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RULES FOR OPEN JUSTICE

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One of the questions that the conference asks is what tomorrow's journalists need to know. But I am taking a little licence to suggest that, while tomorrow is important, today is just as important; perhaps more so.

We heard earlier today about the *white book* - the Civil Procedure Rules - and their role since the 1990s in improving the conduct of business in the civil courts. But I want to tell you about the *buff book*: the Criminal Procedure Rules[1] and some changes that come in next month. What these Rules lack in their number of pages compared with their elder civil sibling, they more than make up for in sheer sharp-end practical guidance.

And I should say also that I am not here to try to poach readers from the number of top flight text books on media law; but I *am* here to promote the source material: the Criminal Procedure Rules themselves. At £38 they are dearer than the text books – and, with their buff cover, they don't look quite as attractive.

But they are excellent value; and, as the original work, they would certainly enhance any training room library or newsroom! What's more, they are available to print off for nothing in rule-sized portions from the Ministry of Justice website. That is the end of the plug!

With characteristic focus, the Council's secretary, Jim Latham, has referred in the conference programme to two of the changes in those Rules that come into force in October. They are changes that will do two things: they will restate the judiciary's commitment to open justice; and, in a practical way, they will make it easier for the media to understand the framework within which that commitment operates. I shall outline them in a few minutes.

But first I hope it will be helpful if I give you a brief context for the Criminal Procedure Rules as a whole. They are of fundamental importance because they provide the structure on which nearly everything that happens in the criminal courts is based.

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[1] The Criminal Procedure Rules 2011, SI 2011/1709

They are easy to understand and are helping to modernise court procedures, some of which, at best, are arcane; and, at worst, can be almost incomprehensible. Thus, the Rules are bringing about a major change to the culture of magistrates' courts, and to the higher criminal courts.

Since magistrates' courts handle around ninety five per cent of criminal cases, there is an argument that the Rules are having an even greater beneficial impact here than they are at the higher level.

They arose from a recommendation by Sir Robin Auld in his review of the Criminal Courts[2], published in 2001. It followed the discovery that there were literally hundreds of sources of law, practice, and rules for handling summary matters – broadly magistrates' courts business; and for handling those on indictment – the business mainly now of the Crown Court; some dating from the 18th century.

He observed, '*There is no definitive, simple and ordered statement of the law governing either the separate procedures of the two jurisdictions, still less the procedures common to both.*' This state of affairs, he said, was an impediment to understanding and, therefore, to making the law accessible. So he proposed a committee to draft a single procedural code for a unified criminal court.

The Courts Act 2003 created the Criminal Procedure Rule Committee, under the chairmanship of the Lord Chief Justice, and including judges of the Appeal Court, the High Court, the Crown Court, a district judge, a magistrate, a justices' clerk, the DPP, criminal barristers and solicitors and others with a direct interest in criminal justice, all managed by a very effective secretariat.

To be clear, the Committee's job is not to make statute law: that is the role of Parliament. Nor is its job to create case law: that is the role of the High Court, the Court of Appeal and the Supreme Court.

The Committee's job is to make Rules - which are law - so that:
(a) the criminal justice system is accessible, fair and efficient, and
(b) the rules are both simple and simply expressed.

The Committee produced the first set of Rules, applicable to the magistrates' and to the Crown Court, in 2005. It was the first time that all the existing Rules governing criminal procedure had been put together in a single volume. Since then, systematically, the Committee has been revising old rules and making new ones through amending instruments published generally twice a year - in April and October.

And since 2010 we have produced an annual set of Rules – about 70 of them -incorporating all the amendments made since the previous one. The 2011 edition comes into force on October 3rd.

The Rules start by expressing an *overriding objective* that *criminal cases are dealt with justly.* And that that includes

- ❒ *Acquitting the innocent and convicting the guilty*

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[2] Report of a review of the Criminal Courts of England and Wales by the Rt. Hon Lord Justice Auld, October 2001.

- ❒ *Dealing with the prosecution and defence fairly*

I am always struck by the power of that declaration - it was penned long before I joined the Committee - because on one hand it may seem blindingly obvious; but on the other it is one of those things, like the judicial oath in which one commits oneself to *do right to all manner of people,* that bears constant attention because it is the starting - and the finishing - point for the entire process.

The Rules then are set out under 11 broad headings dealing in sequence with the stages of cases through the criminal courts. They include *disclosure*, *evidence*, *trial*, *sentencing, appeal* and so on.

To make the Rules, the Committee identifies legislation - such as witness anonymity orders - and codifies case law - such as the Rules on contempt - that is relevant to each stage of court procedure, and then expresses it in the Rules in plain language for courts to apply on a daily basis. Rule 37, *trial and sentence in a magistrates' court* is a good example of how the Rules have distilled complexity into simplicity.

Other innumerable improvements over that time include the codification of the law on costs, underlining the courts' duties towards witnesses' attendance, procedures for seeking to introduce hearsay evidence, and the Rules on expert witnesses.

The Committee has also produced new forms for courts to use at hearings that make preparations for trials. For example, the forms for magistrates' courts call for clarity about the issues in contention in a case and of those that are not. That alone can make a big difference to the progress - or not - of that trial.

This brief outline may belie some of the practical challenges of summarising and clarifying a mass of legislation and other procedural material into something digestible and accessible that can be applied to every conceivable circumstance; and to some circumstances that no one has yet thought of! Indeed, you may feel that some of the Rule changes I am about to explain come into that category.

The first of these replaces the current part five of the Rules. Please do not be put off by the uncatchy title - *Forms and court records.* Importantly, that deals with information about cases and about access to material used in them.

The second change replaces the equally unsnappily headed part 16 *Reporting etc. restrictions.* That is about electronic communications, or, in other words, sound-recording and tweeting. Both, for the first time make clear in one place how the current statute and case law should be applied.

I should explain two other points. First, the Lord Chief Justice is considering what further guidance he may wish to give to courts about the application of these two new Rules. Second, in constructing the Rules, we consulted a number of media organisations in March this year. I think that some may be represented here today, also.

One of the most significant changes appears at part 16, and reflects the tenor of the Rules generally in this area. It is an explicit presumption in favour of open justice: dealing with criminal cases in public and allowing those hearings to be reported to the public. Until now that presumption has been contained only in case law and, indirectly, in the requirements of the European Convention on Human Rights, such as Article 6 and Article 10.

Of course, as you will all know, the principle of open justice is not completely unqualified. Restrictions on reporting committal proceedings are the obvious example of that; but there are numerous others. So as a Committee, one of the challenges was to strike the right balance in the new Rules between principle and practice.

I shall deal first with part five: *forms and court records.* This one covers several aspects of records and record-keeping, including the things that courts must do, in a sense, internally. For the media, the relevant section - Rule 5.8 - deals with supplying information about cases to reporters and to the public.

It now lists the details which, for example, the typical local broadcasting or print news operation will be given. Details such defendant's name, what he has been accused of, his plea, what his sentence is and so on.

By providing in the Rules for the Lord Chancellor to make any arrangements for supplying this information, it puts into law the conventions and practices that have evolved over many years, particularly between the local media, the courts and the Crown Prosecution Service. That part of the Rules adds authority and national consistency.

The next part - dealing with other information - is a little more complicated because it is here, especially, that balancing considerations must apply. This is where any guidance from the Lord Chief Justice would focus. But it is not for me to anticipate what any guidance might say. Again, though, some of you here have been sent a draft practice direction for your comments, but I must emphasise that he may decide to deal with the issue differently.

Nevertheless, I think it is appropriate to indicate in general terms the issue that exercised the Committee as we made the Rule itself. It is this: the mere fact that a document or other information is used in some way at a hearing does not mean automatically that it is in the public domain in the sense that it is free for inspection, copying, publication and so forth. Statute and case law are clear on the point.

Witness statements are an obvious example. Witnesses make statements for use in court proceedings, not for anything else. So their availability for general scrutiny or publication/ reproduction would be inconsistent with the original purpose. That is also the view of the Information Commissioner in respect of applications to see material some time after a trial has ended.

However, the Committee again recognised the special role of the media as a watchdog on behalf of society and the obvious merits in taking legitimate steps to assist them. So its solution, now part of the Rules, is a formal process by which reporters (and the public also) can ask the court for other information not covered by the provision that I mentioned earlier.

In considering such applications, where the information is a party's, the court will expect applicants first to have asked that party for it. If that approach had failed, then the court would wish to understand very clearly the basis for such an application to it. Any applications would be considered on their merits. In discharging these gate keeping duties, the court would balance the competing considerations that I have just outlined.

Having said all that, let us not forget that this Rule deals to some extent, with requests made *after* a case has been heard. You may feel that it is no substitute for the presence of a reporter in court making an accurate note of what is said, as it is said.

Here I think I should drop in the reminder that, with very few exceptions, cases are heard in public and with even fewer exceptions the media are free – I think that *encouraged* is a better word – to report fairly and accurately what happens, as it happens. But media presence in court - or absence from it - especially locally, is a much wider issue and I think that there are some challenges here for news organisations.

Finally, let me move to the other replacement set of Rules: part 16 *Reporting etc. restrictions.* This Rule covers two areas. First, it explains succinctly how statutory reporting restrictions may be applied, or varied or removed. For example, the procedure for seeking the identification of defendants under 18 appearing in a youth court; and how the existence of any reporting restrictions ordered by courts should be made known.

As journalism trainers, you will be familiar with such matters. And I hope that having the Rules that underpin the restrictions set out in one place will be helpful. But it is the other section of amended Rule 16 on which I want to concentrate. It is the section where the courts are keeping pace with technology.

As well as the restrictions - albeit relatively few - about *what* may be reported, the area I have just touched on, there are also a few restrictions on the *means* of reporting.

There are three levels. First, you will all know of the absolute prohibition - under the 1925 Criminal Justice Act - on photography in and around courts, except, now, the Supreme Court. And, as we learned yesterday, some other courts also, subject to legislation. Second you will know also of the restriction on making sound recordings of court proceedings, without permission, under the 1981 Contempt of Court Act.

Third, you will be keenly aware of the other current debate about electronic communications from court - such as tweeting. Here, there are no specific restrictions beyond the courts' general powers to control their own proceedings and under the Contempt Act also to respond to any disruption.

The new Rule provides a structure for dealing with the second and third of these. It starts from the premise that the courts' direction of travel is to support the responsible use of such equipment as a means of improving public understanding of criminal justice.

But as with the Rules about access to court documents or other information, there is a balance to be struck between an unfettered application of the principle of open justice and the overriding objective in the Rules that requires that criminal cases are dealt with justly. At times, they may be competing considerations.

For example, dealing with cases justly may require at short notice, a restriction on *tweeting* to ensure that a witness who is just about to appear does not receive information about the trial that may compromise the integrity of his or her evidence. For obvious reasons, a sound recording would present less of a problem. Nevertheless, there may still be difficulties to overcome.

I think, though, the expectation is that most of the occasions on which this Rule is invoked will arise from a wish to tweet rather than to make sound recordings. But time will tell.

With either method, though, there may also be practical matters to consider to ensure that the use of the equipment itself does not disrupt the hearing.
So the Committee has sought in Rule 16 to balance potential conflict by establishing an open procedure for seeking permission for sound recording and for tweeting. The procedure will

give the parties and the court ample opportunity to make and consider any arguments for and against and reach a reasoned decision.

Where permission is granted, the court may decide to meet any legitimate concerns by imposing conditions on the use of the equipment, such as requiring it to be used in a certain part of the court only, or at certain times only.

Of course, if equipment is used without permission, or contrary to any conditions imposed by the court, then those in contravention are likely to face proceedings for contempt, about which, as I mentioned earlier, there are also comprehensive Rules!

I hope that I have given you a flavour of the new Rules and the wider context within which we have made them. As I have said, they are increasingly being recognised as a tool of the trade that is indispensable not only to the parties in criminal cases, but also to judges and magistrates and their legal advisers. I suggest that they are equally valuable to today's journalists to enable them to make their contribution to open justice.

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