EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT) RULES 2019

2019 No. 342 (L. 3)

1. Introduction

1.1 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 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) ("the CPR"), which govern practice and procedure in the Civil Division of the Court of Appeal, the High Court and the County Court. The amendments cover four matters, explained in paragraph 7, below: (a) open justice reforms; (b) the recovery of costs and expenses incurred by litigation friends; (c) proceedings in the Admiralty Court; and (d) a minor correction arising from an earlier amendment to the rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Civil Procedure Act 1997 established the Civil Procedure Rule Committee ("CPRC") and gave it power to make Civil Procedure Rules, which are rules governing practice and procedure in civil proceedings in the County Court, High Court and Court of Appeal (Civil Division). The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedure and reduce, or at least control, the cost of civil

litigation in England and Wales. The first CPR were made in 1998, and amendments are regularly made in response to practical experience of the operation of rules or decisions of the higher courts, to provide procedure for new matters such as new types of order provided for in new Acts of Parliament, for updating generally and for modernising purposes such as making provision for online or other electronic methods. References below to a rule, or Part, by number alone are references to the rule or Part with that number in the CPR.

7. Policy background

What is being done and why?

7.1 Open Justice. Part 39 of the CPR *'Miscellaneous Provisions Relating to Hearings'*, makes general provision about the conduct of hearings. The changes made by this instrument to Part 39 reinforce the principle of open justice and codify the provisions relating to circumstances where cases must as an exception to that principle be heard in private. In order to promote open justice and transparency, the general rule is (as it was previously) is that all hearings should be in public, but the rules as amended will provide that if the court is satisfied that the criteria for holding a hearing or part of a hearing in private are fulfilled, the court must hold that hearing, or that part of the hearing, in private. This is a general rule which applies to all hearings, but does not displace specific provisions for, for example, hearings involving closed material. Provisions previously included in the Practice Direction supporting Part 39 have been brought into the Part itself, and those provisions of the Practice Direction will no longer have effect once this instrument comes into force. In addition, the definition of "hearing" has been amended to explicitly refer to technological developments, for example by making specific reference to telephone and video hearings. They also introduce new rules for parties communicating with the court, requiring them to ensure that the other side is copied in to any such communications. Further, they enable the court to give directions to facilitate cooperation between the parties with regard to compiling and sharing an informal note or record of the proceedings, while awaiting the approved transcript. This will enable litigants in person, in particular, to seek legal advice as to the merits of an appeal, without delay and at less cost.

The application of the new provisions to all hearings has an effect in relation to Aarhus Convention claims. In relation to environmental challenges falling within the provisions of Article 9 of the Aarhus Convention ("Aarhus Convention claims"), rules in Part 45 of the CPR (which are not amended by this instrument) provide for a default cap on the costs the parties may be required to pay if they lose (£5,000 for an individual claimant, £10,000 for a group or organisation claimant and £35,000 for a defendant), but allow for the court to be able to vary that cap, downwards or upwards, in the light of the schedule of financial means provided by the claimant and according to criteria set out in the rules which mirror those set out in CJEU and UK Supreme Court case law. Where there is a hearing to consider an application to vary a costs cap, there is a standing instruction for that hearing to be listed in the first instance as a hearing in private. This current default position follows a High Court judgment in September 2017[1], following a judicial review brought by a group of environmental NGOs. The effect of the open justice amendments in this respect is likely to be that

[1] *CO/1011/2017 The Royal Society for the Protection of Birds, Friends of the Earth Limited and Client Earth v Secretary of State for Justice and Lord Chancellor [2017] EWHC 2309 (Admin).*

any hearing of an application to vary costs caps in Aarhus Convention claims will (as with any other hearing) be in public but must be in private if the court is satisfied that the conditions for a private hearing are fulfilled.

7.2 Recovery of expenses incurred by litigation friends. CPR 21.12 concerns the expenses and costs that a litigation friend may recover from the damages received by the child or protected party for whom they act. Rule 21.12(1A) places restrictions on such recovery where the litigation friend acts for a child. The amendments to rule 21.12(1A) address concerns that, as currently drafted, this provision could be interpreted as applying to those cases where the litigation friend acts for a protected party. Rule 21.12(8) provides an exception to the general rule that a litigation friend may not make an application for their costs until the costs payable to the person for whom they act have been agreed. The exception applies to those cases where the costs that the child or protected party may recover are fixed by Part 45 of the CPR. The amendment to rule 21.12(8) is intended to clarify that the exception will still apply even though any disbursements, which are also payable to the child or protected party under Part 45, have not been agreed at the time that the litigation friend makes their application.

7.3 Approval of limitation funds in the Admiralty Court. In the *Atlantik Confidence [2014] 1 Lloyd's Rep 1 586*, the Court of Appeal held that shipowners and certain other defined persons have a right under treaty (The Limitation of Liability for Maritime Claims 1976) to limit their liability for maritime claims by providing security in the form of an undertaking or guarantee ("a limitation fund"). Part 61 of the CPR currently provides for limitation funds to be constituted by making a payment into court, but does not provide for a procedure by which a party may apply to the court for the approval of a security. Amendments to Part 61 address this lacuna by enabling limitation funds to be constituted by providing such security and/or by paying money into court. At the same time, the opportunity has been taken to make miscellaneous amendments to address anomalies in the rules dealing with costs in collision claims where a party at trial equals or betters certain offers made by them, and to improve clarity by including definitions of "Admiralty Judge" and "Admiralty Registrar" and ensuring consistency of language between the rules and related provisions in the Senior Courts Act 1981.

7.4 Correction. In addition to the main amendments listed above, an amendment has been made to the table of contents in Part 5 of the CPR, to correct an earlier minor omission.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 No further consolidation of the rules is planned at present.

10. Consultation outcome

10.1 The CRP Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act

1997). The CPR Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in the work of sub-committees reviewing particular aspects of the rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of civil procedure. In the case of this instrument consultation took a variety of forms.

10.2 The rules in respect of Open Justice were the subject of formal public consultation which ran from 12 July 2018 to 23 August 2018 inviting views on five specific areas on: a definition of a hearing; wording on public and private sittings and anonymity orders; procedure for third parties to raise open justice issues; new obligation to copy communications with the courts to other parties and consequences of not doing so and a new proposal for a provision on assistance to parties by providing informal notes of hearings and rulings. 30 responses were received, representing the views of legal representatives, individuals, judiciary, media, reform groups and professional organisations. Not all respondents responded to all questions and some respondents opted to submit their response as a more general response, not always with reference to specific questions or were out of scope of the consultation. Some overarching themes emerged in the consultation responses: the rules must be clearer and more accessible especially to litigants in person and that there must be a commitment to the principle that cases are to be in public, unless there is a good reason for them to be in private and all other options have been explored.

10.3 The amendments relating to Part 21 (costs recoverable by a litigation friend) were recommended by the CPRC's Sub-committee on Costs Payable by a Child and/or Protected Party.

10.4 The amendments to Part 61 (Admiralty Court) were subject to consultation with the Admiralty Bar Group and the Admiralty Solicitors Group whose representatives sit on the Admiralty Court Users' Committee.

11. Guidance

11.1 Amendments to the CPR are drawn to the attention of participants in the civil justice system by correspondence addressed by the CPR Committee secretariat to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunals Service. News of changes to the rules, together with the consolidated version of the rules, are published on the Ministry of Justice website at https://www.justice.gov.uk/courts/procedure-rules/civil.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private, public or voluntary sectors is foreseen.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the amendments to form part of the Civil Procedure Rules which are kept under continuous review by the Civil Procedure Rule Committee, and may be subject to amendment accordingly.

15. Contact

15.1 Amrita Dhaliwal at the Ministry of Justice. Direct line telephone 020 3334 6306 and email: amrita.dhaliwal@justice.gov.uk can answer any queries regarding this instrument.

15.2 David Parkin, Deputy Director for Civil Policy & Law, Access to Justice Directorate, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lucy Frazer QC, MP, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.