

CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 8th OCTOBER, 2021 at 1.30 p.m.

MEETING CONVENED BY VIDEO CONFERENCE

DRAFT MINUTES

Present

Committee members

Lord Justice Fulford (chairman of the meeting)
Lord Justice William Davis
Mrs Justice Foster
HH Judge Edmunds QC
HH Judge Field QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
Paul Jarvis
Shade Abiodun
Edmund Smyth
Assistant Commissioner Nick Ephgrave

Also attending

Professor Cheryl Thomas QC, University College, London
Professor David Ormerod QC, University College, London
Alyson Sprawson, Senior Presiding Judge's Office
Richard Sampson, Chief Magistrate's Office
Siân Jones, JC Service & HM Courts and Tribunals Service
David Barnes, JC Service & HM Courts and Tribunals Service
Nigel Gibbs, Crown Prosecution Service
Sophie Marlow, Attorney General's Office
Michelle Crotty, Serious Fraud Office
Sarah Counsell, Criminal Appeal Office
Trudy Lewis, HM Courts and Tribunals Service
Dhruvee Masters, Ministry of Justice
Maja Vojnovic, Ministry of Justice
Catherine Kemp, Ministry of Justice
Alice Adamson, Ministry of Justice
Richard Chown, Ministry of Justice
Julie Clouder, Ministry of Justice
Anjuli Old, Ministry of Justice
Hannah Henderson, Ministry of Justice
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 continuing circumstances. He welcomed in particular Mrs Justice Foster to her first meeting as a Committee member; and welcomed, too, Dhruvee Masters, Catherine Kemp and Maja Vojnovic, of the Ministry of Justice, attending for the discussion of item 14, and Michelle Crotty, of the Serious Fraud Office, attending as an observer in her capacity now as Chief Capability Officer for the SFO.

The chairman reported apologies for absence from Sue Gadd, from the Director of Public Prosecutions and from Alison Pople QC; and, from among others who regularly attended, the Chief Magistrate.

2. Draft minutes of the meeting held on 16th July, 2021

The minutes were adopted, subject to any corrections to be drawn by members to the secretary's attention.

3. Case management group report

Mrs Justice Foster reported that the group had:

- 1) received a helpful report and had discussed again, and approved, the proposed incorporation in Common Platform online arrangements of a means of collecting the information presently collected by the case management questionnaire used on sending for trial. The group had accepted that comments on guilty plea indications, and information, if any, about a defendant's mental health or other vulnerabilities, could be included as "other information to assist the management of the case".
- 2) endorsed the last of the amended forms of application for search warrant prepared in response to the Law Commission report last year and discussions since.

4. Part 3 (Case management): Crown Court recovery CrimPRC(21)48

The chairman introduced the paper for the Committee, explaining that the objectives for this item were to give members an opportunity to comment on the position in the Crown Court and an opportunity to express views on the adequacy to the task of the current rules.

HH Judge Edmunds QC reported that a Crown Court Improvement Group had been established, chaired by the Senior Presiding Judge with a membership including four Resident Judges and senior representatives of the legal professions, other agencies and the Ministry of Justice. The group would consider restoring the regime established by the Better Case Management initiative, and in particular the arrangements designed to prompt early guilty pleas. It was possible that proposals for the amendment of rules or practice directions would emerge from that group's discussions, but none yet had done so.

HH Judge Field QC agreed. In his view, no rule amendments were needed to facilitate the work under way.

Mr Jarvis and Mr Smyth also agreed. It was reassuring to read, and hear, of the work under way.

Nigel Gibbs added that a more intense focus on the first hearing in the magistrates' court would assist case preparation in the Crown Court, too. A great deal of work was in progress to allow intended guilty pleas to be entered and dealt with promptly and to make sure that contested trials began on time. Work in the south west on triaging cases had proved very successful.

Drawing the discussion to a conclusion, the chairman reported a message received from the Senior Presiding Judge in which the SPJ, too, had observed that the additional triaging that judges had been doing fell within existing rules and in which message the SPJ had referred to his judgment in *R v Khan & Others* [2016] EW Misc B43 (CrownC) (29

November 2016). The terms of reference for the Crown Court Improvement Group were to be (i) to consider lessons learned from the pandemic and make recommendations to improve the future resilience of the Crown Court; (ii) to identify ways of increasing the throughput and timely disposal of cases in the Crown Court; (iii) to identify, develop and disseminate best practice for all professional participants in Crown Court proceedings, (iv) to apply and, where necessary, review the principles of Better Case Management, and (v) to identify and report on barriers to the timely and appropriate disposal of cases within the Crown Court.

5. Parts 5, 21, 24, 25 and 28: consultation by the National Police Chiefs' Council on proposed new rules for disposing of records on the Police National Computer – progress report
CrimPRC(21)49

The chairman introduced the paper for the Committee, observing that those consulting may have received some robust views about the undesirability of removing information in some categories from the Police National Computer records. The letter to the Committee reported that further consideration was under way. He hoped that the Committee would have an opportunity to comment on any further proposals.

Assistant Commissioner Ephgrave recorded his thanks for the Committee's previous discussion. The views expressed by Committee members on the previous occasion accorded with his own, and he was grateful to the Lord Chief Justice for having written. Deputy Chief Constable Malik, leading the review, reported that a further workshop meeting would be convened to which representatives of HM Courts and Tribunals Service, the Crown Prosecution Service and the Judicial Office would be invited. He asked whether Committee members had any views on that suggestion.

The chairman commented that if that further meeting might lead to revised proposals then it would be important for those attending to be sufficiently senior to make decisions on behalf of those for whom they spoke.

HH Judge Edmunds QC reported that at a recent meeting convened by HM Courts and Tribunals Service at which he had been present HMCTS representatives spoke of an initiative affecting criminal court records which had seemed unconnected with the NPCC review. He suggested that steps should be taken to ensure that each review was aware of the other. Assistant Commissioner Ephgrave and the Committee secretary each agreed to do so.

6. Judicial Review and Courts Bill: requirements for rule amendments
CrimPRC(21)50

7. Part 9 (Allocation and sending for trial), Part 28 (Sentencing procedures in special cases), Part 5 (Forms and court records: Judicial Review and Courts Bill rule amendments concerning allocation and sending in writing, etc. CrimPRC(21)51

8. Part 24 (Trial and sentence in a magistrates' court), Part 28, Part 44 (Reopening a case in a magistrates' court), Part 5: Judicial Review and Courts Bill rule amendments concerning the entry of guilty pleas in writing and online
CrimPRC(21)52

9. Part 6 (Reporting, etc. restrictions), Part 17 (Witness summonses, warrants and orders): Judicial Review and Courts Bill rule amendments concerning requirements for hearings
CrimPRC(21)53

10. Part 4 (Service of documents): Judicial Review and Courts Bill rule amendments concerning requirements for service of documents
CrimPRC(21)54

Introducing the papers for the Committee, the chairman indicated that he would take all five items together and observed that it seemed desirable provisionally to consider draft rule proposals given the number of references in this Bill to Criminal Procedure Rules. He pointed out, however, that the Bill's passage, and subsequent implementation, was bound to take some time and that no settled decisions were needed yet.

The chairman directed members successively to the questions raised in paragraphs 19 and 22 of paper (21)51 and then to the proposals made, and questions raised, in paper (21)52, 53 and 54. No member expressed objections or had observations on those proposals pending further and detailed discussion once the Bill had progressed.

11. Part 3 and Part 18 (Measures to help a witness or defendant to give evidence or otherwise participate): potential provision for ISVAs and IDVAs – progress report
CrimPRC(21)55

The chairman introduced the paper for the Committee, suggesting that pending anticipated public consultation by the government on provision generally for victims of crime it would be sensible to postpone further consideration of any detailed draft rules. The Committee agreed.

Alice Adamson reported that relevant ministerial decisions were awaited.

12. Part 20 (Hearsay evidence): hearsay and direct evidence from a computer – progress report
CrimPRC(21)56
CrimPRC(21)37

The chairman introduced the paper for the Committee, suggesting that here again postponement of further work on any draft rules seemed sensible given the pending inquiry.

Nigel Gibbs reported prosecutors' concerns that, given the potential complexity of hearsay, the scope and impact of the rule that had been proposed might be broad enough to extend to all accounting systems in every case that depended on financial information – any reconciliation of accounts might be held to make a representation of fact. He noted that there had been almost no Parliamentary discussion of what had become section 129 of the Criminal Justice Act 2003, nor any detailed judicial consideration since. Professor David Ormerod QC had kindly supplied helpful information bearing upon the interpretation of the section and revealing some conflicting views. It seemed very likely that any requirement for a notice in a case in which section 129 was, or might be, relevant would prompt disproportionate argument and lead to unnecessarily longer trials. An additional concern was that a prosecutor should be expected to make a statement of the reliability of a computer system. Only a person familiar with that system could do so. If the proposal was to be pursued then he suggested that a sub-group should be convened to consider in more detail the application and practical effect of section 129.

Michelle Crotty agreed. The Serious Fraud Office shared the concerns of the Crown Prosecution Service about the number of accounting systems to which the proposed rule would apply and about the requirement for a prosecutor's statement.

The chairman agreed that further Committee discussion should be postponed. In the meantime, he agreed that a sub-group should be convened in which he asked that the Crown Prosecution Service, the Serious Fraud Office, Professor Ormerod and any Committee member who wished to do so should participate. In due course a paper for the Committee describing current practices and potential problems, drawing on case law and experience in this and other jurisdictions, would be helpful.

13. Part 25 (Trial and sentence in the Crown Court): routes to verdict

CrimPRC(21)57

CrimPRC(21)66

Introducing the papers for the Committee the chairman observed that the judgment in *Grant* had dealt with a lack of written directions in what had been a complex case. As the court had pointed out, the current rules did not correspond with current case law. A question frequently asked was whether written directions were necessary in the simplest cases. He doubted whether any case in practice was so simple as to make all written directions unnecessary, and he thought that it asked too much of jurors to be deprived of the assistance that written directions, including questions, could give; but he acknowledged that views differed. The question for the Committee was, should the rules be more closely aligned with the jurisprudence or not? The paper contributed by Professor Thomas QC and Professor Ormerod QC suggested at least a temporary solution.

Lord Justice William Davis shared the chairman's views. He thought that the rules should be more directive. In his only recent experience of what might be considered comparatively trivial cases it had taken him only a short time to prepare written directions, and it had been possible for him to do in advance. Perhaps 'must' would be too strong a requirement, but the requirement should be stronger than 'may' and should be emphasised.

HH Judge Edmunds QC described himself as an enthusiast for written directions, including routes to verdict, but in his view the rule should remain permissive because it would cover a wide range of circumstances and sometime directions on the law were best given within a summary of the evidence and best given orally. The current rule referred to 'assistance', meaning material like a chronology as well as directions on law. He observed that recently appointed judges were likely to give written directions for a number of reasons.

The chairman asked whether, in members' views, written directions elongated trials?

Judge Edmunds replied that less experienced recorders might need a little time to prepare them but, that apart, written directions served to concentrate attention on the issues and to save time overall.

Mrs Justice Foster commented that she found the preparation of written directions helpful to her as well as to others. Nevertheless, it would be very undesirable if the lack of written directions were to become a ground of appeal in itself because the rule had made it a requirement.

Professor Ormerod QC suggested that paper (21)66 provided evidence for the argument that at least some written directions ought to be given in every case.

Professor Thomas QC agreed. In her view, there was now overwhelming evidence from this and other jurisdictions that written directions were valuable, but exactly what those directions should include must be for the judge. In a survey of jurors which she had carried out all of those who had received written directions had found them helpful, and 85% of those who had not received such directions reported that they would have been helped by them. Nevertheless, she acknowledged the concern that the rules should not be overly prescriptive. She observed, too, first, that jurors appeared not to distinguish between written directions and written routes to verdict; second, that written directions should supplement oral directions, in her view, and ought not to be treated as a substitute; and third, that at a recent Judicial College seminary which she had attended every judge in attendance had reported using written directions.

Professor Ormerod added that even if a rule were to make some written directions mandatory it would not give a ground of appeal if that were not done; and pointed out that written directions would assist the Court of Appeal, including in assessing any argument based on the alleged insufficiency of those directions.

The chairman agreed with the views expressed. Written directions helped the judge to formulate clear and succinct directions on the law. He suggested that the draft rule amendment now before the Committee should be reviewed, in consultation with Professor Thomas and Professor Ormerod, and a revised draft should be submitted to the next meeting. His own view was that the current rules were confusingly permissive, but perhaps they should not be as directive as was the Crown Court Compendium. In any event, the Lord Chief Justice's views would need to be sought again; this might be considered a matter of judicial practice not appropriate to a rule.

Judge Edmunds commented that if there were to be a more powerful encouragement to give written directions then that would need to be in a rule to support its legality.

The Committee accordingly directed the preparation of revised rule amendments, in consultation with Professor Thomas QC and Professor Ormerod QC, for further discussion at the next meeting.

14. Part 31 (Behaviour orders) and Part 18: domestic abuse protection orders and special measures for witnesses in domestic abuse cases – further progress report

CrimPRC(21)58

CrimPRC(21)59

The chairman thanked Dhruvee Masters and Catherine Kemp for preparing paper (21)59. He invited them to add anything to that paper which they might wish.

Dhruvee Masters explained that the introduction of domestic abuse protection notices and protection orders which it was hoped would occur eventually in 2025 would be preceded by a pilot scheme, presently expected to commence in early 2023. In advance of that, early next year arrangements would be made for cross-jurisdictional working to ensure a consistent approach to applications for orders in the family court, the civil courts and the criminal courts. It was not yet known exactly what those arrangements would be, and it was likely that their main focus would be the family court and civil courts, with a view to aligning, as far as possible, the processes to be followed in those courts.

Nigel Gibbs reported that the Crown Prosecution Service and the police already had begun to work together on what would be needed to meet the requirements of the new legislation. No further Criminal Procedure Rules were required, but the new legislation would place a heavy burden on the police.

Assistant Commissioner Ephgrave agreed, adding that the police nonetheless would prepare for that.

Siân Jones added that amendments to the magistrates' courts civil rules would be required.

Drawing the discussion to a conclusion, the chairman repeated the Committee's thanks to Dhruvee Masters and Catherine Kemp and asked that the Committee be informed in due course when the new legislation was to be implemented.

15. Part 33 (Confiscation and related proceedings) and Part 45 (Costs): applications for costs in restraint and receivership proceedings

CrimPRC(21)60

CrimPRC(18)10

The chairman introduced the paper for the Committee, explaining the proposal as one to remove an anomalous lack of any time limit for a costs application under rule 33.47. The

suggestion was that that time limit should restrict the making of an application to either during the relevant proceedings or as soon as practicable after those proceedings.

HH Judge Field QC suggested that something more prescriptive would be preferable, perhaps as soon as practicable but in any event within a specified period.

HH Judge Edmunds QC, Mr Jarvis, Michelle Crotty and Nigel Gibbs all agreed. Mr Jarvis observed that it would be important to ensure consistency of expression between Parts 33 and 45, and that the rules in the latter Part should be considered.

The chairman also agreed and directed the preparation of a revised draft amendment or amendments accordingly, in principle with 28 days or the equivalent as the specified period.

16. Part 40 (Appeal to the Court of Appeal about reporting or public access restriction) and generally: extension of time under the Criminal Procedure Rules
CrimPRC(21)61

The Committee noted the judgment reported by the paper.

17. Part 42 (Appeal to the Court of Appeal in confiscation and related proceedings): notice of appeal against a determination of interests in confiscated property
CrimPRC(21)62
CrimPRC(21)44

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

Mr Jarvis suggested amendments to the formulation of references to those who would be respondents to a rule 42.11 appeal, in that rule and consequentially in subsequent rules.

On behalf of the Registrar of Criminal Appeals, Sarah Counsell asked that consideration of the proposed amendments should be a little further postponed to ensure correspondence with the arrangements for communication within HM Courts and Tribunals Service that were being devised. Siân Jones supported that request, explaining that enforcement of orders, including confiscation orders, on behalf of magistrates' courts now was centralised in the National Court Enforcement Service and it would be helpful to refine the proposal to ensure compatibility with that.

The chairman directed consultation with those in the Criminal Appeal Office and elsewhere in HM Courts and Tribunals Service who were developing relevant administrative processes and the preparation of revised rule amendments for further discussion at the next meeting.

18. Part 46 (Representatives): applications for the transfer of legal aid representation
CrimPRC(21)63
CrimPRC(15)14

The chairman introduced the paper for the Committee. He doubted whether the difficulties described were susceptible to cure by a rule amendment but invited views.

HH Judge Edmunds QC agreed that this was a constant problem and from time to time circumstances compelled a transfer of representation even when the legal criteria for such a transfer might not be met. Judges at the Central Criminal Court recently had suggested in a note to Presiding Judges that some changes in practice, and potentially to the rules, might assist, including, potentially, a 'cooling off' period during which it would be presumed that an application for transfer would be allowed, and a requirement for consultation by the proposed new representative with the current representative.

HH Judge Field QC shared Judge Edmunds' views.

Lord Justice William Davis also agreed, adding that the Committee already had done all it could by endorsing the excellent application form that Judge Edmunds had devised and the use of which should be insisted upon. The judge had encountered just such problems as those described elsewhere during his period as Resident judge at Birmingham, and which continued. The proper functioning of the system depended on judges applying the law.

Ms Abiodun and Mr Smyth agreed too. Ms Abiodun attributed the difficulties to the remuneration regime and to the conduct of certain firms. She would send to the secretary examples of applications on which she had been asked to comment. Mr Smyth would canvass opinions and examples from members of the London Criminal Courts Solicitors' Association.

The chairman directed further discussion and review before the Committee decided whether or not to amend the rules.

19. Any other business

The chairman reminded members that arrangements had been made for the next two Committee meetings to take place at 1.30pm at the Queen's Building conference room, Royal Courts of Justice, Strand, London WC2. Further details would be sent as soon as possible.

20. Dates of next meetings: Friday 12th November, 2021, and Friday 10th December, 2021

The meeting closed at 3.20 pm.