EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2016

2016 No. 120 (L. 1)

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 various respects. They add new rules about the procedure on an application to start a prosecution in the Crown Court in a case in which the defendant has not been sent for trial there by a magistrates' court; a new rule requiring a defendant to give advance notice where he or she wants the court to take a benign view of evidence of his or her bad character; new rules about identifying at the beginning of a trial what is going to be in issue, for the benefit of jurors especially; new rules about getting help with the assessment of claims for legal costs in complex cases; and new rules about applications for investigation orders and search warrants. They amend the rules about the procedure on an appeal from a magistrates' court to the Crown Court, and about time limits for (i) starting a Crown Court trial, and (ii) responding to an extradition appeal.

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 consolidated annually, in June, and amended if necessary in December, with these revisions coming into force ordinarily on the first Monday in October and on the first Monday in April, respectively, of each year.

4.3 These Rules exercise new powers conferred on the Rule Committee by amendments made by section 82 of the Deregulation Act 2015 to (i) section 2(6) of the Administration of Justice (Miscellaneous Provisions) Act 1933, which now allows the Criminal Procedure Rules to govern the procedure on an application under that Act to a High Court judge for permission to serve a draft indictment and so start proceedings in the Crown Court, and (ii) Schedule 1 to the Police and Criminal Evidence Act 1984, Schedule 5 to the Terrorism Act 2000, section 352 of the Proceeds of Crime Act 2002 and section 59 of the Criminal Justice and Police Act 2001, each of which now allows the Criminal Procedure Rules to govern the procedure on applications for more types of search warrant than formerly was the case, more types of order for the production of evidence, and orders for the retention or return of seized property. The Rules also now exercise powers to govern the procedure on applications for search warrants and production orders under the Extradition Act 2003, and on applications for the return of seized property under the Police (Property) Act 1897; and they exercise the power to supply the usual time limits for starting a Crown Court trial, under the Senior Courts Act 1981.

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

Time limits for the commencement of trial in the Crown Court

7.1 Rule 3.24 of the Criminal Procedure Rules is amended by rule 4 of these Rules to set the minimum and maximum time limits within which the Crown Court must take a defendant's plea after the case is sent for Crown Court trial by a magistrates' court.

7.2 Section 77 of the Senior Courts Act 1981 requires that Criminal Procedure Rules 'shall prescribe the minimum and the maximum period which may elapse between a person's being sent for trial and the beginning of the trial' (which the Act defines as taking place 'when the defendant is arraigned', meaning when his or her plea is taken). The time limits set by the amended rule – a minimum of two weeks after sending unless the parties otherwise agree, and a maximum of sixteen weeks unless a Crown Court judge otherwise directs – accommodate the initiative recently introduced

by the Presiding judges for the improvement of trial preparation in the Crown Court. That initiative is described at: https://www.judiciary.gov.uk/subject/better-case-management-bcm/.

Application for permission to serve a draft indictment

7.3 A new rule 10.3 is added to the Criminal Procedure Rules by rule 6 of these Rules to govern the procedure on an application by a prosecutor to a High Court judge for permission to start a prosecution in the Crown Court by serving a draft indictment without a magistrates' court first having sent the defendant for trial for the offence. Rules 4.3 and 4.4 of the Criminal Procedure Rules, about service of documents, are amended by rule 5 of these Rules to supplement new CrimPR 10.3.

7.4 For a defendant to be tried in the Crown Court, usually he or she must be sent for trial there by a magistrates' court. In some cases, however, a defendant can be tried without first being sent. One of those cases is where a High Court judge gives the prosecutor permission to serve a draft indictment under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933, for example to allow the trial of related offences to take place at a trial just about to begin. The Criminal Procedure Rule Committee had no power to make rules about applications for such permission until section 82 of the Deregulation Act 2015 amended the 1933 Act. The procedure instead was governed by a combination of the Indictment (Procedure) Rules 1971, practice directions given by the Lord Chief Justice and guidance to prosecutors issued by the Attorney General. The Rule Committee has exercised the new power conferred on it to consolidate and simplify that procedure, in accordance with its statutory objective (see paragraph 4.1 above).

Notice to introduce evidence of a defendant's bad character

7.5 Rule 21.4 of the Criminal Procedure Rules is amended by rule 8 of these Rules to require a defendant (i) to give notice of his or her intention to introduce evidence of his or her own bad character, and (ii) in the Crown Court, at the same time to give notice of any requested direction to the jury about the significance of that evidence.

7.6 In the case of *R v Hunter and Others* [2015] EWCA Crim 631, the Court of Appeal dealt with several appeals against convictions in the Crown Court on grounds relating to the trial judges' directions to jurors about the defendants' character. In each case, the defence itself had revealed a previous conviction and had sought to minimise its significance. At paragraphs 99 – 102 of the judgment the Court of Appeal said:

"The difficulties that have arisen most commonly arise because inadequate discussion has taken place between the advocates and the judge before the evidence has been adduced, before speeches, and before the summing up, and on occasion because the judge has not directed the jury in accordance with his/her stated intention. … we have no doubt that as a matter of good practice, if not a rule, defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and if so the precise terms. This discussion should take place before the evidence is adduced. This has advantages for the court and for the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the Crown can conduct any necessary checks and the judge will have the fullest possible information upon which to rule. The judge should then ensure that the

directions given accord precisely with their ruling. The Criminal Procedure Rule Committee may wish to clarify the scope of the Rule."

7.7 The Rule Committee has made this amendment in response to that judgment.

Identification of issues by the defence

7.8 Rule 24.3 of the Criminal Procedure Rules, which is about trial in magistrates' courts, and rule 25.9, about trial in the Crown Court, are amended by rules 9 and 10(a) of these Rules to provide for the identification of issues by the defence at the beginning of the trial.

7.9 In his *Review of Efficiency in Criminal Proceedings* published on 23rd January, 2015 (see http://www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/), Sir Brian Leveson, the President of the Queen's Bench Division of the High Court, at paragraph 279 recommended that "the Criminal Procedure Rules be amended so as to require, immediately following the prosecution opening, a public identification by the defence of the issues in the case". The Rule Committee has made these amendments to give effect to Sir Brian's recommendation. If, in the Crown Court, the defendant declines the judge's invitation to identify the issues for the jury, and the judge thinks it necessary to help achieve a fair trial that jurors should know what the defendant before the trial declared to be in issue, then the judge can require the jurors to be given a copy of that declaration (known as 'the defence statement').

Reading witness statements aloud at trial in the Crown Court

7.10 Rule 25.12 of the Criminal Procedure Rules is amended by rule 10(b) of these Rules to clarify the circumstances in which written witness statements must be read aloud at trial in the Crown Court.

7.11 The Rule Committee's intention for CrimPR 25.12(2) was that it should allow written witness statements to be read by a judge and jurors to themselves, without being read aloud, unless any member of the public, including any reporter, were present. If they were, then usually the statement should be read aloud so that the evidence could be heard by everyone present. In the Crown Court, jurors may read written evidence for themselves, or it may be read to them aloud, according to what the judge directs; and it may be appropriate to read statements aloud to jurors, so that the witness' evidence has a comparable impact to hearing the witness give that evidence in person. It was reported to the Committee that some judges understood the rule to require the provision of written witness statements to jurors even when those statements were to be read aloud to them, and whether members of the public were present or not. To clarify the intention of the rule, the Committee has amended it to omit reference to the jury and to leave the provision of written statements to them in the court's discretion: subject to the overriding objective in CrimPR 1.1 and, as far as concerns publicity, subject to the open justice principle expressed in CrimPR 6.2.

Case management in appeals to the Crown Court

7.12 Rules 34.7 and 34.11 of the Criminal Procedure Rules are amended by rule 11 of these Rules (i) to include explicit provision for applications for rulings during preparation for an appeal hearing in the Crown Court, and (ii) to include explicit provision for the conduct of case management by a judge without justices of the peace before such an

appeal hearing begins, in exercise of the power conferred on the Criminal Procedure Rules by section 74 of the Senior Courts Act 1981.

7.13 It was reported to the Rule Committee that Crown Court judges were in doubt about the extent of their powers to give case management directions on an appeal from a magistrates' court to the Crown Court prior to the hearing of the appeal. To hear the appeal, the Crown Court must comprise a Crown Court judge and magistrates; but the relevant statute, the Senior Courts Act 1981, is not entirely clear about the judge's power to deal with pre-hearing directions on her or his own. Among judges, the complexity of appeals to the Crown Court is perceived to be on the increase, and there is perceived to be a greater need for case management by the court than has been the case hitherto. The 1981 Act allows the Criminal Procedure Rules to prescribe the constitution of the Crown Court for the purposes of an appeal, and the Rule Committee has used that power to make it clear that a judge alone can give case management directions and, if applicable, can allow an appeal against conviction where the respondent prosecutor does not wish to oppose it (for example, because further evidence has emerged to show that the conviction was plainly wrong – such as evidence that the defendant was in fact insured to drive, in a case of alleged driving without insurance).

Time for costs claims and assessments of costs

7.14 Some rules in Part 45 of the Criminal Procedure Rules, the rules about costs, are amended by rule 14 of these Rules (i) to draw attention to the application of time limits to the court's powers to make some costs orders, and (ii) to supply the procedure where the court requires assistance in assessing costs under some of its powers.

7.15 In the case of *Quayum v Director of Public Prosecutions* [2015] EWHC 1660 (Admin) the High Court pointed out that, unlike other types of costs order, applications under sections 19(1) and 19A of the Prosecution of Offences Act 1985, for orders for wasted legal costs to be paid by the party or lawyer responsible for the waste, had to be made 'during' or 'in' the proceedings, not afterwards; and courts had no power to extend the time within which such costs applications could be made. In the case of *Evans v The Serious Fraud Office* [2015] EWHC 1525 the High Court observed that the amount of costs to be paid on an application under either of those same two sections of the Prosecution of Offences Act 1985 has to be assessed by the court itself, and that in some exceptional cases the amount claimed may be very large, and the assessment complex and time consuming (in the *Evans* case itself, the court made a costs order for £1,726,795.05). The court commented that, 'the jurisdiction of … judges to seek assistance … when required to assess section 19 costs may well be worthy of further consideration by the Criminal Procedure Rule Committee'. Similarly complex costs assessments may be required on an application under section 19B of the 1985 Act for wasted legal costs to be paid by a third party.

7.16 The Rule Committee has made these amendments in response to those judgments.

Investigation orders and warrants

7.17 The rules in Part 47 of the Criminal Procedure Rules are substituted and rearranged, by rule 15 of these Rules and the Schedule to them, with some rules added, and some amended, so as to include new rules about production orders, search warrants and applications for the return of seized property, made in exercise of various powers

recently conferred on the Criminal Procedure Rule Committee. The new powers are contained in Schedule 1 to the Police and Criminal Evidence Act 1984, Schedule 5 to the Terrorism Act 2000, section 352 of the Proceeds of Crime Act 2002 and section 59 of the Criminal Justice and Police Act 2001, all of which are amended by section 82 of the Deregulation Act 2015; and in sections 157 and 160 of the Extradition Act 2003, amended by the Anti-social Behaviour, Crime and Policing Act 2014. In association with that, rules 17.3 and 17.5 of the Criminal Procedure Rules are amended by rule 7 of these Rules to clarify the procedure on an application to the court for an order under section 7 of the Bankers' Books Evidence Act 1879. The current rules about (i) orders for the retention of fingerprints (Section 5 of the new Part 47 rules), (ii) investigation anonymity orders (Section 6 of the new Part) and (iii) investigation approval orders (Section 7) are rearranged and renumbered but otherwise unchanged.

7.18 There have been Criminal Procedure Rules about applications for investigation orders (that is, production orders, orders to grant entry, explanation orders, disclosure orders, customer information orders and account monitoring orders) under the Terrorism Act 2000 and under the Proceeds of Crime Act 2002 since 2009, when the rules were made in response to the judgment of the High Court in *R (Shiv Malik) v Manchester Crown Court and the Chief Constable of Greater Manchester Police* [2008] EWHC 1362 (Admin). There have been Criminal Procedure Rules about applications to magistrates for search warrants since 2013, when they were made in response to the judgment of the High Court in the cases of *R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and Director of the Serious Fraud Office (Vincent Tchenguiz, interested party)* and *R (Robert Tchenguiz and R20 Ltd.) v Director of the Serious Fraud Office, Commissioner of the City of London Police and Central Criminal Court* [2012] EWHC 2254 (Admin). However, until now the Criminal Procedure Rule Committee has had no power to make rules about applications for some other types of investigation order and warrant, because those applications are made to individual judges, described in the relevant Acts either as 'Circuit judges' or as 'judges of the Crown Court', not made to 'the Crown Court'; and the Criminal Procedure Rules govern proceedings in 'the criminal courts', which include 'the Crown Court' but which are not defined to include a judge who is exercising a jurisdiction of his or her own, even though that judge is one of those entitled also to exercise the jurisdiction of the Crown Court. Now, section 82 of the Deregulation Act 2015 has amended several Acts so that the Rules can apply. The Rule Committee has taken the opportunity to enlarge the scope of the Part 47 rules, and to restore the coherence of the rules first made in 2009, again in accordance with its statutory objective (see paragraph 4.1 above).

Extradition appeal response time limit

7.19 Rule 50.21 of the Criminal Procedure Rules is amended by rule 16 of these Rules to redefine the time limit for a respondent's notice in reply to an extradition appeal to the High Court.

7.20 It was reported to the Rule Committee that the current rule was having the effect of requiring respondents to extradition appeals (usually the Crown Prosecution Service, on behalf of the requesting state) frequently to serve a response notice twice: once in response to the original appeal notice, and then again in response to an amended appeal notice. The Rule Committee agreed that that was disproportionate to what the rule was intended to achieve, namely clarity about what was in issue in the appeal.

The rule is amended to give the respondent the same length of time (10 business days) as the appellant has to amend the appeal notice, and to start the respondent's time running only when the appellant actually serves an amended appeal notice, or when the time for doing so runs out.

Miscellaneous amendments and corrections

7.21 Rule 2.2 of the Criminal Procedure Rules is amended by rule 3 of these Rules, the note to CrimPR 24.3 is amended by rule 9(d), CrimPR 25.14 is amended by rule 10(c), CrimPR 38.5 is amended by rule 12, CrimPR 43.2 is amended by rule 13, CrimPR 45.1 is amended by rule 14(a) and the Glossary at the end of the Criminal Procedure Rules is amended by rule 17, in each case to correct errors. Rule 18 of these Rules amends the preamble to the Criminal Procedure Rules to include references to the additional statutory powers now being exercised.

Consolidation

7.22 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. The Committee intends to effect further such consolidations in future. In addition, 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 inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and, in connection with the revised CrimPR Part 47 rules, by inviting and reviewing suggestions and observations from the Ministry of Justice, from Her Majesty's Courts and Tribunals Service and from investigating and prosecuting authorities which have power to make the applications for investigation orders and warrants to which those rules apply.

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. Twice a year the Committee receives and considers statistical information about criminal case management gathered by HM Courts and Tribunals Service.

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: 020 3334 4031 or email: jonathan.solly@justice.gsi.gov.uk can answer any queries regarding the instrument.