A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2016 (S.I. 2016/120)

Where to find the new Rules

The Criminal Procedure (Amendment) Rules 2016 are at this address:
http://www.legislation.gov.uk/uksi/2016/120/contents/made

When the Rules come into force, the changes they make will appear at this address, too:
http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015

What the new Rules are for

The new Rules amend the Criminal Procedure Rules 2015. They:

(a) include new rules about—
- applications for permission to start a prosecution in the Crown Court, in Part 10 of the Criminal Procedure Rules
- giving notice where a defendant intends to refer to his or her own bad character during a trial, in Part 21 of the Rules
- announcing at the beginning of a trial what is going to be in issue (for the benefit of jurors, especially), in Parts 24 and 25
- help for the court with the assessment of claims for legal costs in complex cases, in Part 45
- applications for investigation orders and search warrants, in Parts 17 and 47.

(b) make changes to the rules about—
- appeal from a magistrates' court to the Crown Court (Part 34)
- the time limits for (i) starting a Crown Court trial (Part 3), and (ii) responding to an extradition appeal (Part 50).

(c) make a few miscellaneous alterations and corrections.

When the new rules come into force

The new Rules come into force on Monday 4 April 2016.

What is in the new Rules

Time limits for starting a trial in the Crown Court
Section 77 of the Senior Courts Act 1981 requires Criminal Procedure Rules to '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 of guilty or not guilty is taken in the Crown Court).

Rule 3.24 of the Criminal Procedure Rules is amended by rule 4 of these Rules to set those time limits as 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. That accommodates the initiative recently introduced by the Presiding judges for the improvement of trial preparation in the Crown Court, which is described at:
https://www.judiciary.gov.uk/subject/better-case-management-bcm/.

Application for permission to serve a draft indictment
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 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 a new rule 10.3 of the Criminal Procedure Rules which is added by rule 6 of these Rules. 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 that new rule.

Notice to introduce evidence of a defendant's own bad character

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 a defendant's character. In each case the defendant had revealed a previous conviction and then tried to minimise its significance, asking the judge to direct the jury that they should treat the defendant as a person of good character despite that conviction. 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."

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

Identification of issues by the defence

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. 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. In the Crown Court, if the defendant declines the judge's invitation to identify the issues for the jury, and if the judge thinks it necessary to help achieve a fair trial for jurors to know what the defendant had declared would be in issue before the trial began, 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
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.

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
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 unclear 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 now for case management by the court than there has been before now.

Section 74 of the 1981 Act allows the Criminal Procedure Rules to prescribe the constitution of the Crown Court for the purposes of an appeal. The Rule Committee has used that power. Rule 34.11 of the Criminal Procedure Rules is amended by rule 11 of these Rules to provide explicitly 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). Rule 34.7 is also amended to include explicit provision for applications for rulings during preparation for the appeal hearing.

Time for costs claims and assessments of costs
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.

The Rule Committee has made these amendments in response to those judgments. Rules in Part 45 of the Criminal Procedure Rules 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.

Investigation orders and warrants

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.

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 do not 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.

Extradition appeal response time limit

It was reported to the Rule Committee that rule 50.21 of the Criminal Procedure Rules 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 by rule 16 of these Rules to redefine the time limit for a respondent's notice. The rule now gives the respondent the same length of time (10 business days) as the appellant has to amend the appeal notice, and starts the respondent's time running only when the appellant actually serves an amended appeal notice, or when the time for the appellant to do that runs out.

Other amendments

These Rules correct some errors in the Criminal Procedure Rules 2015: one in CrimPR 2.2, in the definition of 'live link' (rule 3 of these Rules); and one in the note to CrimPR 24.3 (rule 9(d)), one in CrimPR 25.14 (rule 10(c)), one in CrimPR 38.5 (rule 12), one in CrimPR 43.2 (rule 13), one in CrimPR 45.1 (rule 14(a)) and one in the Glossary at the end of the Criminal Procedure Rules (rule 17), all correcting cross-references. Rule 18 of these Rules amends the preamble to the Criminal Procedure Rules to include references to the additional statutory powers now being exercised.

Criminal Procedure Rule Committee secretariat
8 February 2016