

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (MODIFICATION OF CROWN PROCEEDINGS ACT
1947) ORDER 2005

2005 No. 2712

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. The Lord Chancellor makes the Order in exercise of the powers conferred on him by section 4(2) of the Civil Procedure Act 1997. This Order amends the Crown Proceedings Act 1947 to enable certain procedural privileges of the Crown to be revoked when a new Part 66 is added to the Civil Procedure Rules replacing RSC Order 77 (in Schedule 1 to those Rules) and CCR Order 42 (in Schedule 2). The amendments revoke the Crown's privileges in determining the venue of civil proceedings (section 19) and in transferring civil proceedings from the county courts to the High Court (section 20). They also revoke procedural powers contained in section 35 concerning the content of claim forms, default judgments, summary judgments and interrogatories in civil proceedings by or against the Crown.

2.2. The repeal of parts of section 20 of the 1947 Act require consequential amendments to the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 to reflect the removal of Crown's privilege on the transfer of proceedings from the county courts to the High Court.

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

3.1. These changes do not affect existing substantive Crown immunity.

3.2. The Order is made under section 4(2) of the Civil Procedure Act 1997, which gives the Lord Chancellor power, by order, to "amend, repeal or revoke any enactment passed or made before the commencement of this section to the extent he considers necessary or desirable in order to facilitate the making of Civil Procedure Rules". Section 4(2) supplements section 4(1), which gives the Lord Chancellor power to amend, repeal or revoke enactments in consequence of Civil Procedure Rules, by order subject to negative resolution procedure. The then Lord Chancellor, Lord Mackay of Clashfern, introducing this provision by way of an amendment in response to the report of the House of Lords Select Committee on Delegated Powers (Hansard, 9 December 1996, HL vol 575 col 896) commented: "If the rule committee is minded to make a rule which would override an enactment, the enactments would have to be identified and the necessary amendments made to those enactments. I would lay a draft order containing those amendments before the rules were made and that order would then be subject to the affirmative procedure". In the case of this Order, the Civil Procedure Rule Committee wishes to make rules in the form of the draft attached to this memorandum, which will insert new Part 66 into the Civil Procedure Rules, and revoke Order 77 of the Rules of the Supreme Court and Order 42 of the County Court

Rules. Those amendments will override the provisions of the Crown Proceedings Act 1947 which this Order seeks to amend.

4. Legislative Background

4.1. The main areas of change will be in:

4.2. Removing the Crown's power to determine the venue for proceedings. This will remove the burden on litigants travelling to the High Court in London. The court will now decide venue based on the information in hand. The practice direction to Part 66 will point judges to the Attorney General's note which must be consulted alongside Rule 30.3(2) when considering the transfer of cases relating to Crown proceedings.

4.3. Enabling litigants to obtain default judgments against the Crown in certain cases. However a master or a judge must be satisfied that service on the Crown has taken place properly.

4.4. Permitting summary judgments against the Crown in certain circumstances. Rules relating to summary appeals in revenue matters will be retained. In other cases summary judgments will be allowed only after the time for filing a defence has expired.

5. Extent

5.1. The instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. 6.1 In the view of the Secretary of State for Constitutional Affairs the provisions of the Order are compatible with Convention rights.

7. Policy background

7.1. The CPR make provision for the practice and procedure in county courts, the High Court and the Civil Division of the Court of Appeal.

7.2. The Crown Proceedings Act 1947 provides that litigation by or against the Crown shall be instituted and proceeded in accordance with the rules of court. The current rules are contained in RSC Order 77 (Schedule 1 of the CPR) and CCR Order 42 (Schedule 2 of the CPR). These reflect the special position of the Crown in litigation and confer advantages not available to ordinary litigants.

7.3. In October 2003 the Lord Chancellor considered that some of the provisions should no longer be retained and proposed to revoke them. The consultation paper 'Civil Proceedings by or against the Crown: A review of Civil Procedure Rules' issued in February 2004 proposed to simplify the rules setting out the special arrangements for cases involving the Crown. The consultation paper (and responses to the

consultation) is available on the DCA website at <http://www.dca.gov.uk/consult/civilproc/crownclaims.htm>.

7.4. The proposal rules, which do not affect substantive Crown immunity, have been considered and agreed by the Domestic Affairs Committee, the Civil Procedures Rule Committee and the working group representing the Government Legal Service.

7.5. These proposed rules were favourably received by consultees and were agreed by the Civil Procedure Rule Committee in January 2005.

7.6. This Order will enable the making of rules incorporating the new Part 66 of the Civil Procedure Rules and consequential changes. Those rules will be incorporated in a statutory instrument to be made by the Civil Procedure Rule Committee after this draft Order has been approved by both Houses of Parliament. That instrument will be subject to negative procedure and will be the subject of a separate memorandum.

8. Impact

8.1. A Partial Regulatory Impact Assessment was included in the consultation.

9. Contact

9.1. Any enquiries about the contents of this memorandum should be addressed to Declan Hickey in HM Court Service Tel: 020 7210 0759 or e-mail declan.hickey@hmcourt-service.gsi.gov.uk.

CIVIL PROCEDURE RULES

PART 66

CROWN PROCEEDINGS

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Scope of this Part and interpretation

66.1—(1) This Part contains rules for civil proceedings by or against the Crown, and other civil proceedings to which the Crown is a party.

(2) In this Part—

(a) “the Act” means the Crown Proceedings Act 1947;

(b) “civil proceedings by the Crown” means the civil proceedings described in section 23(1) of the Act, but excluding the proceedings described in section 23(3);

(c) “civil proceedings against the Crown” means the civil proceedings described in section 23(2) of the Act, but excluding the proceedings described in section 23(3);

(d) “civil proceedings to which the Crown is a party” has the same meaning as it has for the purposes of Parts III and IV of the Act by virtue of section 38(4).

Application of the Civil Procedure Rules

66.2 These Rules and their practice directions apply to civil proceedings by or against the Crown and to other civil proceedings to which the Crown is a party unless this Part, a practice direction or any other enactment provides otherwise.

Action on behalf of the Crown

66.3—(1) Where by reason of a rule, practice direction or court order the Crown is permitted or required—

- (a) to make a witness statement,
- (b) to swear an affidavit,
- (c) to verify a document by a statement of truth;
- (d) to make a disclosure statement; or

(e) to discharge any other procedural obligation,
that function shall be performed by an appropriate officer acting on behalf of the Crown.

(2) The court may if necessary nominate an appropriate officer.

Counterclaims, other Part 20 claims, and set-off

66.4—(1) In a claim by the Crown for taxes, duties or penalties, the defendant cannot make a counterclaim or other Part 20 claim or raise a defence of set-off.

(2) In any other claim by the Crown, the defendant cannot make a counterclaim or other Part 20 claim or raise a defence of set-off which is based on a claim for repayment of taxes, duties or penalties.

(3) In proceedings by or against the Crown in the name of the Attorney-General, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court.

(4) In proceedings by or against the Crown in the name of a government department, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court unless the subject-matter relates to that government department.

Applications in revenue matters

66.5—(1) This rule sets out the procedure under section 14 of the Act, which allows the Crown to make summary applications in the High Court in certain revenue matters.

(2) The application must be made in the High Court using the Part 8 procedure.

(3) The title of the claim form must clearly identify the matters which give rise to the application.

Enforcement against the Crown

66.6—(1) The following rules do not apply to any order against the Crown—

- (a) Parts 69 to 73;
- (b) RSC Orders 45 to 47 and 52; and
- (c) CCR Orders 25 to 29.

(2) In paragraph (1), “order against the Crown” means any judgment or order against the Crown, a government department, or an officer of the Crown as such, made—

- (a) in civil proceedings by or against the Crown;
- (b) in proceedings in the Administrative Court;
- (c) in connection with an arbitration to which the Crown is a party; or
- (d) in other civil proceedings to which the Crown is a party.

(3) An application under section 25(1) of the Act for a separate certificate of costs payable to the applicant may be made without notice.

Money due from the Crown

- 66.7**—(1) None of the following orders—
- (a) a third party debt order under Part 72;
 - (b) an order for the appointment of a receiver under Part 69; or
 - (c) an order for the appointment of a sequestrator under RSC Order 45,
- may be made or have effect in respect of any money due from the Crown.
- (2) In paragraph (1), “money due from the Crown” includes money accruing due, and money alleged to be due or accruing due.
- (3) An application for an order under section 27 of the Act—
- (a) restraining a person from receiving money payable to him by the Crown; and
 - (b) directing payment of the money to the applicant or another person,
- may be made under Part 23.
- (4) The application must be supported by written evidence setting out the facts on which it is based, and in particular identifying the debt from the Crown.
- (5) Where the debt from the Crown is money in a National Savings Bank account, the witness must if possible identify the number of the account and the name and address of the branch where it is held.
- (6) Notice of the application, with a copy of the written evidence, must be served—
- (a) on the Crown, and
 - (b) on the person to be restrained,
- at least 7 days before the hearing.
- (7) Rule 72.8 applies to an application under this rule as it applies to an application under rule 72.2 for a third party debt order, except that the court will not have the power to order enforcement to issue against the Crown.

ADDITIONAL AMENDMENTS TO THE CPR

Rule 6.1

After rule 6.1, for the cross-reference substitute :
“(For service in possession claims, see Part 55)”.

Rule 6.4

In paragraph (1), for “paragraph (2)” substitute “paragraphs (2) and (2A)”.

After paragraph (2), insert—

“(2A) In civil proceedings by or against the Crown, as defined in rule 66.1(2), documents required to be served on the Crown may not be served personally.”.

Rule 6.5

After paragraph (7), insert—

“(8) In civil proceedings by or against the Crown, as defined in rule 66.1(2)—

- (a) service on the Attorney General must be effected on the Treasury Solicitor;
- (b) service on a government department must be effected on the solicitor acting for that department as required by section 18 of the Crown Proceedings Act 1947.

(The practice direction to Part 66 gives the list published, under section 17 of that Act, of the solicitors acting for the different government departments on whom service is to be effected, and of their addresses)”.

Rule 12.4

After paragraph (3) insert—

“(4) In civil proceedings against the Crown, as defined in rule 66.1(2), a request for a default judgment must be considered by a Master or district judge, who must in particular be satisfied that the claim form and particulars of claim have been properly served on the Crown in accordance with section 18 of the Crown Proceedings Act 1947 and rule 6.5(8).”.

Rule 12.10

For sub-paragraph (a), substitute—

“(a) the claim is—

- (i) a claim against a child or patient; or
- (ii) a claim in tort by one spouse against the other; or”.

PD 12

Delete para 2.3(5).

Rule 16.2

After paragraph (1), insert—

“(1A) In civil proceedings against the Crown, as defined in rule 66.1(2), the claim form must also contain—

- (a) the names of the government departments and officers of the Crown concerned; and
- (b) brief details of the circumstances in which it is alleged that the liability of the Crown arose.”.

Rule 19.4

After paragraph (4), insert—

“(4A) The Commissioners of Inland Revenue may be added as a party to proceedings only if they consent in writing.”.

Rule 19.7B

After rule 19.7A, insert—

“Postal Services Act 2000 (c. 26)

19.7B—(1) An application under section 92 of the Postal Services Act 2000 for permission to bring proceedings in the name of the sender or addressee of a postal packet or his personal representative is made in accordance with Part 8.

(2) A copy of the application notice must be served on the universal service provider and on the person in whose name the applicant seeks to bring the proceedings.”.

PD 19

In paragraph 6.4(1), in the cross-reference, for “annexed to this practice direction” substitute “annexed to the practice direction to Part 66”.

The Annex is transferred to the practice direction to Part 66.

Rule 24.4

After paragraph (1), insert—

“(1A) In civil proceedings against the Crown, as defined in rule 66.1(2), a claimant may not apply for summary judgment until after the expiry of the period for filing a defence specified in rule 15.4.”.

Rule 30.3

In paragraph (2), after sub-paragraph (g), insert—

“.

(h) in the case of civil proceedings by or against the Crown, as defined in rule 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London.”.

Revocations

Schedule 1 : RSC Order 77 - the whole Order

Schedule 2 : CCR Order 42 - the whole Order
CCR Order 49 - rule 15

CROWN PROCEEDINGS BY OR AGAINST THE CROWN

Partial Regulatory Impact Assessment

1. Title of proposal

A review of procedures in the civil courts for cases brought by or against the Crown

2. Purpose and intended effect of measure

- **Objective**

The current procedures reflect the special position of the Crown in litigation and confer on it advantages not available to other litigants. The objective of this proposal is to place the Crown on a more equal footing with those who make claims against the Crown or who defend claims made by the Crown. The changes will be achieved by amending the Crown Proceedings Act 1947 and revoking and amending certain rules of court. At the same time it is proposed to streamline and unify the remaining procedures, incorporating them into the main body of the Civil Procedure Rules. Those bringing claims against the Crown or being sued by the Crown should find the process easier and more straightforward.

- **Devolution**

This change applies to England and Wales only. The Scottish and Welsh Executives are aware of the proposals.

- **The background**

Under the Crown Proceedings Act 1947 special provisions apply where the Crown is the claimant or defendant in the civil courts. The current rules of court are contained in the rules of the Supreme Court Order 77 and County Court Rules Order 42. They make special provisions for the Crown in litigation. Examples of the special arrangements include claims against a company or individual for taxes or excise duties or where a breach of contract is alleged against the Crown.

It is considered that some of the special procedures are no longer justified and it is intended to revoke them. At the same time it is proposed to unify and streamline the rules, integrating them into the Civil Procedure Rules. Other provisions will be retained. The changes to be made are as follows:

- The Crown should no longer have the power to decide the venue for a case. This should be a matter for the court to decide.
- The general provisions on the information to be contained in the claim form will apply and CPR rule 16.2 will specify the additional information required where the claim is against the Crown so that Government Departments can identify the issue in dispute.
- Personal service on the Crown should no longer be allowed for practical reasons.
- Summary judgment against the Crown will be permitted, but only after the time for filing a defence has expired.
- It will be possible to obtain a default judgment against the Crown after a Master or district judge is satisfied that service on the Crown has taken place properly.

The rules relating to:

- counter claims and set-offs involving the Crown;
- the Crown's ability to obtain summary applications in revenue matters;
- the Crown's exemption from the normal rules on enforcement; will be retained.
- **Risk assessment**

Failing to limit the privileges currently exercised by the Crown in civil litigation, results in individuals and businesses facing related costs and inconvenience. The proposed changes should reduce number and effect of the special Crown procedures. For example, for the first time an individual or company will be able to seek a summary judgment against the Crown. The changes are unlikely to affect the numbers of claims made by or against the Crown.

- **Scaling the Issue**

The special provisions relating to the Crown may be invoked in any case where the Crown is the claimant or defendant, however, separate data is not held on the number of claims involving the Crown. The nature and extent of the effect of the provisions depends on the circumstances of the cases.

3. Options

Option 1: Do nothing

Option 2: Unify and reduce the number of special procedures relating to civil litigation by or against the Crown.

4. Benefits

Option 1 - Do nothing: This option would retain the existing provisions, minimising change for litigants (and their representatives), the Crown, the judiciary and Court Service.

Option 2 - Unifying and reducing the number of special procedures by or against the Crown: This option should make it easier for litigants who wish to claim against or defend a claim brought by the Crown. For example, by allowing summary judgments to be obtained against the Crown. The proposed change also removes the right of the Crown to specify where a claim will be heard. This should enable more claims to be dealt with locally rather than in the Royal Courts of Justice. Overall there may be some marginal reduction in costs for individuals and businesses because of the simplification of the procedures. The value of the benefits is difficult to quantify and information is invited from consultees as to the probable level of savings. The proposed changes are consistent with the Civil Justice Reforms.

5. Costs

- **Business sectors affected**

Individuals, businesses of all sizes (including their legal representatives, accountants and tax advisors) and Government Departments are likely to be affected by the proposed changes wherever civil litigation involves the Crown. If the proposal to deregulate is adopted then the burdens on these groups should be reduced.

Government Departments, and their Executive Agencies, are likely to have to change their procedures and may incur additional travelling costs for attending hearings outside London. The Court Service may need to make some changes, but these are thought to be marginal.

This Department does not currently collect information about the number and cost of Crown proceedings. Consultees, likely to be affected by the proposals, are invited to provide information about the likely implications and costs associated with the proposed changes.

- **Equity and fairness**

Option 1 - Do nothing: those wishing to claim against the Crown or who are a party in a case brought by the Crown would continue to be faced with the special provisions relating to the Crown. For example, the Crown may currently obtain a summary judgment against an individual or business, an option not available to other litigants.

Option 2 - Unifying and reducing the number of special procedures by or against the Crown: Should result in parties being placed on a more equal footing before the courts, increasing equity and fairness. For example, where proceedings involve the Crown either party will be able to obtain a summary judgment.

- **Compliance**

Option 1 - Do nothing: Litigants acting as claimants or defendants against the Crown will continue to face additional costs. For example, because a case may be heard in London or because they cannot resolve a case sooner by obtaining a summary judgment.

Option 2 - Unifying and reducing the number of special procedures by or against the Crown: It is not clear if there will be any new compliance costs incurred by those involved in litigation with the Crown. Consultees are invited to provide information about any compliance costs.

- **Other costs**

The changes represent a transfer of costs from individuals and businesses to Government Departments and their Agencies, which may need to make some changes to procedures and pay additional travelling costs for attendance at hearings outside London.

- **Costs for a typical business**

Because of the extremely wide reach of Government Departments and their agencies, a wide range of businesses will be affected by this de-regulation. The changes should impose no new requirements or costs on business, but consultees are invited to provide information about any new costs that they think are likely to result from the changes.

6. Sensitivity analysis

As indicated above, the available data is extremely limited and consequently the conclusions are vulnerable. However, the proposals are deregulatory and it is not anticipated that they will increase costs for businesses. Consultees are invited to provide information to further improve the assessment of the costs of the proposals.

7. Consultation with small business: the Small Firms' Impact Test

We have consulted the Small Business Service [<http://www.sbs.gov.uk>].

8. Competition assessment

It is not anticipated that option 2 will have any impact on competition.

9. Enforcement and sanctions

For those who are involved in proceedings with the Crown, there should be no enforcement or sanctions involved, beyond the powers already exercised by the courts. For Government Departments and their Executive Agencies the courts will deal with any failure to comply with the changed arrangements. Government Departments, as consultees, are invited to supply information about the costs of complying with the proposed provisions.

10. Monitoring and review

Some of the proposals will need changes made to primary legislation, which will affect the timing of any review. It is proposed to invite the Confederation of Businesses, the Federation of Small Businesses, the Advice Services Alliance and Government Departments to comment on how the new arrangements are working after the new procedures have had a chance to bed down.

11. Consultation

- **Within government**

Deputy Prime Minister;

Chancellor of the Exchequer;

Home Secretary;

Secretary of State for Environment, Food and Rural Affairs;

Secretary of State for Work and Pensions;

Secretary of State for Health;

Secretary of State for Wales;

Secretary of State for Scotland;

Leader of the House of Lords;

Secretary of State for Trade and Industry;
Secretary of State for Education and Skills;
Secretary of State for Culture, Media and Sport;
Attorney General;
Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster;
Chief Whip;
Minister of Transport;
Minister without Portfolio.

- **Public consultation**

Because the Crown has a wide reach this consultation exercise is intended to be as broad as is practicable and will include.

The Law Society;
The Bar Council;
The Judiciary;
The Society of Legal Scholars;
The British Chambers of Commerce;
The Confederation of British Industries;
The Small Business Federation;
The Association of British Insurers;
User Groups of the High Court and county courts;
The Advice Services Alliance;
The Equal Opportunities Commission;
Association of Certified Accountants;
The Institute of Chartered Accountants;
Association of Chartered Certified Accountants;
The Race Relations Commission;
The Disability Discrimination Commission;
Age Concern;
Child Poverty Action Group;
Disability Alliance;
HM Treasury;
Cabinet Office;
Other Government Departments and their agencies,
Scottish Executive;
National Assembly for Wales
Association for Personal Injury Lawyers.

12. Summary and recommendation

The proposal to unify and reduce the number of special procedures by or against the Crown is recommended. This deregulation should place the Crown on a more equal footing with other litigants.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....Cathy Ashton.....

Date

Baroness Catherine Ashton of Upholland, Parliamentary Under Secretary,
DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

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