EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (AMENDMENT NO. 2) RULES 2018

2018 No. 847 (L. 8)

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 four principal respects.

2.2 They add detailed new rules about the procedure that criminal courts must follow when commissioning medical reports where a defendant's mental health is in question. They add detailed new rules about the information that the parties to an appeal to the Crown Court must give the court. They add a new procedure about changing the grounds of appeal from the Crown Court to the Court of Appeal. They change the rule about where to give notice of an appeal from the Crown Court to the Court of Appeal.

2.3 In addition, they make miscellaneous other minor amendments and corrections 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 None.

Other matters of interest to the House of Commons

3.2 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.

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

Commissioning medical reports

7.1 Rule 3 of these Rules adds a new rule in Part 3 of the Criminal Procedure Rules (the rules about case management) and makes some consequential changes. Rule 7 of these Rules does the same in Part 28 of the Criminal Procedure Rules (the rules about sentencing procedures in special cases). Each of the two new rules prescribes a procedure for commissioning a medical report to help the court deal appropriately with a defendant whose mental health is in question. The new rules require the court to set a timetable to ensure that the report is obtained within a reasonable period, and require the court to monitor progress.

7.2 Following an inquest into the suicide of a defendant who had been detained pending her trial while the court waited for a psychiatric report, in June 2017 a coroner's report recommended that psychiatric reports should be obtained more quickly where they are needed to help the court assess a defendant's fitness to participate at the trial. At the request of senior judges, the Rule Committee agreed to make more explicit rules about how a medical report must be commissioned, about the procedure to follow to ensure that the report is obtained as promptly as possible, and about what must be done to make sure that the timetable for the report's production is not allowed to slip. The new rules set out specific requirements for letting the psychiatrist or other medical practitioner from whom a report is sought know exactly what is required, and why; and specific requirements for the court to set and monitor a timetable for the production of the report, culminating in the next court hearing.

7.3 The Committee has asked the Lord Chief Justice by means of the Criminal Practice Directions made by him to give courts detailed guidance on what the timetable for obtaining a report should be, and on what courts must do to ensure that progress is being made.

Improving procedure on appeal from a magistrates' court to the Crown Court

7.4 Rule 8 of these Rules amends the rules in Part 34 of the Criminal Procedure Rules, the rules about appeal to the Crown Court from a magistrates' court, to require the appellant and respondent to give the Crown Court as much information as possible about the appeal. The objective is to help the Crown Court arrange an effective appeal hearing. If there is a further appeal to the High Court, another amendment to Part 34 makes it clear that the Crown Court judge alone, without the magistrate members of the appeal court, can approve a formal statement for the High Court of what took place in the Crown Court.

7.5 Under section 79 of the Senior Courts Act 1981, an appeal to the Crown Court from a magistrates' court is by way of rehearing. It was reported to the Rule Committee that, in the experience of Crown Court judges and magistrates who adjudicate on appeals, cases often now were too complicated for an effective appeal hearing to be arranged without obtaining more information than the present rules require, and giving the parties more pre-appeal directions than the present rules anticipate: in short, without doing much the same things as a court must do when preparing for a trial. The Committee agreed to add to the rules requirements for the parties to give more information about what is in issue in the appeal; requirements for the parties to indicate whether they intend to rely upon the same evidence and other material as they relied upon in the magistrates' court, or on other evidence or material; and provision for the court to convene a preparation for appeal hearing, if one is needed.

7.6 Under sections 73 and 74 of the Senior Courts Act 1981 and rule 34.11 of the Criminal Procedure Rules, at an appeal hearing in the Crown Court the appeal is heard by a judge and two magistrates; but the judge has power without the magistrates to give directions for the preparation of the appeal before the hearing. After an appeal to the Crown Court a party can appeal further, to the High Court, on a point of law by first asking the Crown Court to approve a formal statement of what took place at the appeal hearing and of the point of law involved, under section 28 of the Senior Courts Act 1981. For many years it has been the practice for the judge to approve that formal statement, or to refuse to do so, without recalling the magistrates who also heard the appeal. In the case of *R (Arthur) v Blackfriars Crown Court* [2017] EWHC 3416 (Admin) the High Court questioned whether that practice was permitted by the rules. The Rule Committee considered that the practice is long established and efficient, and decided to change the rule to make it clear that it is indeed permitted.

Permission to change the grounds of an appeal to the Court of Appeal

7.7 Rule 10 of these Rules amends rule 36.14 of the Criminal Procedure Rules, the rule about grounds of appeal (that is, reasons for an appeal) from the Crown Court to the Court of Appeal, to prescribe the procedure where an appellant wants to change the grounds on which his or her appeal first was begun.

7.8 In the case of *R v James and Others* [2018] EWCA Crim 285 the criminal division of the Court of Appeal gave guidance on the procedure to be followed where an appellant seeks the court's permission to rely on a fresh ground or grounds of appeal, especially where new legal representatives wish to discard the grounds of appeal submitted by the appellant's original representatives. The court invited the Rule Committee to make more explicit rules about the procedure than presently exist. The Committee agreed to do so.

Service on the Registrar of Criminal Appeals of notice of an appeal to the Court of Appeal

7.9 Rule 11 of these Rules substitutes a new rule 39.2 of the Criminal Procedure Rules, the rule about where to serve notice of an appeal to the Court of Appeal against conviction or sentence in the Crown Court.

7.10 Where a defendant wants to appeal to the criminal division of the Court of Appeal against his or her conviction or sentence, for many years the rule has been that the appeal notice must be delivered ('served') at the office for the Crown Court where the defendant was convicted. The reason was to allow Crown Court staff to send relevant documents to the Registrar of Criminal Appeals in London. Now, however, electronic ways of working have made that arrangement unnecessary and it is easier and quicker for the appellant to send the appeal notice direct to the Registrar (which itself can be done by electronic means). The Registrar has put in place the necessary practical arrangements for receiving notices that hitherto have been received in Crown Court offices. He asked the Rule Committee to change the current rule accordingly and the Committee agreed.

Rules to supplement the Criminal Finances Act 2017: types of investigation

7.11 Rule 13 of these Rules amends rule 47.32 of the Criminal Procedure Rules (Application for warrant under section 352 of the Proceeds of Crime Act 2002) to accommodate statutory amendments made by the Criminal Finances Act 2017 to the Proceeds of Crime Act 2002. The amendments incorporate references to new types of investigation for which the 2002 Act now provides. However, the procedure on an application for a search warrant under section 352 of that Act will remain the same as now.

Miscellaneous corrections

7.12 These Rules make consequential and other corrections to the cross-references contained in rule 3.1, 5.8 (in the note to the rule), 5.9 (in the note to the rule), 24.17, 25.16, 28.3 (in the note to the rule), 35.2 (in the note to the rule), 36.8, 39.3, 46.1, 50.3 and 50.10 of the Criminal Procedure Rules; either because of other changes made by these Rules, or because the Rule Committee has noticed an earlier uncorrected error.

Consolidation

7.13 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 Parts 3 and 28 of the Criminal Procedure Rules (commissioning medical reports: see paragraphs 7.1 – 7.3 of this Memorandum) the Committee convened a working group that included members of the medical profession and others with experience of the mental health services available now to courts, the observations of which group informed the drafting of the rules. In connection with the amendments to Parts 36 and 39 of the Rules (see paragraphs 7.7 – 7.8 and 7.9 – 7.10 above) the Committee invited and acted on observations of the Registrar of Criminal Appeals.

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, within the principal prosecuting authorities, and among local criminal justice boards.

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. 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.

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: 07580 701398 or email: jonathan.solly@justice.gov.uk can answer any queries regarding the instrument.