

EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE (AMENDMENT No. 2) RULES 2016
2016 No. 705 (L. 8)

1. Introduction

- 1.1 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 2015, S.I. 2015 No. 1490, in various respects. They add new rules that require courts to conduct pre-trial hearings by live link or telephone, and to receive evidence by live link, where prescribed conditions are met; they add new rules about the indictment (the formal statement in the Crown Court of the offences charged) which allow for the electronic generation of an indictment in prescribed circumstances, with an associated rule amendment to define the circumstances in which charges must be tried separately; and they add new rules to provide for applications by the Criminal Cases Review Commission for access to documents. They amend the rules about applications for bail with conditions to be supervised in another European Union member State; they amend the rule about the identification of exhibits to written witness statements; they amend the rule about determining applications for special measures for young or otherwise vulnerable witnesses; and they make miscellaneous other amendments to keep the Criminal Procedure Rules up to date.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

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, the High Court, in an extradition appeal, 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. Section 72 requires the Committee to consult such persons as they consider appropriate before making rules. 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 amended if necessary in June, and again if necessary in December, with the changes coming into force ordinarily on the first Monday in October and on the first Monday in April, respectively, of each year.
- 4.3 These Rules exercise a power conferred on the Rule Committee by amendments made by section 82 of the Deregulation Act 2015 to section 2(6) of the Administration of Justice (Miscellaneous Provisions) Act 1933, which allows the Criminal Procedure Rules to provide for ‘the manner in which and the time at which bills of indictment are to be preferred before any court’; they supplement provisions of the Psychoactive Substances Act 2016, which create prohibition orders; they supplement section 18A of the Criminal Appeal Act 1995, which was inserted by the Criminal Cases Review Commission (Information) Act 2016; and they reference sections 35A and 35B of the Road Traffic Offenders Act 1988, which were inserted by the Coroners and Justice Act 2009.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is 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

Use of live links and telephones

- 7.1 Rules 3.2, 3.3 and 3.5 of the Criminal Procedure Rules are amended by rule 3(a), (b) and (c) of these Rules to impose on the court a duty to use live links and telephones for the conduct of pre-trial case management hearings, where appropriate equipment is available and where the other conditions listed in new CrimPR 3.2(4) and (5) are met; and a duty to use live links for receiving evidence where appropriate equipment is available and the relevant statutory conditions are satisfied.
- 7.2 ‘Live link’ is a statutory expression which the Criminal Procedure Rules define to mean, ‘an arrangement by which a person can see and hear, and be seen and heard by, the court when that person is not in the courtroom’. In his *Review of Efficiency in Criminal Proceedings* published on 23rd January, 2015 (see <http://www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/>), Sir Brian Leveson, the President of the Queen’s Bench Division of the High Court, at paragraphs 40 – 50 recommended that pre-trial

hearings should be conducted by live link or telephone wherever possible, in the interests of efficiency. The Rule Committee consulted publicly on draft rules to that effect, and on rules to encourage courts more frequently than at present to exercise their statutory powers to receive evidence by live link. Having reviewed the product of that consultation, the Committee decided to make these rules. They will be supplemented by a Practice Direction to be made by the Lord Chief Justice.

Electronic generation of a draft indictment

- 7.3 Rules 3.21 and 3.24 of the Criminal Procedure Rules are amended, and Part 10 of the Criminal Procedure Rules is replaced, by rules 3(d), (e) and 6 of these Rules, and Schedule 1, to accommodate a new and more efficient electronic way of generating an indictment.
- 7.4 The ‘indictment’ is the formal written record of the offences with which a defendant is charged in the Crown Court. In the *Review of Efficiency in Criminal Proceedings* cited above, at paragraphs 365 – 367, Sir Brian Leveson commented that the current procedure for the preparation of indictments imposes ‘a significant and unnecessary administrative burden for the prosecution and the courts’. Sir Brian recommended that legislative and other steps should be taken as soon as possible to alleviate that burden. The Criminal Justice System Common Platform Programme is a joint initiative of the criminal justice agencies to improve process throughout the system, with the support of new information technology. One of the initiatives under way as part of that programme is to convert, by electronic means, the statement of the criminal charges sent by a magistrates’ court for trial in the Crown Court into the indictment on which the defendant will be accused (‘arraigned’) in the Crown Court.
- 7.5 In the exercise of more extensive powers than the Rule Committee had possessed before to make rules about indictments, the Committee has made new rules that allow an electronically generated draft indictment to be adopted by the prosecutor and presented to the Crown Court without the prosecutor needing to prepare a draft indictment repeating the list of charges, as required now. Where a draft indictment is produced by these means, the new rules have the effect of converting it into an indictment in law at the point at which the defendant is arraigned. Up to that point the prosecutor can make specified types of amendment to the draft, or can withdraw the prosecution altogether, without needing the court’s permission.
- 7.6 In all cases, not only in those cases in which the draft indictment is generated electronically, the new rules require the court at or before arraignment to obtain the prosecutor’s confirmation that the indictment is complete. In all cases, again, the new rules abolish the current requirement that restricts the types of offence which an indictment validly may include, and they replace that requirement with one which restricts the types of offence which may be tried at the same time: the objective being to ensure that a trial is fair while abolishing the present antique and formalistic means of achieving that.

Allocation guidelines

- 7.7 Rule 5 of these Rules adds a note to supplement rule 9.10 of the Criminal Procedure Rules in order to draw attention to the important new allocation guideline issued by the Sentencing Council which came into force earlier this year.
- 7.8 Allocation is the process by which a magistrates’ court assigns for trial either in the magistrates’ court itself or in the Crown Court an offence which can be tried in either

court. In response to another recommendation by Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*, on 10th December, 2015, the Sentencing Council issued a new definitive allocation guideline under section 122 of the Coroners and Justice Act 2009 Act. It took effect on 1st March, 2016. The new guideline is important to the appropriate and consistent allocation of cases between magistrates' courts and the Crown Court. Though it would be impracticable and inappropriate for the Criminal Procedure Rules to reproduce all guidelines issued by the Sentencing Council, in this instance the Rule Committee thought it appropriate to do so.

Bail with conditions to be enforced in other EU states

- 7.9 Rules 14.7 and 14.16 of the Criminal Procedure Rules, which are the procedure rules about 'ESO' (European supervision order) bail, are amended by rule 7 of these Rules to require an applicant for bail to supply the court with the extra information which it will need if it is to grant bail with conditions to be supervised in another European Union member State.
- 7.10 The European Union Framework Decision to which Part 7 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, S.I. 2014 No. 3141, gives effect in England and Wales allows a European Union member State to monitor a defendant's compliance with bail conditions imposed in another such State pending that defendant's trial in that latter state. An order for bail subject to such conditions is known as a 'European supervision order'. CrimPR Part 14 was amended in the Criminal Procedure Rules 2015 to accommodate such orders. Since then, only two applications for such orders have been made in England and Wales, but courts' experience gained from those applications and reported to the Committee has prompted this amendment of the rules in order to require an applicant to complete appropriate forms, the terms of which forms the Lord Chief Justice will be asked to authorise.

Exhibits to written witness statements

- 7.11 Rule 16.3 of the Criminal Procedure Rules is amended by rule 8 of these Rules to make it clear that signing a paper label is not necessary for the purpose of identifying an exhibit to a written witness statement.
- 7.12 Section 9 of the Criminal Justice Act 1967 makes it possible for the court to receive in evidence written witness statements, if various specified conditions are met. The witness who makes such a statement may refer to documents or objects, which are then known as 'exhibits'. The current rule requires that such exhibits must be 'labelled or marked', and the label or mark signed. The Rule Committee had not intended that those requirements should preclude electronic marking or signature where documentary exhibits in electronic form were used, but received reports that in such cases the requirements sometimes were being interpreted to require the documents to be printed for no other reason than to satisfy the rule. The Committee decided to amend the rule to make clear that that was not necessary.

Allowing sufficient time for liaison with witnesses who are victims of crime

- 7.13 Rule 18.4 of the Criminal Procedure Rules is amended by rule 9 of these Rules to impose on the court an obligation to allow the parties, and in practice the prosecutor especially, sufficient time to consult with witnesses who are to be the beneficiaries of special measures to help them give evidence, in accordance with the parties' obligations under the Victims' Code.

- 7.14 The Code of Practice for Victims of Crime issued under section 32 of the Domestic Violence, Crime and Victims Act 2004 emphasises the importance of communication with those who are victims of criminal conduct and, in particular, the importance of (i) discussion with such witnesses of the special measures by which they might benefit, and (ii) the introduction of such witnesses to the arrangements made for them to give evidence. Reports of two inspections by HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, another of the recommendations of the *Review of Efficiency in Criminal Proceedings*, cited above, and some academic research to which the Rule Committee’s attention was drawn, all persuaded the Committee that an explicit reference should be made to the court’s obligation as far as possible to accommodate the parties’ obligations under the Code.

Prohibition orders

- 7.15 Some rules in Part 31 of the Criminal Procedure Rules, the rules about behaviour orders, are amended by rule 11 of these Rules to accommodate a new type of order – prohibition orders – introduced by the Psychoactive Substances Act 2016.
- 7.16 Section 19 of that Act allows a court which convicts a defendant of a ‘relevant offence’, as defined by the Act, to make a prohibition order (defined by section 17). Other provisions of the Act allow the court to vary or discharge such an order, and allow the court to give a special measures direction in proceedings for a prohibition order. CrimPR Part 31 was first introduced in 2008 as a procedural framework for all the ‘behaviour orders’ then extant and which Parliament subsequently might introduce. Consequently, few amendments have been required to accommodate the new Act

Criminal Cases Review Commission applications for access to documents

- 7.17 New rules are added to the rules in Part 47 of the Criminal Procedure Rules by rule 15 of these Rules to accommodate the new type of investigation order created by the Criminal Cases Review Commission (Investigations) Act 2016.
- 7.18 That Act extends the powers of the Criminal Cases Review Commission to obtain documents and other material so that they can be obtained by an order of the Crown Court from a person who is not employed by or serving in a public body. Applications by the Commission under the new provision will only ever be made after trial and conviction, not in aid of a criminal investigation in the usual sense. Nonetheless, the power conferred on the Crown Court resembles the court’s powers under other Acts to make so-called ‘production’ orders, and so the new rules have been added to the procedure rules about production and comparable orders, adopting many features of those other rules. During scrutiny in the House of Lords of the Bill that is now the Act it was indicated that the same special safeguards for journalistic material should be made as is made already in CrimPR Part 47 in relation to production and comparable orders. That has been done in new rule CrimPR 47.54(4), which prevents the court from determining an application for an order for access to journalistic material otherwise than at a hearing in the respondent journalist’s presence, unless the journalist waives the opportunity to attend.

Miscellaneous amendments and corrections

- 7.19 In the case of *R v Uddin and Others* [2015] EWCA Crim 1918 the Court of Appeal observed that where representations plainly were required to be delivered in writing to another party and to the court, in some instances the Criminal Procedure Rules so

required in terms but not in other instances. Where the Rules require an application, a notice or representations to be ‘served’, the definition of service in Part 4 of the Rules means that they must be written. The Rule Committee agreed that in those circumstances it was superfluous to require something which must be served to be ‘written’, or ‘in writing’. A number of rules are amended to remove that superfluity.

Consolidation

- 7.20 When it made the Criminal Procedure Rules 2005, the Rule 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 subsequently produced the Criminal Procedure Rules 2011, the Criminal Procedure Rules 2012, the Criminal Procedure Rules 2013, the Criminal Procedure Rules 2014 and the Criminal Procedure Rules 2015: each consolidating the previous year’s rules with subsequent amendments. The Committee intends to effect further such consolidations in future but, in response to representations by publishers and others, the Committee has decided not to do so again until 2020, thus reverting to its initial plan to consolidate at 5 yearly intervals. In the meantime, 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-2015>

8. Consultation outcome

- 8.1 The Rule Committee fulfilled its statutory obligation to consult as the Committee considers appropriate by, in each instance, inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn.
- 8.2 In connection with the new live link rules, the Committee published at <http://www.justice.gov.uk/courts/procedure-rules/criminal>, and distributed to the legal professions, the judiciary and other interested bodies, an invitation to comment on a draft. The invitation was issued on 16th November, 2015, and replies were invited by 26th February, 2016. Twenty-seven replies were received, from police forces and police organisations, defence solicitors and solicitors’ organisations, judges, magistrates, the Crown Prosecution Service, the Youth Justice Board and an academic commentator. Substantial changes to the proposed rules were made in consequence, the Committee deciding to confine the extent of the new duty imposed on the court pending the more extensive availability of live links.

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 HM Courts and Tribunals Service, within the principal prosecuting authorities, and among local criminal justice boards.

9.2 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 There is 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 activities that are undertaken by small businesses.

12. Monitoring & 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 HM 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 HM 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

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