

**EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT) RULES 2009**

2009 No. 2092 L. 24

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 This instrument amends the Civil Procedure Rules (S.I. 1998/3132) (the “CPR”). The CPR are rules of court, which govern practice and procedure in the civil division of the Court of Appeal, the High Court and county courts. The rules are a vehicle for implementation of new initiatives, modernisation of the rules, and introduction of European directives and regulations.

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

3.1 None

4. **Legislative Context**

4.1 The amendments to the CPR covered by this instrument mostly relate to Government or judicial initiatives.

4.2 There are also four matters which are consequential on the commencement of primary legislation—

- amendments consequential to the Counter-Terrorism Act 2008 and the Prevention of Terrorism Act 2005;
- amendments consequential to the implementation of the Companies Act 2006 which replaces most provisions of the Companies Act 1985;
- amendments consequential to the implementation of the Constitutional Reform Act 2005; and
- amendments consequential to the implementation of the Violent Crime Reduction Act 2006.

4.3 An amendment has also been made in consequence of guidance from the European Court of Justice in relation to certain applications to that 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

The Civil Procedure Act 1997 created the Civil Procedure Rule Committee (“the Committee”) and gave it power to create civil procedure rules. The first CPR were made as the Civil Procedure Rules (1998). The intention of the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and county courts, replacing the old county court rules (CCR) and Rules of the Supreme Court (RSC).¹ The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report ‘Access to Justice’ (1996) by Lord Woolf.

7.2 This instrument amends the CPR, in particular by:

- (a) introducing measures requiring parties to notify the other party of the existence of, and information about, an After The Event (ATE) insurance premium, with penalties where disclosure of the premium is not made. This will apply to all civil proceedings. In relation to publication proceedings, a specified period is also introduced after notification of an ATE premium when a defendant, who admits liability and offers to settle, will not incur liability for payment of the claimant’s ATE insurance policy if the matter settles without court proceedings. “Publication proceedings” are defined as defamation, malicious falsehood or breach of confidence involving publication to the public at large.
- (b) rationalising the rules concerning experts, in particular
 - providing a new definition of “expert” and “single joint expert” (a single joint expert being an expert instructed to prepare a report for the court on behalf of two or more parties in the proceedings);
 - including guidance on the appointment of single joint experts to promote greater consistency and ensuring that questions put to experts are proportionate and appropriate;
 - amending the wording of the expert’s statement of truth to ensure that experts confirm that they both understand their duty to the court and have complied with that duty.
- (c) making amendments throughout the CPR to reflect changes in legislation relating to companies and limited liability partnerships.

¹ This work is ongoing: the few remaining CCR and RSC are included in ‘schedules’ to the CPR.

- (d) making amendments to assist borrowers and their tenants in mortgage possession proceedings, including—
- requiring the lender to send a notice to the property which is addressed to both the occupier and the tenant when possession proceedings are started and a hearing date is fixed, so that they will both have the opportunity to act at an early stage in proceedings which may affect them;
 - requiring the lender to notify the local authority in which the property is located of the proceedings, so that local authorities will be able to identify households that would benefit from support such as accommodation or through the Mortgage Rescue Scheme.
- (e) amending the rules relating to intellectual property claims, by updating references to legislation, re-ordering and clarifying the rules and making other consequential amendments.
- (f) providing rules (mirroring those for Anti-Social Behaviour Orders) for the procedure for applying for Drinking Banning Orders in consequence of the commencement of Chapter 1 of Part 1 of the Violent Crime Reduction Act 2006.
- (g) clarifying the rules as to the length and content of references sent to the European Court of Justice, to ensure that references contain the appropriate information without being too lengthy. Further amendments are made to provide a streamlined procedure in courts for processing of urgent preliminary rulings.
- (h) providing rules for the procedure for applications for notification orders (requiring individuals who have been convicted of terrorist related incidents overseas to register their details) in consequence of the commencement of Part 4 of the Counter-Terrorism Act 2008.
- (i) making provision in relation to various aspects of the procedure relating to control orders—
- enabling a special advocate to adduce evidence and cross-examine witnesses in applications relating to control orders under the Prevention of Terrorism Act 2005;
 - extending the time within which an individual, who is subject to a non-derogation control order can make representations to the court;
 - allowing the Secretary of State to apply for an anonymity order to protect the identity of a controlled person when permission for such an order is sought.
- (j) amending references to the Supreme Court Act 1981, the Supreme Court, the Supreme Court Costs Office, the House of Lords and related references throughout the CPR. These amendments are consequential on the implementation of the Constitutional Reform Act 2005 which establishes the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords.
- (k) making a minor amendment to remove redundant words in response to a suggestion by the Joint Committee on Statutory Instruments.

8. Consultation outcome

8.1 The Civil Procedure Rule Committee must before making Civil Procedure Rules consult such persons as they consider appropriate (Civil Procedure Act 1997 s.2(6)(a)). Where the Committee initiates amendments then consultation is undertaken where deemed necessary. Consultations were undertaken on the following:

8.2 In February 2009 the Ministry of Justice undertook a consultation exercise on 'Costs in Defamation Proceedings'. The consultation and responses are available on the Ministry of Justice website at www.justice.gov.uk. A wide range of individuals and bodies were consulted including the judiciary, the Law Society, the Association of Costs Draftsmen, the Newspaper Society, the Society of Editors and all those that responded to two previous related consultations on 'Conditional Fee Agreements in Publication Proceedings' and 'Civil Procedure Rules – Costs Capping Orders'. A total of 65 responses were received. Of these, 69% supported the introduction of a requirement for parties to provide early notification of ATE insurance cover and 83% supported the introduction of a requirement that specified information should be provided as part of that early notification. 79% supported the introduction of a specified period during which, if the defendant admits liability or makes an offer of amends leading to settlement, the defendant is not liable for the ATE insurance premium. There was less clear cut support for the other measures contained in the consultation paper and these will be considered further in the light of recommendations made by Lord Justice Jackson's review of civil litigation costs.

8.3 In 2007 the Civil Justice Council (CJC) undertook a consultation exercise on Part 35 of the Civil Procedure Rules, its practice direction and the protocol relating to experts in civil cases. The responses were published on the CJC website in January 2008. Among the professional bodies who responded to this consultation were the Bar Council, the Law Society, the Association of Personal Injury Lawyers, the Forum of Insurance Lawyers, the Personal Injury Bar Association, the Association of District Judges, the Clinical Disputes Forum, the Association for Victims of Medical Accidents, the Association of British Insurers, the National Health Service Litigation Authority, the British Medical Association, the Expert Witness Institute and the Academy of Experts. The vast majority of respondents agreed that fundamental reform was not required and that the rules were working satisfactorily. However, some of the CJC's proposals to improve guidance to experts and to clarify and strengthen the rules were accepted by the Civil Procedure Rule Committee.

8.4 A full consultation on the Companies Act 2006 was completed before its introduction by, what was then known as, the Department for Business Enterprise and Regulatory Reform. The changes in this instrument are consequent to the implementation of that Act and no further consultation was necessary.

8.5 The Home Office undertook a number of consultations in 2007 in relation to the Counter-Terrorism Act 2008.

8.6 In July 2003 the Department for Constitutional Affairs carried out a public consultation to gather views on the form and responsibilities of the proposed UK Supreme Court.

9. Guidance

9.1 A preview summarising the forthcoming changes will also be published on the Ministry of Justice website in August 2009 at http://www.justice.gov.uk/civil/procrules_fin/index. The Ministry of Justice will also write to key stakeholders detailing the changes in August 2009. The consolidated rules will be published by the Stationery Office and will be available on the Ministry of Justice website when they come into force in October 2009. On coming into force on 1 October 2009 the amendments to the rules will be made on the website, which will coincide with issue of the printed version of the new rules.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument which gives effect to a variety of changes from different sources.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to provide a summary of the changes up to three months in advance through the CPR website and by writing to key stakeholders.

12. Monitoring & review

12.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the Civil Procedure Rule Committee. The Civil Procedure Rule Committee will make any subsequent amendments to these rules.

13. Contact

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