

A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT NO 2) RULES 2016 (S.I. 2016/705)

Where to find the new Rules

The Criminal Procedure (Amendment No. 2) Rules 2016 are at this address:

<http://www.legislation.gov.uk/ukSI/2016/705/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—

- the court's duty to conduct pre-trial hearings by live link or telephone, and to receive evidence by live link where the court can, in Part 3 of the Criminal Procedure Rules
- preparing the indictment (the formal written statement of charges in the Crown Court), and the circumstances in which charges must be tried separately in the Crown Court, in Parts 3 and 10 of the Rules
- applications by the Criminal Cases Review Commission for orders for access to documents, in Part 47 of the Rules

(b) make changes to the rules about—

- applications for bail with conditions to be supervised in another EU member State (Part 14)
- identifying exhibits to written witness statements (Part 16)
- determining applications for special measures directions for young or otherwise vulnerable witnesses (Part 18)

(c) make a few other miscellaneous additions and alterations.

When the new rules come into force

The new Rules come into force on Monday 3 October 2016.

What is in the new Rules

Use of live links and telephones for court hearings

'Live link' is a statutory expression which the Criminal Procedure Rules explain means, 'an arrangement by which a person can see and hear, and be seen and heard by, the court when that person is not in the courtroom'. In his *Review of Efficiency in Criminal Proceedings* published on 23 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 paragraphs 40 – 50 recommended that pre-trial hearings should be conducted by live link or telephone wherever possible, in the interests of efficiency. The Rule Committee consulted publicly on draft rules to that effect, and on rules to encourage courts more frequently than at present to exercise their statutory powers to receive evidence by live link. After considering the responses to that consultation, the Committee decided to make these rules.

Rule 3(a), (b) and (c) of these Amendment Rules amends rules 3.2, 3.3 and 3.5 of the Criminal Procedure Rules to impose on the court a duty to use live links and telephones for the conduct of pre-trial case management hearings, where appropriate equipment is available and where the other conditions listed in new CrimPR 3.2(4) and (5) are met; and a duty to use live links for receiving evidence where appropriate equipment is available and the

relevant statutory conditions are satisfied. The new rules will be supplemented by a Practice Direction to be made by the Lord Chief Justice.

Preparation of the indictment, including electronic generation of a draft indictment

The 'indictment' is the formal written record of the offences with which a defendant is charged in the Crown Court. In the *Review of Efficiency in Criminal Proceedings* mentioned above, at paragraphs 365 – 367, Sir Brian Leveson commented that the current procedure for the preparation of indictments imposes 'a significant and unnecessary administrative burden for the prosecution and the courts'. Sir Brian recommended that legislative and other steps should be taken as soon as possible to alleviate that burden.

The Criminal Justice System Common Platform Programme is a joint initiative of the criminal justice agencies to improve process throughout the system, with the support of new information technology. One of the initiatives under way as part of that programme is to convert, by electronic means, the statement of the criminal charges sent by a magistrates' court for trial in the Crown Court into the indictment on which the defendant will be formally accused ('arraigned') in the Crown Court.

Exercising more extensive powers than it has possessed before to make rules about indictments, the Rule Committee has made new rules that allow an electronically generated draft indictment to be adopted by the prosecutor and presented to the Crown Court without the prosecutor needing to prepare a draft indictment repeating the list of charges, as required now. Where a draft indictment is produced by these means, the new rules have the effect of converting it in law into an indictment at the point at which the defendant is arraigned. Up to that point the prosecutor can make some types of amendment to the draft, or can withdraw the prosecution altogether, without needing the court's permission.

In all cases, not only in those cases in which the draft indictment is generated electronically, the new rules require the court at or before arraignment to obtain the prosecutor's confirmation that the indictment is complete. Again in all cases the new rules abolish the current requirement that restricts the types of offence which an indictment validly may include, and replace that requirement with one which restricts the types of offence which may be tried at the same time: the objective being to ensure that a trial is fair while abolishing the present formalistic rule meant to achieve that.

Rules 3(d), (e) and 6 and Schedule 1 of these Amendment Rules make the necessary amendments to rules 3.21 and 3.24 of the Criminal Procedure Rules, and replace Part 10 of the Rules. Where the new electronic arrangements are introduced, court users will be informed (and it will be apparent when the defendant is sent for trial).

Allocation guidelines

Allocation is the process by which a magistrates' court assigns for trial either in the magistrates' court itself or in the Crown Court an offence which can be tried in either court. In response to another recommendation by Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*, on 10 December 2015, the Sentencing Council issued a new definitive allocation guideline under section 122 of the Coroners and Justice Act 2009 Act. It took effect on 1 March 2016. The new guideline is important to the appropriate and consistent allocation of cases between magistrates' courts and the Crown Court.

It would be impracticable and inappropriate for the Criminal Procedure Rules to reproduce all the guidelines issued by the Sentencing Council, but in this instance the Rule Committee thought it appropriate to do so. Rule 5 of these Amendment Rules adds a note to supplement rule 9.10 of the Criminal Procedure Rules in order to draw attention to the new allocation guideline.

Bail with conditions to be supervised in another EU member State

The European Union Framework Decision to which Part 7 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, S.I. 2014 No. 3141, gives effect in England and Wales allows a European Union member State to monitor a defendant's compliance with bail conditions imposed in another such State pending that defendant's trial. An order for bail subject to such conditions is known as a 'European supervision order'. CrimPR Part 14 was amended in the Criminal Procedure Rules 2015 to accommodate such orders. Since then, only two applications for such orders have been made in England and Wales, but courts' experience gained from those applications and reported to the Committee has prompted this amendment.

Rule 7 of these Amendment Rules amends rules 14.7 and 14.16 of the Criminal Procedure Rules to require an applicant for bail to supply the court with the extra information which it will need if it is to grant bail with conditions to be supervised in another EU state. The necessary forms have been authorised by the Lord Chief Justice for use with the amended rules and they are published under the Part 14 heading at <http://www.justice.gov.uk/courts/procedure-rules/criminal/forms>.

Exhibits to written statements

Section 9 of the Criminal Justice Act 1967 makes it possible for the court to receive in evidence written witness statements, if various specified conditions are met. The witness who makes such a statement may refer to documents or objects, which are then known as 'exhibits'. The current rule requires that such exhibits must be 'labelled or marked', and the label or mark signed. The Rule Committee had not intended that those requirements should prevent electronic marking or signature where documentary exhibits in electronic form were used, but received reports that in such cases the requirements sometimes were understood to require the documents to be printed for no other reason than to satisfy the rule. The Committee decided to amend the rule to make clear that that was not necessary. Rule 8 of these Amendment Rules clarifies rule 16.3 of the Criminal Procedure Rules for that reason.

Allowing sufficient time to communicate with witnesses who are victims of crime

The Code of Practice for Victims of Crime issued under section 32 of the Domestic Violence, Crime and Victims Act 2004 emphasises the importance of communication with those who are victims of criminal conduct and, in particular, the importance of discussing with those who are witnesses the special measures for giving evidence by which they might benefit, and the importance of familiarising them with arrangements at court.

Reports of two inspections by HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, another of the recommendations of the *Review of Efficiency in Criminal Proceedings*, mentioned above, and some academic research to which the Rule Committee's attention was drawn, all persuaded the Committee that an explicit reference should be made to the court's obligation as far as possible to accommodate the parties' obligations under the Code. Rule 9 of these Amendment Rules amends rule 18.4 of the Criminal Procedure Rules for that purpose.

Prohibition orders

Section 19 of the Psychoactive Substances Act 2016 allows a court which convicts a defendant of a 'relevant offence', as defined by the Act, to make a prohibition order (defined by section 17). Other provisions of the Act allow the court to vary or discharge such an order, and allow the court to give a special measures direction in proceedings for a prohibition order.

Part 31 of the Criminal Procedure Rules was first introduced in 2008 as a procedural framework for all the 'behaviour orders' which then existed and which Parliament subsequently might introduce. Consequently, few amendments to the Criminal Procedure Rules have been required to accommodate the new type of order. Rule 11 of these Amendment Rules makes the necessary amendments to some rules in CrimPR Part 31.

Criminal Cases Review Commission applications for access to documents

The Criminal Cases Review Commission (Investigations) Act 2016 extends the powers of the Criminal Cases Review Commission to obtain documents and other material so that material can be obtained under an order of the Crown Court from a person who is not employed by or serving in a public body. Applications by the Commission under the new provision will only ever be made after trial and conviction, not in aid of a criminal investigation in the usual sense. Nonetheless, the power conferred on the Crown Court resembles the court's powers under other Acts to make so-called 'production' orders, and so rule 15 of these Amendment Rules adds new rules to the CrimPR Part 47 procedure rules about production and comparable orders, adopting many features of those other rules. During scrutiny in the House of Lords of the Bill that is now the Act it was indicated that the same special safeguards for journalistic material should be made as is made already in CrimPR Part 47 in relation to production and comparable orders. That has been done in new rule CrimPR 47.54(4), which prevents the court from determining an application for an order for access to journalistic material otherwise than at a hearing in the respondent journalist's presence, unless the journalist waives the opportunity to attend.

Other amendments

In the case of *R v Uddin and Others* [2015] EWCA Crim 1918 the Court of Appeal observed that where representations plainly were required to be delivered in writing to another party and to the court, in some instances the Criminal Procedure Rules so required explicitly but not in other instances. Where the Criminal Procedure Rules require an application, a notice or representations to be 'served' the definition of service in Part 4 of the Rules means that they must be written. The Rule Committee agreed that in those circumstances it was superfluous and potentially confusing to require something which must be served to be 'written', or 'in writing'. A number of rules are amended by these Amendment Rules to remove the superfluous words.

In the case of *Thomas v Crown Prosecution Service* [2015] EWHC 4079 (Admin) the High Court observed that the rule about applications for bail pending appeal from a magistrates' court to the Crown Court usefully could make it more clear that such an application may be made to either court. The Rule Committee agreed that some further clarification would assist. CrimPR 34.2, which sets out the requirements for serving the appeal notice in such a case, and the note to that rule are amended for that reason. For consistency there is a corresponding amendment to the note to CrimPR 35.2, a rule which concerns applications to a magistrates' court or to the Crown Court to state a case on an appeal to the High Court.

CrimPR 29.1 (Representations about obligatory disqualification or endorsement) sets out the procedure where the court by default is required to disqualify a defendant from driving, or to endorse his or her driving record. It was suggested to the Rule Committee that it would be helpful for the note to that rule to refer to sections 35A and 35B of the Road Traffic Offenders Act 1988, which deal with the extension of a period of disqualification where the court also imposes a custodial sentence. The Rule Committee agreed that such a reference should be included.

Criminal Procedure Rule Committee secretariat
8 July 2016