

A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT No. 2) RULES 2022 (S.I. 2022/815)

Where to find the new Rules

The Criminal Procedure (Amendment No. 2) Rules 2022 are at this address:

<https://www.legislation.gov.uk/ukxi/2022/815/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/ukxi/2020/759/contents>

What the new Rules are for

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

- (a) supplement provisions of the Police, Crime, Sentencing and Courts Act 2022 that—
 - allow courts to use live video and audio links in more circumstances than before
 - allow for a British Sign Language interpreter to assist a deaf juror
 - introduce serious violence reduction orders, and
 - amend existing provisions about overseas production orders
- (b) supplement provisions of the Judicial Review and Courts Act 2022 that—
 - allow the Crown Court to send a case back to a magistrates' court for trial or sentence where appropriate, and
 - allow documents to be served in accordance with Criminal Procedure Rules which before could be served only by post
- (c) supplement provisions of the Domestic Abuse Act 2021 that create domestic abuse protection orders
- (d) require publication of warnings in court hearing lists where an automatic statutory reporting restriction may apply to a listed case
- (e) in connection with private prosecution—
 - require identification of the prosecutor in a magistrates' court summons where the prosecutor is not a public authority
 - list established criteria for refusing to issue a summons
 - require more detailed information than before for the trial court about any claim for a private prosecutor's costs to be paid out of public funds
- (f) impose obligations on prosecutors and courts to avoid duplication and ambiguity in the preparation of indictments in the Crown Court
- (g) amend rules that provide for the retention of written jury directions and the retention of other material held by the court
- (h) supply a procedure to be followed when a defendant previously found by the Crown Court to be unfit to be tried later recovers sufficiently for the trial to resume
- (i) impose a requirement to give advance notice of additional requirements in football banning orders
- (j) amend rules that govern applications to the Crown Court to re-assess confiscation orders made under previous legislation
- (k) impose a time limit for the initial decision on an application to a magistrates' court or to the Crown Court for a case to be stated in a proposed appeal to the High Court
- (l) amend rules that provide for court staff to take statutory declarations from defendants.

When the new rules come into force

The changes to the Criminal Procedure Rules made by these rules come into force in two instalments.

These changes come into force on 15 August 2022—

- (a) the amendments in Parts 2, 3, 7, 14, 18 and 47 about live links
- (b) the amendments in Part 4 about service of documents
- (c) the amendments in Parts 9 and 28 about sending a defendant back from the Crown Court to a magistrates' court for trial, and remitting a defendant from the Crown Court to a magistrates' court for sentence
- (d) the amendment in Part 26 about the oath or affirmation by a British Sign Language interpreter for a juror
- (e) an amendment to rule 9.2 that corrects an error.

These changes come into force on 3 October 2022—

- (a) the amendments in Part 2 about the powers of court officers
- (b) the amendments in Part 3 about indictments on arraignment in the Crown Court
- (c) the amendments in Part 5 about (i) court records, (ii) case materials, (iii) access to documents and recordings, and (iv) warnings about reporting or access restrictions
- (d) the amendments in Part 7 about (i) declining to issue a summons, and (ii) identification of a private prosecutor in a summons
- (e) the amendments in Part 10 about indictments
- (f) the amendments in Part 25 about (i) indictments for trial and sentencing, (ii) the resumption of trial after a defendant's recovery from being unfit to be tried, and (iii) retention of written jury directions and other jury materials
- (g) the amendments in Parts 29, 44 and the preamble to the Criminal Procedure Rules consequent on the relocation of rules about the powers of court officers
- (h) the amendments in Part 31 that will provide for serious violence reduction orders and domestic abuse protection orders when those two new types of order become available, and that provide for additional requirements in football banning orders
- (i) the amendments in Part 33 that accommodate applications for revised financial assessments in cases that began before 2002
- (j) the amendments in Parts 34 and 39 that will accommodate appeals in connection with serious violence reduction orders and domestic abuse protection orders when those two new types of order become available
- (k) the amendments in Part 35 about (i) the time limit for the court's decision to state a case, and (ii) the duties of magistrates' legal advisers
- (l) the amendments in Part 45 about private prosecutors' applications for costs from central funds
- (m) the amendments in Part 47 about overseas production orders.

What is in the new Rules

Live links

Under the Crime and Disorder Act 1998 and the Criminal Justice Act 2003, which were temporarily modified by the Coronavirus Act 2020, criminal courts had some powers to allow participants in criminal proceedings to take part by a video or audio electronic link – a “live link”. The Police, Crime, Sentencing and Courts Act 2022 replaces those provisions with new ones that apply in more circumstances and to more participants, subject to statutory conditions the most important of which is that the court must be satisfied that it is in the interests of justice to give a live link direction in the individual case.

The Criminal Procedure Rules contain rules that supplement and accommodate the previous Acts, but which are not compatible with the new one. For that reason, the Rule Committee has made some new rules and has amended others to bring them up to date. There is a new definition of “live link” to correspond with the new statutory definition. The new rules supply procedures for the exercise of the courts' new powers. Although those powers can be exercised without an application, the new rules provide also for the content of an application where one is made and for associated procedures. There are major amendments to Parts 2, 3 and 18 of the Criminal Procedure Rules, and consequential or other minor amendments in Parts 7, 14 and 47.

Indictments

The 'indictment' is the formal written record of the offence with which a defendant is charged in the Crown Court. The formal reading of the charge in order to take the defendant's plea, either guilty or not guilty, is called the 'arraignment'. Usually, the arraignment takes place at a pre-trial hearing when the court gives directions for preparation for trial. Rule 3.32 of the Criminal Procedure Rules requires the Crown Court to obtain the prosecutor's confirmation that the indictment accurately lists all the offences of which the prosecutor accuses the defendant just before the arraignment takes place (and therefore well before the trial). Rule 10.2 of the Rules governs the form of the indictment and the way in which it must be presented to the court. Rule 25.2 applies at the trial and lists some general powers that the court can exercise at that stage. With the court's permission, an indictment can be amended. In some circumstances, however, the law allows the prosecutor to replace an indictment without the court's permission, unless the defendant objects.

In 2019, in response to the judgment of the Court of Appeal in the case of *R v Johnson, R v Burton*¹ (which concerned two cases in each of which a defendant had been tried and convicted on an indictment containing charges on which that defendant had not been arraigned), the Rule Committee elaborated the rules² to codify the practice recommended in that judgment "for trial judges to enquire of counsel whether there were any outstanding issues in relation to the indictment before it is read before the jury at trial". Since then, and despite that, it has been reported to the Committee that a proliferation of indictments and amended indictments in many cases still can cause confusion, argument and, potentially, unfairness. In December, 2021, an article was published in a legal practitioners' journal criticising the current state of the law.³

After further discussion of Committee members' experiences the Rule Committee decided to impose on prosecutors and on courts (i) more specific requirements for identification of the correct indictment or indictments, (ii) a prohibition against proceeding further on an indictment not identified as a correct one, (iii) a new requirement for the endorsement of every indictment document with a note of its intended status (for example, as a proposed amendment, or as a replacement), and (iv) a new requirement for the prosecutor to provide a final, composite, indictment for sentencing purposes if the court so requires.

Service of documents

The Judicial Review and Courts Act 2022 removes 21 statutory requirements for documents to be sent by post so that they can be "served" (meaning, sent and delivered formally) in accordance with Criminal Procedure Rules instead. Part 4 of the Criminal Procedure Rules governs service of documents and defines the various means by which a document may be served. To supplement those 21 statutory amendments, these rules amend Part 4 of the Criminal Procedure Rules explicitly to apply the Part 4 rules where other legislation so provides, and to list the 21 provisions concerned.

Court records

Rule 5.4 of the Criminal Procedure Rules requires court staff to make the records which it lists. Rule 5.6 provides for court staff to keep evidence and other material served by the parties to a case, or to arrange for it to be kept by some other appropriate person (for example, for prosecution exhibits to be kept by the police). Rules 5.8, 5.9 and 5.10 provide for access to information held by the court. Rule 25.17 requires court staff in the Crown Court to make case materials available to the court at the trial. Rule 25.18 requires court staff to make records of the times at which the judge gives jurors directions, to make it easier to find records of what the judge said in a transcript of a trial. It was suggested to the Rule Committee that (i) the rules about keeping evidence should apply explicitly to material not

¹ [\[2018\] EWCA Crim 2485](#).

² By the Criminal Procedure (Amendment No. 2) Rules 2019, [SI 2019/1119](#).

³ *A sad indictment*, Paul Jarvis, Archbold Review 2021 Issue 10, 15 December 2021, at page 4.

served by a party but prepared at the court's direction (for example, a video recording of the pre-trial cross-examination of a witness), (ii) the rules should require explicitly that written directions to a jury should be retained, and (iii) the duties to make records should be consolidated in a single rule.

Information about reporting restrictions

Rule 5.11 of the Criminal Procedure Rules requires court staff to publish information about imminent court hearings in order to promote the open justice principle: that is, dealing with criminal cases in public, and allowing a public hearing to be reported to the public, as the principle is expressed in rule 5.7 of the Criminal Procedure Rules. However, in some cases reporting restrictions, listed in Part 6 of the Criminal Procedure Rules, apply, which restrictions may be imposed by the court in an individual case, or which may apply by Act of Parliament to all cases in a specified category – for example, the statutory prohibition against reporting the identity of the complainant of a sexual offence. Court lists include notice of reporting restrictions imposed by the court in individual cases, but it was reported to the Rule Committee that notice of cases in categories to which restrictions apply generally could not always be given.

The Rule Committee takes the view that people attending court are entitled to be warned if reporting restrictions do, or might, apply. After consulting HM Courts and Tribunals Service the Committee decided to amend the existing rule to require a warning that reporting restrictions might apply to cases in a court hearing list where the restriction is not one imposed by the court in an individual case.

Private prosecution

Most prosecutions are started by public authorities, principally the Crown Prosecution Service. However, section 6 of the Prosecution of Offences Act 1985 preserves the right for any person to start a prosecution if they can satisfy the court that the proposed defendant's alleged conduct, if it were proved, would amount to a crime; subject to the court's powers, in limited circumstances, to refuse to issue a summons for the defendant to attend court under section 1 of the Magistrates' Courts Act 1980; and subject to a power for the Director of Public Prosecutions to intervene and stop a prosecution if, in the Director's opinion, it fails to meet criteria that the Crown Prosecution Service would have applied. Rule 7.2(6) of the Criminal Procedure Rules requires a private prosecutor to give the court information about the proposed prosecution needed to help the court to decide whether to issue a summons. Rule 7.4(2) of the Rules lists the information that must be included in such a summons.

In October, 2020, the House of Commons Justice Committee recommended, among other things, that "every defendant who is privately prosecuted should be informed of his or her right to seek a review from the CPS. We recommend that this change be implemented by a change to the Criminal Procedure Rules."⁴ In response to that recommendation and after discussion with the Director of Public Prosecutions, with magistrates' representatives and with HM Courts and Tribunals Service, the Rule Committee decided (i) to require that every summons issued on the application of a private prosecutor should identify that prosecutor, so that the defendant could, if they wished, oppose the continuation of the proceedings in the court, or invite the Director to intervene, or both, and (ii) to list in the rule the circumstances in which magistrates' courts may refuse to issue a summons.

A private prosecutor can recover their legal costs from public funds if the court so orders, irrespective of the outcome of the case but subject to any limit imposed by the court, under section 17 of the Prosecution of Offences Act 1985. Rule 45.4 of the Criminal Procedure Rules anticipates a detailed assessment of costs by staff for the court under the regulations that apply and requires the private prosecutor to outline their claim to the court but not to give

⁴ <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/497/49702.htm>, recommendation 7 (page 31).

details. Consistently with past judgments, the rule includes a presumption in favour of the court making a costs order.

In September, 2021, in the case of *R (TM Eye Limited) v Crown Court at Southampton and Others*⁵ the High Court decided that a court which had dealt with a private prosecution could, and should, require more information about a private prosecutor's claim for costs where the information supplied was not enough for the court to decide whether an order should be made and what limit, if any, to impose. In response to that judgment the Rule Committee decided that in future rules should require the court to be given information that corresponds with what the costs assessment regulations require for assessment staff, so that the court will be better able to decide on the order to be made.

Sending a case back to a magistrates' court for trial or sentence

In some cases, a magistrates' court must, or can, send a defendant to the Crown Court for trial. In some circumstances a magistrates' court which convicts a defendant must, or can, commit that defendant for sentence to the Crown Court so that a more severe sentence can be imposed than a magistrates' court has the power to pass. Sometimes, however, after sending or committal the available evidence or other circumstances may change and it may become more appropriate for a defendant to be tried, or sentenced, or both, in a magistrates' court after all. The Judicial Review and Courts Act 2022 gives the Crown Court new powers to send a case back to the magistrates' court for trial or sentence.

The Rule Committee has made some new rules and has amended others to supply procedures for the exercise of the new powers. To distinguish between the new power to send back for trial and an existing power for the Crown Court to refer a defendant's case to a magistrates' court in limited circumstances at the end of proceedings in the Crown Court, the new rule about sending back refers to both powers.

Defendant becoming fit to be tried in the Crown Court

A defendant whom the Crown Court finds unfit to be tried on the basis of medical evidence, and whom the jury then finds to have done the act or made the omission charged as an offence, cannot be convicted but can be detained in hospital compulsorily. If in due course the defendant becomes fit to be tried they can be returned to the Crown Court for the trial to resume, under section 5A of the Criminal Procedure (Insanity) Act 1964: a process that requires a co-ordination of action by hospital and prison authorities, the court, the prosecutor, and the defendant's legal representatives.

The statutory provisions are insufficiently detailed to govern the procedure. At present, there are no material procedure rules; practice varies; and a lack of clarity may result in the unlawful detention, or premature release, of the defendant. It was reported to the Rule Committee that it would assist if the Criminal Procedure Rules were to specify a procedure to follow for the giving of directions and the resumption of trial. The Committee agreed.

British Sign Language interpreter for a juror

The Police, Crime, Sentencing and Courts Act 2022 provides for a British Sign Language interpreter to assist a deaf juror who needs that interpretation to be able to participate effectively. To that extent the Act abolishes the law against allowing a non-juror to accompany jurors while they deliberate, and it imposes corresponding duties of confidentiality on the interpreter. The Criminal Procedure Rules prescribe the terms of the oath or affirmation taken by jurors themselves and the Rule Committee agreed to prescribe the terms of an oath or affirmation to be taken by a juror's interpreter.

⁵ [\[2021\] EWHC 2624 \(Admin\)](#).

Behaviour orders

Part 31 of the Criminal Procedure Rules sets out standard procedures for dealing with court orders that the rules call 'behaviour orders', meaning orders for which a number of Acts provide, which are made on a defendant's conviction (and in some cases on acquittal), and which impose prohibitions and requirements on the defendant's conduct to deter future offending.

The Domestic Abuse Act 2021 creates domestic abuse protection orders to protect people connected with a defendant from domestic abuse, or the risk of domestic abuse. The Police, Crime, Sentencing and Courts Act 2022 creates serious violence reduction orders to protect members of the public from the risk of harm involving a bladed article or offensive weapon used by the defendant. A football banning order under section 14A of the Football Spectators Act 1989 may simply ban the defendant from football matches or, like other behaviour orders, it may impose additional requirements. If the prosecutor gives no advance notice of additional requirements to be proposed in the event of conviction the case may have to be adjourned to consider them. It was suggested to the Committee that rule 31.3 of the Criminal Procedure Rules should require such advance notice, and the Committee agreed.

To accommodate and supplement the new orders, and to provide for advance notice of football banning order requirements, these rules amend Part 31 of the Criminal Procedure Rules. To include references to new rights of appeal to the Crown Court and to the Court of Appeal created by the 2021 and 2022 Acts, these rules amend Parts 34 and 39 of the Criminal Procedure Rules.

Reassessment of confiscation orders under legislation repealed

At the end of a Crown Court case the court can make an order confiscating the proceeds of a convicted defendant's crimes. Repealed provisions of the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 remain in force for some purposes in relation to confiscation orders which were made before the Proceeds of Crime Act 2002 came into force and which remain undischarged. Those provisions allow applications for the variation of such orders. Rule 33.66 of the Criminal Procedure Rules governs some applications under the 1988 and 1994 Acts but not applications to vary an order. The lacuna was pointed out to the Rule Committee, which agreed to amend rule 33.66 accordingly.

Decision on application for a case to be stated for the High Court

Section 111 of the Magistrates' Courts Act 1980 and section 28 of the Senior Courts Act 1981 confer rights of appeal on points of law from magistrates' courts and the Crown Court to the High Court. The prospective appellant first must obtain from the court that made the decision to be appealed a written statement of the circumstances and of the legal point in issue. Part 35 of the Criminal Procedure Rules governs the procedure and sets a timetable for the preparation of that written "case". The rules specify no time limit for the court's initial decision to state a case or to decline to do so. In magistrates' courts, the rules require the magistrates' legal adviser to assist the court and to help prepare the case, but only if the court asks for that help.

It was reported to the Rule Committee that the absence of a time limit for the initial decision led sometimes to misunderstanding and sometimes to substantial delay. The Committee agreed to impose a time limit of 15 business days, the equivalent of three weeks. If necessary, that time limit can be extended by a judicial decision, the reasons for which decision will be recorded. The Committee decided, too, that magistrates' legal advisers should be required always to assist the magistrates in dealing with an application for a case to be stated.

Overseas production orders

Where treaty arrangements with another country allow, the Crime (Overseas Production Orders) Act 2019 provides for a Crown Court judge in England and Wales at the request of an investigator in this country to make an order against a person or company in another

country which requires that person or company to produce or give access to electronic data likely to be of substantial value to the investigation here. The Police, Crime, Sentencing and Courts Act 2022 amends the definition of “excepted electronic data” in the 2019 Act and amends the provisions in the Act for the service of documents abroad. These rules amend Part 47 of the Criminal Procedure Rules to accommodate and supplement those statutory amendments.

Statutory declarations made before court officers: relocation of rules

A defendant can make a statutory declaration of ignorance of an unpaid fixed penalty notice registered as a fine under section 72 or 73 of the Road Traffic Offenders Act 1988, or a statutory declaration of ignorance of the proceedings to render void proceedings in a magistrates’ court under section 14 or 16E of the Magistrates’ Courts Act 1980. Under section 2 of the Commissioners for Oaths Act 1889 and rules 29.4 and 44.2 of the Criminal Procedure Rules, the Rules allow a court officer to take those declarations. It was suggested to the Rule Committee that those two provisions should be consolidated in a single rule placed with other rules about the powers of court officers, in Part 2 of the Rules. The Committee agreed.

Criminal Procedure Rule Committee secretariat
19 July 2022