

EXPLANATORY MEMORANDUM TO
THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2020

2020 No. 32 (L. 5)

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 seven principal respects.
- 2.2 They add new rules that (i) allow authorised court staff to exercise some judicial functions, under powers conferred by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, (ii) supply a procedure for notifying courts where there is an especially sensitive background to a case, (iii) supply a procedure for adding new charges to existing prosecutions in magistrates' courts, (iv) impose a requirement for courts to send any medical reports that they may have about a defendant to any prison to which that defendant is sent, and (v) supply a procedure for appeal to the Court of Appeal by a defendant who has been found unfit to be tried. They amend the rules about (i) the provision of information by court staff to journalists, and (ii) the supplementary 'behaviour orders' that may be made where a defendant is convicted, to accommodate the new power to make a knife crime prevention order conferred by the Offensive Weapons Act 2019. They make some other amendments consequent upon those main changes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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)

- 3.2 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 67B of the Courts Act 2003, inserted by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018: see paragraphs 7.1 to 7.3 of this Memorandum. They supplement sections 19, 26 and 27 of the Offensive Weapons Act 2019, which provide for the making, review and variation of knife crime prevention orders in criminal cases: see paragraphs 7.12 and 7.13.

7. Policy background

What is being done and why?

Exercise of judicial functions by authorised court staff

- 7.1 Under section 67A of the Courts Act 2003, inserted by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, 'relevant judicial function' means a function of a court to which the general duty of the Lord Chancellor under section 1 of that Act applies and a judicial function of a person holding an office that entitles the person to exercise functions of such a court but does not include, among other things, any function so far as its exercise involves authorising a person's committal to prison, or (with some exceptions) any function so far as its exercise involves authorising a person's arrest. Under section 67B of the 2003 Act, rules of court may provide for the exercise of relevant judicial functions by persons who are members of court staff and who satisfy any requirements specified in those rules as to qualifications or experience. Such a staff member may exercise such a function only if authorised to do so by the Lord Chief Justice.
- 7.2 Rule 3 of these rules amends Part 2 of the Criminal Procedure Rules to provide for the exercise by authorised court staff of specified judicial functions in each of the courts

in which the Rules apply, namely the criminal division of the Court of Appeal, the High Court in extradition appeal cases, the Crown Court and magistrates' courts in criminal cases, and in extradition cases before a District Judge (Magistrates' Courts). The Rule Committee published an invitation to comment on the rules in draft and subsequently published a report on the outcome of that consultation: see paragraph 10.2 of this Memorandum. That invitation and that report explain the Committee's reasons for the choice of functions that court staff may exercise if authorised to do so. In summary, the Committee has maintained the status quo, legal and practical, and has removed current anomalies. Where the provision is new, notably in relation to the Crown Court, the powers conferred are modest and formalise common informal arrangements.

- 7.3 Section 67C of the Courts Act 2003 requires the Rule Committee to consider whether the rules should include a right for the parties to proceedings in which a decision is made by a member of court staff to have that decision reconsidered by a judicial office holder, and to give reasons if it makes rules that do not include such a right. The new rules include rights of reconsideration of court officers' decisions in the Court of Appeal, the High Court and the Crown Court, but not in magistrates' courts or in extradition proceedings before a District Judge (Magistrates' Courts). The Committee concluded that the existing law already supplied such a right of reconsideration in proceedings before those two latter courts, for the reasons explained in detail at paragraphs 36 to 44 of the report on the outcome of its consultation mentioned above.

Notification hearings

- 7.4 In the case of *R v Ali* [2019] EWCA Crim 1527¹ the Court of Appeal reviewed a practice that had arisen under which, in exceptional circumstances, a prosecutor might notify the court, but not the defendant, of the existence of material which neither assisted nor undermined the prosecution case, and which did not assist the defence, but of which it was thought necessary to make the court aware "in the interests of justice to avoid the risk of inadvertent mismanagement of the trial occasioning unfairness to the defendant". The court commented, "We think it essential if such hearings are to continue – and for the reasons given they may, exceptionally, be necessary to do justice – that the practice be placed on a sounder and more appropriate footing" and invited the Rule Committee to make rules to govern the procedure.
- 7.5 The Rule Committee accepted that invitation and accordingly rule 4 of these rules adds a new rule to the Criminal Procedure Rules to govern the exercise of the jurisdiction identified by the court. The Committee has asked the Lord Chief Justice to consider giving guidance by means of the Criminal Practice Directions made by him on the circumstances in which it would be appropriate for that jurisdiction to be invoked.

Information about cases for journalists

- 7.6 Rule 5.8 of the Criminal Procedure Rules specifies the information about criminal cases that court staff must give to members of the public, including reporters, on request, and specifies the information that must be published in lists of pending court cases. It was reported to the Rule Committee by press representatives that requests by

¹ The judgment is available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2019/1527.html>.

journalists for information about cases dealt with under sections 16A to 16D of the Magistrates' Courts Act 1980 and rule 24.9 of the Criminal Procedure Rules, known as 'single justice procedure' cases, could not always be dealt with as quickly as was desirable and that the information published about pending cases did not always give as many details as journalists legitimately required.

- 7.7 In consultation with HM Courts and Tribunals Service the Committee reviewed the rules. Rule 5 of these rules makes changes that will allow and require court staff to provide more information to media representatives who are accredited by their organisations than rule 5.8 of the Criminal Procedure Rules requires to be given to members of the general public.

Adding new charges to a prosecution in a magistrates' court

- 7.8 The rules in Part 7 of the Criminal Procedure Rules govern the procedures for starting prosecutions in magistrates' courts. At present, no rule specifies the procedural requirements for adding a new charge to an existing prosecution. Those requirements appear only in case law.
- 7.9 In the case of *Director of Public Prosecutions v McFarlane* [2019] EWHC 1895 (Admin) the prosecutor had issued a notice of intention to substitute for an allegation of obstructing one police officer in the execution of his duty an allegation of obstructing two other officers, and the case concerned the effect of that notice. The Rule Committee reviewed the Part 7 rules in the light of that judgment and decided to incorporate and codify the case law requirements. Rule 6 of these rules amends those rules accordingly.

Sending medical reports to prisons

- 7.10 Where a defendant is to be detained in hospital under a provision of the Mental Health Act 1983, or is made the subject of a guardianship order under that Act, rule 28.9 of the Criminal Procedure Rules requires the court to pass on to the hospital or guardian any information that the court has received which seems likely to assist in treating or otherwise dealing with the defendant. That information will include any medical, including psychiatric, report prepared for the court. At present, no rule requires such information to be passed to any prison or other custodial institution where a defendant is remanded in custody pending trial or is sentenced to imprisonment or detention.
- 7.11 In practice, such information already is passed by HM Courts and Tribunals Service to HM Prisons and Probation Service when a defendant is to be kept in custody, in the interests of the defendant's welfare and in others' interests. However, it was reported to the Rule Committee that on occasions this information did not come promptly to the attention of the appropriate prison staff; and it was suggested that to amend the rule about the content of warrants for imprisonment, and the rule about the transmission of medical reports, would help to ensure that vital information about the defendant's state of physical and mental health would come promptly to the attention of those prison staff who needed it. The Committee agreed. Accordingly, rule 7 of these rules amends rule 13.4 of the Criminal Procedure Rules about the information to be included in a warrant for detention or imprisonment and rule 8 of these rules amends rule 28.9 of the Criminal Procedure Rules to apply that rule to prisons, too.

Provision for knife crime prevention orders

- 7.12 Part 31 of the Criminal Procedure Rules sets out standard procedures for dealing with court orders that the rules call ‘behaviour orders’, meaning orders for which a number of Acts provide, which are made on a defendant’s conviction (and in some cases on acquittal), and which impose specific prohibitions and requirements on the defendant’s conduct to deter future offending.
- 7.13 Section 19 of the Offensive Weapons Act 2019 provides for the making of a ‘knife crime prevention order’ where a defendant is convicted, the statutory purpose of such an order being to protect the public from the risk of harm involving a bladed article, to protect any particular member of the public (including the defendant) from such risk, or to prevent the defendant from committing an offence involving a bladed article. Accordingly, rule 9 of these rules amends Part 31 of the Criminal Procedure Rules to include references to this new type of ‘behaviour order’, and rules 10 and 11((a)(i), (iii) of these rules amend Parts 34 and 39 of the Criminal Procedure Rules to include in them references to new rights of appeal to the Crown Court and to the Court of Appeal, respectively, created by the 2019 Act.

Appeal to the Court of Appeal by a defendant found unfit to be tried

- 7.14 In *R v Roberts* [2019] EWCA Crim 1270² the Court of Appeal considered an application for permission to appeal by a defendant who had been found unfit to be tried and who was detained in hospital under the provisions of the Criminal Procedure (Insanity) Act 1964. The appellant was not represented by a lawyer for the purposes of his application and the court had to decide how to deal with a proposed appeal in such circumstances without being unfair. The court decided that such an application should not be dismissed summarily but should be assessed by a judge, who could give directions for the preparation of an appeal if there appeared to be reasonably arguable grounds of appeal or who could refuse to do so if there were none.
- 7.15 The Criminal Procedure Rules contain no provision for such an application. At the suggestion of the Registrar of Criminal Appeals the Rule Committee decided to make rules to codify the procedure adopted by the court. Rule 11(a)(ii) and (b) of these rules amend the rules in Part 39 of the Criminal Procedure Rules accordingly.

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

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 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 now intends to effect a further consolidation in June

² The judgment is available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2019/1270.html>.

2020, thus reverting to its initial plan to consolidate at 5 yearly intervals. Meanwhile, an informal consolidated text remains 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>.

10. Consultation outcome

- 10.1 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.
- 10.2 In addition, (i) in connection with the amendments to Part 5 of the Criminal Procedure Rules affecting the provision of information by court staff to journalists the Committee invited observations from representatives of media organisations two of whom attended a Committee meeting for the purpose, and (ii) in connection with the amendments to Part 2 of the Rules, which provide for the exercise of some judicial functions by court staff, the Committee consulted publicly and received responses from 22 interested individuals and groups. The Committee's invitation to comment was published in April, 2019 at: <http://www.justice.gov.uk/courts/procedure-rules/criminal> and its report of the outcome of that consultation was published at that address in November, 2019.

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 on the Ministry of Justice website, at: <http://www.justice.gov.uk/courts/procedure-rules/criminal>.

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: 07580 701398 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.