

EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2009

2009 No. 2087 (L.23)

1. This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Rules amend the Criminal Procedure Rules 2005. They introduce new procedure rules about investigation orders, contempt of court and costs. They replace the current rules about disclosure and witness statements. They amend the current rules about case management, service of documents, forms and court records, the indictment, bail, international co-operation, expert evidence, and appeal to the Court of Appeal.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Sections 68 to 72 of the Courts Act 2003 provide for a Criminal Procedure Rule Committee of 18 members to make rules that govern the practice and procedure of the criminal courts, that is, magistrates' courts, the Crown Court and the Court of Appeal, Criminal Division. Section 69 requires the Committee to make rules that are simple and simply expressed, and that help make the criminal justice system accessible, fair and efficient. Members of the Rule Committee are drawn from among all the groups involved in the criminal justice system: the judiciary, including the magistracy, the legal professions, prosecutors, the police, voluntary organisations and government departments.

4.2 The first rules made by the Rule Committee were the Criminal Procedure Rules 2005, S.I. 2005 No. 384. In those Rules, the Committee consolidated, organised and began to simplify rules of criminal procedure that before then had been contained in nearly 50 separate statutory instruments, and added notes that cross-referred to other relevant criminal justice legislation. Since then, the Committee has continued to revise and simplify those procedure rules in accordance with its statutory objective, while at the same time providing for new government initiatives, and for developments in legislation and in case law. Unless rule changes are needed urgently, the Committee amends the Criminal Procedure Rules only twice a year, in June or July and again in December or January. The amendments are brought into force ordinarily on the first Monday in October and on the first Monday in April of each year.

5. Territorial extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

Case management

7.1 Part 3 of the Criminal Procedure Rules (Case management) is amended to require explicitly that courts take every reasonable step to facilitate the attendance of witnesses.

7.2 The rules in Part 3 place courts under a general duty, and give them explicit powers, to manage the preparation and trial of criminal cases in accordance with the overriding objective in Part 1 of the Criminal Procedure Rules. Detailed listing guidance issued by the judiciary and Her Majesty's Courts Service requires listing officers to have particular regard to the needs of witnesses. It was suggested to the Committee that it would be helpful to add a rule that encapsulated this particular aspect of the court's general duty, and the Committee agreed.

7.3 Rule 4 of these Amendment Rules gives effect to this amendment.

Investigation orders

7.4 A new Part 6 (Investigation orders) is added to the Criminal Procedure Rules. It deals with applications for production and other orders under the Terrorism Act 2000, and under the Proceeds of Crime Act 2002. These new rules supersede the current rules in Part 62.

7.5 The current Part 62 of the Criminal Procedure Rules contains some rules about applications for orders in connection with investigations under the Proceeds of Crime Act 2002. However, the rules do not deal with all such applications, and they do not deal with comparable applications under the Terrorism Act 2000. In a decision of the Administrative Court last year, *R (Shiv Malik) v Manchester Crown Court and the Chief Constable of Greater Manchester Police* [2008] EWHC 1362, which concerned production orders made under Schedule 5 to the Terrorism Act 2000 against the author and publishers of a book about terrorism, the court commented on the lack of relevant procedure rules. In response to that decision, the Committee has made comprehensive rules about applications for investigation orders under the 2000 Act and under the Proceeds of Crime Act 2002, so that applicants for those orders, and those against whom such orders may be made, can find the relevant procedure rules in a single place.

7.6 Rule 7 of these Amendment Rules and Schedule 2 place these new rules in Part 6 of the Criminal Procedure Rules, before the rules (in Part 7) that deal with starting a prosecution, so as to reflect the stage at which an application for an investigation order is most likely to be made.

The indictment

7.7 Part 14 of the Criminal Procedure Rules (The indictment) is amended so as no longer to imply that a draft indictment must be signed before that draft can become the indictment.

7.8 Section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 presently requires a member of Crown Court staff to sign a draft indictment (in that Act, called a ‘bill of indictment’), and provides that that draft, or bill, ‘shall thereupon become an indictment and be proceeded with accordingly’. It was held by the House of Lords in *R v Clarke, R v McDaid* [2008] UKHL 8 that the section meant there could be no valid Crown Court trial if the draft indictment had not been signed. In the Coroners and Justice Bill, Parliament is considering an amendment of that section that would remove the need for a signature as a condition precedent to a valid Crown Court trial. The Committee decided that it still would be helpful for the procedure rule to require Crown Court staff to sign and date the draft indictment, so as to identify the date on which that important document reaches the court office from the prosecutor. However, if Parliament decides to amend the 1933 Act, then omitting the signature no longer would invalidate the trial, because breach of the procedure rule would not have the same effect as breach of the Act.

7.9 Rules 8 and 9 of these Amendment Rules give effect to this amendment.

Bail

7.10 Part 19 of the Criminal Procedure Rules (Bail in magistrates’ courts and the Crown Court) is amended to require specifically that the providers of electronic monitoring and other bail services are notified of relevant bail conditions, and variations of them.

7.11 At present, there is no clear and explicit obligation on court staff to pass on the details specified by the new rules to the providers of monitoring and other bail services (usually the National Offender Management Service, or that agency’s contractors), or to notify those providers of any subsequent variation or termination of relevant bail conditions. It was reported to the Committee that failures of communication sometimes had led to a failure to give effect, promptly or at all, to the imposition, variation or termination of such bail conditions: sometimes placing defendants in ostensible breach of bail, through no fault of theirs, and sometimes incurring costs unnecessarily. It was suggested to the Committee that it would be helpful to add rules imposing such obligations, and the Committee agreed.

7.12 Rules 12 and 13 of these Amendment Rules give effect to this amendment.

Disclosure

7.13 A new Part 22 (Disclosure) is added to the Criminal Procedure Rules. It consolidates, revises and simplifies current Parts 22, 23, 25 and 26. (Parts 22 and 23 presently are empty, having been set aside when the Criminal Procedure Rules first were made to allow for new rules on this subject.)

7.14 As part of its programme of progressive revision and simplification of the Criminal Procedure Rules, the Committee decided to consolidate and rewrite the current procedure rules about disclosure, without changing their substance. Much of the procedure that applies to prosecution and defence disclosure is contained in the Criminal Procedure and Investigations Act 1996, rather than in rules. To make it easier for users of the rules to understand the context, the Committee decided to supplement the rules with a summary of what the Act contains, in a note at the end of the new Part 22.

7.15 Rule 14 of these Amendment Rules and Schedule 3 introduce these new rules.

Witness statements

7.16 A new Part 27 (Witness statements) is added to the Criminal Procedure Rules, in substitution for the current Part 27.

7.17 As part of its programme of progressive revision and simplification of the Criminal Procedure Rules, the Committee decided to rewrite the current procedure rules about witness statements, without changing their substance. The current Part 27 contains some rules that repeat requirements contained in Part 10 (Committal for trial), and that refer to legislation due to be repealed. The new Part 27 replaces them with shorter and clearer rules.

7.18 Rule 16 of these Amendment Rules and Schedule 4 introduce these new rules.

International co-operation

7.19 Part 32 of the Criminal Procedure Rules (International co-operation) is amended to provide for the court's consideration of an 'overseas freezing order' and to remove the redundant current requirement that magistrates' courts' records of overseas orders must be kept in a separate 'book'.

7.20 Sections 20 to 25 of the Crime (International Co-operation) Act 2003 provide for the making of 'overseas freezing orders' to secure evidence sought by a criminal court in a European Union state, or other country designated by the Secretary of State. Under section 21, the Secretary of State must nominate a court to give effect to such an order; and that court then must give effect to it, unless one of the statutory reasons for not doing so applies. It was reported to the Committee that these sections were likely to be brought into force in the near future; and the Committee was asked to make rules about how, and when, the nominated court should carry out its functions under the Act. At the same time, it was pointed out that the keeping of electronic records had superseded the current requirement for a separate 'book' of overseas orders in a magistrates' court.

7.21 Rule 17 of these Amendment Rules gives effect to this amendment.

Expert evidence

7.22 Part 33 of the Criminal Procedure Rules (Expert evidence) is amended to incorporate and simplify the current separate rules about serving expert evidence.

7.23 As part of its programme of progressive simplification of the Criminal Procedure Rules, the Committee decided to revise the current procedure rules about the service of expert evidence, presently contained in Part 24 of the Criminal Procedure Rules, and to consolidate them with the main rules about expert evidence, in Part 33, without changing the substance of any of those rules. As few consequential amendments as possible to Part 33 have been made (limited to a renumbering of some rules, to preserve a logical sequence), those Part 33 rules being the product of extensive consultation and discussion during 2005 and 2006.

7.24 Rule 18 of these Amendment Rules and Schedule 5 give effect to this amendment, by substituting a slightly amended Part 33 for the current Part.

Contempt of court

7.25 A new Part 62 (Contempt of court) is added to the Criminal Procedure Rules. It deals with applications for the punishment for contempt of court of those who disobey Crown Court orders, or who disclose prosecution material without authority.

7.26 In a case before the Court of Appeal last year, *R v M* [2008] EWCA Crim 1901, the appellant questioned the jurisdiction of the Crown Court to punish him for alleged disobedience to a restraint order made under the Proceeds of Crime Act 2002. The court commented on the fact that there are at present no relevant Criminal Procedure Rules. It found that the Crown Court had the necessary powers, but that in the absence of relevant rules the procedure was unclear. In response to that case, the Committee has made rules about this type of application to punish for contempt of court, so that applicants, and those accused of failing to obey this type of order or requirement, can find the relevant procedure rules in a single place. The Committee intends as soon as possible to make rules about the procedure in other types of allegation of contempt of court.

7.27 Rule 23 of these Amendment Rules and Schedule 6 introduce the new rules. Rules 20 and 21 give effect to an associated amendment to Part 59 (Proceeds of Crime Act 2002 – rules for restraint proceedings).

Appeal to the Court of Appeal

7.28 Part 65 of the Criminal Procedure Rules (Appeal to the Court of Appeal: general rules) is amended to give the Court of Appeal a discretion to hear oral representations on an appeal against an order excluding the public from proceedings in the Crown Court.

7.29 Current rule 65.6(3) of the Criminal Procedure Rules requires the Court of Appeal to decide such an appeal without a hearing. It is the only such prohibition in the Rules. Such appeals need to be decided quickly, because the Crown Court trial is held up pending the appeal; and the Court of Appeal sometimes needs to receive sensitive information about national security, where that was the reason for the Crown Court decision to exclude the public. Notwithstanding these considerations, in a case before the Court of Appeal last year, *R v Wang Yam* [2008] EWCA Crim 269, the court suggested that, had the interests of justice required a hearing, then it would have had to consider overriding the rule. In response to that case, and in response to representations from the Registrar of Criminal Appeals, among others, the Committee has amended the rule to give the Court of Appeal a discretion to decide such an appeal with or without a hearing: without altering the court's power to reach a decision swiftly, and if need be in private.

7.30 Rule 26 of these Amendment Rules gives effect to this amendment.

Costs

7.31 A new Part 76 (Costs) is added to the Criminal Procedure Rules. These new rules supersede the current rules in Part 78, and deal with applications for all the costs orders that the criminal courts can make.

7.32 The legislation that confers powers to make orders about costs in criminal cases, some of which legislation also contains supplementary procedural provisions, is to be found in a number of different Acts, and in Regulations. The Committee thought

that this could lead to confusion, misunderstanding and, potentially, injustice. Courts might not always appreciate the availability and extent of their powers, or the criteria for their exercise: especially where costs were incurred unnecessarily or wastefully, as a result of a failure to comply with the court's directions or with procedure rules. As part of its programme of progressive revision and simplification of the Criminal Procedure Rules, the Committee decided to consolidate, revise and simplify the procedure rules about applications for costs orders, supplementing them with cross-references to the other relevant legislation.

7.33 Rule 32 of these Amendment Rules and Schedule 7 introduce the new rules.

Other amendments

7.34 Part 4 of the Criminal Procedure Rules (Service of documents) is amended to require personal service of an application under the new rule 62.3 to punish for contempt of court, so as to make sure that the respondent is aware of the application against him or her. Parts 5 and 6 of the Rules are amalgamated in Part 5 (Forms and court records), so as to make Part 6 available for the new rules about investigation orders. The current Part 62 rules about investigation orders are superseded by the new Part 6 rules, leaving Part 62 available for the new rules about contempt of court. Parts 23, 24, 25, 26, 77 and 78 are omitted, in consequence of the consolidation of rules made by the other changes. Other amendments bring up to date references to the new Supreme Court, and other cross-references, in the Criminal Procedure Rules. The Arrangement of Rules is brought up to date.

Bringing the new rules into force

7.35 The changes made by these Amendment Rules come into force on Monday 5th October, 2009, following the convention explained at paragraph 4.2 above. However, to avoid confusion and potential unfairness to those involved in cases that have started before that date, rule 3 adds new paragraphs to rule 2.1 of the Criminal Procedure Rules so as to provide that the new rules in Parts 6, 22, 62 and 76 will apply only (i) where an application or other step, to which the Part concerned applies, is made or taken on or after that date, or (ii) where the court orders that the new rules will apply to an existing case. Otherwise, the current rules will continue to apply.

• **Consolidation**

7.36 The Committee intends to consolidate changes to the Criminal Procedure Rules in 2010, and after that at no less than 5 yearly intervals. In the meantime, an informal consolidated text is available to the public free of charge on the Ministry of Justice website at http://www.justice.gov.uk/criminal/procrules_fin/index.htm.

8. Consultation outcome

8.1 The Criminal Procedure Rule Committee consulted publicly on the new Part 76 rules about costs between October, 2008 and January, 2009. Copies of the Committee's invitation to comment were sent to members of the judiciary, to professional and other bodies with an interest in criminal procedure, to the principal prosecuting authorities, to the criminal justice departments of government, and to editors of relevant legal periodicals. The invitation was published on the Ministry of Justice website.

8.2 A total of 13 responses were received: seven from judicial bodies, one from the legal professions, four from prosecuting authorities, and one from members of court

staff. Respondents answered 10 questions posed by the invitation about the content of the proposed rules. In each case, the Rule Committee has accepted the view of the majority of respondents. In addition, respondents offered a number of detailed drafting suggestions, many of which the Rule Committee adopted gratefully.

8.3 On the new rules about investigation orders and contempt of court, the Committee consulted with those prosecuting authorities and investigating agencies most likely to use those rules: and modelled the rules about contempt of court on the well-established equivalent civil procedure rules.

8.4 On the amendment of Part 65, about appeal to the Court of Appeal, the Committee consulted with the Court of Appeal judges and the Registrar of Criminal Appeals, and with others likely to be affected by the amendment.

9. Guidance

9.1 Amendments to the Criminal Procedure Rules are drawn to the attention of participants in the criminal justice system by correspondence addressed by the Committee secretariat to members of the judiciary, to other relevant representative bodies (for example, the Law Society and the Bar Council) and to the editors of relevant legal journals; as well as by publicity within Her Majesty's Courts Service, within the principal prosecuting authorities, and among local criminal justice boards.

9.2 In addition, news of changes to the Rules and a 'plain English' description of the effect of those changes is published on the Ministry of Justice website. See the website links at <http://www.justice.gov.uk/about/criminal-proc-rule-committee.htm>.

10. Impact

10.1 These rules have no impact on business, charities or voluntary bodies.

10.2 These rules have no impact on the public sector because they introduce no procedures that are not already current in courts.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring and review

12.1 The making of Criminal Procedure Rules attracts independent academic and other comment. From time to time the Rules are in issue in cases in which the judgment is reported. The Committee secretariat draws members' attention to such comment and reports. Observations arising from judicial, institutional and commercial training courses on the Rules are monitored by Committee members. Twice a year the Committee receives and considers statistical information about criminal case management gathered by Her Majesty's Courts Service.

12.2 Each judge and lawyer member of the Criminal Procedure Rule Committee practises regularly in the criminal courts, and each other member deals regularly with

matters that affect or arise from the business of those courts. Each therefore draws upon his or her experience of the operation of the courts and of the Rules. Although members participate in an individual capacity, each is able also to reflect the views of the professional or other ‘constituency’ from which each comes.

12.3 Representatives of Her Majesty’s Courts Service, and of the criminal justice departments of government, attend Rule Committee meetings as observers. They, too, draw to the Committee’s attention, as they arise, matters affecting the operation of the Rules.

13. Contact

Jonathan Solly at the Ministry of Justice can answer any queries regarding the instrument. Telephone: 020 3334 4031, or e-mail: jonathan.solly@justice.gsi.gov.uk.