EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (AMENDMENT NO. 2) RULES 2019

2019 No. 1119 (L.9)

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 five principal respects.

2.2 They add new rules about (i) applications to a Crown Court judge for an order under the Crime (Overseas Production Orders) Act 2019, (ii) applications for the suspension of certain orders pending appeal, and (iii) taking statutory declarations in magistrates' courts. They amend the rules about (i) establishing the terms of the indictment and taking the defendant's plea in the Crown Court, and (ii) the variation of sentence in magistrates' courts and the Crown Court.

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.

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 for the first time in the Criminal Procedure Rules a power conferred by section 2 of the Commissioners for Oaths Act 1889: see paragraphs 7.5 and 7.6 of this Memorandum. They supplement the Crime (Overseas Production Orders) Act 2019: see paragraphs 7.11 and 7.12.

7. Policy background

What is being done and why?

Confirming the content of the indictment

7.1 The 'indictment' is the formal written record of the offences with which a defendant is charged in the Crown Court. The formal reading of those charges to the defendant in order to take his or her plea, either guilty or not guilty, is known as the 'arraignment'. Usually the arraignment takes place at a pre-trial hearing when the court gives directions for preparation for trial. Rule 3.24 of the Criminal Procedure Rules requires the Crown Court to obtain the prosecutor's confirmation that the indictment accurately lists all the offences of which the prosecutor accuses the defendant just before the arraignment takes place (and so well before the trial). Rule 25.2 of the Criminal Procedure Rules applies at the trial in the Crown Court and sets out some general powers and requirements that apply at that stage.

7.2 Rule 4 of these rules amends rule 3.24 of the Criminal Procedure Rules and rule 7 of these rules amends rule 25.2 so that both will require the Crown Court to invite confirmation that the indictment is correct and that there are no outstanding amendments or unresolved objections to that indictment, not only at arraignment but also just before the trial begins. Both rules are amended, too, to require the court to ensure that there has been explained to the defendant on each occasion (usually by the defendant's legal representatives), in terms that the defendant can understand, each of the allegations against him or her.

7.3 In the judgment of the Court of Appeal in the case of *R v Johnson, R v Burton* [2018] EWCA Crim 2485[1] the court dealt with two cases in each of which a defendant had

[1] The judgment is available at: https://www.bailii.org/ew/cases/EWCA/Crim/2018/2485.html.

been tried and convicted on an indictment containing charges on which that defendant had not been arraigned. The prosecutor's intention in each case had been to apply for the court's permission formally to amend the original indictment before the trial began but in each case that step had been overlooked. In neither case had there been any unfairness to the defendant, who had understood what was alleged and had not been prejudiced by the defect. In each case the convictions were upheld. However, the Court of Appeal added that, "it would obviously be good practice for trial judges to enquire of counsel whether there were any outstanding issues in relation to the indictment before it is read before the jury at trial: whether that should be incorporated into a rule is a matter for the Criminal Procedure Rule Committee".

7.4 The Committee agreed that the good practice identified by the court should be incorporated in the Criminal Procedure Rules. In doing so, the Committee decided that the procedural requirement for the court to make sure that the defendant understands the allegations, which requirement already applies in magistrates' courts under rule 24.2 of the Criminal Procedure Rules, should apply in the Crown Court, too.

Statutory declarations made before court officers

7.5 Where the defendant did not know about proceedings against him or her in a magistrates' court until after the trial, then under section 14 or 16E of the Magistrates' Courts Act 1980 he or she can make a statutory declaration to that effect and the declaration renders the trial void and allows the court to try the case again. Where a defendant against whom an unpaid fixed penalty notice for a road traffic offence has been registered as a fine did not receive the notice, or had applied for a hearing in respect of the alleged offence, or was not the owner of the vehicle involved, then under section 72 or 73 of the Road Traffic Offenders Act 1988 he or she can make a statutory declaration to that effect and the declaration renders the registration of the notice void. The taking of such a declaration is a formal but not a judicial act, under the Statutory Declarations Act 1835. At present, the declaration can be made before a magistrate or a solicitor. Section 2 of the Commissioners for Oaths Act 1889 allows procedure rules to authorise a court officer to take such a declaration for any purpose connected with the officer's duties. In the County Court, similar declarations for various purposes already can be made before court staff.

7.6 It was suggested to the Rule Committee by HM Courts and Tribunals Service that it would allow magistrates' courts staff to provide a more efficient service to the defendant and to the court if the declaration could be made before an appropriate staff member, without needing to interrupt a justice of the peace or a District Judge (Magistrates' Courts) and without needing to send the defendant away to find a solicitor. The Committee agreed. Accordingly, rule 6 of these rules amends rule 24.17 of the Criminal Procedure Rules (which supplies the procedure on delivering a declaration under the Magistrates' Courts Act) and rule 9 of these rules amends rule 29.4 of the Criminal Procedure Rules (which supplies the procedure on delivering a declaration under the Road Traffic Offenders Act).

Public announcement of the variation of a sentence

7.7 Under section 142 of the Magistrates' Courts Act 1980 a magistrates' court can vary a sentence which that court has passed. Under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 the Crown Court can vary a Crown Court sentence. In either case, the variation must be made by the same magistrates or judge who passed

the original sentence. Rule 28.4 of the Criminal Procedure Rules prescribes the procedure. Under that rule the court can vary a sentence without a hearing, but only where no more severe a sentence is passed. In the case of *R v Cox* [2019] EWCA Crim 71[2] the Court of Appeal criticised the variation of a sentence without a hearing where the condition set by the rule had not been met, and cautioned against routinely dealing with variations of sentence otherwise than in public.

7.8 The Rule Committee reviewed the rule in the light of that judgment. It has asked the Lord Chief Justice to consider giving guidance by means of the Criminal Practice Directions made by him on when it would be appropriate for a court to consider in public the variation of a sentence which otherwise could be varied without a hearing. In addition, although the Court of Appeal had not explicitly called for this, the Committee decided that it would codify best practice for every variation of sentence, including one made without a hearing, to be announced in public, if necessary by a court constituted differently to the court by which that variation had been made (because that court's members were not available, for example). Rule 8 of these rules amends rule 28.4 accordingly.

Suspension of a disqualification or order pending appeal

7.9 Under section 40 of the Road Traffic Offenders Act 1988 the Crown Court can suspend a defendant's disqualification from driving imposed by a magistrates' court pending an appeal from the magistrates' court to the Crown Court. Under that same provision the Court of Appeal can suspend a defendant's disqualification from driving imposed by the Crown Court pending appeal from the Crown Court to the Court of Appeal. Under section 129 of the Licensing Act 2003, either appeal court can suspend the forfeiture or suspension of a licence under that Act pending an appeal from the trial court. Part 34 of the Criminal Procedure Rules, which contains the rules about appeal to the Crown Court, already provides for an application to that court under the Road Traffic Offenders Act, but at present the rules about appeal to the Court of Appeal in Part 39 of the Rules do not do so; and neither Part 34 nor Part 39 provides for an application under the Licensing Act.

7.10 The omission was pointed out by the legal representative of a defendant who wished to apply to the Court of Appeal to suspend his disqualification from driving pending appeal. The Committee agreed that the relevant rules should be amended and rules 10 and 11 of these rules amend Parts 34 and 39 accordingly.

Overseas production orders

7.11 The Crime (Overseas Production Orders) Act 2019 allows a Crown Court judge in England and Wales at the request of an investigator in this jurisdiction to make an order against a person or corporation in another jurisdiction requiring them to produce or give access to electronic data likely to be of substantial value to the investigation here. The provisions of the Act are modelled on those of the Police and Criminal Evidence Act 1984, which allows for the making of a production order against a person or corporation here.

7.12 Rule 12 of these rules adds new rules to Part 47 of the Criminal Procedure Rules to provide for applications under the new Act. The rules follow closely the new statutory provisions. New rule 47.67(3), (4) and new rule 47.68(1) require notice to be given in

[2] The judgment is available at: https://www.bailii.org/ew/cases/EWCA/Crim/2019/71.html.

every case of an application for an order unless, exceptionally, the applicant can satisfy the court of one of the circumstances listed in the first of those rules.

Miscellaneous corrections

7.13 These rules correct the cross-references contained in rules 3.13, 3.24 (in the note to the rule) and 10.2 of the Criminal Procedure Rules because of other changes made by these rules.

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.

8.2 However, because there are pending changes to Part 47 of the Criminal Procedure Rules made by the Criminal Procedure (Amendment) (EU Exit) Regulations 2019, S.I. 2019 No. 908, rules 2 and 13 of these rules accommodate the possibility of those changes taking effect before these rules come into force by adjusting, in that event, the amendments to Part 47 made by rule 12 of these rules.

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 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. Meanwhile, 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.

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, in connection with the amendments to Part 47 of the Criminal Procedure Rules occasioned by the Crime (Overseas Production Orders) Act 2019 the Committee invited observations from the Home Office.

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, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 David Gauke, the Lord Chancellor, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.