

EXPLANATORY MEMORANDUM TO
THE PROSECUTION OF OFFENCES (CUSTODY TIME LIMITS)
(CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

2020 No. 953

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations amend the Prosecution of Offences (Custody Time Limits) Regulations 1987 (“the 1987 Regulations”). They set maximum periods in custody on remand in respect of those defendants awaiting a summary trial or trial on indictment.
- 2.2 The Covid-19 pandemic has presented unprecedented challenges for the criminal justice system (CJS) in England and Wales. The scale and seriousness of the situation has presented significant difficulties to the criminal court process, including the Crown Court’s ability to hear jury trials for all defendants within their Custody Time Limit (CTL).
- 2.3 The Government is taking action to ensure that, as we work to restore capacity to pre-Covid levels, courts have sufficient powers to effectively manage these unavoidable delays. These Regulations temporarily extend the amount of time a defendant can be held in custody before their Crown Court trial is heard and before which time the prosecution must apply to extend it.
- 2.4 This change recognises the delays caused to the listing of trials due to the current circumstances and provides more certainty for victims and the public in cases where there is a risk that defendants may abscond or commit offences if released back into the community on bail.
- 2.5 The Government does not intend to have this measure in place any longer than necessary: it will automatically expire after 9 months.

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 a negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Section 22(1) of the Prosecution of Offences Act (POA) 1985 provides for the Secretary of State to set time limits in relation to preliminary stages of criminal proceedings for an offence.
- 6.2 The 1987 Regulations provide for maximum periods of time in custody in respect of a defendant awaiting trial in the Crown Court. These Regulations amend the Custody Time Limits¹ (CTLs) provided in regulation 5(3)(b) and (6B) to the 1987 Regulations by 56 days from 182 days to 238 days for all triable either-way and indictable only criminal offences awaiting trial on indictment at the Crown Court. And from 112 days to 168 days, in the rarer cases, where a voluntary bill of indictment is preferred, or a fresh trial has been ordered by the Court of Appeal.
- 6.3 This extension will apply to a defendant remanded in custody for the first time from commencement of these Regulations during the temporary 9-month period for which these amended Regulations will apply. In addition, the new extended periods will continue to apply where a defendant is remanded for the first time in custody after the commencement of these Regulations but before the expiry of the Regulations, where their custody time limit extends beyond the expiry of these Regulations (i.e. their period on remand will not revert back to 112 or 182 days)). The extension will also not apply to a defendant remanded in custody for the first time prior to the commencement of these Regulations who are subject to the CTLs in regulation 5 of the 1987 Regulations.

7. Policy background

What is being done and why?

Introduction to Custody Time Limits

- 7.1 CTLs safeguard defendants by preventing them from being held on remand in prison for an excessive amount of time prior to their trial. Currently, there are two main maximum periods in custody provided for by the 1987 Regulations. These begin the day after the court appearance at which the defendant was first remanded in custody prior to a trial. The CTLs are 56 days for offences awaiting summary trial in the magistrates' court and 182 days for offences awaiting trial on indictment in the Crown Court.
- 7.2 In rare circumstances, an alternative CTL of 112 days can apply to criminal offences awaiting trial in the Crown Court:
- a) if the prosecution is granted a Voluntary Bill of Indictment under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 by a High Court Judge; or
 - b) following an order by the Court of Appeal for a retrial on a fresh indictment.

¹ A Custody Time Limit (CTL) is the period of time a defendant can be remanded in custody before their trial must be heard. If the trial cannot be heard before the limit expires, the court must release the person on bail unless the prosecution successfully applies to extend it.

- 7.3 Section 22(3) of the POA 1985 allows for CTLs to be extended, or further extended, if the prosecution apply to the court before the limit expires but shall not do so unless the court is satisfied that the prosecution has acted with all due diligence and expedition and the need for the extension is due to:
- a) the illness or absence of the accused, a necessary witness, a judge or a magistrate;
 - b) postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused persons, or two or more charges; or
 - c) some other good and sufficient cause;

7.4 The legal burden of monitoring and complying with CTLs rests on the prosecution. There exists a “Protocol” between the Crown Prosecution Service (CPS) and HM Courts & Tribunals Service (HMCTS) for the effective handling of cases to reduce monitoring errors and ensure cases are finalised before the expiry of CTLs.

The handling of Custody Time Limit cases during the coronavirus pandemic

- 7.5 To comply with social distancing restrictions and protect the safety of court users, the Crown Court in England and Wales has not been able to hear as many jury trials as normal. This has led to delays in jury trials resulting in an increase in cases where the defendant is currently held in custody on remand. This has resulted in an increase in applications by the Crown to extend the time defendants are held on remand pending trial.
- 7.6 Work to increase the capacity of the Crown Court to hear jury trials is ongoing however, it is not yet possible for the courts to resume business as usual. Even though, as of 25 August 2020, 66 out of 81 Crown Court buildings had re-started jury trials, the limitations posed by social distancing means that the courts are unlikely to achieve pre-Covid levels of trial hearings for some time. Consequently, it is proving difficult to hear jury trials for all defendants within their CTLs – especially for multi-handed cases with 3 or more defendants. The total number of outstanding cases where a defendant is remanded in custody in the Crown Court has gradually risen since monitoring began on 1 April 2020, even though cases with CTLs have been prioritised.
- 7.7 On 27 March 2020 – at the start of the pandemic – HMCTS, the CPS, and the Senior Presiding Judge (SPJ) agreed to an adapted “Coronavirus Crisis Protocol” that set a temporary framework for the efficient and expeditious handling of cases where there are CTLs. The adapted protocol acknowledges that the pandemic is an exceptional situation and the adjournment of trials as a consequence of government health advice and of directions made by the Lord Chief Justice amounts to “good and sufficient cause” to extend CTLs. It contains rules of practice only and does not create legal obligations or restrictions on any party, nor does it override independent judicial discretion. Following a judicial review heard on 16 June 2020, the courts upheld that the pandemic constituted a “good and sufficient cause” to extend CTLs under section 22(3) POA 1985 and rejected the complainant’s contention that the protocol unlawfully fettered the discretion of any judge hearing an application to extend.
- 7.8 However, the current arrangement of extending CTLs on a case-by-case basis under the framework of the “Coronavirus Crisis Protocol” was only intended as a short-term measure and needs to be reviewed in light of the scale of impact the pandemic has had on court business and the potential for a further spike in coronavirus cases.

Negative statutory instrument (SI) to temporarily extend the duration of Custody Time Limits

- 7.9 This amendment to the 1987 Regulations will be implemented through the laying of a statutory instrument that is subject to a negative resolution procedure in Parliament.
- 7.10 The amended Regulations will temporarily extend the Custody Time Limit (CTL) by 56 days from 182 days to 238 days for all triable either-way and indictable only criminal offences awaiting trial on indictment at the Crown Court and by 112 days to 168 days where a voluntary bill of indictment is preferred or a fresh trial has been ordered by the Court of Appeal. This extension will apply to new CTLs following the defendant's first remand in custody where this begins during the temporary 9-month period for which time the amended Regulations will apply (it will not be applied retrospectively so will not affect prisoners currently on remand whose case is subject to a CTL that began before the amended Regulations came into force).
- 7.11 In addition to the above, the new extended period of 238 days (and 168 days) will continue to apply where a defendant's period on remand in custody begins during these Regulations but extends beyond the expiry of these Regulations (i.e. their period on remand will not revert back to 182 days (or 112 days)).
- 7.12 Further, the amended Regulations will not apply to anyone remanded in custody for the first time before the amended Regulations come into force.
- 7.13 The objective of this provision is to create more consistency and certainty about the way in which the CJS manages the CTL for untried defendants held on remand. Increasing the length of the CTL delays the need for an application to extend and, in some cases, negates an application entirely if a trial can be listed within the additional time-limit. This will help to protect against releasing defendants, who are likely to abscond or who pose a risk to the public, into the community on bail before their trial can be heard. It should also help to manage demand while the Crown Court transitions to full jury trial capacity.

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 or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 The MoJ has been unable to conduct a consultation due to the need to commence these Regulations as soon as possible in light of the implications for criminal courts due to the coronavirus pandemic.

11. Guidance

- 11.1 Formal guidance has not been produced as there will be no changes to process or procedure.
- 11.2 The temporary change to the CTL will be communicated to the relevant criminal justice system practitioners including, the prosecution, defence, police service, court staff, and the judiciary.

11.3 The CPS have been notified of the change and will amend their IT system protocols to automatically amend CTLs from 182 days to 238 days and 112 days to 168 days as applicable for time limits commencing during the period of these Regulations.

12. Impact

12.1 There is no impact on business.

12.2 The likelihood of net burden on charities or voluntary bodies is extremely low and exempted from the department's business impact target by virtue of the Small Business, Enterprise and Employment Act 2015 s27 (3). Any additional costs will be met under contract from HMPPS.

12.3 There is no, or no significant, impact on the public sector.

12.4 An Impact Assessment has not been prepared for this instrument because departmental costs are expected to be low and no definitive cost can effectively be monetised.

12.5 Amendments set out in this SI will only be in force for a temporary period of 9 months.

12.6 To inform Parliamentary scrutiny of the Order, this Explanatory Memorandum includes a summary of the potential impact the change could have on Crown Court time and the prison population.

Counterfactual

12.7 A difficulty in calculating the impact of this policy is that it is unclear what independent judicial behaviour would be in its absence. It is possible that in absence of this policy, almost all judges would continue to see the Coronavirus pandemic as a good and sufficient cause to extend custody time limits and would continue to extend them on this basis. Alternatively, it is possible that many would cease to see the Coronavirus pandemic as sufficient reason to extend and would start rejecting CTL extension applications made on this basis.

12.8 The impact of this policy depends on what scenario it is compared against. Therefore, both options have been included.

Counterfactual: judges continue to accept CTL extensions

12.9 It is assumed here that judges would have continued to accept CTL extension applications, so this policy causes no change in the number of defendants held more than 182 days or 112 days.

12.10 Extending the CTL reduces the number of CTL extension hearings. This reduces the cost to HMCTS of CTL extension hearings.

12.11 However, defendants subject to the new maximum period might be more likely to apply for bail, as the CTL is now proportionally longer when compared with any custodial sentence they might receive. This could be the case for low level either way offences that might not receive a custodial sentence much longer than 8 months. An increase in bail hearings would increase the cost to HMCTS.

12.12 Without knowing exactly how defendants and judges will react to the increase, it is not possible to calculate the overall impact on HMCTS costs. However, a reduction in

CTL hearings would likely represent a minor cost saving, which might be offset by an increase in bail hearings.

- 12.13 Extending the CTL does not increase the remand population, as judges would have continued to extend regardless.
- 12.14 However again if it prompts an increase in bail hearings it could result in more defendants being released on bail. Therefore, the overall effect of this policy could be to decrease the amount of time remanded in custody. This would reduce costs for HMPPS.

Counterfactual: judges stop granting CTL extensions

- 12.15 It is assumed here that many judges would have ceased to approve CTL extension applications, so this policy increases the number of defendants held for more than 182 days or 112 days and reduces the number released on bail.
- 12.16 Extending the CTL reduces the number of CTL extension hearings. This reduces the cost to HMCTS of CTL extension hearings.
- 12.17 However, defendants subject to the new maximum period might be more likely to apply for bail, as the CTL is now proportionally longer when compared with any custodial sentence they might receive. This could be the case for low level either way offences that might not receive a custodial sentence much longer than 8 months. An increase in bail hearings would increase the cost to HMCTS.
- 12.18 Without knowing exactly how defendants and judges will react to the increase, it is not possible to calculate the overall impact on HMCTS costs. However, a reduction in CTL hearings would likely represent a minor cost saving, which might be offset by an increase in bail hearings.
- 12.19 HMPPS is committed to always having enough prison places to accommodate those sent to custody by the courts. They closely monitor the prison population forecasts, and these numbers can fluctuate in response to a wide range of factors. The Covid-19 pandemic has presented unique challenges, but staff have worked rapidly to ensure there is sufficient suitable accommodation.
- 12.20 This policy would increase the time spent remanded in custody and this could therefore, place strain on the prison estate. The MoJ and HMPPS will need to continue to assess these anticipated impacts to effectively manage the number of prison places available.
- 12.21 There could also be an impact on the police. Extending CTLs helps prevent defendants who are a flight risk from being released. There are costs to the police if someone absconds on bail as the police have to allocate resources to find and arrest the person. Therefore, this policy could reduce police costs.
- 12.22 We have presented two counterfactuals here for clarity, but of course it's possible reality could be somewhere in between the two.

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 changes made by this Order will be temporary as it will be subject to a 9-month sunset clause.
- 14.2 The effects of the changes made by this Order will be monitored and reviewed as part of on-going criminal justice system operational agency meetings and functions.
- 14.3 The CPS and HMCTS will continue to carefully monitor outstanding criminal cases due for trial at Crown Court that are subject to a CTL on a weekly basis to ensure they are prioritised and listed effectively. These two agencies also work closely with the Crown Court Working Group chaired by Mr Justice Edis.
- 14.4 The CPS, HMCTS, and the Senior Presiding Judge (SJP) will also continue to review the “Coronavirus Crisis Protocol” which will continue to serve as a temporary framework alongside the 9-month Order until such time as the adapted protocol is withdrawn.
- 14.5 The MoJ have provided an Equality Impact Statement for this measure and will update our assessment as the impacts become clearer or new available evidence emerges. This approach is in line with the continuing ongoing nature of the Public-Sector Equality Duty (PSED).

15. Contact

- 15.1 Julie Clouder at the MoJ, Criminal Courts Policy, Telephone: 07795 497127 or email: julie.clouder@justice.gov.uk can be contacted with any queries regarding this instrument.
- 15.2 Matthew Gould, Deputy Director of Criminal Courts and Criminal Law Policy at the MoJ, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Right Honourable Robert Buckland QC MP, the Lord Chancellor and Secretary of State for Justice, can confirm that this Explanatory Memorandum meets the required standard.