A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2018 (S.I. 2018/132)

Where to find the new Rules

The Criminal Procedure (Amendment) Rules 2018 are at this address:
http://www.legislation.gov.uk/uksi/2018/132/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 to start prosecutions in magistrates' courts, in Part 7 of the Criminal Procedure Rules (Starting a prosecution in a magistrates' court)
- applications to introduce evidence of a complainant's previous sexual behaviour under section 41 of the Youth Justice and Criminal Evidence Act 1999, in Part 22 of the Rules (Evidence of a complainant's previous sexual behaviour)
- the material that must be supplied to an advocate appointed by the court to cross-examine a witness whom an unrepresented defendant is not allowed to cross-examine, in Part 23 of the Rules (Restriction on cross-examination by a defendant)
- the procedure to follow where the Court of Appeal is asked to re-open previous appeal proceedings, in Part 36 of the Rules (Appeal to the Court of Appeal: general rules)
- applications for further information orders under the Terrorism Act 2000 and under the Proceeds of Crime Act 2002, both as amended by the Criminal Finances Act 2017, in Part 47 of the Rules (Investigation orders and warrants)

(b) make changes to the rules about—

- ordering separate Crown Court trials (Part 3: Case Management)
- the supply of transcript of Crown Court proceedings (Part 5: Forms and court records)
- the arrest warrant that a magistrates' court must issue where a defendant is sentenced to imprisonment or detention in his or her absence (Part 13: Warrants for arrest, detention or imprisonment)
- identifying those people, for example laboratory technicians, upon whose preparatory work an expert witness relies (Part 19: Expert evidence)
- taking a jury's verdicts where more than one offence is charged (Part 25: Trial and sentence in the Crown Court)
- the content of grounds of appeal to the Court of Appeal (Part 39: Appeal to the Court of Appeal about conviction or sentence)
- references and applications by the Attorney General to the Court of Appeal (Part 41: Reference to the Court of Appeal of point of law or unduly lenient sentencing)
- the duties of legal representatives in extradition appeal cases (Part 50: Extradition)

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

When the new rules come into force

The rules come into force on Monday 2 April 2018.

What is in the new Rules

Order for separate trials

Until 2016 the Criminal Procedure Rules had prohibited the inclusion of more than one alleged offence in a single Crown Court indictment (the formal list of allegations against the defendant) unless those offences all were founded on the same facts or formed or were part of a series of offences of the same or a similar character; and the common law was understood to mean that the consequence of breach of that particular procedural requirement would be the annulment of the entire trial. With effect from 3 October 2016 the Criminal Procedure (Amendment No. 2) Rules 2016, S.I. 2016/705, removed that procedural requirement and changed rule 3.21 of the Criminal Procedure Rules (Application for joint or separate trials, etc.) to require the Crown Court always to order separate trials of offences that were not connected in one of those ways.

However, section 5(3) of the Indictments Act 1915 provides that where an indictment charges more than one offence then the court may or may not order separate trials. During further Committee discussion of the case of *R v Williams* [2017] EWCA Crim 281, [2017] 4 W.L.R. 93,[1] it was suggested that a procedure rule which purports to require the separate trial of offences where the 1915 Act does not require that might not be compatible with the Act. After consideration, the Committee agreed, and agreed to further amend rule 3.21 of the Criminal Procedure Rules accordingly. Rule 4 of the Amendment Rules does that.

Supply of transcript

Rule 5.5 of the Criminal Procedure Rules (Recording and transcription of proceedings in the Crown Court) prohibits the supply of transcript if that supply would contravene a reporting restriction. Statutory reporting restrictions, for example the restriction on publishing the name of a child or the name of the complainant of a sexual offence, prohibit the publication or broadcasting to the general public of the information to which they apply but they do not necessarily prohibit the supply of transcript to an individual member of the public, who could have been present in court anyway and so could have heard what was said. The Rule Committee learned that new administrative arrangements for the supply of transcript of proceedings in the Crown Court had brought to light a misunderstanding about the rule, which had been read to mean that if reporting restrictions of any kind applied to information given in public in the proceedings then transcript of those proceedings could not be supplied to anyone other than the Registrar of Criminal Appeals without a judge's permission.

The Committee therefore agreed to rephrase the rule to make it more obvious that transcript can be supplied unless a reporting restriction that applies has the effect of prohibiting its supply in the particular circumstances. During discussion of that amendment the Committee agreed also to clarify the relationship between rule 5.5 and rules 5.7 and 5.8, which concern the supply of other information and documents to parties and the public respectively: namely, that rule 5.5 applies to transcript and the other two rules do not. Rule 5 of the Amendment Rules makes all those amendments.

Application for a summons

The majority of prosecutions brought by the police, the Crown Prosecution Service, the Serious Fraud Office and local and other public authorities begin now with arrest and charge, or by means of a written charge and requisition issued by the prosecutor, but some still are started by the issue of a summons to the defendant to attend court; and any prosecution brought by a private individual or body begins with an application for the court to issue a summons.

At present the detailed procedural requirements for an application to issue a summons are contained in case law and not in the Criminal Procedure Rules. It was suggested to the Rule Committee that it would help prospective applicants and magistrates' courts if the procedure were codified and set out in the Rules. The Committee agreed. Rule 6 of the Amendment

[1] The judgment is available at: http://www.bailii.org/ew/cases/EWCA/Crim/2017/281.html.

Rules amends Part 7 of the Criminal Procedure Rules (Starting a prosecution in a magistrates' court) accordingly. The Committee will now prepare an application form for use with the rule by someone who is neither a public authority nor represented by a lawyer, to help such a person submit to the court the information that the court needs to decide whether it is appropriate to issue a summons.

Warrant for detention or imprisonment after conviction in absence

In some circumstances section 11(3), (3A) and (5) of the Magistrates' Courts Act 1980 allows a magistrates' court to impose a custodial sentence on a defendant in his or her absence; but in such a case the Act requires that 'the offender must be brought before the court before being taken to a prison or other institution to begin serving his sentence (and the sentence or order is not to be regarded as taking effect until he is brought before the court)'. It was suggested to the Rule Committee that it would help to clarify the effect of those statutory words, and would help magistrates' courts, if rule 13.3 of the Criminal Procedure Rules (Terms of a warrant for detention or imprisonment) provided explicitly for the terms of the warrant to be issued in such a case. The Committee agreed. Rule 8 of the Amendment Rules amends rule 13.3 accordingly and rule 12 of the Amendment Rules amends rule 24.12 (procedure where a party is absent at trial) consequentially. The effect is explicitly to authorise the issue of just one dual-purpose warrant of arrest and of commitment to custody, but via the court.

Experts' assistants

Section 127 of the Criminal Justice Act 2003 (Expert evidence: preparatory work) provides that if an expert witness bases an opinion or inference on 'any representation of fact or opinion' made by another person for the purposes of criminal proceedings then as long as the expert gives notice of the name of that person, and of the nature of the fact or opinion involved, then that representation of fact or opinion can be accepted in court as evidence even though the person who made it is not called as a witness him or herself. Rule 19.4 of the Criminal Procedure Rules (Content of expert's report) lists what an expert witness must include in a written report of his or her own findings and expert opinion. One of its current requirements is that the report must 'say who carried out any examination, measurement, test or experiment which the expert has used for the report and (i) give the qualifications, relevant experience and accreditation of that person, (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and (iii) summarise the findings on which the expert relies'. That corresponds with the equivalent Civil Procedure Rule and practice direction.

The Rule Committee received representations from the Forensic Science Regulator reporting that among forensic science providers the current rule is understood to require an expert witness to identify in his or her report every assistant who has contributed in any way, however small, to the outcome of a test or experiment – by preparing laboratory equipment, for example, or by preparing materials to be used in a test – and not just those assistants on whose representations of fact or opinion the expert relies within the meaning of section 127 of the 2003 Act. In the Committee's view such an interpretation of the rule goes beyond what the rule or section 127 requires. To clarify the intention of the rule, therefore, the Committee agreed to adopt the language of the Act itself in place of the paraphrase in the current rule. Rule 9 of the Amendment Rules amends rule 19.4 of the Criminal Procedure Rules accordingly.

Evidence of a complainant's previous sexual behaviour

Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits evidence or cross-examination about the alleged previous sexual behaviour of a complainant of a sexual offence, subject to statutory exceptions. The rules in Part 22 of the Criminal Procedure Rules (Evidence of a complainant's previous sexual behaviour) govern the procedure on an application for the court's permission exceptionally to allow the introduction of such evidence under one of those exceptions. In connection with their review of section 41 published on

14 December 2017,[2] the Lord Chancellor and the Attorney General invited the Committee to review the rules. The Committee did so – the rules had not been reviewed since 2006 – and decided that revised rules would better facilitate the just and effective exercise of the court's power under section 41.

Rule 10 of the Amendment Rules and the Schedule substitute revised rules accordingly. The rules are rearranged for consistency with the arrangement of rules about special measures for witnesses (in Part 18 of the Criminal Procedure Rules) and other Criminal Procedure Rules about the introduction of evidence (in Parts 20 and 21), which other rules have been revised and re-ordered since the Part 22 rules first were made. The time for an application to introduce sexual behaviour evidence is clarified and abbreviated, consistently with those other rules. The new rules make explicit the court's and the prosecutor's obligations to complainants. They make explicit the court's powers to give directions for the treatment and questioning of a witness (sometimes called 'ground rules') about whom such evidence is due to be introduced.

Information for cross-examination advocates

Sections 34 and 35 of the Youth Justice and Criminal Evidence Act 1999 prevent a defendant who is not represented by a lawyer from cross-examining a witness who is the complainant of a sexual offence or who is a child. Section 36 of the Act allows the court to prevent such a defendant from cross-examining a witness in other circumstances. Under section 38 of the Act, where a defendant is prevented from cross-examining a witness under one of those other sections then the court must give the defendant an opportunity to appoint an advocate to conduct the cross-examination, and if he or she does not do so then the court may appoint an independent advocate for the purpose. Rule 23.2 of the Criminal Procedure Rules (Appointment of advocate to cross-examine witness) presently requires the court to give directions for the supply of relevant material to such an advocate but does not specify what such material usually should include.

It was suggested to the Rule Committee that the rules should be more specific about what material should be supplied to an independent advocate and about the procedure after the court appoints such an advocate. The Committee agreed. Drawing on relevant guidance issued by the legal professions as well as on Committee members' own experience, by rule 11 of the Amendment Rules they have amended rule 23.2 of the Criminal Procedure Rules accordingly. The rule also now allows an advocate to apply for an order for the disclosure of unused prosecution material if the advocate thinks that appropriate.

Taking the jury's verdicts where more than one offence is alleged

Paragraph VI 26Q of the Lord Chief Justice's Criminal Practice Directions[3] supplements the Criminal Procedure Rules by listing the questions that must be asked by the judge or by court staff when taking a jury's verdict. The directions recognise that where a jury must reach verdicts on more than one alleged offence then it is possible that not all their verdicts will be reached at the same time and possible that not all their verdicts will be unanimous. The directions say, 'The judge may exercise discretion in deciding when to record the unanimous verdict; the circumstances of the case may dictate that it is more desirable to give the majority direction before the recording of any unanimous verdicts. If so, then instead of being asked about each count in turn, the jury should be asked "Have you reached verdicts upon which you are all agreed in respect of all defendants and/or all counts?" Should the jury in the end be unable to agree on a verdict by the required majority, the judge in his discretion will either ask them to deliberate further, or discharge them.'

It was pointed out to the Rule Committee that rule 25.14 of the Criminal Procedure Rules (Directions to the jury and taking the verdict), which sets out the procedure for taking a jury's

[2] See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/667675/limiting-the-use-of-sexual_history-evidence-in-sex_cases.pdf

[3] The content of the practice directions is published with the Criminal Procedure Rules at: http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015.

verdict on each individual allegation (because the verdict on each must be announced separately), implies that the court may not postpone the taking of a verdict in the circumstances described in the practice directions. That was not the Committee's intention and rule 13 of the Amendment Rules amends rule 25.14 accordingly.

Reopening the determination of an appeal to the Court of Appeal
In a series of judgments of the Court of Appeal between 2015 and 2017, beginning with the judgment in *R v Yasain* [2015] EWCA Crim 1277, [2015] 2 Cr App R 28[4] and culminating in the judgment in *R v Hockey* [2017] EWCA Crim 742, [2017] WLR(D) 398 [5], the court defined its inherent jurisdiction in rare cases to reopen a previous decision determining appeal proceedings. In each of the two judgments just mentioned the court suggested that the Rule Committee should make rules to supply a procedure for invoking that jurisdiction.

The Committee has accepted those invitations. Accordingly, rule 15 of the Amendment Rules amends rule 36.6 of the Criminal Procedure Rules (Appeal to the Court of Appeal: general rules; Hearings) and adds a new rule 36.15 (Reopening the determination of an appeal) to supply a procedure that supplements the jurisdiction of the Court of Appeal in exceptional circumstances to reopen a final decision that it previously has reached.

Discouraging prolixity in grounds of appeal to the Court of Appeal
Rule 39.3 of the Criminal Procedure Rules prescribes what an appeal notice must contain. Among other things it requires that the notice must 'identify each ground of appeal … concisely outlining each argument in support', but the current rule does not prescribe the length of the appeal notice or how it must be arranged. In several recent judgments of the Court of Appeal, including notably the judgment in *R v James, R v Selby* [2016] EWCA Crim 1639, the court has complained of the unnecessary and excessive length of an appellant's grounds of appeal – in that case, extending to well in excess of 100 pages in the case of each appellant – and has made the point that such prolixity impedes the court's comprehension of what is in issue, makes it more difficult for the court to deal justly with the case and, by increasing the time required to read and adjudicate in that case, impedes the consideration of other cases. In a recent extradition appeal case the High Court made similar complaints about the excessive length of written submissions ('skeleton arguments'): see paragraph 7 of the judgment in *RT v the Circuit Court in Tarnobrzeg, Poland* [2017] EWHC 1978 (Admin), [2017] 4 WLR 137.[6]

In the judgment in *R v James, R v Selby* the court suggested that the Rule Committee should make rules to give what the court called 'more pointed guidance' to appellants, and perhaps should impose a page limit of some sort. The Committee has accepted that invitation and rule 16 of the Amendment Rules amends rule 39.3 of the Criminal Procedure Rules (Appeal to the Court of Appeal about conviction or sentence; Form of appeal notice) to emphasise the importance of clarity and concision in an appellant's grounds of appeal. The Committee has also asked the Lord Chief Justice to impose constraints on other written submissions, in the Court of Appeal and in the other criminal courts, by means of the Criminal Practice Directions made by him.

Service of references and applications by the Attorney General to the Court of Appeal
Under section 36 of the Criminal Justice Act 1972, where a defendant is acquitted in the Crown Court the Attorney General may refer to the Court of Appeal a point of law that arose – for example, to obtain a ruling of the Court of Appeal on the correct interpretation of an Act of Parliament that was in issue in the case. Under section 36 of the Criminal Justice Act 1988, if the Attorney General thinks the sentencing of a defendant in the Crown Court is unduly lenient then in specified circumstances the Attorney may refer the case to the Court of Appeal for the sentence to be reviewed. Part 41 of the Criminal Procedure Rules (Reference

[4] The judgment is available at: http://www.bailii.org/ew/cases/EWCA/Crim/2015/1277.html
[5] The judgment is available at: http://www.bailii.org/ew/cases/EWCA/Crim/2017/742.html
[6] The judgment is available at: http://www.bailii.org/ew/cases/EWHC/Admin/2017/1978.html

to the Court of Appeal of point of law or unduly lenient sentence) prescribes the procedure on such a reference or application.

Under the current rules the reference or application is served only on the Registrar of Criminal Appeals, whose duty it then is to send a copy to the defendant concerned. To improve the speed and efficiency of the process it has been agreed between the Attorney and the Registrar that the Attorney will serve the relevant documents on the defendant, too, at the same time as serving them on the Registrar. They jointly invited the Rule Committee to amend the rules accordingly. Rule 17 of the Amendment Rules amends the rules in Part 41 of the Criminal Procedure Rules accordingly.

Withdrawal of legal representative in extradition appeal case
Part 46 of the Criminal Procedure Rules (Representatives) deals generally with the functions of legal representatives in the cases to which the Rules apply and deals with the appointment, dismissal or withdrawal of legal representatives in those cases. Until now, however, there has been no explicit provision in those rules about extradition appeal cases in the High Court, to which the Criminal Procedure Rules have applied since 2014. The procedure has been governed, but incompletely, by the Criminal Practice Directions instead. Consequent on a discussion of other aspects of the rules about extradition appeal in Part 50 of the Criminal Procedure Rules, the Rule Committee decided to correct the omission and rule 19 of the Amendment Rules amends rule 46.2 of the Criminal Procedure Rules (Notice of appointment, etc. of legal representative: general rules) accordingly. Because of the special circumstances of extradition cases, the rule amendments require a representative who withdraws from an extradition appeal case to give the court office information about the defendant's whereabouts and about his or her likely requirements for interpretation or other arrangements to facilitate his or her participation.

Rules to supplement the Criminal Finances Act 2017: further information orders
Under new section 22B of the Terrorism Act 2000 and under new section 339ZH of the Proceeds of Crime Act 2002, both added to those two Acts by the Criminal Finances Act 2017, a magistrates' court can make what is called a 'further information order' to require someone to provide information 'relating to a matter arising from a disclosure' where that disclosure was required by one of the other provisions of those two Acts (a disclosure by a bank or other financial institution, etc. of a suspicion of terrorist financing or of money laundering).

To accommodate those statutory amendments, rule 20 of the Amendment Rules amends four rules in Part 47 of the Criminal Procedure Rules (Investigation orders and warrants). The rule amendments follow closely the new statutory provisions. Among other existing rules that will apply to these new types of application, rule 47.5 (Exercise of court's powers) and rule 47.6 (Application for order: general rules) will apply and will require notice of the application to be given unless the applicant can satisfy the court of one of the factors listed in the first of those two rules.

Other amendments
Rules 3, 4(a), 7, 14, 15(a), 16(b), 18 and 20(e) and (f) of the Amendment Rules correct and bring up to date the references that appear in each of the corrected Criminal Procedure Rules and notes to rules.

Criminal Procedure Rule Committee secretariat
9 February 2018