

EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (AMENDMENT No. 3) RULES 2017

2017 No. 755 (L. 11)

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 2015, S.I. 2015 No. 1490, in various respects. New and amended Criminal Procedure Rules require the Crown Court when giving directions for trial to ensure that specified explanations have been given to the defendant. They draw attention to the potential consequences of trying together offences that should be tried separately. They allow electronic service of documents in extradition appeal cases later on the day of service than now. They supply procedures to supplement the Criminal Justice (European Investigation Order) Regulations 2017 and the Criminal Finances Act 2017. 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 In its Twenty-sixth Report of Session 2016-17, published on 31st March, 2017, the Joint Committee on Statutory Instruments reported the Criminal Procedure (Amendment) Rules 2017, S.I. 2017 No. 144, for defective drafting. The Joint Committee observed that rule 11 of those Rules inserted a new rule 47.39 into the Criminal Procedure Rules and renumbered subsequent rules in that Part; but in four of those renumbered rules references to other renumbered provisions had not been changed. At Appendix 9 to that Report (referenced at paragraph 9.3. of the Report as Appendix 8) there were recorded the Ministry's apology for those errors and its undertaking to correct them.
- 3.2 Rule 10(o), (p), (q) and (t) of these Rules correct those errors.

Other matters of interest to the House of Commons

- 3.3 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 other legislation to which paragraphs 2 and 7 of this Memorandum refers.

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

Explanations for the defendant in the Crown Court

- 7.1 Rule 4(a) of these Rules amends rule 3.13 of the Criminal Procedure Rules to require the Crown Court at the plea and trial preparation hearing, which is the principal pre-trial case management hearing in the Crown Court, to ensure that explanations have been given to the defendant about potential credit for a guilty plea and about the potential consequences of failing to attend the trial.
- 7.2 Consequent on a general discussion of the rate of absence of defendants from trial in magistrates' courts and in the Crown Court the Committee concluded that some of the practice now followed in the Crown Court when a defendant is absent without giving a good, or any, reason for that absence potentially is unfair to co-defendants, and confusing for the jury. The Committee decided to require as a matter of course explanations of the potential consequences of absence (trial in absence; directions to the jury; sanctions for breach of bail) so as to make those clear to the defendant and to allow the court justly to impose those consequences if appropriate.

Consequences of trying together offences that should be tried separately

- 7.3 Rule 4(b) of these Rules adds a note to rule 3.21 of the Criminal Procedure Rules to draw attention to the potential consequences of conducting a trial in breach of the requirements of that rule.
- 7.4 Until last year the Criminal Procedure Rules had prohibited the inclusion of more than one alleged offence in a single Crown Court indictment (the formal list of allegations against the defendant) unless those offences all were founded on the same facts or formed or were a part of a series of offences of the same or a similar character; and the common law was understood to require that the consequence of breach of that particular procedural requirement would be the annulment of the entire trial. With effect from 3rd October, 2016, the Criminal Procedure (Amendment No. 2) Rules 2016, S.I. 2016/705, removed that procedural requirement and in its place changed rule 3.21 of the Criminal Procedure Rules to require the Crown Court to exercise its power to order separate trials of offences that did not meet those criteria. The Explanatory Memorandum published with those Amendment Rules explained:¹
- “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”.
- 7.5 In the case of *R v Williams* [2017] EWCA Crim 281, [2017] 4 W.L.R. 93,² in which the defendant’s trial had taken place before the rule was changed, the Court of Appeal in its judgment drew attention to the rule change and invited the Rule Committee to clarify its effect, as far as that can be done in procedure rules. The Committee decided to add a note to rule 3.21 to draw attention to the powers of the Court of Appeal to quash a conviction that is unsafe – for example, because the trial was unfair – and in an appropriate case to order a re-trial.

Service of documents in extradition appeal cases

- 7.6 Rule 5 of these Rules amends rule 4.11 of the Criminal Procedure Rules to allow the service of documents by electronic means in extradition appeal cases to have effect on the same business day if those documents are sent at a later time of day than in other criminal proceedings – by 4.30pm instead of by 2.30pm.
- 7.7 Part 4 of the Criminal Procedure Rules contains the rules about how documents are to be formally delivered (‘served’) in the cases to which the Rules apply, and about when documents are to be taken as having been served, depending on the method of ‘service’ used. At present, documents served by electronic means (most often by email, or by uploading to a website to which only the parties have access) count as delivered on that same day if the day is a usual working day (a ‘business day’) and if service takes place by 2.30pm – so as to give the recipient enough time to consider the document and respond before the next business day. Representatives of lawyers who practise regularly in extradition appeal cases asked the Rule Committee to change the rules to provide that electronic service would occur the same business day if it took place by 4.30pm instead; the particular circumstances of such cases making it desirable to allow the sender that extra 2 hours, and not unfair to the recipient of a

¹ The Memorandum is available at: <http://www.legislation.gov.uk/ukxi/2016/705/memorandum/contents>. See paragraph 7.6.

² The judgment is available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2017/281.html>.

document served up to 2 hours later. Having consulted regular representatives of the parties in such cases, both defence lawyers and the Crown Prosecution Service, the Committee agreed to change the rule accordingly. The rule change makes no difference to the statutory time limits for giving notice of an extradition appeal.

Rules to supplement European investigation orders

- 7.8 Rule 7, rule 10(a), (u) and (w) and rule 12 of these Rules amend rules in Part 18, Part 47 and Part 49 of the Criminal Procedure Rules (respectively, Measures to assist a witness or the defendant to give evidence; Investigation orders and warrants; and International co-operation) to provide for applications to a court in England and Wales for a ‘European investigation order’ for execution in another state, and to provide for the judicial consideration in England and Wales of such an order made in another state which has been sent for execution here.
- 7.9 The Criminal Justice (European Investigation Order) Regulations 2017, S.I. 2017/730, give effect in the United Kingdom to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Under regulation 6 of those Regulations a court in the UK can make an order specifying one or more ‘investigative measures’ that are to be carried out in a State listed in Schedule 2 to the Regulations (a ‘participating State’). One such measure is hearing for the purposes of proceedings in the UK, by live video or, potentially, audio link (described in the Regulations as ‘videoconference or other audio visual transmission’ and as ‘telephone conference’ respectively), a witness who is in that participating State. Other such measures include the issue by a court in the UK of a search warrant, or of a production or similar order, for the purpose of obtaining evidence in a participating State for use in a criminal investigation or criminal proceedings here. In relation to orders made in other participating States, regulations 35 to 45 of the 2017 Regulations require those orders to be submitted to a UK court before they can be given effect in this jurisdiction.
- 7.10 The amendments made by these rules to Parts 18 and 47 of the Criminal Procedure Rules govern applications for ‘outbound’ orders. The amendments to Part 49 govern the procedure on the judicial consideration of ‘inbound’ orders. All the rule amendments follow closely the provisions of the Regulations and set out the procedure to be followed.

Rules to supplement the Criminal Finances Act 2017

- 7.11 Rule 9 and rule 10(b) to (n), (v) and (x) of these Rules amend rules in Parts 33 and 47 of the Criminal Procedure Rules (respectively, Confiscation and related proceedings; and Investigation orders and warrants) to accommodate statutory amendments made by the Criminal Finances Act 2017 to the Terrorism Act 2000 and to the Proceeds of Crime Act 2002. Rule 33.24 is amended to allow for the new scope of applications under section 67 of the Proceeds of Crime Act 2002 (Seized money) which now will allow money seized by investigators to be applied towards payment of a confiscation order. The changes to the rules in Part 47 reflect the introduction by the 2017 Act of new types of investigation into proceeds of crime, and provide for applications by investigators for the Crown Court to extend the ‘moratorium period’ under the new section 336A of the Proceeds of Crime Act 2002.
- 7.12 Under sections 335 and 336 of the 2002 Act a moratorium period is the period of 31 days starting with the day on which consent to the doing of an act is refused by a

constable, a customs officer or the Director General of the National Crime Agency. The act to which those sections refer is one that would be an offence under section 327, 328 or 329 of the 2002 Act (money laundering offences) but for the making of a disclosure within the meaning of section 338 to such an officer in relation to that act. On the expiry of the moratorium period the person who made the disclosure will be treated as having the relevant officer's consent to the doing of the act and so will commit no offence by doing it. Under new section 336A of the 2002 Act the Crown Court may extend a moratorium period by up to another 31 days beginning with the day after the day on which the period otherwise would end.

- 7.13 The rule amendments follow closely the new statutory provisions. New rule 47.63(3) and new rule 47.64(2) of the Criminal Procedure Rules require notice to be given in every case of an application to extend a moratorium period unless, exceptionally, the applicant can satisfy the court of one of the factors listed in the first of those rules.

Miscellaneous corrections

- 7.14 Rules 4(c), 6, 8, 10(o) to (t) and 11 of these Rules correct and bring up to date the references that appear in each of the corrected Criminal Procedure Rules.

Consolidation

- 7.15 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 Part 4 of the Criminal Procedure Rules (see paragraphs 7.6 to 7.7 above) the Committee invited observations from the Extradition Lawyers' Association, the Defence Extradition Lawyers' Forum (from which organisation came the initial proposal for that rule amendment) and the Crown Prosecution Service; in connection with the amendments occasioned by the Criminal Justice (European Investigation Order) Regulations 2017 (see paragraphs 7.8 to 7.10 above) the Committee invited observations from the Home Office, the Crown Prosecution Service, the Serious Fraud Office, the National Crime Agency, HM Courts and Tribunals Service and those individual members of the judiciary likely to

receive applications to be governed by the new rules; and in connection with the amendments occasioned by the Criminal Finances Act 2017 (see paragraphs 7.11 to 7.13 above) the Committee invited observations from the Home Office, the National Crime Agency and HM 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 HM Courts and Tribunals Service and within the principal prosecuting authorities.
- 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.gov.uk can answer any queries regarding the instrument.