

EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2017

2017 No. 144 (L. 2)

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 a new rule about the procedure that applies to the provision of initial details of the prosecution case and a new rule about the procedure to be followed where one party wants to withhold information from another on an application for the retention or return of property seized during a criminal investigation. They amend the rules about the supply and consideration of information in bail proceedings; about the issue of receipts for fines; about the provision of draft ‘behaviour orders’ in some cases; about consent orders in confiscation proceedings; about the constitution of the Crown Court on appeal; about grounds of appeal to the criminal division of the Court of Appeal and the introduction of evidence in that court; and about extradition proceedings; and they make miscellaneous other minor 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 supplement the Acts to which paragraph 7 of this Memorandum refers. They reference section 20 of the Immigration Act 2016, which creates labour market enforcement orders.

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

Allowing sufficient time for consideration of prosecution information

- 7.1 Rules 3 and 4 of these Rules amend Parts 8 and 14 of the Criminal Procedure Rules (i) to impose on the court a duty to ensure that if information about the prosecution case is supplied later than usually is required then the defendant, and any defence representative, is allowed sufficient time to consider it; (ii) explicitly to require that information provided for the court in bail proceedings must be provided for the defendant, too; and (iii) to require the court itself in bail proceedings to take sufficient time to consider the parties' representations and reach its decision.
- 7.2 Part 8 of the Criminal Procedure Rules (Initial details of the prosecution case) contains rules requiring the prosecutor at the first hearing to provide the defendant and the court with enough information to help each assess the prosecution case and make decisions about how to proceed. Part 14 of the Criminal Procedure Rules (Bail and custody time limits) contains rules about the procedure relating to the court's decision to detain or release the defendant pending trial. Two reports published in February, 2016, one by HM Crown Prosecution Service Inspectorate entitled *Transforming Summary Justice: An Early Perspective of the CPS Contribution*¹ and the other by researchers at the University of the West of England entitled *The Practice of Pre-trial Detention in England and Wales*², suggested that in some cases the information required under Parts 8 and 14 was not being provided as quickly as it should be, so that when the information reached the court, late, pressure arose to make progress nonetheless: sometimes more quickly than might be just. Complaints by defence solicitors to the same effect were also reported to the Rule Committee.

¹ <http://www.justiceinspectors.gov.uk/hmcp/inspections/transforming-summary-justice/>

² <http://eprints.uwe.ac.uk/28291/>

- 7.3 Following discussion with prosecution and defence representatives, the Committee decided to make these amendments in order to impose explicit obligations upon the court to ensure that sufficient time – which might be no more than 5 or 10 minutes – is allowed for information to be considered and representations made and assessed. The Director of Public Prosecutions has issued guidance to prosecutors to corresponding effect.

Receipt for payment of fine, etc.

- 7.4 Rule 5 of these Rules amends rule 30.3 of the Criminal Procedure Rules (Enforcement of fines and other orders for payment – duty to give a receipt) to remove the obligation to give the defendant a receipt for the payment of a fine, etc. where the method that the defendant chooses to pay generates an independent record of the transaction.
- 7.5 The Rule Committee received a report from HM Courts and Tribunals Service that the overwhelming majority of payments made in discharge of fines and other sums ordered to be paid by the criminal courts now are made using credit or debit cards, or by direct bank transfer, thus generating an independent banking record to which reference can be made in the event of any dispute about payment. The Committee agreed that in those circumstances it was unnecessary to send the payer a receipt as well, and has changed the rule accordingly. The amended rule still requires the issue of a receipt where the method of payment does not create a bank, etc. record – where payment is made in cash, for example.

Restraining orders and labour market enforcement orders

- 7.6 Rule 6 of these Rules amends Part 31 of the Criminal Procedure Rules (Behaviour orders) (i) to require service of a draft restraining order where such an order is proposed by the prosecutor, and (ii) to accommodate a new type of order – a labour market enforcement order – introduced by the Immigration Act 2016.
- 7.7 A restraining order is an order made by a criminal court under section 5 of the Protection from Harassment Act 1997, if the defendant is convicted, or under section 5A of that Act if the defendant is acquitted, which for the purpose of protecting another person from harassment prohibits the defendant from doing anything described in the order. The Rule Committee received a report that despite the requirement of the current rules that a person against whom an order is proposed must be allowed an opportunity to consider it and make representations, still on occasions restraining orders were being made without sufficient consideration given to their terms. The Committee decided that an explicit requirement should be imposed for the service of a draft order in advance.
- 7.8 Section 20 of the Immigration Act 2016 allows a court which convicts a defendant of a ‘trigger offence’, as defined by section 14 of the Act, to make a labour market enforcement order imposing a prohibition, restriction or requirement of a type described in section 21 of the Act. Section 23 of the Act allows the court to vary or discharge such an order. CrimPR Part 31 was first introduced in 2008 as a procedural framework for all the ‘behaviour orders’ then extant and those which Parliament subsequently might introduce. Consequently, few amendments have been required to accommodate this new type of order.

Orders made by consent in connection with confiscation orders

- 7.9 Rule 7 of these Rules amends Part 33 of the Criminal Procedure Rules (Confiscation and related proceedings) to allow for some applications to the court to be determined with the consent of the parties without a court hearing.
- 7.10 Under the Proceeds of Crime Act 2002 the Crown Court can make an order confiscating the proceeds of a convicted defendant's crime or crimes. The court must make findings about the amount of the defendant's benefit from crime and about the amount available for confiscation, based on information supplied by the prosecutor and by the defendant and based on some presumptions prescribed by the Act. If on the information available when the defendant is convicted the prosecutor decides not to apply for a confiscation order, or the court decides not to make such an order, or the court decides that the defendant's benefit from crime was less than subsequently appears to be the case, and the prosecutor obtains fresh evidence, then under section 21 of the 2002 Act the prosecutor can ask the court to reconsider. Or if a confiscation order is made and on the information then supplied the court decides that the amount available for confiscation is less than subsequently appears to be the case, then under section 22 of the Act the prosecutor, or a receiver appointed to enforce the order, can ask the court to increase the amount to be confiscated. Or, finally, if a confiscation order is made and on the information then supplied the court decides that the amount available for confiscation is more than subsequently appears to be the case, then under section 23 of the Act the defendant, the prosecutor or a receiver appointed to enforce the order can ask the court to reduce the amount to be confiscated.
- 7.11 The Rule Committee received a report from the Crown Prosecution Service that in many such cases there is no dispute between the parties about the decision that the Crown Court should be asked to make. The current relevant rules, rule 33.15 (Application for reconsideration), rule 33.16 (Application for new calculation of available amount) and rule 33.17 (Variation of confiscation order due to inadequacy of available amount), each requires a court hearing; and it was suggested that they should be amended to allow for the possibility of the court making an order by consent so that neither party need attend a hearing. The Committee agreed and has amended those three rules accordingly. In future, a hearing need only be arranged where there is a dispute, or where the judge is not satisfied that the order proposed by the parties is appropriate.

Constitution of the Crown Court on an appeal from a youth court

- 7.12 Rule 8 of these Rules amends rule 34.11 of the Criminal Procedure Rules (Appeal to the Crown Court – constitution of the Crown Court) to remove the requirement that on an appeal from a youth court to the Crown Court the members of the Crown Court must include at least one of each gender.
- 7.13 Until July, 2016, it was a requirement of the law that governs the constitution of youth courts that such a court should consist either of (i) a District Judge (Magistrates' Courts), or (ii) not more than three justices, those three to include at least one man and one woman. On 31st July, 2016, that requirement was abolished by the Justices of the Peace Rules 2016. Under sections 73 and 74 of the Senior Courts Act 1981, in criminal cases it is the Criminal Procedure Rules that prescribe the constitution of the Crown Court on an appeal from a magistrates' court, including on an appeal from a magistrates' court sitting as a youth court. The Rules require the Crown Court to comprise a Crown Court judge and no fewer than two, or more than four, justices of

the peace. For as long as the constitution of a youth court was required to include members of both genders the Rule Committee thought it appropriate to impose a consistent requirement on the Crown Court, too. However, now that in a criminal case the youth court itself may comprise all women or all men (or just one District Judge (Magistrates' Courts)), the Committee thought it appropriate to maintain the consistency by allowing a Crown Court constitution of all women or all men.

Grounds of appeal to the Court of Appeal

- 7.14 Rule 9 of these Rules amends rule 36.14 of the Criminal Procedure Rules (Appeal to the Court of Appeal: general rules – grounds of appeal and opposition) to provide for the exclusion and reinstatement of grounds of appeal.
- 7.15 In the case of *R v Hyde and others* [2016] EWCA Crim 1031 the Court of Appeal confirmed a judge's power, when giving permission to appeal, to distinguish between grounds of appeal assessed as arguable, which can be relied upon at the appeal hearing, and grounds assessed as unarguable, which are excluded from discussion at the appeal hearing unless the appeal court gives the appellant permission to rely on them. The court observed that this power is not referenced by the Criminal Procedure Rules. Having considered the judgment, the Rule Committee decided to include in the Rules a reference to the exercise of the power and a procedure for applying to the court for permission to rely upon a ground of appeal that has been excluded.

Introducing evidence in the Court of Appeal

- 7.16 Rule 10 of these Rules amends Part 39 of the Criminal Procedure Rules (Appeal to the Court of Appeal about conviction or sentence) to include procedures for the introduction and assessment of evidence in those cases in which the court decides to consider evidence on appeal.
- 7.17 Rule 39.7 of the Criminal Procedure Rules (Adaptation of rules about introducing evidence) is a rule about the procedure for introducing evidence in the Court of Appeal on those occasions on which under section 23 of the Criminal Appeal Act 1968 the court allows an application for fresh evidence to be introduced. Rules 39.3 (Form of appeal notice) and 39.6 (Respondent's notice) contain provisions that require the parties to an appeal to give notice of any such application. However, the current rules contain no details of what exactly such an application must include; and they contain no procedure governing the way in which the Court of Appeal should arrange for a witness to be questioned before an examiner (that is, a judge or other person who presides over the questioning) where the court orders that to be done under section 23(4) of the 1968 Act. While considering other aspects of procedure in the Court of Appeal, the Rule Committee noted these omissions and decided to amend the rules to include more comprehensive provision.

Information withheld from another party on an application for the retention or return of seized property

- 7.18 Rule 11 of these Rules amends Section 4 of Part 47 of the Criminal Procedure Rules (Investigation orders and warrants – Orders for the retention or return of property) to include a procedure for dealing with information relevant to an application for the retention or return of seized property where the party who supplies that information thinks it should be withheld from the other party in the public interest, for example because it discloses details of a continuing investigation.

- 7.19 The rules in Section 4 of Part 47 of the Criminal Procedure Rules supplement the statutory provisions that allow magistrates and Crown Court judges to make orders about the retention or return of property which has been obtained in the course of a criminal investigation, on an application made by the investigators or by the owner of the property. In the case of *R (Haralambous) v St Albans Crown Court* [2016] EWHC 916 (Admin) the High Court decided that on such an application it was permissible for a court to take account of information relied upon by one party which in the public interest was withheld from the other. Having considered the judgment, the Rule Committee decided to include in the Rules a procedure for applying to the court to make a decision about how to deal with such information.

Extradition proceedings: case management, etc. amendments

- 7.20 Rule 12 of these Rules amends twenty rules in Part 50 of the Criminal Procedure Rules (Extradition) so as to provide for (i) a further objective in extradition proceedings; (ii) the conduct of some proceedings without a hearing in the magistrates' court; (iii) proceedings in a defendant's absence in prescribed circumstances in the magistrates' court; (iv) case management in the magistrates' court; (v) the procedure on an application to appeal out of time to the High Court; (vi) the making of a consent order without a hearing in the High Court; (vii) the exclusion and reinstatement of grounds of appeal to the High Court; (viii) notices and consent orders that conclude proceedings in the High Court; (ix) proceedings on post-extradition requests for the court's consent to prosecution for other offences in the requesting state, or for extradition from that state to a third state; and (x) changes consequential on all those others.
- 7.21 The rules in Part 50 of the Criminal Procedure Rules supplement the Extradition Act 2003 and govern procedure in extradition cases in the magistrates' court and in extradition appeal cases in the High Court. In the course of its judgment in *Puceviciene v Lithuanian Judicial Authority and other appeals* [2016] EWHC 1862 (Admin), the High Court invited the Rule Committee to include in the Rules explicit provision for advance notice of issues to be raised in extradition proceedings in the magistrates' court and explicit provision for the preparation of requests for information from requesting states for use in such proceedings. During 2016 the Committee received also a number of suggestions for procedural improvements from judges, from court staff, from the Crown Prosecution Service (which conducts most extradition cases) and from defence lawyers; some of those suggestions prompted by the *Puceviciene* judgment and some others prompted by another High Court judgment, in *Norbert Szegfu v Court of Pecs, Hungary* [2015] EWHC 1764 (Admin), which considered the circumstances and manner in which an application for permission to appeal out of time should be considered by the High Court.
- 7.22 The Rule Committee considered those judgments and all the suggestions received. The amendments on which the Committee decided will adopt a new 'further objective' to supplement the overriding objective in Part 1 of the Criminal Procedure Rules with provisions specific to extradition proceedings, in response to observations by the High Court in the *Puceviciene* case. The amendments will make explicit the magistrates' court's existing powers of case management, including its powers to superintend the preparation of requests for information from requesting states, to vary procedural time limits (subject to statutory time limits) and to conduct and postpone post-extradition hearings; its existing powers to deal with ancillary matters without a hearing, including, for example, an unopposed application to alter conditions of bail;

and its existing powers to conduct proceedings by live video link. The amendments will incorporate references to the court's existing statutory power to proceed in a defendant's absence where, for example, a defendant who is in custody refuses to attend court, and to the court's power to consider without a hearing the circumstances in which an application for permission to appeal has been made out of time, as established by the judgment in the *Szegfu* case. The amendments will allow for more cases than now in which the High Court can make an order to which the parties agree so that neither need attend a hearing when there is nothing in dispute. Finally, the amendments will align the rule about excluding and reinstating grounds of appeal to the High Court with the new rule on the same subject for the Court of Appeal: see paragraphs 7.14 and 7.15 above.

Miscellaneous corrections

- 7.23 Rule 39.11 of the Criminal Procedure Rules (Appeal to the Court of Appeal about conviction or sentence – Right to attend hearing) lists the circumstances in which an appellant or respondent who is in custody has a right to attend a hearing in the Court of Appeal. While considering other aspects of procedure in the Court of Appeal, the Rule Committee corrected an omission from that list.
- 7.24 In Part 50 of the Criminal Procedure Rules (Extradition) a number of rules are amended to remove superfluous instances of the expression 'written' or 'in writing', where that occurs in a context which necessarily requires there to be a written document.

Consolidation

- 7.25 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 addition, in connection with the amendments to Parts 8 and 14 of the Criminal Procedure Rules (see paragraphs 7.1 to 7.3 above) the Committee convened a special meeting with prosecution and defence representatives from the relevant national organisations; and in connection with the amendments to the extradition procedure

rules (see paragraphs 7.20 to 7.22 above) the Committee invited and received written and oral comments from representatives of those mentioned in paragraph 7.21.

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 and the Ministry of Justice.
- 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.