EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (AMENDMENT NO. 2) RULES 2021

2021 No. 849 (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.

2. Purpose of the instrument

2.1 These Rules amend the Criminal Procedure Rules 2020, S.I. 2020 No. 759, in eleven principal respects.

2.2 They codify the procedure for a defendant to ask a magistrates' court for an indication of whether a custodial or a non-custodial sentence is more likely in the event of a prompt guilty plea. They clarify the requirements for the making of court records, including the need to record the exercise of a magistrates' court's powers by a judge who is not then adjudicating in a magistrates' court. They clarify and simplify the procedure for obtaining information held by the court about a criminal case. They acknowledge a magistrates' court's recently recognised power to send a defendant for trial in the Crown Court in the defendant's absence in some circumstances. They make explicit provision for the court to apply the procedure rules about expert opinion evidence if what has been introduced as evidence of fact includes expert opinion. They require the parties to a case to explain the basis for the admissibility of any evidence which is not evidence of fact within the witness' direct knowledge. They require court staff, not the parties, to pass on an application to vary an order that restrains a person from harassing someone else where that application is made by the person restrained or by the person protected. They provide for the time limit for an appeal against conviction from a magistrates' court to the Crown Court to run from the date of sentence or from the date of committal for sentence, where that occurs. They make explicit provision for the secure storage of information supplied on an application for an investigation order or search warrant. They require a magistrate who considers an application for a search warrant to be advised and assisted by a legal adviser. They require an applicant for a search warrant so far as practicable to identify information sought which may be stored in an electronic device.

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 Not applicable.

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 86A of the Courts Act 2003, inserted by the Policing and Crime Act 2016, in specified circumstances to require the obtaining of a defendant's name and date of birth. They supplement section 66 of the Courts Act 2003, which allows a holder of a judicial office listed in that section to exercise the powers of a District Judge (Magistrates' Courts) in relation to criminal cases. They supplement section 361(1) of the Sentencing Act 2020, replacing section 5(4) of the Protection from Harassment Act 1997, which allows for the variation of a restraining order made on conviction, and section 5A(2B) of the 1997 Act, which allows for the variation of such an order made on acquittal. They make rule amendments consequent on the Sentencing Act 2020.

7. Policy background

What is being done and why?

Sentencing indications in magistrates' courts

7.1 The Criminal Justice Act 2003 provided for indications of likely sentence by magistrates' courts during allocation for trial between that court and the Crown Court, to help defendants decide whether or not to accept magistrates' court trial.[1] In its

[1] See amended section 20(3) of the Magistrates' Courts Act 1980, available at: https://www.legislation.gov.uk/ukpga/1980/43/section/20.

judgment in the case of *R v Goodyear*[2] in 2005 the Court of Appeal approved the Crown Court practice of allowing a defendant to ask for an indication of likely sentence in the event of entering a guilty plea there and then, as long as the Crown Court followed the procedure now set out in rule 3.31 of the Criminal Procedure Rules (Application for indication of sentence). The court said, "In our judgment it would be impracticable for these new arrangements to be extended to proceedings in the Magistrates' Court. We are not at present satisfied that an advance sentence indication can readily be applied to and processed there. We believe that it would be better for the new arrangements in the Crown Court to settle in for some time before considering whether and, if so how, similar arrangements can be made in the context of summary trials. Accordingly, for the time being, the magistrates should confine themselves to the statutory arrangements in Schedule 3 of the 2003 Act."

7.2 It was reported to the Rule Committee that now, 16 years after the *Goodyear* judgment, magistrates' courts fairly and usefully could adopt arrangements corresponding with those in the Crown Court. The Committee decided to prescribe arrangements based on existing procedure during allocation for trial which arrangements would be available to any defendant due to be tried in a magistrates' court, and available also to a young defendant where the youth court has to decide whether to send that defendant for Crown Court trial.

7.3 Rules 4(a), (d) and 6 of these Rules amend the rules in Parts 3 and 9 of the Criminal Procedure Rules accordingly. They make associated rule adjustments, including requirements for a defendant to give name and date of birth at allocation for trial if that is the first court hearing in the case.

Court records and access to information in court records

7.4 Rule 5.4 of the Criminal Procedure Rules lists the events and other information that court staff must enter in court records. Under section 66 of the Courts Act 2003[3] (Judges having powers of District Judges (Magistrates' Courts)) every holder of a judicial office listed in that section has the powers of a justice of the peace who is a District Judge (Magistrates' Courts) in relation to criminal cases. The list includes Circuit judges and judges of the High Court and Court of Appeal. Under that section such judges can exercise magistrates' courts' powers where it is useful to do so even though at that moment they may be adjudicating in another court, for example the Crown Court.

7.5 At present, rule 5.4 does not explicitly require that decisions of judges taken under section 66 must be reported to the relevant magistrates' court's staff and entered in that court's records. In its judgment in in the case of *R v Gould and Others*[4] the Court of Appeal drew attention to the lack of explicit such provision and invited the Rule Committee to review that. The Committee decided to include such provision in the rule and, having regard to procedural errors identified in the same judgment, decided also to include more explicit provision about the recording of magistrates' courts' decisions to send cases for trial to the Crown Court.

7.6 Rule 5(a) of these Rules amends rule 5.4 of the Criminal Procedure Rules accordingly.

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[2] [2005] EWCA Crim 888, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2005/888.html.
[3] Available at: https://www.legislation.gov.uk/ukpga/2003/39/section/66.
[4] [2021] EWCA Crim 447, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/447.html. See paragraph 60 of the judgment.

7.7 Rules 5.7 and 5.8 of the Criminal Procedure Rules govern access to information about criminal cases held in court records when such information is requested by the parties to a case or by members of the public, including reporters. The rules were first added to the Criminal Procedure Rules in 2011 after consultation with media organisations, among others. As since amended from time to time they remain compatible with the, sometimes conflicting, requirements of open justice and freedom of information, on the one hand, and, on the other, data protection and rehabilitation of offenders.

7.8 In its judgment in 2019 in the case of *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)*[5], which concerned the interpretation of Civil Procedure Rules governing access to court records, the Supreme Court urged all UK court procedure rule committees to review their rules on that subject. The Criminal Procedure Rule Committee did so and continues to do so. In June, 2020, the Rule Committee was asked to assist the Lord Chief Justice in the preparation of new procedure rules about access to information in magistrates' courts' records concerning civil cases.[6] In its report on search warrants published in October, 2020,[7] the Law Commission recommended that the Criminal Procedure Rule Committee should, among other things, consider "amending the requirement under rule 5.7(6) that an investigator has 14 days to issue a notice of objection after being served with a request for the supply of information" and should consider setting out "matters that should be considered by the court when determining whether sensitive material ought to be withheld on the grounds of public interest immunity". The Rule Committee decided to give effect to the Law Commission's recommendations and, having regard to the other events described above, decided while doing so to rewrite current rules 5.7 and 5.8. The underlying principles remain the same but the procedure has been made easier to understand for those requesting information, easier for court staff and courts to apply, and consistent with the new procedure in civil cases in magistrates' courts.

7.9 Rule 5(b), (c) and (d) of these Rules replaces current rules 5.7 and 5.8 with new rules 5.7 to 5.11 of the Criminal Procedure Rules accordingly and makes associated amendments.

Sending for trial in absence

7.10 Rule 9.2 of the Criminal Procedure Rules lists the circumstances in which a magistrates' court can deal in a defendant's absence with allocation and sending for Crown Court trial. Until recently it was understood that there was no power formally to send a defendant for trial in their absence even if they were represented in court by a lawyer. In its judgment in April in *R v Umerji*[8] the Court of Appeal decided that that interpretation of the law was wrong. The Rule Committee decided to include in rule 9.2 a reference to the power as now interpreted and rule 6(b) of these Rules makes that amendment.

Expert evidence

7.11 Expert evidence is an exception to the general rule that evidence must be of fact, not of opinion. The rules about expert evidence in Part 19 of the Criminal Procedure

[5] [2019] UKSC 38, [2019] 3 WLR 429, available at: https://www.supremecourt.uk/cases/uksc-2018-0184.html. See paragraph 51 of the judgment.
[6] Those rules now are available at: https://www.legislation.gov.uk/uksi/2021/626/article/2/made.
[7] Available at: https://www.lawcom.gov.uk/project/search-warrants/. See recommendations 38 and 39.
[8] [2021] EWCA Crim 598, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/598.html.

Rules govern the way in which expert opinion can be introduced in criminal cases and codify duties of expert witnesses established by case law. In its judgment in *R v Turner*[9] the Court of Appeal dealt with a case in which it was argued that a witness called to give evidence of fact about mobile telephone signals had given evidence of opinion as well. In her annual report for 2019 – 2020[10] the then Forensic Science Regulator commented on the case and invited the Criminal Procedure Rule Committee to review the rules. The Rule Committee agreed that the procedure for dealing with such circumstances was not as clear as it might be and decided that where evidence introduced as evidence of fact is found to include expert opinion then the court may impose on the witness and on the evidence the same obligations and other rules that apply to such opinion.

7.12 Rule 7(a) of these Rules amends rule 19.1 of the Criminal Procedure Rules accordingly.

Explaining how evidence is admissible

7.13 Evidence is "admissible" in criminal proceedings if it complies with the law of evidence (the law governing information that a court may rely on in reaching a decision). As well as Part 19 of the Criminal Procedure Rules, about expert evidence, the Rules provide for the introduction of other types of evidence to which special procedures apply, for example hearsay evidence. During the discussion of expert evidence described at paragraph 7.11 above Committee members reported that, despite recognised best practice and current rules, sometimes too little attention was paid during preparation for trial to the grounds on which evidence other than direct evidence of fact would be admissible. In a judgment of the Court of Appeal last year about hearsay evidence the court had said, "The Criminal Procedure Rules are not decorative. They are there for a reason. The structure and language of the rules, if complied with, should ensure that tricky questions of procedure or evidence are addressed by the parties in time, so that, where dispute arises, the parties have developed positions which can be laid clearly before the judge who must resolve the problem. That is the point of the Rules."[11] To encourage and to facilitate that, the Committee decided to amend the expert evidence rules and the rules in Parts 24 and 25 of the Criminal Procedure Rules (which apply to trial in a magistrates' court and in the Crown Court respectively) explicitly to require explanations of how evidence is said to be admissible unless it is only evidence of fact within the witness' direct knowledge.

7.14 Rules 7(b), 8 and 9 of these Rules amend rules 19.3, 24.4, 24.5, 25.11 and 25.12 of the Criminal Procedure Rules accordingly.

Applications to vary restraining orders

7.15 At the end of a criminal case in some circumstances the court can make an order under one of the statutory provisions listed in the note to rule 31.1 of the Criminal Procedure Rules requiring the defendant to do, or not to do, specified things, for example to stay away from a specified area, or not to contact a specified person. One such "behaviour order" is a restraining order, which can be made on conviction under section 360 of the Sentencing Act 2020[12] or on acquittal under section 5A of the

[9] [2020] EWCA Crim 1241, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2020/1241.html.
[10] Available at: https://www.gov.uk/government/publications/forensic-science-regulator-annual-report-2020.
[11] *R v Smith* [2020] EWCA Crim 777, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2020/777.html.
[12] Available at: https://www.legislation.gov.uk/ukpga/2020/17/section/360.

Protection from Harassment Act 1997[13] for the purpose of protecting a victim or other person mentioned in the order from harassment by the defendant.

7.16 The statutory provisions allow the defendant or a person protected by the order to apply to the court to vary the order's requirements, including its duration. At present, rule 31.5 of the Criminal Procedure Rules provides for such an application by a defendant to be "served on" (in the words of the Rules, meaning "delivered to") a protected person by the court staff so that the defendant need not contact that person – which, depending on the terms of the order, itself might amount to harassing them. However, the rule does not at present provide for service on the defendant by court staff of an application to vary a restraining order which is made by a protected person. Sometimes that, too, can provoke confrontation. It was reported to the Rule Committee that to help avoid any such confrontation arrangements now had been made for court staff to serve on the defendant an application to vary a restraining order made by a protected person, as well as serving on the protected person an application to vary such an order made by the defendant. The Committee agreed to amend the rules to facilitate these new arrangements.

7.17 In addition, rule 31.5 presently requires the person making an application to vary a behaviour order to explain "what material circumstances have changed since the order was made". In its judgment in *R v Jackson*[14] the Court of Appeal pointed out that the statutory provisions governing variation of a restraining order impose no such requirement, unlike the provisions governing some other behaviour orders. The Committee agreed that it would be desirable to clarify the rule.

7.18 Rule 10(b)(iii) to (vii) and (c) of these Rules amend rules 31.5 and 31.9 of the Criminal Procedure Rules accordingly.

Time limit for appeal from a magistrates' court to the Crown Court

7.19 Under section 108 of the Magistrates' Courts Act 1980[15] a defendant may appeal to the Crown Court against conviction or sentence in a magistrates' court. On an appeal against conviction the Crown Court tries the defendant again and may acquit or convict. On an appeal against sentence the Crown Court passes a fresh sentence, which may be less or more severe. At present the time limit for an appeal against conviction is 15 business days from the date of sentence or from the date on which sentence is deferred (if it is) under sections 4 and 5 of the Sentencing Act 2020,[16] whichever is earlier. Under sections 14 to 17 of the Sentencing Act 2020[17] a magistrates' court can commit a convicted defendant to the Crown Court for sentencing instead of passing or deferring sentence itself.

7.20 The effect of the present rule is that if a defendant is convicted by a magistrates' court and committed for sentence to the Crown Court then the time limit for appeal against the conviction does not expire until after the defendant has been sentenced in the Crown Court. That may postpone the appeal unnecessarily; it may result in what turns out to be an unnecessary sentencing in the Crown Court (because the defendant then is acquitted on appeal); and in some circumstances it may affect the sentencing powers of the Crown Court on the appeal if the appeal fails.

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[13] Available at: https://www.legislation.gov.uk/ukpga/1997/40/section/5A.
[14] [2021] EWCA Crim 901, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/901.html.
[15] Available at: https://www.legislation.gov.uk/ukpga/1980/43/section/108.
[16] Available at: https://www.legislation.gov.uk/ukpga/2020/17/section/4.
[17] Available at: https://www.legislation.gov.uk/ukpga/2020/17/section/14.

7.21 In practice, the Crown Court usually can avoid these potential difficulties by postponing its decision on the committal for sentence until after the appeal against conviction, but only if the defendant decides not to wait until after the sentencing before starting the appeal. The Rule Committee heard from Crown Court judges that it would be more efficient, and fairer both to defendants and witnesses, if the time limit for appeal against conviction were to run from the date of committal for sentence to the Crown Court, where that happens. The Committee agreed.

7.22 Rule 11(b)(i) of these Rules amends rule 34.2 of the Criminal Procedure Rules accordingly.

Applications for search warrants

7.23 Part 47 of the Criminal Procedure Rules contains rules about, among other things, applications for search warrants. Last October the Law Commission published a report about search warrants[18] in which it recommended that the Criminal Procedure Rule Committee should, among other things, (i) "consider amending the Criminal Procedure Rules to include rules governing the storage of sensitive material provided to the court during a search warrant application"[19]; (ii) formalise in the Criminal Procedure Rules the requirement for a magistrate hearing a search warrant application to be advised by a legal adviser[20]; and (iii) "consider amending search warrant application forms to require an investigator, when they are seeking to obtain a warrant to search for and seize electronic devices to acquire electronic data, to explain in as much detail as practicable what information on devices is sought."[21]

7.24 The Rule Committee accepted those three recommendations and decided to apply the third to the relevant rules as well as to the application forms to which the Law Commission referred. Rule 12(a), (b)(i) and (ii) and (c) of these Rules implements the first. Rule 12(b)(iii) implements the second. Rule 12(d) to (k) implements the third.

References to sentencing legislation

7.25 On 1st December, 2020, the Sentencing Act 2020 consolidated and replaced most previous legislation to do with sentencing. The Criminal Procedure Rules 2020 contained a number of references to that previous legislation which would have been misleading had they not been replaced and the Criminal Procedure (Amendment) Rules 2021, S.I. 2021 No. 40, replaced most of them with references to the corresponding new provisions. These Rules replace some more.

Other miscellaneous and consequential rule amendments

7.26 The Police, Crime, Sentencing and Courts Bill now before Parliament if it passes may repeal some temporary provisions of the Coronavirus Act 2020 before those provisions expire. That would affect the temporary modifications to the Criminal Procedure Rules 2020 which have effect under rule 2.1(4) of the 2020 Rules, in particular the modifications to the rules about live links. These Rules amend rule 2.1 of the Criminal Procedure Rules so that those temporary modifications will cease to have effect when the Coronavirus Act provisions expire or are repealed, whichever happens first.

[18] Available at: https://www.lawcom.gov.uk/project/search-warrants/.
[19] Law Commission recommendation 37.
[20] Law Commission recommendation 20.
[21] Law Commission recommendations 46 – 48.

7.27 The statutory provisions that create the behaviour orders to which Part 31 of the Criminal Procedure Rules refers use different words to mean substantially the same thing in connection with the variation and termination of such orders. These Rules amend rules 31.1 and 31.5 to make it clear that Part 31 applies to 'renewal' and 'discharge' as well as to 'variation' and 'revocation'.

7.28 These Rules make some other amendments consequent upon the main amendments described in the paragraphs above, to correct what otherwise would be inaccurate or misleading cross-references.

8. European Union Withdrawal and Future Relationship

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 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 desirability of continuing to consolidate the Rules at regular intervals, the Committee decided to do so: at first annually, between 2010 and 2015, then in 2016 reverting to the plan to consolidate at 5 yearly intervals.

9.2 In accordance with that plan the Rules were consolidated again in 2020. The Committee now intends to make a further consolidation in 2025. Meanwhile, the effects of amendments to the Criminal Procedure Rules 2020 will be published at http://www.legislation.gov.uk/uksi/2020/759/contents/made and an informal consolidated text will continue to be available to the public, with some additional commentary and explanation, at https://www.gov.uk/guidance/rules-and-practice-directions-2020.

10. Consultation outcome

10.1 The Rule Committee fulfilled its statutory obligation to consult as the Committee considers appropriate by inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn.

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 at https://www.gov.uk/guidance/announcements-from-the-criminal-procedure-rule-committee.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector because these Rules 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 for those reasons.

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: 07811 823574 or email: jonathan.solly@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Alice Adamson, 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.