock, Mr Kenyon and Ms Case and Ms Hewer).

4. Part 3 Case management: information and directions in linked criminal and care proceedings

CrimPRC(20)32

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

District Judge (Magistrates' Courts) Snow asked that the proposed rule should apply in extradition proceedings as well as in prosecutions. The Chief Magistrate agreed, and questioned the restriction of the rule to a case involving a witness or victim under 17. Mrs Bryant observed that Family Court cases involved adults, too, and might not involve children. She endorsed the suggestion that a working group should be convened to consider the points raised and the expression of the draft rules.

HH Judge Edmunds QC remarked that the draft rules might work in some court centres, where judges of the Family Court and Crown Court judges were able to consult each other, but would not work elsewhere. A process for the exchange of information between judges at different court centres would be required. He pointed out that although in principle any Circuit judge could exercise the jurisdiction of the Crown Court and that of the Family Court, in practice few had authority to exercise both.

Assistant Commissioner Ephgrave expressed concern about the potential failure of the Family Court to appreciate the significance and sensitivity of information about criminal proceedings, especially information contained in disclosed prosecution material. He reported circumstances in which the sources of confidential information received by the police had been inadvertently revealed by the passing on of information supplied to the Family Court, with damaging consequences for participants in the prosecution involved. The chairman agreed that any potential for such damage always should be pointed out by the supplying court.

The Committee agreed in principle that, in criminal courts, arrangements for the exchange of information with the Family Court should apply in extradition cases as well as in prosecutions; and agreed to establish a working group comprising Committee members and some others further to discuss (a) the difficulties identified, and (b) a revision of the draft rules.

5. Parts 3, 18, 24 and 25: the Law Commission report *Unfitness to Plead*

CrimPRC(20)33

The chairman introduced the paper for the Committee and invited members to address each of the questions posed. The Committee's answers were as follows:

A. Questions about potential rule and practice direction amendments

- (1) before contemplating further adjustments to the draft rules about intermediaries the eventual outcome of the Committee's current consultation should be considered (see paper (20)33, paragraph 18).

Mr Justice William Davis recommended this conclusion. The Director of Public Prosecutions added that the Committee should take no action that anticipated and might inhibit the government's decisions on implementing the Law Commission report. Professor Ormerod QC observed that such action as the Committee might otherwise wish to take to implement the report could not achieve its recommendations without primary legislation, though rules which had the effect of drawing attention to defendants' potential needs would be worth making.

- (2) subject to (1) above, in principle the draft rules about intermediaries should list as a factor potentially to be taken into account when deciding whether to appoint an intermediary for a defendant an assessment by a mental health liaison and diversion practitioner, if such an assessment was available. However, the commissioning of such an assessment should not be made a requirement given the limited availability of such practitioners (see paper (20)33, paragraph 19). See also (6) beneath.

The Director of Public Prosecutions added that, just as this conclusion would not require the assessment of every defendant, so too not every prosecution witness' capacity was assessed.

- (3) subject to (1) above, in principle CrimPR 3.3 should require parties to raise concerns about a defendant's capacity. Moreover, consideration should be given to amending CrimPR 3.2(2)(b) (court's duty to identify witnesses' needs) to extend to defendants (see paper (20)33, paragraph 20).

Ms Gadd proposed the amendment to rule 3.2. HH Judge Picton suggested that where an expert medical report identified a defendant as unfit to participate then it should be the professional duty of defence representatives promptly to reveal that to the court.

- (4) procedure rules of themselves could not impose a duty to reveal the content of an expert report commissioned by the defence. However, where one party's report identified incapacity then the joint, not individual, commissioning of a second report often would be highly desirable, to reduce delay and cost (see paper (20)33, paragraph 22).

The chairman doubted that the Criminal Procedure Rules had power to impose any such duty absent primary legislation.

HH Judge Edmunds QC agreed; and agreed, too, with the Law Commission that where a medical report identified a defendant as unfit to participate then the joint commissioning of the necessary second report seemed highly desirable.

Professor Ormerod QC also agreed that rules had no power to override legal professional or litigation privilege. He reminded the meeting that this power was one the Commission had recommended should be imposed by primary legislation.

- (5) the Committee saw no practical advantage in elaborating CrimPR 25.10 (advocate for unfit defendant) pending such primary legislation as the Law Commission recommended (see paper (20)33, paragraph 23). See also (7) beneath.
- (6) the Committee's conclusions were as at (2) above (see paper (20)33, paragraph 26).

Professor Ormerod QC explained that the Commission's recommendation had been based on an expectation that every court would have access to the services of a mental health liaison and diversion practitioner, and the recommendation had received a great deal of support. However, if such practitioners were not readily available then he agreed that it would be impracticable to require an assessment of a defendant by such a person.

Ms Gadd suggested that such assessments should be encouraged even if they could not sensibly be required; but it was important not to raise unrealistic expectations. Siân Jones agreed, observing that, at present, to adjourn for such an assessment was likely to incur a lengthy delay.

- (7) in relation to CrimPR 39.2 (appeal by unfit defendant's advocate), the Committee's conclusions were as at (5) above (see paper (20)33, paragraph 27).

The chairman doubted that the rule could be improved upon absent statutory amendment.

- (8) the Committee lent its support to a commission issued by the Lord Chief Justice for a review and abbreviation of the Criminal Practice Directions in their entirety (see paper (20)33, paragraph 30).

The chairman reported that the convening of a working group was in hand. Mr Justice William Davis agreed that shorter directions would be helpful, and observed that a revision of the directions concerning the appointment of intermediaries now was essential.

B. Questions raised by the Ministry of Justice

- (1) this is a question for the government and for Parliament rather than the Committee (see paper (20)33, paragraph 32).

- (2) the Committee's views were as at A(2) above (see paper (20)33, paragraph 33).

Members reiterated concerns that the availability of mental health liaison and diversion practitioners was not sufficient to supply assessments by such practitioners in every case.

- (3) the Committee would be willing to contribute to the formulation of guidance for clinicians (see paper (20)33, paragraph 34).

- (4) the Committee endorsed the Law Commission's recommendations for amended statutory requirements for expertise (see paper (20)33, paragraph 35).

The chairman observed that the Law Commission's point was that on occasions a non-doctor's expert assessment might assist.

- (5) the Committee's views were as at A(4) above (see paper (20)33, paragraph 36).

- (6) the Committee would be willing to contribute to the formulation of guidance for defence practitioners, but the professional bodies themselves should be the principal contributors (see paper (20)33, paragraph 37).

- (7) & (8) the Committee's views were as at A(5) above. Neither procedure rules nor practice directions could prescribe rules of evidence or avenues of appeal without statutory authority to do so. (See paper (20)33, paragraphs 38 & 39.)

Professor Ormerod QC observed that the Law Commission's recommended 'alternative finding' procedure relied upon new statutory provision and on conferring powers on courts that rules could not confer.

Nigel Gibbs pointed out that the findings reached in such a procedure would be susceptible to challenge by judicial review but suggested that it would be better if any Bill introduced instead provided an avenue of appeal to the Court of Appeal, criminal division: notwithstanding that such an appeal would not be in a criminal cause or matter, strictly so defined.

Mr Justice William Davis agreed.

Professor Ormerod QC also agreed, observing that it was only by a legal technicality that such findings were not treated as criminal. The Law Commission's research had found that questions of fitness to participate arose in about 100 cases each year. Where one of several co-defendants was unfit the difficulties for the trial court were particularly acute under the present law, especially where the same point of law arose in relation to all those defendants.

6. Part 36 Appeal to the Court of Appeal general rules: intervention in proceedings CrimPRC(20)34

The chairman introduced the paper for the Committee, remarking that it was he who bore responsibility for this discussion as it was he who had allowed the intervention in the case of *Richards* which was its subject.

Mr Justice William Davis observed that that case had been very exceptional and that he was unaware of any other such. He doubted whether a rule was required. In the rare event of receiving an application to intervene the court could simply adopt a fair procedure adapted to the particular, exceptional, circumstances.

The Director of Public Prosecutions agreed. No rule was required, but the parties to an appeal needed to receive prompt and adequate notice of the proposed intervention and of the court's disposition. Nigel Gibbs also agreed, reporting another recent case in which the Howard League for Penal Reform had intervened and the Crown Prosecution Service had known nothing of the intervention until the League's written representations in the appeal were received. Prompt notice to the parties was essential.

The chairman observed that to make a rule might give a false impression that intervention was not uncommon and was to be expected. He suggested that the difficulties reported might more effectively be resolved by his reminding those who presided in criminal appeals to ensure that the parties were promptly notified in the event of any proposed intervention so that they could make representations and prepare. Ms Pople QC agreed.

The Committee decided that no rule was required.

7. Part 50 Extradition: procedure on extension of an extradition period CrimPRC(20)35

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

District Judge (Magistrates' Courts) Snow agreed that it was appropriate to incorporate the High Court's decision in the rules. He observed that the inter-authority decisions in question were not part of the proceedings and that the defendant was not a party to them. He was content with the proposed rule amendments.

Mr Justice William Davis pointed out that such decisions sometimes were required in the High Court, too, after an appeal, in which court they were taken by authorised court officers. He agreed that the defendant should be notified of any decision that had the effect of postponing extradition, not least because the defendant then might wish to apply for bail.

The Chief Magistrate agreed with both.

The Committee approved the proposed rule amendments.

8. Magistrates' Courts Rules 1981: access to documents from court records

CrimPRC(20)36

CrimPRC(17)71

CrimPRC(19)62

The chairman proposed that this should be referred to a working group. The Chief Magistrate agreed. District Judge (Magistrates' Courts) Snow observed that magistrates' courts received an increasing number of applications for access to court records and documents for which rules were urgently required.

The Committee endorsed in principle the proposal to prepare draft new rules, and agreed to establish a working group comprising Committee members and some others further to discuss the content of such draft rules before inviting others' views.

9. Any other business

The Committee continued and concluded its discussion of aspects of the Law Commission report, as minuted at item 5 above.

No other business was raised.

**10. Dates of next meetings: Friday 17th July, 2020, and
Friday 2nd October, 2020**

The meeting closed at 2.58 pm.