

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE RULES 2012**

2012 No. 1726 (L. 6)

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 2011, S.I. 2011 No. 1709, and the Criminal Procedure (Amendment) Rules 2011, S.I. 2011 No. 3075. In addition, they replace the existing rules about bail applications and appeals (Part 19), and about the statement of a case by a magistrates' court or the Crown Court for the purposes of an appeal to the High Court (Part 64). They make amendments to (i) the rules about the service of documents in criminal cases (Part 4); (ii) the rules about applications for investigation orders (Part 6); (iii) the rules about sending a defendant for trial in the Crown Court (Part 9); (iv) the rules about reporting restrictions (Part 16); (v) the rules about written witness statements (Part 27); (vi) the rule about giving advance notice of hearsay evidence (Part 34); (vii) the rules about the introduction of oral and written evidence at trial in magistrates' courts (Part 37); and (viii) the rule about giving notice of the requirements of suspended sentence orders, and about giving notice to those affected by a community order requirement (Part 42). 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 In its Thirty-first Report of Session 2010-12, published on 8th November, 2011, the Joint Committee on Statutory Instruments reported the following features of the Criminal Procedure Rules 2011, for the following reasons: (a) the empty Parts of the Rules, as requiring elucidation; (b) a rule introducing a glossary of terms, for failing to comply with proper drafting practice; (c) rules using 'will' and 'as a general rule' as expressions of expectation, for failing to comply with proper drafting practice; (d) a rule defining the date on which service by document exchange would occur, for defective drafting; and (e) the inclusion in the glossary of superfluous terms, for defective drafting.

3.2 In these Rules, features (b), (d) and (e) have been discarded or amended. As to (b) and (d), see paragraphs 7.22 and 7.23 respectively of this Memorandum. As to (e), the superfluous terms in the glossary were removed by the Criminal Procedure (Amendment) Rules 2011.

3.3 Feature (a) (empty Parts) is repeated, maintaining a feature established by the Criminal Procedure Rules 2005 (S.I. 2005/384) and repeated previously in the Criminal Procedure Rules 2010 (S.I. 2010/60) as well as in the Criminal Procedure Rules 2011. As explained in the memorandum submitted by the Ministry of Justice

which was appended to the JCSI Report, the Rule Committee believes that to maintain this feature averts confusion pending its planned final consolidation of the Criminal Procedure Rules, with numeration in order and no blank provisions then retained. Research conducted by the Rule Committee among those who use and who publish the Rules has indicated that the renumbering of the rules in the interim would result in a potential for confusion, and a certainty of disproportionate expense, for such users and publishers. The Ministry of Justice respectfully agrees.

3.4 Feature (c) (expressions of expectation) has been reconsidered carefully by the Rule Committee. As far as concerns rules 5.8(5) and 5.8(7), it inclines to the view that, read in the context in which those two paragraphs appear, they do not obscure the extent of, or reason for, what is expected of the court officer, as there described. As far as concerns the other instances reported by the JCSI, one of which appertains to an expectation of those serving documents and the others to expectations of the court itself, the Rule Committee inclines to the view that neither the non-judicial reader nor a court would misunderstand the nature and the extent of each expectation there described, having regard to the context in which each expression appears and having regard to the long established use of the expressions in question. Again, the Ministry of Justice respectfully agrees. For these reasons, the impugned provisions have been for the time being maintained. However, the Rule Committee will continue to reflect on the observations contained in the JCSI Report in the course of its continuing review of the Rules.

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 the Ministry of Justice.

4.2 The first rules made by the Rule Committee were the Criminal Procedure Rules 2005. 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 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: section 115 of the Coroners and Justice Act 2009, which places restrictions on applications for bail where the defendant is charged with murder; section 41 of the Crime and Security Act 2010, which amends the provision about parenting orders in the Crime and Disorder Act 1998; section 13 of the Education Act

2011, which amends the Education Act 2002 so as to impose restrictions on the reporting of allegations against teachers and to provide for applications and appeals in relation to those restrictions; sections 37 and 38 of the Protection of Freedoms Act 2012, which amend the Regulation of Investigatory Powers Act 2000 so as to require the approval of a justice of the peace for the use of some investigatory measures by a local authority; section 68 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amends the provision about suspended sentences of imprisonment in the Criminal Justice Act 2003; and Schedule 11 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which provides for a prosecution right of appeal against a grant of bail by the Crown Court.

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: first in the Criminal Procedure Rules 2011 and now in these Rules.

Investigation orders

7.2 In Part 6 (Investigation orders), rule 6.1 (When this Part applies) and the notes to that rule are amended to give a better description of the investigations under the Proceeds of Crime Act 2002 to which the Part 6 rules apply; and also to accommodate applications for the approval of authorisations and notices under the new sections 23A, 23B, 32A, 32B and 43(6A) of the Regulation of Investigatory Powers Act 2000. Rule 6.3 (Exercise of court's powers) is amended to allow the court to determine an application for an order without convening a hearing, and in the absence of any party (including the applicant): subject to specified exceptions but otherwise in the court's discretion. The rule also now requires a person applying for an order to include a declaration of truth. Rule 6.5 (Documents served on the court officer) is amended to require someone who makes an application to a judge or magistrate when the court office is closed to deliver the documents used in the application to the court officer (for the court's records) within 72 hours. The applications under the Regulation of Investigatory Powers Act 2000 which are mentioned above are provided for by new rules 6.27 (Application for approval for authorisation or notice) and 6.28 (Exercise of court's power to quash an authorisation or notice). Rules 6.2, 6.14 and 6.16 contain amendments consequential on one or more of these other changes.

7.3 Prosecuting authorities and investigators find it increasingly easy, and more efficient, to use email and other electronic means to deliver applications and

supporting material to the court, instead of relying on paper documents. The Committee was asked to review the Part 6 rules with that in mind and agreed to allow for applications to be submitted electronically and determined in the absence of the applicant: as long as certain conditions were met and as long as the application was supported by a formal declaration that it was true and complete.

7.4 New restrictions on local authority investigations imposed by sections 37 and 38 of the Protection of Freedoms Act 2012 (which make amendments to the Regulation of Investigatory Powers Act 2000) require local authority investigators to obtain the approval of a justice of the peace before gathering information about the use of postal or telecommunications services, and before using surveillance or a 'covert human intelligence source'. The Committee has made new rules 6.27 and 6.28 to provide for applications for those approvals.

Reporting restrictions

7.5 In Part 16 (Reporting, etc. restrictions), rule 16.5 is amended to provide for a new category of appeal to the Crown Court against the decision of a magistrates' court.

7.6 Section 13 of the Education Act 2011 amends the Education Act 2002 to impose restrictions on the public reporting of alleged offences by teachers. The new provisions allow for an application to a magistrates' court to remove those restrictions, and for an appeal to the Crown Court against the magistrates' court's decision. Rule 16.5 already provides for applications to vary or remove reporting restrictions, so that rule already accommodates applications to magistrates' courts. The Committee has added rule 16.5(4), (5) to provide for the new right of appeal to the Crown Court.

Bail and custody time limit applications and appeals

7.7 A new Part 19 (Bail and custody time limits) is substituted for the old rules in Parts 19 and 20.

7.8 With only a very few subsequent amendments, the existing rules are those first adopted by the Committee when it made the Criminal Procedure Rules 2005. Those rules provide for a number of specific circumstances but they do not provide for the generality of applications for bail. Nor do they satisfactorily accommodate some relevant statutory amendments made during the last few years. The result is that the Criminal Procedure Rules have not until now provided a comprehensive procedural code for bail applications and appeals. 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 amalgamate, revise and simplify those rules, in the manner of other Criminal Procedure Rules. The Committee's intention is not to change the current practice and procedure of the courts, merely (i) to reformulate the rules compatibly with the expression of other, more recently drafted, Criminal Procedure Rules, (ii) to minimise duplication, and (iii) to incorporate appropriate references to all the legislation relevant.

Written witness statements

7.9 In Part 27 (Witness statements), rule 27.4(1) (Written statement in evidence) is amended to acknowledge that, where a prosecutor or defendant relies on section 9 of the Criminal Justice Act 1967 for the admission in evidence of a written witness statement, what is given to the court may be either the statement or an authenticated copy.

7.10 Under section 9 of the Criminal Justice Act 1967, a written witness statement can be used as evidence instead of the witness giving that evidence in person, as long as, among other things, no other party objects. The Act anticipates that the statement will be in a document delivered to the court, so the current rule requires the party who introduces the statement to give copies to the other parties and to ‘serve the statement itself’ on the court officer.

7.11 However, section 133 of the Criminal Justice Act 2003 provides that, where a statement in a document is admissible as evidence in criminal proceedings, then that statement may be proved by producing either (i) the document or (ii) (whether or not the document exists) a copy of the document, authenticated in whatever way the court may approve. As steadily increasing use is made of documents, including written witness statements, in electronic form, the Crown Prosecution Service asked the Committee to review the current rule, which in its present terms could be read as always requiring the delivery to the court of something written on paper. The Committee concluded that to make this amendment would clarify the requirements of the rule and remove any ostensible inconsistency with section 133 of the Criminal Justice Act 2003. A note to the rule now cross-refers to that section.

Notice of hearsay evidence in a document prepared for use in criminal proceedings

7.12 In Part 34 (Hearsay evidence), rule 34.2(1) (Notice to introduce hearsay evidence) is amended to require that, where a prosecutor or defendant relies on section 117 of the Criminal Justice Act 2003 for the admission in evidence of a written witness statement prepared for use in criminal proceedings, then advance notice must be given to make that clear.

7.13 Section 117 of the Criminal Justice Act 2003 provides that, among other things, a written witness statement prepared for use in criminal proceedings can be used as evidence instead of the witness giving that evidence in person, and even if another party objects, as long as one of the conditions specified by the Act is met: for example, that the witness is too unwell or too frightened to give evidence, or is abroad, or cannot be found, or cannot reasonably be expected to remember the matters dealt with in the statement.

7.14 Section 117 also makes certain other business, etc. documents admissible in evidence as hearsay, and there is no present requirement to give advance notice of reliance on section 117 documents because what they are will usually be obvious. However, where a party relies first on section 9 of the Criminal Justice Act 1967 for the admission in evidence of a written witness statement (as to which, see paragraph 7.10 above) but another party objects, so they cannot rely on that; and then the witness falls ill, or goes abroad, for example, so that section 117 can be relied upon instead: it may not be obvious that the circumstances have changed. An example of this occurred in the case of *R v SVS Solicitors* [2012] EWCA Crim 319. Other requirements of the Criminal Procedure Rules make it highly unlikely that no advance notice at all would be given of a party’s intention to rely on a written statement instead of the witness giving evidence in person (and notice in fact was given in the case of *SVS*). However, if no notice were to be given then that well might prove unfair and disruptive. For that reason, the Committee decided to make this exception to the general rule that notice need not be given where section 117 is relied upon.

Evidence of a witness in person and in writing

7.15 In Part 37 (Trial and sentence in a magistrates' court), rules 37.4 (Evidence of a witness in person) and 37.5 (Evidence of a witness in writing) are amended to provide separately for (i) the introduction of evidence given by a witness in person and (ii) the introduction of written evidence, whether as a written statement, under Part 27; as expert evidence, under Part 33; or as hearsay evidence, under Part 34.

7.16 At present, rule 37.4 provides for the procedure where a witness gives evidence in person, and rule 37.5 for the procedure where a party introduces the written statement of a witness under Part 27 and section 9 of the Criminal Justice Act 1967 (as to which, see paragraphs 7.9 and 7.10 above). However, at present rule 37.4 deals also with the procedure where, while giving evidence in person, a witness adopts as part of that evidence a written statement that he or she has made earlier. By reason of section 114 of the Criminal Justice Act 2003, such a written statement then is hearsay evidence, and the provisions of that Act govern the circumstances in which it can be admitted as evidence. In the light of experience of the use of the rules, the Committee concluded that it would avoid potential confusion to remove from rule 37.4 the present reference to adopting an earlier written statement, and instead to deal separately and comprehensively with all sorts of written evidence in rule 37.5.

Notice of requirements of suspended sentence and community, etc. orders

7.17 Rule 42.2 (Sentencing procedures in special cases – notice of requirements of suspended sentence and community, etc. orders) is amended in consequence of the amendment of section 189 of the Criminal Justice Act 2003 by section 68 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

7.18 When that statutory amendment comes into force, among other things the court may, but no longer must, impose additional requirements when passing a suspended sentence, so the rule is amended to reflect that change. In addition, the rule is amended to provide explicitly for notice to be given to a person protected, or otherwise affected, by a community or youth rehabilitation order requirement.

Application to state a case for the opinion of the High Court on an appeal

7.19 A new Part 64 (Appeal to the High Court by case stated) is substituted for the old rules in that Part.

7.20 The most common avenue of appeal from a decision of a magistrates' court in a criminal case lies to the Crown Court. From the Crown Court, the most common avenue of appeal lies to the Court of Appeal. However, there are also rights of appeal from either court to the High Court, on the ground that the decision under appeal 'is wrong in law or is in excess of jurisdiction', as the relevant Acts put it. The procedure in the High Court is governed by the Civil Procedure Rules, but the preparation of a written 'case' – meaning a statement of what is in issue in the appeal – by the magistrates' court or by the Crown Court is governed by the Criminal Procedure Rules.

7.21 With only a very few subsequent amendments, the existing rules are those first adopted by the Committee when it made the Criminal Procedure Rules 2005. 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 amalgamate, revise and simplify those rules, in the manner of other Criminal Procedure Rules. The Committee's intention is (i) to reformulate the rules compatibly with the expression of other, more

recently drafted, Criminal Procedure Rules, (ii) to minimise duplication, and (iii) to incorporate appropriate references to all the legislation relevant. The only substantial departure from what the current rules require in magistrates' courts is that notice of an application to the court to state a case must be given to the other party, who must be allowed an opportunity to make representations about it (which corresponds with what is already required in the Crown Court).

Other amendments

7.22 In response to a report by the Joint Committee on Statutory Instruments (see paragraph 3.1 above), the rule that introduced the glossary, former rule 2.4, has been replaced with a note to the same effect and the glossary is presented in the same style as notes to rules.

7.23 In response to that same report, the Rule Committee agreed to amend rules 4.4(1), 4.5, 4.6 and 4.10(2)(c) (each of which deals with service of documents by different means) to make it clear beyond possibility of misunderstanding that a document to be served needs to be addressed to the person for whom it is intended; and to describe in more detail than before what service by document exchange entails.

7.24 Where a defendant is being sent by a magistrates' court to the Crown Court for trial, for an offence which can be tried only in the Crown Court, rule 9.7 provides for the defendant to be asked if he or she intends to plead guilty in the Crown Court: so that appropriate arrangements can be made for the hearing there. In response to observations by commentators on that rule, the Rule Committee has amended it to make it clear beyond misunderstanding that any indication of plea in such a case does not affect the magistrates' decision to send the case for trial.

7.25 In response to comments made on behalf of the Joint Committee on Statutory Instruments, the Rule Committee agreed to amend rule 10.5(1) (Committal for trial – material to be sent to court of trial) to align the time limit for which that rule provides with the definition of 'business day' in rule 2.2.

7.26 In response to comments made on behalf of the Joint Committee on Statutory Instruments, the Rule Committee agreed to amend rules 18.2, 18.3 and 18.4 (which deal with the content of warrants of arrest, detention or imprisonment) and rule 52.7(1) (which deals with the content of warrants to take goods, etc.), so as to substitute the expression 'each person' for 'person(s)'. Rule 18.4 is also amended to bring up to date the cross-references to statutes which it contains.

7.27 Rule 34.3(2)(d) (Hearsay evidence – opposing the introduction of hearsay evidence) is amended to make clear that it imposes a requirement to announce and explain any objection to the introduction of hearsay evidence even though no application to introduce such evidence is required.

7.28 Rule 41.5 (Retrial following acquittal for serious offence – bail or custody hearing) cross-refers to the Part 19 bail rules and is amended in consequence of making the new rules in Part 19. Rules 41.11 (Powers exercisable by the Registrar) and 41.12 (Determination by full court) refer to a form of application which no longer is prescribed and are amended to omit that reference.

7.29 Rule 50.2(3)(b) (Civil behaviour orders after verdict or finding – general rules) refers to the making of a parenting order. It is amended in consequence of an

amendment to the Crime and Disorder Act 1998 made by the Crime and Security Act 2010. That adjusted the circumstances in which such an order may be made and the rules have not previously reflected it.

7.30 In Part 57 (Proceeds of Crime Act 2002: Rules applicable to all proceedings) and in Part 58 (Proceeds of Crime Act 2002: Rules applicable only to confiscation proceedings), rules 57.9, 57.11 to 57.14 and 58.12 are re-paragraphed and renumbered to correct a typographical error in the Criminal Procedure Rules 2011 and in consequence of the omission of rules and paragraphs by the Criminal Procedure (Amendment) Rules 2011.

7.31 Rule 63.1(d) (Appeal to the Crown Court – when this Part applies) is amended to cross-refer to the right of appeal against a parenting order, to which the rules in this Part apply but which cross-reference had been omitted. Rules 63.2 (Service of appeal notice) and 63.4 (Duty of magistrates’ court officer) are amended to provide explicitly for any ancillary application to suspend a disqualification pending appeal, so as to align these rules with the rules in the new Part 64 (see paragraphs 7.19 to 7.21).

7.32 The notes about case management provisions at the end of Part 3, the reference to the abolition of committal for trial at the beginning of Part 10, and the notes to rules 2.4, 5.8, 6.1, 6.6, 6.14, 6.15, 6.16, 6.17, 6.18, 6.19, 8.1, 16.1, 16.5, 18.3, 18.4, 27.4, 33.6, 34.2, 36.2, 37.5, 42.2, 50.2, 55.2, 63.1 and 63.2 all are amended to bring up to date the cross-references they contain.

Bringing the new rules into force

7.33 These Rules come into force on Monday 1st October, 2012, following the convention explained at paragraph 4.2 above. To effect the transition from the Criminal Procedure Rules 2011, rule 2.1(3) preserves any right or duty at that date existing under those rules.

- ***Consolidation***

7.34 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/courts/procedure-rules/criminal/rulesmenu>

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 rules about bail, and about appeal by case stated, the Committee consulted with those practitioners and authorities most likely to use or to be affected by those rules. On the various amendments to give effect to new statutory provisions, the Committee consulted those government departments responsible for the implementation of those provisions, 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 of the effect of those changes is published on the Ministry of Justice website, at:

<http://www.justice.gov.uk/courts/procedure-rules/criminal>

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.