A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT NO. 2) RULES 2021 (S.I. 2021/849)

Where to find the new Rules

The Criminal Procedure (Amendment No. 2) Rules 2021 are at this address:
https://www.legislation.gov.uk/uksi/2021/849/contents/made

When the Rules come into force, the changes they make will appear at these addresses, too:
https://www.gov.uk/guidance/rules-and-practice-directions-2020
https://www.legislation.gov.uk/uksi/2020/759/contents

What the new Rules are for

The new Rules amend the Criminal Procedure Rules 2020. They:

(a) include rules about—
- sentencing indications in magistrates' courts
- sending for trial in the defendant's absence
- explaining the admissibility of expert and other evidence
- service of applications to vary restraining orders
- legal advice for magistrates during applications for search warrants

(b) make changes to the rules about—
- court records, to include decisions by other judges exercising powers of magistrates' courts
- access to court records, to clarify and simplify them
- the time limit for an appeal against conviction from a magistrates' court to the Crown Court, so it runs from the date of committal for sentence where that occurs
- applications for search warrants, to ensure secure storage of information given to the court and to require applicants to identify information sought which may be stored in an electronic device

(c) bring rules up to date because of new sentencing legislation.

When the new rules come into force

The changes made by these rules come into force on 4 October 2021.

What is in the new Rules

Sentencing indications in magistrates' courts
The Criminal Justice Act 2003 allows for indications of likely sentence during allocation for trial to help defendants decide whether or not to accept magistrates' court trial. In the case of *R v Goodyear*[1] in 2005 the Court of Appeal approved the Crown Court practice of allowing a defendant to ask for an indication of likely sentence in the event of entering a guilty plea there and then (the procedure is now in rule 3.31 of the Criminal Procedure Rules). The court said, "In our judgment it would be impracticable for these new arrangements to be extended to proceedings in the Magistrates' Court. We are not at present satisfied that an advance sentence indication can readily be applied to and processed there. We believe that it would be better for the new arrangements in the Crown Court to settle in for some time before considering whether and, if so how, similar arrangements can be made in the context of summary trials."

The Rule Committee decided that now, 16 years after that judgment, magistrates' courts fairly and usefully could adopt a procedure for sentencing indications based on the procedure

[1] [2005] EWCA Crim 888, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2005/888.html.

during allocation for trial. These rules amend the rules in Parts 3 and 9 of the Criminal Procedure Rules to allow for that.

Court records and access to information in court records
Under section 66 of the Courts Act 2003 some judges, including judges in the Crown Court, can exercise magistrates' courts' powers where it is useful to do so even though at that moment the judge is in another court. Rule 5.4 of the Criminal Procedure Rules lists events and other information that court staff must enter in court records. At present, it does not explicitly require the recording of a decision taken under section 66. In its judgment in in the case of *R v Gould and Others*[2] the Court of Appeal drew attention to that and invited the Rule Committee to review it. The Committee decided to include such provision in the rule and, because of procedural errors discussed in the same judgment, decided also to include more explicit provision about the recording of magistrates' courts' decisions to send cases for trial to the Crown Court. These Rules amend rule 5.4 of the Criminal Procedure Rules accordingly.

Rules 5.7 and 5.8 of the Criminal Procedure Rules govern access to information about criminal cases held in court records. In a judgment in 2019 the Supreme Court urged all UK court procedure rule committees to review their rules on that subject.[3] In June, 2020, the Rule Committee helped prepare new procedure rules about access to information in magistrates' courts' records about civil cases.[4] In October, 2020, in its report on search warrants, the Law Commission recommended that the Criminal Procedure Rule Committee should, among other things, consider "amending the requirement under rule 5.7(6) that an investigator has 14 days to issue a notice of objection after being served with a request for the supply of information" and should consider setting out "matters that should be considered by the court when determining whether sensitive material ought to be withheld on the grounds of public interest immunity". The Rule Committee has given effect to the Law Commission's recommendations and, in view of the other events described above, has rewritten current rules 5.7 and 5.8. The underlying principles remain the same, but the procedure has been made easier to understand for those requesting information, easier for court staff and courts to apply, and consistent with the new procedure in civil cases in magistrates' courts. To achieve that, these Rules replace current rules 5.7 and 5.8 with new rules 5.7 to 5.11 of the Criminal Procedure Rules.

Sending for trial in absence
Rule 9.2 of the Criminal Procedure Rules lists the circumstances in which a magistrates' court can deal in a defendant's absence with allocation and sending for Crown Court trial. Until recently it was understood that there was no power to send a defendant for trial in their absence even if they were represented in court by a lawyer. In its judgment in *R v Umerji*[5] the Court of Appeal decided that that interpretation of the law was wrong. The Rule Committee has included in rule 9.2 a reference to the power as now interpreted.

Expert evidence
The rules about expert evidence in Part 19 of the Criminal Procedure Rules govern the way in which expert opinion can be introduced in criminal cases and codify the duties of expert witnesses established by case law. Expert evidence is an exception to the general rule that evidence must be of fact, not of opinion. In its judgment in *R v Turner*[6] the Court of Appeal dealt with a case in which it was argued that a witness called to give evidence of fact about mobile telephone signals had given evidence of opinion as well. In the Forensic Science

[2] [2021] EWCA Crim 447, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/447.html. See paragraph 60 of the judgment.
[3] *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38, [2019] 3 WLR 429, https://www.supremecourt.uk/cases/uksc-2018-0184.html. See paragraph 51 of the judgment.
[4] Those rules are available at: https://www.legislation.gov.uk/uksi/2021/626/article/2/made.
[5] [2021] EWCA Crim 598, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/598.html.
[6] [2020] EWCA Crim 1241, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2020/1241.html.

Regulator's annual report for 2019 – 2020 the Regulator commented on the case and invited the Criminal Procedure Rule Committee to review the rules. The Rule Committee agreed that the procedure for dealing with such circumstances was not as clear as it might be and decided that where evidence introduced as evidence of fact is found to include expert opinion then the court may impose on the witness and on the evidence the same obligations and other rules that apply to such opinion. These Rules amend rule 19.1 of the Criminal Procedure Rules accordingly.

Explaining how evidence is admissible

Evidence is "admissible" in criminal proceedings if it complies with the law of evidence (the law governing information that a court may rely on in reaching a decision). As well as Part 19 of the Criminal Procedure Rules, about expert evidence, the Rules provide for the introduction of other types of evidence to which special procedures apply, for example hearsay evidence. The Rule Committee heard that, despite best practice and current rules, sometimes too little attention was paid during preparation for trial to the grounds on which evidence other than direct evidence of fact would be admissible. In a judgment of the Court of Appeal last year about hearsay evidence the court had said, "The Criminal Procedure Rules are not decorative. They are there for a reason. The structure and language of the rules, if complied with, should ensure that tricky questions of procedure or evidence are addressed by the parties in time, so that, where dispute arises, the parties have developed positions which can be laid clearly before the judge who must resolve the problem. That is the point of the Rules."[7] To encourage and to facilitate that, the Committee has amended the expert evidence rules and the rules in Parts 24 and 25 of the Criminal Procedure Rules (which apply to trial in a magistrates' court and in the Crown Court respectively) explicitly to require explanations of how evidence is said to be admissible unless it is only evidence of fact within a witness' direct knowledge.

Applications to vary restraining orders

At the end of a criminal case in some circumstances the court can make an order under one of the statutory provisions listed in the note to rule 31.1 of the Criminal Procedure Rules requiring the defendant to do, or not to do, specified things, for example to stay away from a specified area, or not to contact a specified person. One such "behaviour order" is a restraining order, which can be made on conviction under section 360 of the Sentencing Act 2020 or on acquittal under section 5A of the Protection from Harassment Act 1997 for the purpose of protecting a victim or other person mentioned in the order from harassment by the defendant.

The statutory provisions allow the defendant or a person protected by the order to apply to the court to vary the order's requirements, including its duration. At present, rule 31.5 of the Criminal Procedure Rules requires such an application by a defendant to be "served on" (in the words of the Rules, meaning "delivered to") a protected person by court staff so that the defendant need not contact that person – which, depending on the terms of the order, itself might amount to harassing them. However, the rule does not at present provide for service on the defendant by court staff of an application to vary a restraining order which is made by a protected person. Sometimes that, too, can provoke confrontation. It was reported to the Rule Committee that to help avoid any such confrontation arrangements now had been made for court staff to serve on the defendant an application to vary a restraining order made by a protected person, as well as serving on the protected person an application to vary such an order made by the defendant. The Committee has amended the rules to facilitate those new arrangements.

Rule 31.5 also requires the person making an application to vary a behaviour order to explain "what material circumstances have changed since the order was made". In its judgment in *R v Jackson*[8] the Court of Appeal pointed out that the statutory provisions governing variation

[7] *R v Smith* [2020] EWCA Crim 777, https://www.bailii.org/ew/cases/EWCA/Crim/2020/777.html.
[8] [2021] EWCA Crim 901, available at: https://www.bailii.org/ew/cases/EWCA/Crim/2021/901.html.

of a restraining order impose no such requirement, unlike the provisions governing some other behaviour orders. The Committee has clarified the rule.

Time limit for appeal from a magistrates' court to the Crown Court
Under section 108 of the Magistrates' Courts Act 1980 a defendant may appeal to the Crown Court against conviction or sentence in a magistrates' court. On an appeal against conviction the Crown Court tries the defendant again and may acquit or convict. On an appeal against sentence the Crown Court passes a fresh sentence, which may be less or more severe. At present the time limit for an appeal against conviction is 15 business days from the date of sentence or from the date on which sentence is deferred (if it is) under sections 4 and 5 of the Sentencing Act 2020, whichever is earlier. Under sections 14 to 17 of the Sentencing Act 2020 a magistrates' court can commit a convicted defendant to the Crown Court for sentencing instead of passing or deferring sentence itself.

Under rule 34.2 of the Criminal Procedure Rules if a defendant is convicted by a magistrates' court and committed for sentence to the Crown Court then at present the time limit for appeal against the conviction does not start until the defendant has been sentenced in the Crown Court. That may postpone the appeal unnecessarily. It may result in what turns out to be an unnecessary sentencing in the Crown Court (because the defendant then is acquitted on appeal). In some circumstances it may affect the sentencing powers of the Crown Court on the appeal if the appeal fails. In practice, the Crown Court usually can avoid these potential difficulties by postponing its decision on the committal for sentence until after the appeal against conviction, but only if the defendant decides not to wait until after the sentencing before starting the appeal. The Rule Committee heard from Crown Court judges that it would be more efficient, and fairer both to defendants and witnesses, if the time limit for appeal against conviction were to run from the date of committal for sentence to the Crown Court, where that happens. The Committee agreed and has changed the time limit in the rule.

Applications for search warrants
Part 47 of the Criminal Procedure Rules contains rules about, among other things, applications for search warrants. Last October the Law Commission published a report about search warrants in which it recommended that the Criminal Procedure Rule Committee should, among other things, (i) "consider amending the Criminal Procedure Rules to include rules governing the storage of sensitive material provided to the court during a search warrant application"; (ii) formalise in the Criminal Procedure Rules the requirement for a magistrate hearing a search warrant application to be advised by a legal adviser; and (iii) "consider amending search warrant application forms to require an investigator, when they are seeking to obtain a warrant to search for and seize electronic devices to acquire electronic data, to explain in as much detail as practicable what information on devices is sought." The Rule Committee accepted those three recommendations and decided to apply the third to the relevant rules as well as to the application forms to which the Law Commission referred. These Rules implement all three.

References to sentencing legislation
On 1st December, 2020, the Sentencing Act 2020 consolidated and replaced most previous legislation to do with sentencing. The Criminal Procedure Rules 2020 contained a number of references to that previous legislation which would have been misleading had they not been replaced and the Criminal Procedure (Amendment) Rules 2021, S.I. 2021 No. 40, replaced most of them with references to the corresponding new provisions. These Rules replace some more.

Criminal Procedure Rule Committee secretariat
20 July 2021