EXPLANATORY MEMORANDUM TO

THE PROSECUTION OF OFFENCES (CUSTODY TIME LIMITS) (CORONAVIRUS) (AMENDMENT) REGULATIONS 2021

2021 No. 91

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 This instrument concerns the maximum periods for which certain defendants awaiting trial at the Crown Court can be held in custody on remand. This maximum period is referred to as a custody time limit (CTL). These regulations amend The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 ("the 2020 Regulations") to exclude defendants under the age of 18 years from the temporary extension to CTLs which came into force on 28 September 2020.

2.2 The 2020 Regulations temporarily extended the CTL for all defendants awaiting trial at the Crown Court. This extension was introduced because of the unprecedented challenges COVID-19 presented to the criminal justice system in England and Wales. The scale and seriousness of the situation presented significant difficulties to the criminal court process, including the Crown Court's ability to hear jury trials for all defendants within their CTL.

2.3 It was always anticipated that the 2020 Regulations would have a limited impact on defendants under the age of 18. Our law recognises the unique circumstances and needs of children and young people in the justice system. Youth cases are prioritised in court listing and only a small minority are heard in the Crown Court where the CTL extension applies. The listing of the trial of a youth defendant outside of the non-extended CTL would only have been necessary in extremely limited circumstances. This instrument removes the specific generic extension for defendants under 18 years of age when in custody for the first time in relation to an offence. If a defendant turns 18 after their first time in custody for an offence but in the course of the proceedings against them, the non-extended CTL will continue to apply.

2.4 These regulations will be retrospective. This means that any defendant under the age of 18 who was remanded on or after 28 September 2020, the date on which the 2020 Regulations came into force, will no longer be subject to the extended CTL.

2.5 The extended CTL will continue to apply to adult defendants in the Crown Court and, due to a sunset provision included in the 2020 Regulations, will automatically expire 9 months after 28th of September 2020.

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 this instrument is subject to the 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 the 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 1985 ("the 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 Prosecution of Offences (Custody Time Limits) Regulations 1987 ("the 1987 Regulations") set the maximum CTL for defendants awaiting trial in the Crown Court at regulation 5. The 2020 Regulations amend regulation 5(3)(b) and (6B) of the 1987 Regulations to increase the maximum 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 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. This came into force on 28 September 2020.

6.3 This instrument removes children and young people from the extension described in paragraph 6.2. Therefore children and young people will have a CTL of 182 days for all triable either-way and indictable only criminal offences awaiting trial on indictment at the Crown Court. In rare cases where a voluntary bill of indictment is preferred, or a fresh trial has been ordered by the Court of Appeal, children and young people will have a CTL of 112 days.

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 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. In the Magistrates' Court the CTL is 56 days for offences awaiting summary trial. For those awaiting trial on indictment in the Crown Court the 2020 Regulations has temporarily extended the CTL from 182 days to 238 days.

7.2 In rare circumstances, an alternative CTL can apply to criminal offences awaiting trial in the Crown Court. The 2020 Regulations temporarily extended this rarer CTL to 168 days from 112 days. This applies:

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.

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 led to delays in jury trials resulting in an increase in cases where the defendant is held in custody on remand. This 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. Since the original decision was taken the criminal courts have recovered effectively, with 290 rooms open for jury trial by the end of 2020, however the limitations posed by social distancing and the changing threat posed by Covid-19 means that the courts are unlikely to achieve pre-Covid levels of trial hearings for some time.

7.7 On 27 March 2020, 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 acknowledged 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 amount to "good and sufficient cause" to extend CTLs. It contained rules of practice only and did not create legal obligations or restrictions on any party, nor did it override independent judicial discretion.

7.8 However, this arrangement for extending CTLs on a case-by-case basis under the framework of the "Coronavirus Crisis Protocol" was only intended as a short-term measure. It was therefore withdrawn, and the 2020 Regulations were instead introduced to extend the duration of CTLs. This approach will provide more certainty to defendants as well as their victims.

7.9 Following a judicial review heard on 16 June 2020, the courts held that the pandemic constituted a "good and sufficient cause" to extend CTLs under section 22(3) of the POA 1985 and rejected the complainant's contention that the protocol unlawfully fettered the discretion of any judge hearing an application to extend. A court hearing a further judicial review on 4 November 2020, where the steps taken by the government in response to the pandemic were considered, again resulted in the court deciding that the pandemic is a good and sufficient cause to extend CTLs.

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

7.10 The 2020 Regulations temporarily extended CTLs as described above in paragraph 6.2.

7.11 The objective of the 2020 Regulations was to create more consistency and certainty about the way in which the criminal justice system manages CTLs for untried defendants held on remand. Increasing the length of a 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 helps 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 is also helping to manage demand while the Crown Court transitions to full jury trial capacity.

Negative statutory instrument (SI) to remove children and young people from the temporarily extended Custody Time Limits

7.12 This instrument will remove all defendants under 18 years of age at the time of their first appearance for an offence at the Crown Court from the extension to CTLs introduced by the 2020 Regulations.

7.13 Defendants under 18 years of age will be subject to a CTL of 182 days for all triable either-way and indictable only criminal offences awaiting trial on indictment at the Crown Court and 112 days where a voluntary bill of indictment is preferred or a fresh trial has been ordered by the Court of Appeal.

7.14 This instrument will be retrospective and any cases involving a defendant under 18 years of age which have been listed for trial beyond the 182 day (or 112 days in the rarer circumstances set out at paragraph 7.2), will be relisted for a date within the specified timeframe. We therefore anticipate that no defendant under the age of 18 will be practically affected by the 2020 Regulations.

7.15 The purpose of removing defendants under 18 years of age is to remove the specific generic extension and allow any decisions to extend a CTL beyond 6 months to be made by a judge on a case by case basis.

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 / 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 this instrument as soon as possible in light of the implications for defendants under the age of 18 currently on remand awaiting trial at the Crown Court.

11. Guidance

11.1 Formal guidance has not been produced as there will be no changes to process or procedure.

11.2 The new CTL for defendants under the age of 18 years has been communicated to the relevant criminal justice system practitioners including, the CPS, defence, police service, court staff, and the judiciary.

11.3 The CPS has been notified of the change and will amend their IT system reflect the Regulations.

12. Impact

12.1 In 2019, of 25,309 prosecutions against under-18s, 1,570 (6%) of these were sent for trial at Crown Court. Children and young persons were a small minority of individuals dealt with at Crown Court (1% in 2019)[1]. Our law recognises the unique circumstances and needs of children and young people in the justice system. Youth cases are prioritised in court listing and only a small minority are heard in the Crown Court where the CTL extension applies. CPS guidance states that 'All youths charged alone shall be tried summarily in the Youth Court' apart from in a small set of specific circumstances[2]. The listing of the trial of a youth defendant outside of the non-extended CTL would only have been necessary in extremely limited circumstances and the existing ability to apply to court on a case by case basis for an extension remains in place if this is deemed justified.

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

12.3 There is no significant impact on the public sector.

12.4 An Impact Assessment has not been prepared for this instrument because any change in departmental costs is expected to be small and cannot be effectively monetised.

12.5 An Equalities Impact Statement has been prepared for this instrument and will be published on legislation.gov.uk alongside the laying of the 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 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.

[1] https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019
[2] https://www.cps.gov.uk/legal-guidance/youth-offenders

15. Contact

15.1 Rosie Melville at the Ministry of Justice rosie.melville1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Matthew Gould, Deputy Director for Criminal Justice Strategy & Criminal Court Policy, at the Ministry of Justice 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.