

EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2021
2021 No. 40 (L. 1)

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Rules amend the Criminal Procedure Rules 2020, S.I. 2020 No. 759, in nine principal respects.
- 2.2 They add to the overriding objective of the Criminal Procedure Rules an explicit obligation to treat participants with politeness and respect. They require the parties to a criminal case to alert the court to any impediment to a defendant's effective participation in the proceedings and provide explicitly for the appointment and duties of intermediaries for witnesses and defendants. They require the parties to alert the criminal court to any related family proceedings and encourage the exchange of relevant information with a court dealing with those proceedings. They require the obtaining of a defendant's nationality at the point at which that information is relevant. They require the parties to an appeal to the Court of Appeal to supply that court with documents in electronic form. They clarify references to 'respondents' on applications for some types of investigation order. They include rules to supplement a new power of arrest in extradition proceedings. They amend rules consequentially on new sentencing legislation. They amend rules consequentially on other legislation that has effect in connection with the withdrawal of the United Kingdom from the European Union.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 In its Twenty-Sixth Report of Session 2019-21, published on 14th October, 2020, the Joint Committee on Statutory Instruments reported for defective drafting (i) rule 33.59 of the Criminal Procedure Rules 2020, which continued erroneously to refer to section 31B of the Bankruptcy (Scotland) Act 1985 instead of to section 82 of the Bankruptcy (Scotland) Act 2016, (ii) rule 44.2(2)(a)(i) of the 2020 Rules, which erroneously referred to a time limit of 15 business days instead of to the applicable statutory time limit of 21 days, and (iii) rule 44.2(4)(b) and (c), (5)(c) and (6)(b) of the 2020 Rules which referred erroneously to "the rules in this Part" instead of to "the rules in Part 24". Those errors are corrected by rules 19 and 26 of these Rules.
- 3.2 In the same Report the Joint Committee reported rule 47.32 of the Criminal Procedure Rules 2020 for requiring elucidation, provided by the department's memorandum, and drew attention to the department's undertaking to invite an elaboration of the note to the associated rule 47.24. Rule 27(j) of these Rules elaborates that note.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 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 criminal division of the Court of Appeal. 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.
- 6.2 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 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 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.
- 6.3 These Rules exercise the power conferred by section 86A of the Courts Act 2003, inserted by the Policing and Crime Act 2016, in specified circumstances to require the obtaining of a defendant's nationality. They supplement sections 74A to 74E of the Extradition Act 2003, inserted by the Extradition (Provisional Arrest) Act 2020, which in specified circumstances allow for the arrest without warrant of a defendant sought for an alleged extradition crime. They clarify the procedure rules governing applications for disclosure orders made under Schedule 5A to the Terrorism Act 2000 or under sections 357 and 362 of the Proceeds of Crime Act 2002. They make rule amendments consequent on the Sentencing Act 2020, and consequent on the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 and the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019.

7. Policy background

What is being done and why?

Obligation to treat others with politeness and respect

- 7.1 There were reported to the Rule Committee occasions on which participants in criminal cases had been subjected to disrespectful, abusive, aggressive or violent behaviour. The Committee decided that it would be appropriate explicitly to require that which it had been hoped would be implicit, obvious and superfluous, in the hope of encouraging the maintenance of mutual politeness and respect among all participants.
- 7.2 Rule 5 of these Rules amends rule 1.1 of the Criminal Procedure Rules, the overriding objective, accordingly.

Effective participation and intermediaries

- 7.3 Intermediaries in criminal cases help witnesses and defendants who need such assistance to understand and answer questions and to understand what happens in court. The appointment of an intermediary may be approved by the court under statutory powers (section 29 of the Youth Justice and Criminal Evidence Act 1999 for witnesses, or section 33BA of that Act for defendants – but that latter provision is not yet in force) or made in exercise of the court’s inherent powers. Non-legislative guidance about the appointment and functions of intermediaries has long been available;¹ the Court of Appeal has given guidance (for example, in *R v Thomas*² and in the cases cited in that judgment); and Criminal Practice Directions made by the Lord Chief Justice apply.³ However, there have been no Criminal Procedure Rules governing those matters.
- 7.4 It was reported to the Rule Committee that the absence of rules had on occasion led to misapprehensions about the role and responsibilities of intermediaries. The Committee decided to codify the requirements identified by the courts and in the advice and guidance already published. It consulted with those representing intermediaries, with the suppliers of intermediaries’ services, with those responsible for the preparation of the existing advice and guidance, and with members of the judiciary and legal professions. The outcome is the new rules and rule amendments in Parts 3 and 18 of the Criminal Procedure Rules 2020 added by rules 6 and 9 of these Rules. The new rules include a definition of ‘intermediary’ for the purposes of the Criminal Procedure Rules; criteria for the appointment of an intermediary; requirements for the content of an intermediary’s report for the court; rules about the variation or discharge of an intermediary’s appointment; and a description of an intermediary’s duty to the court.

Related family proceedings

- 7.5 In a judgment given two years ago⁴ a former President of the Family Division of the High Court deprecated a lack of communication in that case between the courts and

¹ See in particular the ‘toolkits’ at: <https://www.theadvocatesgateway.org/toolkits> and the *Equal Treatment Bench Book* published by the Judicial College at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

² [2020] EWCA Crim 117, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2020/117.html>.

³ Set out in the judgment in *R v Thomas*.

⁴ *Re H (Children)* [2018] EWFC 61, available at: <https://www.bailii.org/ew/cases/EWFC/HCI/2018/61.html>.

parties dealing with a prosecution and with family proceedings arising out of the same events. Prompted by that judgment and by Committee members' own experiences, and after consulting with the current President of the Family Division, the Rule Committee decided to make rule amendments the effect of which is (i) to remind parties to criminal proceedings of their obligations to ensure that family proceedings related to a prosecution are brought to the attention of the criminal court, and relevant information about the prosecution is conveyed to the court dealing with those family proceedings, and (ii) to remind parties and courts of the criminal court's powers and potential responsibilities to request and supply relevant information.

- 7.6 Rule 6 of these Rules makes amendments to rules 3.3 and 3.5 of the Criminal Procedure Rules 2020 accordingly.

Requirement to collect defendant's nationality

- 7.7 Section 86A of the Courts Act 2003 requires Criminal Procedure Rules to require criminal courts to require a defendant to give the defendant's name, date of birth and nationality at a stage or stages of proceedings specified by the Rules. The section was added by the Policing and Crime Act 2016 and came into force on 13th November, 2017. The Explanatory Notes published with the 2016 Act described the objective of the legislation as follows: "Foreign nationals comprise 12% of the prison population in England and Wales. The Government aims to remove as many Foreign National Offenders ("FNOs") as quickly as possible to their home countries, to protect the public, to reduce costs and to free up spaces in prison."
- 7.8 Courts ask defendants to confirm their identity at the beginning of each case, to make sure that the person attending is the person whom the court expects. Where a defendant is held in custody pending trial, and where a defendant is convicted and given a custodial sentence, custody staff obtain the defendant's nationality, among other personal details. The effect of the 2016 statutory amendment was taken to be that every defendant had to be asked to give their nationality at the beginning of the case, when they were asked to give their name and date of birth, and the Criminal Procedure Rules so required from the date on which that statutory amendment came into force.
- 7.9 On 25th May, 2018, the Data Protection Act 2018 came into force. The Act sets out data protection principles which prescribe the circumstances in which personal information, such as a person's name, date of birth and nationality, lawfully may be collected, recorded and passed on to others. The published objective of such 'data processing', as the Act calls it, is a relevant factor, as is the proportionality to that objective of the means used to achieve it.
- 7.10 In July, 2020, the Rule Committee received a paper suggesting that the practice required by the Criminal Procedure Rules no longer could be reconciled with the data protection principles prescribed by the Data Protection Act 2018. It suggested that the collection of a defendant's nationality under section 86A could not lawfully take place unless and until that defendant had been convicted and had received such a sentence as would render a foreign national offender susceptible to deportation under immigration law. The Committee accepted that suggestion and advised courts to act accordingly. Rule 6(d) and (e) of these Rules removes the current requirements from the Criminal Procedure Rules 2020, and rules 12(c) and 13(c) of these Rules add the statutory requirements to those already applied by custody staff.

Electronic documents for the Court of Appeal

- 7.11 Most documents needed for a Crown Court trial now are delivered and stored electronically, so that the court and the parties to the case have ready access to them. On an appeal from the Crown Court to the Court of Appeal the staff of the Registrar of Criminal Appeals also have access to those documents by electronic means; and if the parties to the appeal identify the electronic documents and electronic case reports that they want the Court of Appeal to read then the appeal can be prepared and dealt with more efficiently.
- 7.12 For that reason, the Registrar of Criminal Appeals asked the Rule Committee to make it a requirement for the parties to an appeal to include with their appeal notices electronic links to each stored document to which they want to refer, and electronic copies of case reports on which they rely. The Committee agreed to do so. Rules 20, 21, 22, 23, 24 and 25 of these Rules make the necessary amendments to the relevant Parts of the Criminal Procedure Rules 2020.

Applications for disclosure orders – identification of respondents

- 7.13 The rules in Part 47 of the Criminal Procedure Rules 2020 govern applications for, among other things, a type of court order that can be made under the Terrorism Act 2000 and under the Proceeds of Crime Act 2002 known as a ‘disclosure order’, which authorises a person investigating a suspected crime to question anyone whom the investigator thinks may have information of substantial value to the investigation. The rules presently assume that at the time of the application to the court there will be at least one identifiable person whom the investigator expects to question, described by the rules as a ‘respondent’.
- 7.14 It was pointed out to the Rule Committee that although in practice usually there will be such a respondent when the application to the court is made nevertheless neither Act requires that there must be such a person at that stage, and there may be cases in which there is none then. The Committee accepted that in such a case the way in which the rules are written could be misleading and agreed to adjust them. Accordingly, rule 27(b) to (i) of these Rules adjusts eight rules in Part 47 to accommodate the possibility of there being no identifiable respondent at the time the application is made.

Rules to supplement the Extradition (Provisional Arrest) Act 2020

- 7.15 Where another country seeks the return of a fugitive defendant for a serious extradition offence under Part 2 of the Extradition Act 2003 then the Extradition (Provisional Arrest) Act 2020 gives the police a new power of arrest without warrant pending receipt of a formal extradition request. Where the new power is used then as soon as practicable an extradition judge must assess the supporting evidence or information and must decide whether it would have been enough to justify the issue of an extradition arrest warrant, had one been sought. If it would not, the defendant must be discharged. If it would, then the extradition proceedings will continue just as if the arrest had been under a warrant.
- 7.16 This new procedure requires some amendments to the extradition procedure rules in Part 50 of the Criminal Procedure Rules 2020 so as to provide for a first court hearing and the procedure at that hearing. The Rule Committee has made rule amendments accordingly which are applied by rule 29(b) to (f) of these Rules.

References to sentencing legislation

- 7.17 On 1st December, 2020, the Sentencing Act 2020 consolidated and replaced most previous legislation to do with sentencing. The Criminal Procedure Rules 2020 contain a number of references to that previous legislation which would be misleading if they were not replaced. These Rules replace those references with references to the corresponding new provisions.

Rule amendments connected with the withdrawal of the United Kingdom from the European Union

- 7.18 The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, S.I. 2019 No. 742,⁵ and the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019, S.I. 2019 No. 780,⁶ on 31st December, 2020, each repealed, revoked or amended other criminal justice legislation on termination of the arrangements with EU member states to which that other legislation gave effect. The Explanatory Memoranda published with those two statutory instruments give details. The Criminal Procedure Rules 2020 contain references to that other criminal justice legislation which would be misleading if they were not removed. These Rules remove those references from the 2020 Rules.
- 7.19 The 2019 Regulations include transitional provisions the effect of which, in summary, is to retain for the purposes of a case in progress on the date on which those Regulations come into force the criminal justice legislation which they otherwise repeal, revoke or amend. Rule 3 of these Rules therefore makes corresponding transitional provision for the amendments to the 2020 Rules. The effect is that where, for example, the United Kingdom has received a request to enforce a financial penalty imposed by an EU member state and the enforcement was not complete when the Regulations came into force, then regulation 20 of the Criminal Justice (Amendment, etc.) (EU Exit) Regulations 2019, the relevant transitional provision, applies; and under rule 3 of these Rules the revocation of rule 30.10 of the 2020 Rules by rule 16(b) of these Rules does not apply for the purposes of completing that request.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 Under the powers conferred by sections 69 and 72 of the Courts Act 2003 this instrument makes amendments to the Criminal Procedure Rules 2020 described in paragraphs 7.18 and 7.19 of this Memorandum which are consequent on amendments to other legislation which have been made to address failures of retained EU law to operate effectively, or other deficiencies arising from the withdrawal of the UK from the EU.

9. Consolidation

- 9.1 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 desirability of continuing to consolidate the Rules at regular intervals, the Committee decided to do so: at first annually, between 2010 and 2015, then in 2016 reverting to the plan to consolidate at 5 yearly intervals.

⁵ Published at <https://www.legislation.gov.uk/ukxi/2019/742/contents>.

⁶ Published at <https://www.legislation.gov.uk/ukxi/2019/780/contents/made>.

9.2 In accordance with that plan the Rules were consolidated again in 2020. The Committee now intends to make a further consolidation in 2025. Meanwhile, the effects of amendments to the Criminal Procedure Rules 2020 will be published at <http://www.legislation.gov.uk/ukxi/2020/759/contents/made> and an informal consolidated text will continue to be available to the public, with some additional commentary and explanation, at <https://www.gov.uk/guidance/rules-and-practice-directions-2020>.

10. Consultation outcome

- 10.1 The Rule Committee fulfilled its statutory obligation to consult as the Committee considers appropriate by inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn.
- 10.2 In addition, (i) in connection with the new rules about intermediaries the Committee consulted with those representing intermediaries, with the suppliers of intermediaries' services, with those responsible for the preparation of the current advice and guidance about intermediaries, and with members of the judiciary and legal professions; (ii) in connection with the new rules about related family proceedings the Committee consulted with the President of the Family Division of the High Court; (iii) in connection with the new rules about electronic documents for the Court of Appeal the Committee consulted with the Registrar of Criminal Appeals and her staff; (iv) in connection with the amendments to the rules about applications for disclosure orders the Committee invited comments from agencies that make applications for such orders; and (v) in connection with the rule amendments occasioned by the Extradition (Provisional Arrest) Act 2020 the Committee invited comments from the Home Office. In each case the Committee incorporated the observations received.

11. Guidance

- 11.1 Amendments to the Criminal Procedure Rules are drawn to the attention of participants in the criminal justice system by correspondence addressed 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.
- 11.2 News of changes to the Rules and of the effect of those changes is published at <https://www.gov.uk/guidance/announcements-from-the-criminal-procedure-rule-committee>.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 These Rules have no impact of themselves on the public sector because they maintain rules and procedures that are already current and introduce new rules and procedures that give effect to other legislation or established best practice.
- 12.3 An Impact Assessment has not been prepared for this instrument.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 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. At least once 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.
- 14.2 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.
- 14.3 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.

15. Contact

- 15.1 Jonathan Solly at the Ministry of Justice telephone: 07811 823574 or email: jonathan.solly@justice.gov.uk can answer any queries regarding the instrument.
- 15.2 Matthew Gould, Deputy Director for Criminal Courts and Criminal Law Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon. Robert Buckland QC MP, the Lord Chancellor, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.