

**EXPLANATORY MEMORANDUM TO  
THE CRIMINAL PROCEDURE RULES 2011**

**2011 No. 1709 (L. 15)**

**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 In accordance with the programme of the Criminal Procedure Rule Committee, these Rules replace with consolidated rules the Criminal Procedure Rules 2010, S.I. 2010 No. 60, and the two subsequent amendments. They replace the existing rules about forms and court records, about preparatory hearings in the Crown Court, and about reporting restrictions and restrictions on public access to criminal cases. They make amendments to the rules about the electronic service of documents in criminal cases; to the time limits for making applications, and giving notices, in connection with special measures for vulnerable witnesses, hearsay evidence and bad character evidence; to the rules about restraint orders and other orders in proceedings for the confiscation of proceeds of crime; and to the time limits that apply where the Criminal Cases Review Commission refers a conviction to the Court of Appeal. They introduce a new rule about procedure on the enforcement of financial penalties imposed in other European Union member states. They make consequential rule amendments and include up to date references to relevant legislation. In all other respects, they reproduce the rules that they supersede.

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

3.1 As requested by users and publishers of the Criminal Procedure Rules, the Rules for the time being continue to include empty Parts where old rules have been consolidated with others, or revoked: as did the Criminal Procedure Rules 2005 and 2010.

**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. They are listed at <http://www.justice.gov.uk/about/moj/advisory-groups/criminal-procedure-rule-committee.htm>.

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. Subsequently, 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 rules now are consolidated annually, in June, and amended if necessary in December, with these revisions coming into force ordinarily on the first Monday in October and on the first Monday in April, respectively, of each year.

4.3 The Rules accommodate, by new rules, by rule amendments, or by cross-reference, as appropriate: sections 84 to 92 of the Criminal Justice and Immigration Act 2008, which implement Framework Decisions of the Council of the European Union on the application of the principle of mutual recognition of financial penalties; sections 98 to 103, and 105, of the Coroners and Justice Act 2009, which amend provisions of the Youth Justice and Criminal Evidence Act 1999 about special measures to assist vulnerable witnesses to give evidence in criminal proceedings; and the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011, S.I. 2011 No. 209, which prescribe the time for service of a defence statement and of a defence witness notice under the 1996 Act.

## **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*

### *Consolidation*

7.1 When it made the Criminal Procedure Rules 2005, the Committee declared its intention to effect after 5 years a legislative consolidation of those Rules with such amendments as had been made by then, and it did so in the Criminal Procedure Rules 2010. Having consulted on the possibility of continuing to consolidate the Rules at regular intervals, the Committee decided to do so, and this is the first such further consolidation.

### *Electronic service of documents*

7.2 In Part 4 (Service of documents), rule 4.2 (Methods of service) and rule 4.6 (Service by electronic means) are amended to facilitate and encourage the electronic service of documents; and rules 4.3, 4.5, 4.10 and 4.12 all are amended in consequence, to keep the expression of the rules consistent with each other.

7.3 Prosecuting authorities, in particular, find it increasingly easy, and more efficient, to use email and other electronic means to transmit case materials to defence representatives and to the court, instead of relying on paper documents. The Crown Prosecution Service asked the Committee to review the Part 4 rules with that in mind. The Committee concluded that it would serve the statutory objective set by section 69 of the Courts Act 2003 (see paragraph 4.1 above) to make these amendments. The

principal amendments introduce a general presumption in favour of electronic service, where that is possible, and an assumption that a legal representative who gives an electronic address will receive material by electronic means.

#### *Forms and court records*

7.4 A new Part 5 (Forms and court records) is substituted for the old rules in that Part.

7.5 The existing rules apply only to magistrates' courts; they do not list the information about a case which, ordinarily, a member of the public, or the media, can expect to be given on request; and they do not bring together various related rules about the making of records of court proceedings. In connection with the revision and simplification of Part 16 (see paragraphs 7.8 and 7.9 below), the Committee decided to consolidate and amend the rules, having regard to the various statutory provisions that govern the making of, and access to, such records. The new rules apply to all the criminal courts, and codify requirements hitherto contained only in case law or in guidance.

#### *Preparatory hearings in the Crown Court*

7.6 A new Part 15 (Preparatory hearings in the Crown Court) is substituted for the old rules in that Part.

7.7 The Committee decided to revise the rules about applications for such hearings in consequence of recent case law on (i) the circumstances in which a statutory preparatory hearing may be appropriate (*R v C* [2010] EWCA Crim 2578), and (ii) the procedure where the application is for a trial without a jury because of a danger of jury tampering (*R v Twomey and Others* [2011] EWCA Crim 8). The new rules require the applicant to explain how the case meets the relevant statutory criteria. They supply a special procedure for a case in which the prosecutor applies for a non-jury trial on the basis of information withheld from the defendant.

#### *Reporting and other restrictions*

7.8 A new Part 16 (Reporting, etc. restrictions) is substituted for the old rules in that Part.

7.9 The existing rules deal only with a very few of the statutory grounds for the making, or variation, of a reporting restriction, or a restriction on public access to the court room. They do not deal at all with the statutory restriction on making audio recordings of criminal proceedings, or with the restrictions on using devices such as mobile telephones or portable computers to transmit written messages from the court room (on which the Lord Chief Justice recently consulted the public). Experience of the operation of the relevant law persuaded the Committee that the existing rules should be comprehensively revised and simplified. The new rules apply to the exercise of all the reporting and access restrictions available to the criminal courts. They include an explicit presumption in favour of open justice that has been hitherto contained in case law and, indirectly, in the requirements of the European Convention on Human Rights.

*Special measures, hearsay and bad character: time limits for applications and notices*

7.10 The time limits in rule 29.3 (Making an application for a direction or order), rule 34.2 (Notice to introduce hearsay evidence) and rule 35.4 (Notice to introduce evidence of a defendant's bad character) all are extended.

7.11 It was reported to the Committee that the time limits for the making of applications in magistrates' courts for special measures directions, and for prosecutors to give notices of hearsay or bad character evidence in magistrates' courts, rarely could be met. Ordinarily the courts now take the defendant's plea, and give directions for trial, at an early stage, making it almost impossible in practice for investigators and prosecutors to obtain the information required to make such applications, or give such notices, within the times prescribed. The Committee agreed to enlarge the time limits concerned, observing that the changes would not jeopardise trial timeliness because of other, overlapping, time limits which had to expire before a trial could be arranged.

*Financial penalties imposed in other EU member states*

7.12 A new rule 52.10 (Financial penalties imposed in other European Union member states) is added, to accommodate sections 84 to 92 of the Criminal Justice and Immigration Act 2008, which implement Framework Decision 2005/214/JHA of the Council of the European Union on the application of the principle of mutual recognition of financial penalties, and the subsequent Framework Decision 2009/299/JHA. The 2008 Act provides, among other things, for the reception and enforcement in the United Kingdom of a financial penalty imposed in another EU member state. The new rule supplies a procedure that gives the defendant an opportunity to raise any valid objection that there may be to the enforcement of such a penalty.

*Restraint orders and ancillary orders; powers conferred on a receiver*

7.13 In Part 59 (Proceeds of Crime Act 2002: Rules applicable only to restraint proceedings), rule 59.1 (Application for restraint order or ancillary order) is amended to make it clear that an application for a restraint order under section 41 of the Proceeds of Crime Act 2002 may, but need not, be accompanied by an application for an ancillary order in support; and to list what any application for an ancillary order must include, where appropriate. Rule 59.4 (Application for variation of restraint or ancillary order by the person who applied for the order) is amended correspondingly. In Part 60 (Proceeds of Crime Act 2002: Rules applicable only to receivership proceedings), rule 60.2(3) is amended to list what an application must include where it is for the court's authority for a receiver to engage in other legal proceedings.

7.14 A 'restraint order' under the Proceeds of Crime Act 2002 stops someone dealing with property that may be confiscated as the proceeds of crime. Section 41(7) of the Act allows the court to make whatever 'ancillary order' it believes is appropriate for the purpose of ensuring that a restraint order is effective. Where a receiver is appointed to deal with property that has been restrained or confiscated, sections 49 and 51 of the Act allow the court to confer powers on the receiver among other things to start, carry on or defend any legal proceedings in respect of the property. The Committee decided to amend the rules in response to concerns that the wide powers conferred by those sections of the 2002 Act were not adequately reflected in the terms of the relevant rules. It took account of representations by Her Majesty's Courts and Tribunals Service and by the Crown Prosecution Service.

*Time limits on reference of a conviction to the Court of Appeal*

7.15 In Part 68 (Appeal to the Court of Appeal about conviction or sentence), rule 68.2(2) (Service of appeal notice) and rule 68.6(4) (Respondent's notice) are amended to adjust the time limits within which any appeal notice, and any respondent's notice in reply, need be served in a case in which the Criminal Cases Review Commission refers a conviction to the Court of Appeal.

7.16 The Registrar of Criminal Appeals suggested to the Committee that, in such a case, the existing time limit for an appeal notice (56 days) was too long, and that 28 days would be adequate; and that the existing time limit for a respondent's notice (14 days) was too short, and that it, too, should be 28 days. On the reference of a conviction by the Commission, the appellant does not usually need to serve an appeal notice. However, the respondent prosecutor often needs to prepare a compendious reply to assist the court. In those circumstances, the Committee accepted the Registrar's recommendations.

*Other amendments*

7.17 Rule 3.11 (Case management forms and records) is amended explicitly to require that notice of a court hearing must be given to any person required to attend, and also to anyone who has custody of that person (usually, the prison where that person is detained). The notice may be given by any means for which the Criminal Procedure Rules provides. The requirement to give such notice, by any appropriate means, is implicit in the rules in Part 3, but it was reported to the Committee that on occasions this had been doubted. The Committee therefore decided to clarify the rules.

7.18 The new Part 5 rules, described at paragraphs 7.4 and 7.5 above, now bring together rules about court records and recordings of Crown Court proceedings that until now have been in other Parts of the Criminal Procedure Rules. Some rules have been amended in consequence: rule 2.2(1) (to include the definition of 'Registrar'), and rule 65.1, 65.8 and 65.9 (to omit the provisions that now appear in Part 5).

7.19 The old Part 16, which is being replaced as described at paragraphs 7.8 and 7.9 above, up to now has included some miscellaneous rules about the types of pre-trial application that can be heard in private. Those rules applied only in the Crown Court, and they were not consistent with some other Criminal Procedure Rules. The provisions that they contained have been moved to the rules that deal with the procedures concerned. This is the reason for the amendments to rules 3.5 (about case management directions), 19.17 (about bail appeals), 19.18 (about bail applications), 20.2 (about custody time limit applications and appeals) and 64.6 (about appeals by case stated).

7.20 The Committee has taken the opportunity to make a number of other, miscellaneous, amendments. Rule 10.5(1) is amended to omit the references it contained to legislation which has been repealed. Rule 52.1(1)(a) is amended, for consistency of expression, to refer to a 'sum', not a 'penalty'. Rule 57.15(1) is amended so that it applies to every type of appeal under the Proceeds of Crime Act 2002 with which Parts 71, 72 and 73 deal. The reference to the powers of an accredited financial investigator in rule 60.1(3)(d) is amended, for consistency of expression with the amended rules in Part 59 described in paragraphs 7.13 and 7.14 above. Rule 68.1(1)(a) is amended to include a reference to the right of appeal conferred on a 'transferred life prisoner' by section 274(3) of the Criminal Justice Act 2003. Rules 76.1 and 76.7, about costs, are amended to include references to a



provision of the Dangerous Dogs Act 1991 under which costs can be ordered. The notes about defence disclosure, at the end of Part 22, the notes about eligibility for a special measures direction, at the end of Part 29, and the notes to rules 7.2, 19.11, 29.9, 32.9, 37.1, 40.4, 40.5, 40.7, 65.8, 65.9, 68.1, 68.3 and 76.1, all are amended to bring up to date the cross-references they contain.

#### *Bringing the new rules into force*

7.21 These Rules come into force on Monday 3<sup>rd</sup> October, 2011, following the convention explained at paragraph 4.2 above. To effect the transition from the Criminal Procedure Rules 2010, rule 2.1(3) preserves any right or duty at that date existing under those rules.

- ***Consolidation***

7.22 See paragraph 7.1 above. An informal consolidated text will continue to be available to the public free of charge on the Ministry of Justice website at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>.

## **8. Consultation outcome**

8.1 On the desirability of consolidating the Criminal Procedure Rules at regular intervals, the Rule Committee consulted with members of the judiciary, with bodies representing the legal professions, with commercial publishers of the text of the Criminal Procedure Rules, with the Parliamentary Committees charged with their scrutiny, and with relevant government departments and agencies. No opposition was expressed to consolidation in principle. Several of those consulted endorsed the Committee's view that it would be important to identify in exactly what respect consolidated rules amended the rules that they replaced; and that it would be appropriate to use for that purpose the Explanatory Note and the Explanatory Memorandum published with the Rules. Some publishers and representatives of the legal professions cautioned against any significant re-arrangement of the Rules, for example by renumbering the constituent Parts to accommodate the omission of those that had become redundant, before the Committee's programme of reform was completed in a few years' time.

8.2 On the new and amended rules about the enforcement of financial penalties imposed in other EU member states, and about restraint orders, the Committee consulted with those authorities and agencies most likely to use those rules. On the substituted rules about access to information about a case, and about reporting restrictions, the Committee consulted representatives of the printed and broadcast media, and representatives of Her Majesty's Courts and Tribunals Service.

## **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 and Tribunals 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, at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/index.htm>.

## **10. Impact**

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

10.2 These rules have no impact of themselves on the public sector, because they reproduce rules and procedures that are already current, and they introduce new rules and procedures that supplement legislation already made.

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. The Committee secretariat maintains an email address for enquiries about the rules, and from the enquirers to that address receives comments which it relays to the Committee. Twice a year the Committee receives and considers statistical information about criminal case management gathered by Her Majesty’s Courts and Tribunals 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 and Tribunals 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](mailto:jonathan.solly@justice.gsi.gov.uk).