

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE RULES 2013**

2013 No. 1554 (L. 16)

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 2012, S.I. 2012 No. 1726, and the Criminal Procedure (Amendment) Rules 2012, S.I. 2012 No. 3089. In addition, they replace the existing rules about procedure in extradition cases (Part 17), and make amendments to (i) the rules about preparation for trial (Part 3); (ii) the rules about applications for investigation orders (Part 6); (iii) the rules about applications to dismiss a case sent for trial in the Crown Court (Part 9); (iv) the rules about applications for bail and appeal against bail decisions (Part 19); and (v) the rules about ‘behaviour orders’ made on a defendant’s conviction (Part 50). 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 as failing to comply with proper drafting practice the use in the Criminal Procedure Rules 2011, S.I. 2011 No. 1709, of the word ‘will’ to express expectation where the JCSI had concluded that clarity required an expression of obligation instead.

3.2 In its Ninth Report of Session 2012-13, published on 8th November, 2012, the JCSI reported as requiring elucidation the continued use in the Criminal Procedure Rules 2012 of the word ‘will’ in the same instances as reported before. The Report referred to consultation on the use of that expression between the Criminal Procedure Rule Committee, the Civil Procedure Rule Committee and the Family Procedure Rule Committee. In its First Special Report of Session 2013-14, entitled ‘Excluding the inert from secondary legislation’, published on 21st May, 2013, the JCSI referred again to that consultation.

3.3 In these Rules, the word ‘will’ has been replaced by the word ‘must’ in those instances reported by the JCSI and in all comparable instances, with the exception of four occurrences. The rules which have been amended are listed in the Explanatory Note to these Rules and at paragraph 7.26 below. The four occurrences not yet amended appear in Part 73 (Appeal to the Court of Appeal under the Proceeds of Crime Act 2002: restraint or receivership orders). As part of its programme of rule reform, the Criminal Procedure Rule Committee intends as soon as possible to replace that Part in its entirety. In the meantime, no judgment of a court, nor any complaint by a user of the Criminal Procedure Rules, save for the JCSI’s Thirty-first Report of Session 2010-12, suggests that the affected rules have been misunderstood since rules in those terms first appeared in the Criminal Appeal (Confiscation, Restraint and

Receivership) Rules 2003, S.I. 2003 No. 428, and subsequently in the Criminal Procedure Rules 2005, S.I. 2005 No. 384, and in the Criminal Procedure Rules 2010, S.I. 2010 No. 60.

3.4 Having consulted with the Civil Procedure Rule Committee and the Family Procedure Rule Committee, the Criminal Procedure Rule Committee understands that neither presently intends to change its established drafting practice, as described in a memorandum appended to the JCSI's Forty-first report of Session 2010-12, published on 6th March, 2012, and reproduced in the First Special Report of Session 2013-14, cited above. A difference between the circumstances of the three Rule Committees that the Committees regard as significant is that, in numerous instances, primary legislation imposes procedural obligations upon courts when dealing with criminal cases which such legislation does not impose in civil or family cases. To that extent, therefore, the rules of procedure made by each Rule Committee reflect different statutory contexts.

3.5 These Rules include empty Parts, maintaining a feature established by the Criminal Procedure Rules 2005 and repeated in the Criminal Procedure Rules 2010, the Criminal Procedure Rules 2011 and the Criminal Procedure Rules 2012. The Criminal Procedure Rule Committee believes that to maintain this feature avoids confusion pending its planned final consolidation of the Criminal Procedure Rules in 2015, with numeration in order and no empty Parts then retained. Consultation conducted by the Rule Committee in previous years among those who use and who publish the Rules has indicated that the repeated renumbering of the rules in the meantime would result in a potential for confusion, and a certainty of disproportionate expense, for such users and publishers. In these Rules, the Rule Committee has made one exception to that principle by removing from Part 21 to Part 10 the rules about service of initial details of the prosecution case. Those rules do not concern disclosure in the sense in which that word is used in the heading to the division of the Rules in which Part 21 appears. In the Rule Committee's view, in this instance any disadvantage caused by the relocation of those rules now is outweighed by the advantage of their removal to a more appropriate position.

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 These Rules accommodate, by new rules, by rule amendments, or by cross-reference, as appropriate: sections 8, 15 and 16 of the Police and Criminal Evidence Act 1984, and section 2 of the Criminal Justice Act 1987, which allow a justice of the peace to issue a search warrant to officers investigating an alleged criminal offence; sections 3, 14 and 19 of the Protection of Freedoms Act 2012, which insert in the Police and Criminal Evidence Act 1984 and in the Terrorism Act 2000 provisions governing the retention by the police of fingerprints, DNA profiles and DNA samples; and miscellaneous amendments to other legislation made by the Crime and Courts Act 2013.

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 annual intervals, the Committee decided to do so: first in the Criminal Procedure Rules 2011, then in the 2012 Rules, and now in these Rules.

Case management: identifying the intended defence trial advocate

7.2 In Part 3 (Case management), rule 3.8(3) (Case preparation and progression) is amended to require the defendant in a Crown Court case to give notice of the identity of the intended defence trial advocate, and to give notice of any change of advocate.

7.3 This information is already invited by the questionnaire prescribed for use in pre-trial Crown Court case management by the Consolidated Criminal Practice Direction made by the Lord Chief Justice. The effect of the rule amendment is to reinforce the long-standing expectation, reflected in that questionnaire, that the court must be told as soon as possible who is to be the trial advocate: potentially to facilitate the listing of the trial, and for all the other purposes of case management and trial preparation. The rule thus codifies the established practice requirements and requires of defence representatives no more than is already expected.

7.4 The Rule Committee expects the rule also to assist the defendant's representatives by ensuring that the court office has an accurate and up to date record

of the identity of the trial advocate for use in the administration of claims for, and payment of, fees.

Investigation orders: search warrants; retention of fingerprints, etc.

7.5 In Part 6 (Investigation orders), rule 6.1 (When this Part applies) and the notes to that rule are amended to extend the scope of Part 6 to an application to a justice of the peace for a search warrant, and to an application or appeal concerning the retention by the police of fingerprints, samples and DNA profiles. Rule 6.2(c) (definitions) and rule 6.5 (which requires court staff to be given, and to keep, certain documents) are amended in consequence. Rules 6.29 to 6.33 are added to govern the procedure on an application for a search warrant. Rules 6.34 to 6.36 are added to govern the procedure on fingerprint, etc. retention applications and appeals. The Part title and table of contents are amended correspondingly.

7.6 The Criminal Procedure Rules have not hitherto governed applications for search warrants. In the case of *R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and Director of the Serious Fraud Office (Vincent Tchenguiz, interested party)* and *R (Robert Tchenguiz and R20 Ltd.) v Director of the Serious Fraud Office, Commissioner of the City of London Police and Central Criminal Court* [2012] EWHC 2254 (Admin), the High Court recommended that the Criminal Procedure Rule Committee should review the procedures followed on such applications. The Rule Committee has added rules 6.29 to 6.33 to supply a procedure which is intended to help make sure that applications meet fully all the relevant statutory requirements, as interpreted by the courts.

7.7 While considering those rules, the Rule Committee heard from magistrates and their legal advisers that it would help magistrates' courts to have a prescribed procedure for dealing with applications for access to the material on the basis of which a search warrant had been issued. The Committee has amended rule 5.7 (Supply to a party of information or documents from records or case materials) to help courts strike the right balance between, on the one hand, the confidentiality which must attach to the investigation of an alleged crime and, on the other, a person's right to know why a search warrant was issued against him or her.

7.8 Rules 6.34 to 6.36 supply a procedure to supplement the new legislation about the retention of fingerprints etc., consistent with the requirements of that legislation.

Committal, transfer and sending for trial

7.9 In Part 9 (Allocation and sending for trial), rule 9.16 is added to supply the procedure on an application to dismiss a charge sent to the Crown Court for trial, in substitution for the rules formerly in Part 13. The table of contents is amended correspondingly. The rules that were in Parts 10, 11 and 13 of the Criminal Procedure Rules 2012 all are revoked (and new rules are placed in Part 10: see below).

7.10 By the final implementation on 28th May, 2013, of the statutory amendments made by Schedule 3 to the Criminal Justice Act 2003, the processes of committal for trial to the Crown Court and of transfer for trial there were abolished. Now, more serious cases are instead sent for trial by a magistrates' court, under the statutory provisions that are listed in the notes to the rules in Part 9.

7.11 Where a case has been sent to the Crown Court for trial, provisions of the Crime and Disorder Act 1998 allow the defendant to apply to the court to dismiss a

charge on the grounds that the prosecution evidence would not be sufficient for the defendant to be properly convicted. Hitherto, the procedure rules governing such applications have been contained in Part 13 of the Criminal Procedure Rules. The Rule Committee has taken this opportunity to revise, simplify and consolidate those rules, and to place the new rule governing the procedure with the other rules about sending for trial. The Committee's intention is not to change the current practice and procedure of the Crown Court, merely to reformulate the rules compatibly with the expression of other, more recently drafted, Criminal Procedure Rules.

Initial details of the prosecution case

7.12 The rules that were in Part 21 of the Criminal Procedure Rules 2012 have been moved to Part 10. They have not been changed. As explained at paragraph 3.5 above, Part 10, now it is available, is a more appropriate place for them.

Extradition

7.13 A new Part 17 (Extradition) is substituted for the old rules in that Part.

7.14 Hitherto, Part 17 of the Criminal Procedure Rules has supplied the procedure where either the Backing of Warrants (Republic of Ireland) Act 1965 or the Extradition Act 1989 applied. Those Acts were replaced by the Extradition Act 2003. Those Acts, and the old rules, still are not wholly redundant, because they continue to apply to an extradition request presented to the Secretary of State under either of the old Acts before the end of 2003; and, in some cases, the fugitive in question remains at large. However, the overwhelming majority of extradition requests that now come before the court are made under the Extradition Act 2003, which comprehensively superseded the previous extradition regimes.

7.15 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 bring up to date the rules, expressing them in the manner of other, more recently drafted, Criminal Procedure Rules. The Committee's intention is that the new rules should set out in simple steps the procedure compelled by the provisions of the Extradition Act 2003.

7.16 Rule 2.1(4) preserves the old rules for old extradition cases.

Bail

7.17 In Part 19 (Bail and custody time limits), rule 19.4(4) is added to include in the list of information that the magistrates' court officer must give the defendant where relevant, where bail is withheld, a statutory certificate that the court heard full argument. Rule 19.8(3) is amended to require the defendant to pass that certificate to the Crown Court officer on making an application under that rule. Rule 19.9(6) is amended to remove the requirement for the Crown Court officer to send information to the High Court on a prosecutor's appeal to that court against a grant of bail by the Crown Court.

7.18 In some circumstances, a defendant who has been refused bail by a magistrates' court can renew the application to the Crown Court. Under the Bail Act 1976 and the Senior Courts Act 1981, one of the pre-conditions for being able to do so is that the magistrates' court heard 'full argument' in support of the application for bail before refusing and has issued a certificate to that effect. Although the rules in Part 19 already contain provisions meant to ensure that the 'certificate of full argument' is passed to the Crown Court, enquiries by the Rule Committee established

that this was not always done, and that applications might be delayed or rejected unnecessarily in consequence. The Committee decided that rules 19.4 and 19.8 should be amended to make it clear that, in such a case, the magistrates' court staff must give the certificate to the defendant, and the defendant in turn must give it to the Crown Court.

7.19 In some circumstances, where a defendant is granted bail by the Crown Court, the prosecutor can appeal against that decision to the High Court. The procedure in the High Court is governed by the Civil Procedure Rules. Those rules have been amended to require the prosecutor to give the High Court documents which, under the current Criminal Procedure Rules, the Crown Court staff must send to the High Court. The Criminal Procedure Rule Committee has changed rule 19.9 to remove that duplication. In future, it will be the responsibility of the prosecutor, only, to deliver those documents to the High Court.

Sentence review

7.20 In Part 42 (Sentencing procedures in special cases), rule 42.11 is amended to clarify the prosecutor's obligations on applying for a sentence review.

7.21 Under section 74 of the Serious Organised Crime and Police Act 2005, where the Crown Court has sentenced a defendant the prosecutor can ask the court to reduce that sentence if the defendant subsequently agrees to assist in the investigation or prosecution of an offence. Or, where the defendant has received a lesser sentence than the court otherwise would have passed because the defendant has agreed to give such assistance, the prosecutor can ask the court to increase that sentence if the defendant subsequently fails to assist.

7.22 The current rule requires the prosecutor, on making such an application, to specify for the court the reduction or increase proposed. The Crown Prosecution Service reported to the Rule Committee that the wording of the current rule was being read by some to mean that the prosecutor should make more explicit sentencing proposals than is usually considered appropriate. The Committee agreed to amend the rule to clarify its intention.

Sexual offences prevention orders

7.23 In Part 50 (Civil behaviour orders after verdict or finding), rule 50.3 is amended to require that a draft of any proposed sexual offences prevention order must be served not less than 2 business days before the hearing at which the order may be made. The table of contents is amended correspondingly.

7.24 Under the Sexual Offences Act 2003, in some circumstances the court which convicts a defendant may make an order imposing prohibitions that the court considers 'necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant'. The penalty for breach of such an order is a maximum of 5 years' imprisonment.

7.25 On several occasions in recent years, the Court of Appeal has expressed concern at the wide or ambiguous terms in which a sexual offences prevention order had been imposed, finding that insufficient attention had been given to the drafting of the order. In the case of *R v Smith, Clarke, Hall and Dodd* [2012] 1 WLR 1316, the Court of Appeal recommended that at least 2 days' written notice should be given of the proposed terms of an order. Although Part 50 of the Criminal Procedure Rules

already requires that a defendant against whom is sought any of the orders to which that Part applies should have an opportunity to consider what is proposed, the Rule Committee decided that it would be appropriate to codify in the Rules the specific requirement recommended by the Court of Appeal.

Other amendments

7.26 In response to the reports by the Joint Committee on Statutory Instruments (see paragraphs 3.1 and 3.2 above), the word ‘must’ has been substituted for the word ‘will’ in rules 4.2(2), 5.1, 5.7(5), 5.8(5) and (7), 6.3(1)(a), 6.12(4)(a), 6.21(4)(a), 6.23(1)(a) and (2)(a), 15.4(4)(a) and (5)(a), 16.6(6)(a) and (7)(a), 22.3(6)(a) and (7)(a), 22.6(6)(a) and (7)(a), 29.12(4)(a), 29.18(1)(a), 29.19(3)(a), 32.10(2)(a), 34.4(2), 37.10(5)(c), 37.11(3), 52.4(3), 52.6(4)(a), 52.10(4)(a), 55.5(7), 60.7(6), 61.15(1), 61.19(3), 62.8(3), 62.10(3), 75.3(2), 76.2(6), 76.4(5), 76.5(3), 76.9(7) and 76.10(7). In response to the same reports, rule 75.4 has been omitted.

7.27 The notes about case management provisions at the end of Part 3, and the notes about the general entitlement to bail and the exceptions to that general entitlement at the end of Part 19, are brought up to date; as are the notes to rules 5.4, 5.8, 5.9, 6.1, 9.1, 9.3, 9.5, 9.6, 9.7, 14.1, 16.1, 19.6, 19.7, 19.9, 19.16, 50.3, 55.2 and 68.11. The entries in the Glossary for ‘committal proceedings’, ‘estreatment’, ‘examining justices’ and ‘notice of transfer’ all are removed because, consequent among other things on the abolition of committal and transfer proceedings (see paragraph 7.10 above), those expressions no longer appear in the Rules.

Bringing the new rules into force

7.28 These Rules come into force on Monday 7th October, 2013, following the convention explained at paragraph 4.2 above. To effect the transition from the Criminal Procedure Rules 2012, rule 2.1(3) preserves any right or duty at that date existing under those rules.

- ***Consolidation***

7.29 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 search warrants, the retention of fingerprints etc., and extradition, the Committee consulted with those practitioners and authorities most likely to use or to be affected by those rules; with those government departments responsible for the implementation of the relevant new statutory provisions; and with 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 because they include new rules 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.