CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 4th FEBRUARY, 2022 at 1.30 p.m.

MINISTRY OF JUSTICE
CONFERENCE ROOMS 12 & 13, GROUND FLOOR
102 PETTY FRANCE, LONDON SW1
and 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
Ed Lidington
Sue Gadd
The Director of Public Prosecutions, Max Hill QC
Alison Pople QC
Paul Jarvis
Edmund Smyth
Assistant Commissioner Nick Ephgrave

Also attending
Senior District Judge Goldspring, Chief Magistrate
Professor David Ormerod QC, University College, London
Hanna van den Berg, Lord Chief Justice's office
Claire-Louise Manning, Chief Magistrate's Office
Michelle Crotty, Serious Fraud Office
Sophie Marlow, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
David Barnes, JC Service & HM Courts and Tribunals Service
Trudy Lewis, HM Courts and Tribunals Service
Ben Archibald, Ministry of Justice
Richard Chown, Ministry of Justice
Christopher Burke, Ministry of Justice Legal Advisers
John Curtis, 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 those attending, in person or by video conference. He welcomed in particular Ed Lidington, the Ministry of Justice

Director for Court Recovery, Criminal and Family Justice, recently appointed as a Committee member by the Lord Chief Justice on the nomination of the Lord Chancellor.

The chairman welcomed, too, all those who usually attended, now including Claire-Louise Manning of the Chief Magistrate's Office. He reported apologies for absence from Shade Abiodun and, from among others who regularly attended, Siân Jones, David Kenyon and Jodie Blackstock.

2. Draft minutes of the meeting held on 10th December, 2021

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

Arising from item 4 of those minutes (access for the Family Court, and for parties to family proceedings, to video recordings of cross-examination under section 28, Youth Justice and Criminal Evidence Act 1999), the chairman reported that he and the President of the Family Division had agreed to establish a working group of judges drawn from the criminal and family jurisdictions to consider this difficulty and to settle suitable arrangements. That work would be greatly assisted by the ruling yesterday by HH Judge Edmunds QC at Isleworth Crown Court on an application by the London Borough of Ealing for access to recordings of the cross-examination of two child witnesses in a prosecution due imminently to be tried, with a view to the introduction of the recordings in related Family Court proceedings due to take place after the criminal trial. However, circumstances other than those obtaining in that case might arise and it would be helpful to join with family judges and representatives of the police and Crown Prosecution Service to discuss arrangements. A particular concern must be the interests of vulnerable witnesses where a recording of their evidence was to be used for a purpose other than that for which the recording had been made.

The Director of Public Prosecutions agreed that the Crown Prosecution Service would take part in the group proposed, and agreed that witnesses would need to be reassured.

Assistant Commissioner Ephgrave also agreed. He proposed Deputy Chief Constable Barnett of Staffordshire Police.

District Judge (Magistrates' Courts) Snow asked that a District Judge (Magistrates' Courts) might join the group in view of the potential effect of family proceedings on extradition proceedings. The Chief Magistrate added that video recording of cross-examination might not always be confined to the Crown Court and for that reason he, too, asked that a District Judge (Magistrates' Courts) should participate.

HH Judge Edmunds QC observed that the present protocol that applied to the sharing of information material both to criminal and family proceedings was dated 2013, was in urgent need of review, and needed to be brought up to date.

The chairman agreed, and agreed urgently to convene the working group contemplated in December to consider, among other things, a potentially wider application of the criteria and safeguards identified in Judge Edmunds' recent ruling.

3. Case management group report

Mrs Justice Foster reported that the group had discussed the Law Commission recommendations to the Committee about entry warrants and had considered first drafts of application and warrant forms that the Commission had recommended should be devised. Amended drafts would be considered further at the next meeting.

The judge added that the group had been told of challenges to the authority of forms of search warrant and of a continuing expectation that such forms should bear a manuscript signature. This would be raised with the Committee next time.

4. Progress of the Police, Crime, Sentencing and Courts Bill and the Judicial Review and Courts Bill **CrimPRC(22)02**

The chairman introduced the paper for the Committee, observing that much would need to be done to accommodate and to implement this legislation. He anticipated lengthy future discussions.

The Director of Public Prosecutions asked whether there would be an immediate transition from the live link provision temporarily now in force, and due soon to expire, to the new such provision due to be made by the delayed Police, Crime, Sentencing and Courts Bill. Mr Lidington undertook to enquire and to respond.

(At Mr Lidington's request the Committee secretary circulated this message to members on 28th February:

> "The current temporary powers contained in the Coronavirus Act 2020 are due to expire on 25 March 2022. The Police, Crime, Sentencing and Courts Bill which contains replacement measures is not expected to obtain Royal Assent before the end of March at the earliest and possibly not until April. This is later than originally anticipated and means our replacement measures will not commence before the end of May/beginning of June.
>
> To bridge the gap in legislative provision, we are preparing draft Regulations which would provide us with a six-month extension to the temporary measures starting from the date the Coronavirus Act expires (i.e. until 24th September 2022). These will need to be debated and agreed by both Houses of Parliament.")

5. Committee programme for 2022 **CrimPRC(22)03**

The Committee postponed discussion of this item until the next meeting.

6. Part 3 (Case management); Part 7 (Starting a prosecution in a magistrates' court); Part 45 (Costs): private prosecutions – working group rule amendments **CrimPRC(22)04**

The chairman introduced the paper for the Committee. He reported the view of the Lord Chief Justice that the Committee could deal only with minor rule amendments and that significant reform of private prosecution was a matter of policy for which the Ministry of Justice must take responsibility. He summarised the first proposal made by the paper as one to tell the defendant that the prosecution was brought privately. That information might lead to questions which would need to be answered by or on behalf of the court, but the Committee already had decided, rightly, to avoid encouraging the involvement of the Crown Prosecution Service.

HH Judge Field QC suggested that the Preparation for Effective Trial form and the Plea and Trial Preparation Hearing form each might be amended to record that the defendant had been told this. HH Judge Edmunds QC agreed.

The Director of Public Prosecutions explained that the CPS were content with the proposed rules 3.16 and 3.21 but wished to go no further.

District Judge (Magistrates' Courts) Snow suggested that the requirement should be confined to cases in which the defendant had no legal representative. The Committee agreed.

The chairman summarised the second proposal as one to add a list to rule 7.2 of circumstances that might render a prosecution an abuse of the court. The list was not exhaustive, but he thought it helpful. The Committee agreed.

Turning to the proposals to amend the rules about costs, in the absence of support in recent case law the chairman did not favour a removal of the presumption in favour of making a costs order.

Judge Field questioned use of the phrase, "without waiting for the verdict". Sometimes there would be protracted confiscation proceedings for which the prosecutor could claim costs. He suggested that "outcome" would be a more appropriate expression. Judge Snow agreed.

Mr Jarvis was content with the proposals as thus far discussed. Richard Chown was content also. He reported that the Ministry of Justice intended to consider private prosecution more generally, jointly with members of the Criminal Law Reform Now Network, including Mr Jarvis.

Turning then to the proposal to provide for security for costs the chairman suggested that this seemed unobjectionable.

The Director of Public Prosecutions agreed that it was a good idea in principle but might be impractical. A ruling that brought a private prosecution to an end for failure to give security for costs could be susceptible to appeal, thus incurring yet further costs that then might prove irrecoverable. Mr Smyth and Judge Field agreed; the judge suggested that further reflection was needed.

Mrs Justice Foster observed that in civil courts, under the Civil Procedure Rules, to require and enforce security for costs was straightforward and practical, by contrast with criminal cases in which procedure rules were confined by statute.

The chairman agreed that on reflection further thought was required. Supporters of the proposal would be asked for their further views.

7. Part 5 (Forms and court records): hearing lists and reporting restrictions

CrimPRC(22)05

The chairman introduced the paper for the Committee, observing that it would not be reasonable to require something to be done that was for the time being impossible. He suggested that there ought to be, however, some kind of warning about reporting restrictions where they might apply.

Professor Ormerod QC observed that in Scotland attention was directed to any reporting restriction that applied in every case affected, recalling that the government's response to the Law Commission's recommendations in its report on court reporting and contempt in 2014 had been that they would consider how an online reporting restriction database could be taken forward. He asked about the present position. Richard Chown replied that it was hoped that the common platform project would be able eventually to deliver this.

HH Judge Edmunds QC warned of the risk of publishing too many notices, with a diminishing effect on readers. He suggested that any general warning ought to appear in court lists themselves. In any event, professional reporters ought to know in which cases reporting restrictions applied by operation of law.

Lord Justice William Davis agreed that if the only defence offered to an alleged contempt of court were that the hearing list failed to draw attention to the application of such a restriction then that defence would be unlikely to succeed. The judge could see no harm in the giving of a general warning.

In further discussion the Committee favoured the giving of a warning by some appropriate means, preferably in the list itself, that reporting restrictions might apply by operation of law, and directed the preparation of a draft rule to that effect for discussion.

8. Part 10 (The indictment); Part 25 (Trial and sentence in the Crown Court): draft and final indictments **CrimPRC(22)06**

The chairman reported that the Lord Chief Justice had complained about the number of indictments that he had found stored in the Crown Court Digital Case System in a recent case and among which he had been unable to identify the right one. The chairman tended to sympathise with the view that everything should be treated as an application until the court had given appropriate directions, but recognised that that view was not one held universally.

Mr Jarvis explained that his recent article had been provoked by exasperation. He had found it extraordinarily difficult to work out, after the event, of what exactly the defendant had been convicted. No doubt there were different ways of achieving that, but clarity was required. The proposed amendments were modest but useful. More was needed, but these were a good start.

The Director of Public Prosecutions shared the frustrations expressed but pointed out that procedure rules ought not prohibit that which the substantive law allowed. In his view a better approach would be the procedure for which rule 10.3 provided, allowing every draft indictment to remain a draft until arraignment; the version on which arraignment occurred then to be marked; and subsequently prosecution confirmation at trial of the indictment upon which that trial would proceed. The underlying problem was that the prosecutor was allowed very little time when proceedings began to settle an indictment, and at that stage a case still would be developing.

Nigel Gibbs observed that the problem was exacerbated by requiring every document to be uploaded to Section B of the Digital Case System, the indictments section, rather than Section Q, the section for applications.

HH Judge Edmunds QC acknowledged that where good practice is not followed in the Crown Court it may be difficult to identify, at the appeal stage, which was the true indictment. Nevertheless, it could be assumed that those in court for the arraignment would have known which indictment was used since the clerk would have arraigned from it and, on the DCS, applied the plea stamps. The problem lay in the record keeping. The same problem had occurred with paper files but appeared greater now that the CPS could rapidly generate and upload proposed amended versions or prefer joinder indictments. Staff and judges should be astute to note when an indictment is amended to a new version or when the prosecution elect to prefer a replacement but do not always do so. The problem had been exacerbated now with Common Platform where there could be acute difficulties in court offices with matching indictment counts to Common Platform records.

Judge Edmunds observed that a simple way forward would be to require the prosecutor to obtain permission in every case to join or amend indictments, but the law gave the prosecutor the right to prefer a new joined indictment. If that right was taken away it would likely result in an increase in hearings. Under the present arrangements the joinder indictment could be preferred and the CPS could ask HMCTS to merge files, which could be done before the Plea and Trial Preparation Hearing so that all parties could approach the hearing on the joined file. Without that facility the risk was that another hearing would be convened when the joinder was ordered and the PTPH adjourned to another date.

The judge argued that the proposed addition to rule 25.2 would institutionalise failure observing that Court of Appeal already had said that the circumstances to which that rule would apply would not lead to the quashing of a conviction in any event.

As to what should be done, the judge referred the committee to his memorandum of 26th March, 2021, which made proposals for indictment hygiene and invited the DCS and Common Platform development teams to address this issue. Despite a year having elapsed since the Committee's most recent previous discussion and that memorandum, no material progress had been made by the Common Platform programme. He suggested that the Committee usefully might consider making a rule that required the preparation of a single list of charges against all those accused; or for better systems of recording which indictments were live.

HH Judge Field QC commented that the technology was letting courts down. In a case with which he was dealing at present, eight defendants had been arraigned, there were 12 indictments, and sentences were to be passed on at least three of those indictments. Section B of the Digital Case System should be divided into two parts, one for the indictment and the other for applications to amend the indictment. It then would be possible to see at a glance the document that constituted the current indictment and clarity would be restored.

Judge Edmunds explained that his memorandum last year had proposed precisely that for both the Digital Case System and the Common Platform. The response from those responsible for the DCS had been that no adjustment to that system could be made because it was due to be replaced by the Common Platform, and development of the latter had been delayed. He hoped that the Judicial Working Group would continue to press for this, but meanwhile progress had stalled.

The chairman agreed with Judge Edmunds that the difficulty lay in the clarity of the records, not necessarily in the number of draft or final indictments, and therefore lay in the technical capacity rather than in the rules. He urged further discussion with those responsible both for the Digital Case System and the Common Platform to see what could be done. It would be helpful to achieve a division of DCS Section B, as had been suggested. He accepted that it would be possible to rely on case law for the effect of the proposed amendment to rule 25.2 rather than codifying that case law. Bringing the discussion to a conclusion, he directed the preparation of a draft rule to govern arrangements for distinguishing between draft and final indictments stored in a repository such as the DCS or Common Platform, which draft then could be discussed with those responsible for those repositories and eventually again with the Committee.

9. Part 25 (Trial and sentence in the Crown Court): resuming prosecution after finding of unfitness to plead CrimPRC(22)07

The chairman introduced the paper for the Committee, suggesting that some provision would be useful given the curious primary legislation and the effect of the defendant's "arrival", in the words of the statute, at court.

Lord Justice William Davis reported that in one such case with which he had dealt it had become apparent on the defendant's arrival at court that he plainly still was unfit to be tried, and no copy of the responsible clinician's assessment could be found. He suggested that the rule should require the delivery of that assessment with the other documents for the court. Mrs Justice Foster agreed, observing that the judge plainly would require at least one medical report. Professor Ormerod QC also agreed, commenting that adoption of the Law Commission's recommendations in its report on unfitness to plead would avoid these difficulties.

The Committee adopted the rule proposed, but directed that it should include explicit provision for a direction requiring the submission to the court of the responsible clinician's assessment of the defendant's recovery.

10. Part 46 (Representatives): invitation to comment on suggested rule amendments
CrimPRC(22)08

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

HH Judge Field QC questioned the compatibility with regulation 14(3) of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 of relieving the current solicitor of the obligation to comment in every case. The Committee agreed that the draft rule amendment and invitation to comment should make it clear that information from the current solicitor might be required by to supplement information from the defendant required for the purposes of that regulation as well as for the purposes of regulation 14(4).

Ms Gadd suggested that the draft rule amendments should provide for an application by the current solicitor as well as for an application by the defendant.

The Committee agreed to issue an invitation to comment on the proposed amendments to rule 46.3, but with those adjustments.

11. Any other business

None was raised.

12. Dates of next meetings: Friday 18th March, 2022, and
Friday 29th April, 2022

The meeting closed at 3.30 pm.