

CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 17th JULY, 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
HH Judge Picton
HH Judge Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
Sue Gadd
Paul Jarvis
Edmund Smyth
Jodie Blackstock
David Kenyon

Also attending

Senior District Judge (Magistrates' Courts) Arbuthnot, the Chief Magistrate
Professor Cheryl Thomas QC, University College, London
Professor David Ormerod QC, University College, London
Detective Inspector Karen Bangs, Metropolitan Police Service
Hanna van den Berg, Lord Chief Justice'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
Ceri Hopewell, Serious Fraud Office
Claire Juke, HM Courts and Tribunals Service
Simon Bartlett, HM Courts and Tribunals Service
Trudy Lewis, HM Courts and Tribunals Service
Richard Chown, Ministry of Justice
Julie Clouder, Ministry of Justice
Dominic van der Wal, Ministry of Justice Legal Advisers
Pinky Tanna, Ministry of Justice Legal Advisers
Cathy Dilks, Criminal Cases Review Commission
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 welcomed in particular

Professor Thomas QC Director of the University College, London, jury project, attending for the discussion of agenda item 8.

He reported apologies for absence from Mr Justice William Davis, the Director of Public Prosecutions, Alison Pople QC, Shade Abiodun and Assistant Commissioner Ephgrave; and from among those who usually attended the Committee's meetings, Alyson Sprawson and Matthew Gould.

2. Draft minutes of the meeting held on 12th June, 2020

The draft minutes of the meeting on 12th June, 2020, were approved.

The minutes were adopted. Arising from items 4 and 8 of those minutes (family and criminal cases; access to documents in civil cases in magistrates' courts), the chairman reported that two working groups since had met; one meeting was the subject of agenda item 3; and the product of the other's discussion would be reported to the Committee meeting in October.

3. Part 3 Case management: exchange of information between criminal and family courts **CrimPRC(20)37**

The chairman introduced the paper for the Committee and invited HH Judge Picton to summarise the working group's discussion.

Judge Picton reported a productive discussion leading to the revised draft rules now before the Committee, imposing a duty on the parties to draw attention to associated proceedings and including what amounted to a reminder of the proper process for exchanging information between criminal and family courts.

HH Judge Edmunds QC welcomed the draft rules as a good way forward but suggested that their scope might be too wide. He suggested confining their application to 'linked' family proceedings, which word was used in the Plea and Trial Preparation Hearing form.

Mrs Bryant preferred 'related' to 'linked', the latter being too specific in her view. She observed that the Family Procedure Rules were complicated and suggested that the views of the Family Procedure Rule Committee should be canvassed before any amendments to the Criminal Procedure Rules were settled finally.

Mr Jarvis suggested that the rules usefully should apply to any non-criminal proceedings, citing a case in which a civil claim had concerned the same circumstances as a prosecution.

After further discussion the Committee:

- (1) agreed that proposed rule 3.3(2)(f) (parties' duties) should read, 'Active assistance for the purposes of this rule includes ... (f) alerting the court to any related proceedings or anticipated such proceedings in the Family Court, as soon as reasonably practicable after becoming aware of them.';
- (2) directed the issue of an invitation to the Family Procedure Rule Committee to review and, potentially, to amend the Family Procedure Rules to achieve reciprocity between those rules and the Criminal Procedure Rules; and
- (3) directed the issue of a request to the Civil Procedure Rule Committee to consider the potential advantages of a corresponding reciprocity between the Criminal and Civil Procedure Rules.

4. Part 3 Case management: requirement to collect defendant's nationality

CrimPRC(20)38

The chairman introduced the paper for the Committee, observing that this matter was urgent because the current procedure appeared to be unlawful and the Committee was invited, exceptionally, to encourage HM Courts and Tribunals Service to change the practice at once. He invited members' views.

The Chief Magistrate expressed her delight, remarking that defendants' answers to the question presently required showed that it was widely misunderstood. She observed, however, that custodians might argue against delegation of the task to them.

Ms Gadd and Mrs Bryant agreed, Mrs Bryant suggesting that the rule should require collection of nationality information only by custodians, not by court staff.

The secretary reported agreement by Mr Justice William Davis to the proposal that the information should be collected by custody staff. The judge had observed that, "It will be no more than another box to tick in the paperwork which has to be completed."

HH Judge Edmunds QC drew members' attention to two forms already routinely completed by custody staff in which the defendant's nationality indeed featured as a box to tick, namely the Person Escort Record and the HM Prison Service Core Record. He observed that the collection of that information in those forms lent force to the argument that collection by the court also was unnecessary and excessive. He agreed that court staff should not be required to collect it at all.

HH Judge Picton also agreed, adding that it would be wholly undesirable if judges were to be required to say anything more than already was required of them at the point of sentence.

Ms Blackstock agreed too, drawing attention to the report cited by the Committee paper which had identified the collection of nationality information by the court as detracting from the court's perceived independence and impartiality. She agreed that the current procedure should cease immediately, and that the collection of the information should be left to custody staff, who it now transpired already collected it.

Siân Jones added that if legal advisers to magistrates were to be required to collect the information after sentence had been passed then the requirement was liable to be overlooked, or the information refused. She agreed that the obvious solution was for custody staff to collect it, as they did.

District Judge (Magistrates' Courts) Snow agreed with others' observations but expressed concern over whether custody staff could act on behalf of the court. He wondered what the position would be if the defendant refused to disclose his or her nationality to custody staff when asked. Ms Gadd suggested that the draft rule amendment be revised to require the collection of information not 'on the court's behalf' but 'at the court's direction'. Judge Edmunds suggested that HM Prison Service usefully might amend their forms to draw attention to the potential sanction for refusing to supply nationality information. Ms Blackstock recommended that care should be taken to ensure that defendants understood clearly what was being asked of them and why. Siân Jones expressed doubt about whether a refusal to supply that information to a custody officer could constitute an offence even if the requirement were imposed at the court's direction.

Drawing the discussion to a conclusion, the chairman summarised the Committee's conclusions as agreement that the collection by the court of nationality information as presently required by CrimPR 3.13(5) and 3.27(5) no longer complied with the Data Protection Act 2018; agreement at the earliest possible opportunity to amend the Criminal Procedure Rules explicitly to adopt the custodian's action as being taken as if at the

direction of the court; and agreement that in the meantime the current court practice should cease immediately.

**5. Part 15 Disclosure: handling of information collected from a witness
a recent judgment**

CrimPRC(20)39

The chairman introduced the paper for the Committee, observing that this offered members an opportunity to comment on the matters the subject of the judgment – and indeed on his judgment itself! The recent report by the Information Commissioner to which members’ attention had been drawn by email was an important relevant event, as was the recent announcement by the National Police Chiefs’ Council about revision of the current data extraction consent forms.

Lord Justice Haddon-Cave, HH Judge Edmunds QC and Nigel Gibbs each welcomed the judgment and the principles which it set out. Mr Kenyon agreed, observing that the present investigative practice was hard to reconcile with data protection principles and with witness’ rights to privacy.

Sophie Marlow commented that the delivery of the judgment had been timely for the Attorney General’s consultation on revision of the Guidelines on Disclosure.

The secretary reported a suggestion by Mr Justice William Davis that in the absence of Committee members with close interests in the subject discussion should be continued at the next meeting. The chairman agreed that it would be desirable further to discuss the tensions identified by Mr Kenyon.

The Committee agreed to continue the discussion at the Committee meeting in October, by when more would be known about the outcome of the Attorney General’s consultation on revised editions of the disclosure Code of Practice and the Guidelines on Disclosure, and more would be known about the new form announced by the National Police Chiefs’ Council to obtain permission from complainants and witnesses to search for information on mobile phones and other devices. Members asked for arrangements to be made, if possible, for the Victims’ Commissioner for London or a representative to contribute to the continued discussion.

**6. Part 18 Measures to assist a witness or defendant to give evidence:
live links legislation**

CrimPRC(20)40

The chairman invited members to postpone discussion of legislative details and instead to make any general observations that they might wish to contribute, keeping in mind that courts might need to use live links for a long time. He invited especially the views of Professor Ormerod QC and of Professor Thomas QC.

Professor Ormerod reported that he and Professor Thomas had been commissioned to undertake research for the Lord Chief Justice into the current arrangements. It was too soon yet to offer any settled views, but they would take account of the matters raised in the Committee paper and he hoped that it would be possible to say more by the time the Committee met again in October. Professor Thomas agreed, adding that they had already gathered some interesting information and that they intended to assess in particular the effect of live links on the quality of justice.

Ms Blackstock reported a recent meeting with representatives of HM Courts and Tribunals Service from which she had understood that evaluations were being conducted on behalf of the Service. She was pleased to learn of the research undertaken by Professor Ormerod and Professor Thomas. She had been troubled by passages in the ruling by Mr Justice Edis

to the effect that a defendant might not be able to see all that went on during a trial even while using a live video link to participate.

HH Judge Edmunds QC, too, welcomed Professor Ormerod's and Professor Thomas' review. He suggested that everyone would agree that the current labyrinthine legislative hoops should be swept away and replaced with something much simpler. He was concerned about, among other things, the making of live link orders after what might be a perfunctory consideration at best. He hoped that a review of the legislation might address its structure as well as its efficacy.

The secretary reported observations by Mr Justice William Davis to similar effect, and the judge's concern that legislative provisions for press attendance should be simple, practical and effective, having regard to restrictions on what would constitute broadcasting.

The chairman agreed that it was essential to review the current tangle. Among other impediments which he had encountered was the prohibition against the fully video determination of an appeal against conviction, with the consequence that at least one judge had to sit in a courtroom in which the proceedings could be said to be taking place: a device which gave no advantage to the appellant or anyone else.

Professor Thomas confirmed that the review would consider all these points and would welcome all views.

The Committee agreed to continue the discussion at the meeting in October, by when at least some information from the review might be available.

7. Parts 18 and 3: intermediaries – responses to second invitation to comment

CrimPRC(20)41

Introducing the paper for the Committee, the chairman expressed the hope that the preparation of these draft rules now was nearing a conclusion. It was disappointing that no responses had been received from the Council of HM Circuit Judges or from the Council of HM District Judges (Magistrates' Courts), but it might be that, under present circumstances especially, neither Council had any observations it wished to add. In relation to the District Judges' Council, District Judge (Magistrates' Courts) Snow agreed and suggested that no further enquiry need be made.

The chairman invited members to address each of the four questions raised. The Committee agreed:

- (a) to make no amendment to the time limit set by CrimPR 18.4,
- (b) to elaborate rule 18.27(1) as tentatively suggested by the paper,
- (c) to include in rule 18.27 no explicit reference to any qualification that an individual intermediary might or might not possess, and
- (d) subject to those three decisions, to treat the draft rules as now settled, without further consultation.

8. Part 26 Jurors: jury deliberation guidance

CrimPRC(20)42

CrimPRC(19)46

The chairman introduced Professor Thomas QC and invited her to describe the proposed guidance.

Professor Thomas reminded the Committee that previous research had established that almost all jurors said they would welcome guidance on how to conduct deliberations. More recent research, though interrupted by the pandemic, had revealed the same. Hence

the proposed inclusion in the *Crown Court Compendium* of the suggested guidance before the Committee.

HH Judge Picton added that more and more judges had begun to offer jurors guidance on deliberating and the *Compendium* editors had decided that a degree of uniformity would assist.

The chairman commended the content of the guidance. He asked whether it would be distributed in writing or only delivered orally by the trial judge, suggesting that it would be more difficult for jurors to adhere to it if they had nothing in writing.

Judge Picton explained that the guidance was predicated on the assumption that it would be handed out in writing as well as explained orally, but the *Compendium* could not require that.

The secretary reported Mr Justice William Davis' concerns about inconsistent judicial practices arising without the adoption of a standard document setting out the guidance devised by Professor Thomas.

HH Judge Edmunds QC commented that it was undesirable for judges to be offering jurors their own personal guidance otherwise than as part of the summing up. In his view it would be preferable for a standard form of guidance to be handed out, when the jury retired to deliberate; or perhaps earlier, if research were to favour that – and assuming that individual jurors would not then mislay that guidance.

Ms Gadd observed that, based on her own experience of jury service, it would help to have such guidance earlier. The Chief Magistrate, Mr Kenyon and Ms Blackstock agreed, Ms Blackstock reporting that the dearth of available guidance at present had been remarked when arrangements were being made for the experimental jury trials by live link that had been organised by JUSTICE.

Professor Thomas agreed with Judge Edmunds that assumptions should not be made about what would be the most effective time to provide guidance and that tests should be conducted before any standard national practice was adopted. She was pleased to report that recent research had revealed that all the jurors questioned had retained the prescribed jury notice each had received.

Judge Picton added that the *Compendium* could provide further assistance for judges on the means by which, and the time at which, the guidance should be provided to jurors.

In conclusion, the chairman thanked Professor Thomas for very valuable guidance and a very valuable discussion.

9. Criminal Practice Directions VI Trial: jurors with disabilities

CrimPRC(20)43

The chairman introduced the paper for the Committee, reporting that senior judges' views had been invited and that the proposal had been approved by them. HH Judge Edmunds QC added that the directions were long overdue and would succeed guidance previously issued by the Senior Presiding Judge.

The secretary reported observations by Mr Justice William Davis to the effect that the proposed directions were principally directed at jurors with a significant hearing disability, but comparable provision should be considered for those with a sight disability, and potentially others. The chairman commented that in his view the proposed directions should proceed but could be elaborated further in due course.

Ms Blackstock suggested that the judge's explanation of the role of British sign language interpreters or stenographers required by paragraph 26C.20 should be directed to all participants in the trial, not only to the jury.

The Committee welcomed the practice direction and endorsed the clarification suggested by Ms Blackstock.

10. Criminal Practice Directions: review and revision

CrimPRC(20)44

The chairman summarised the project described by the paper. He explained that the ambition was to complete the proposed review of the Practice Directions by April, 2021, and invited members to send any suggestions to Mrs Justice McGowan. He did not anticipate any wider consultation than with the Committee.

11. Any other business

No other business was raised.

The chairman expressed the hope that it would be possible to convene the next meeting in the conventional manner, or something approximating to that; but that would depend on events. He observed that he had found the conduct of Committee meetings by video conference a satisfactory alternative but would welcome any suggestions for the improvement of those arrangements.

**12. Dates of next meetings: Friday 2nd October, 2020, and
Friday 6th November, 2020**

The meeting closed at 3.05 pm.