

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2011**

**2011 No. 3075 (L. 22)**

**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 2011, S.I. 2011 No. 1709. They introduce new procedure rules about allocation and sending for trial. They amend the current rules about case management; about the attendance of the parties where a magistrates' court receives a written plea of guilty; about the making of restraining and certain other orders to which Part 50 of the Criminal Procedure Rules applies; and about the service of documents.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 These Rules remove from the Glossary appended to The Criminal Procedure Rules 2011 four expressions which, in its Thirty-first Report of Session 2010-12, the JCSI observed no longer appear in those Rules.

**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 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. 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 government departments.

4.2 The first rules made by the Rule Committee were The Criminal Procedure Rules 2005, S.I. 2005 No. 384. 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 accommodate, by the introduction of new rules and by amendments to rules and to notes to rules, (i) the anticipated implementation of Schedule 3 to the Criminal Justice Act 2003, which replaces, with a new procedure of

allocation and sending for trial, the committal for trial of offences triable either in magistrates' courts or in the Crown Court (offences 'triable either way') and (ii) the enactment of Schedule 2 to the Armed Forces Act 2011, which allows qualifying judge advocates to sit as judges of the Crown Court.

## **5. Territorial extent and Application**

5.1 This instrument applies to 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*

### *Allocation and sending for trial*

7.1 New rules about allocation and sending for trial, in Part 9 of the Criminal Procedure Rules, are substituted for the current Part 12, which deals with sending for trial.

7.2 The Magistrates' Courts Act 1980 allows magistrates' courts to commit for trial in the Crown Court offences that are classified as 'triable either way', where (i) the magistrates decide that their powers of sentencing (which are less than in the Crown Court) would be inadequate were the defendant to be convicted of the offence or (ii) the defendant opts for trial in the Crown Court. But before there can be committed for Crown Court trial a case in which the magistrates or the defendant chooses such a trial, the magistrates must decide whether there is sufficient evidence to commit. That process often is a formality, which may needlessly delay the progress of the case: inefficiently, and unfairly to all involved.

7.3 In some cases only (cases of alleged serious fraud, and cases of certain violent or sexual offences to which a child was a witness), the Criminal Justice Act 1987 and the Criminal Justice Act 1991, respectively, allow the prosecuting authority to transfer the case directly to the Crown Court for trial.

7.4 The Crime and Disorder Act 1998 requires magistrates' courts to send for trial in the Crown Court offences that are classified as triable on indictment only, and other offences related to those principal offences. The magistrates are not required to assess the sufficiency of the evidence. Instead, the defendant can apply to the Crown Court to have the case dismissed if he or she believes there is too little evidence to put him or her on trial.

7.5 Schedule 3 to the Criminal Justice Act 2003, which since it was first enacted has been amended itself, makes amendments to the 1980 and 1998 Acts so that magistrates' courts can 'send' to the Crown Court for trial not only those cases that can only be tried there but also cases that are 'triable either way', if (just as under the present process for committal for trial) (i) the magistrates decide that their powers of sentencing would be inadequate were the defendant to be convicted of the offence or (ii) the defendant opts for trial in the Crown Court. However, under these new powers the magistrates will not have to consider the sufficiency of the evidence. Schedule 3

also repeals prosecutors' powers under the 1987 and 1991 Acts, and replaces them with a special sending procedure. Just as under the existing sending procedure, in any case sent for trial under the new powers the defendant can apply to the Crown Court to have the case dismissed, if he or she believes there is not enough evidence to put him or her on trial.

7.6 The government has announced that it intends next year to begin to implement the Schedule 3 amendments. The new Part 9 rules supply the associated court procedures. Because the new powers to allocate and send are likely to be introduced in stages, the new rules are arranged in such a way that some of them (rules 9.6 and 9.8 to 9.14, inclusive) apply only to the new powers, while the other rules apply to the current sending powers as well as to the new ones. A new rule 2.1(4) of the Criminal Procedure Rules is added, to provide for the rules to apply in stages corresponding with this anticipated implementation in increments.

7.7 And because the new powers to allocate and send are likely to be introduced in stages, the existing rules about committal and transfer for trial, in Parts 10 and 11 of the Criminal Procedure Rules, are retained for the time being. So, too, are the existing rules about the dismissal of charges transferred or sent to the Crown Court, in Part 13 of the Rules. However, the Committee concluded that it would serve the statutory objective set by section 69 of the Courts Act 2003 (see paragraph 4.1 above) to take the opportunity to harmonise the time limits for applications to dismiss, which hitherto have differed according to the Act under which a case had been sent or transferred for trial.

7.8 Rules 3(a), 6, 7 and 8 of these Amendment Rules give effect to these amendments.

#### *Case management*

7.9 Rule 3.5 of the Criminal Procedure Rules is amended to give the court explicit power to require that the issues in the case should be identified by the parties in writing.

7.10 Rule 3.2(2)(a) of the Criminal Procedure Rules requires the court to pursue the early identification of 'the real issues'. Rule 3.3(a) requires the parties actively to assist the court in doing so. Rule 3.10 requires that, in order to manage a trial or an appeal, 'the court must establish, with the active assistance of the parties, what are the disputed issues'. To help the court to secure an effective trial, concentrating on what is in issue between the prosecution and the defence and not dwelling on what is common ground between them, courts routinely use case management, or trial preparation, forms, which include questions directed to what is and is not in dispute. It was reported to the Committee that some courts doubted their powers, under the rules just mentioned, to require the identification in writing of what was in issue, and the Committee agreed to elaborate the rules accordingly.

7.11 Rule 4 of these Amendment Rules gives effect to the amendment.

#### *Qualifying judge advocates*

7.12 Schedule 2 to the Armed Forces Act 2011 amends the Senior Courts Act 1981 to allow 'qualifying judge advocates', who conduct military courts, to sit also as judges of the Crown Court: though with some limitations on the types of case in which such judges may sit.

7.13 In one instance (appeal from a magistrates' court), the Criminal Procedure Rules provide for the constitution of the Crown Court. In others, the Rules refer to the judge by whom the powers of the Crown Court may be exercised. The relevant rules and Notes, therefore, are amended to incorporate references to this new type of Crown Court judge.

7.14 Rules 5 and 16 of these Amendment Rules give effect to these amendments.

*Written guilty plea: attendance of the parties*

7.15 Sections 12 and 12A of the Magistrates' Courts Act 1980 allow a magistrates' court to deal with an offence in a defendant's absence, where it is one that can be tried only in a magistrates' court and where the specified procedure has been followed. The procedure is often used in minor road traffic cases, and in vehicle and television licensing cases. The defendant can send the court a notice that he or she wishes to plead guilty, with any explanation that he or she wants to give, but need not attend. The Act allows the court to deal with the case in the prosecutor's absence, as well. The procedure is contained in rule 37.8 of the Criminal Procedure Rules.

7.16 It was reported to the Committee that, despite the defendant having chosen not to attend, and despite there being no need for the prosecutor to attend, courts sometimes wrongly expected that prosecutors should attend. The Committee decided to amend the rule to emphasise the expectation that, in such a case, a prosecutor need not attend unless, in its discretion, the court actively so required.

7.17 Rule 11 of these Amendment Rules gives effect to this amendment.

*Adequate notice of the making of a restraining order, etc.*

7.18 Part 50 of the Criminal Procedure Rules governs the procedure on the making of one of a number of what the Rules describe as 'civil behaviour orders', being orders like an injunction made by a civil court but where breach of the order is an offence in its own right. The legislation creating some of these orders anticipates an application being made by the prosecutor, but each of them can be made by the court on its own initiative. The legislation creating four of these types of order explicitly contemplates the possibility of the court taking account of evidence other than the main evidence in the case, and one of those four – a restraining order, prohibiting the defendant from harassing someone – can be made even though the defendant is acquitted.

7.19 In consequence of the recent case of *R v Kapoor* [2011] EWCA Crim 1843, in which the Court of Appeal held that the acquitted defendant had had insufficient notice of the proposed order, or of the evidence on which the Crown Court relied, the Committee decided to amend the rules further to emphasise the requirement for adequate notice.

7.20 Rule 12 of these Amendment Rules gives effect to the amendments.

*Service of documents in confiscation, etc. proceedings*

7.21 Part 4 of the Criminal Procedure Rules provides for the service of documents in all cases to which the Rules apply, subject to any 'special rules'. When the first Criminal Procedure Rules were made, Parts 57 and 58 contained such special rules, which made separate provision for service in proceedings under the Proceeds of Crime Act 2002 for the restraint and confiscation of assets representing proceeds of crime.

7.22 As time has passed, successive amendments to the Part 4 service rules have removed the advantage that there once was in maintaining those separate rules. In particular, the Part 4 rules that provide for the electronic service of documents now supersede the corresponding special rules in Part 57. The Committee decided that the time had come to remove those special rules, leaving the Part 4 rules to govern service in all cases.

7.23 Rules 13 and 14 of these Amendment Rules give effect to these amendments.

#### *Other amendments*

7.24 Rules 2.3 and 62.9 of the Criminal Procedure Rules, and the Notes to Part 3 and to rules 16.1, 21.1 and 69.1 all are amended to bring up to date the cross-references they contain. The Glossary at the end of the Rules is amended to omit entries for expressions which, as time has passed, have been removed from the Rules.

#### *Bringing the new rules into force*

7.25 With the exception of the new rules in Part 9 (Allocation and sending for trial), as explained in paragraph 7.6 above, the changes made by these Amendment Rules come into force on Monday 2<sup>nd</sup> April, 2012, following the convention explained at paragraph 4.2 above.

#### • *Consolidation*

7.26 When it made The Criminal Procedure Rules 2005, the 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 Committee intends to effect further such consolidations at regular intervals in future. 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/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>.

## **8. Consultation outcome**

8.1 On the new rules about allocation and sending for trial, the Committee consulted with magistrates, their legal advisers and District Judges (Magistrates' Courts), and the new rules take account of their comments (though the rules are closely constrained by the statutory provisions they supplement).

## **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 Her Majesty's Courts and Tribunals Service, within the principal prosecuting authorities, and among local criminal justice boards.

9.2 In addition, news of changes to the Rules and a ‘plain English’ description of the effect of those changes is published on the Ministry of Justice website, at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/index.htm>.

## **10. Impact**

10.1 These rules have 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 small businesses.

## **12. Monitoring and 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 Her Majesty’s 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 Her Majesty’s 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**

Jonathan Solly at the Ministry of Justice can answer any queries regarding the instrument. Telephone: 020 3334 4031, or e-mail: [jonathan.solly@justice.gsi.gov.uk](mailto:jonathan.solly@justice.gsi.gov.uk).